Detailed Analysis of Belize
Freedom of Information Act 1994
&
Recommendations For Amendments

"The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task…is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."

--- Kofi Annan

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Analysis of the Belize Freedom of Information Act 1994

1. The Commonwealth Human Rights Initiative (CHRI) was approached by Mr Joss Ticehurst, representing SPEAR, a Belizean NGO which is working on promoting better governance in Belize by strengthening the national freedom of information (FOI) regime. Notably, Belize has had the Freedom of Information Act in place since 1994, but Mr Ticehurst has confirmed that the Act has rarely been used and is poorly implemented by officials. For example, none of the annual reports required to be prepared by the Ombudsman have been written and/or published. Mr Joss Ticehurst has now requested CHRI's assistance in reviewing the Act, with a view to lobbying the Government to amend the Act to strengthen the Belize people's right to information.

2. CHRI welcomes this opportunity to comment on the Act. CHRI's analysis draws on international best practice standards, in particular, good legislative models from the Commonwealth countries. This paper suggests areas which could be reconsidered and reworked, as well as providing examples of legislative provisions which could be incorporated into a revised version of the Act.

ANALYSIS OF THE ACT AND SUGGESTIONS FOR IMPROVEMENT

3. While it is necessary to ensure that the public participates in any amendment process to ensure that the final legislation is appropriate for the national context, it is generally well accepted that there are basic minimum standards, which all RTI legislation should meet. Chapter 2 of CHRI's Report, *Open Sesame: Looking for the Right to Information in the Commonwealth*[1], provides more detailed discussion of these standards. The critique below draws on this work.[2]

4. Overall, CHRI's assessment is that the Act in its current form contains some useful provisions. Nonetheless, it should be noted that in the last five years there have been a number of important developments in the area of access to information legislation, which have extended and broadened the right to information. This analysis suggests a number of amendments, modeled on recent right to information legislation. At all times, the recommendations proposed attempt to promote the fundamental principles of: maximum disclosure; minimum exceptions; simple, cheap and user-friendly access procedures; independent appeals; strong penalties; and effective monitoring and promotion of access.

General

5. The Act has largely been drafted in a simple, straightforward manner. However, in some places the language of the Act is complicated and contains long and confusing sentences, for example, s.8. As a result, it may be very difficult not only for the public to understand the intent of the law, but also for public officials to know how to implement it properly. The right to information is primarily about trying to open up government to the participation of the common person. As such, it is crucial that any right to information law is drafted in a user-friendly way. The terms of the law need to be clear and precise. The new Indian *Right to Information Act 2005*, the South African *Access to Information Act 2000* and the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide better models.

Recommendation:

The Act should be reviewed with a view to simplifying some of its provisions and ensuring that it can be easily understood by the public and bureaucrats alike. User-friendly language should be used and legalistic language should be avoided as far as possible.

[1] http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm
[2] All references to legislation can be found on CHRI's website at http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_&_papers.htm

Part I: Preliminary

Object of the Act

6. It is positive that the introduction of the Act includes a basic objectives provision. However, to assure the most liberal interpretation of the right to information in accordance with democratic principles, and to promote a presumption in favour of access, the objects clause should be extended to establish clearly the principle of maximum disclosure, cheap and user-friendly access procedure and to specifically recognise that that the purpose of the Act is to promote transparency, accountability and participation. Section 2 of the Jamaican *Access to Information Act 2002* provides a good model. This is an important amendment, because courts will often look to the objects clause in legislation when interpreting provisions of an Act.

7. The objects clause should also be amended because it currently narrows the right by permitting access only to "official documents". This is a very limiting formulation of the right to information, unlike India and New Zealand for example, which allow a broad right to access "information" or "official information". The objects clause – and in fact, the entire Act – should be amended to provide that all "information" shall be accessible, whatever its form, unless an exemption applies (see paragraph 8 for further discussion).

Recommendations:

- *Amend the current Objects clause to more clearly set out the broader democratic objectives of the Act, for example*
  WHEREAS there exists a need to:
  - *(i) give effect to the fundamental Right to Information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability, promoting and protecting human rights and reducing corruption*
  - *(ii) foster a culture of transparency and accountability in public authorities by giving effect to the right of freedom of information, including by providing for public examination of records relating to Government's financial, contractual and other transactions;*
  - *(iii) establish voluntary and mandatory mechanisms or procedures to give effect to the right to information in a manner which promotes maximum disclosure and minimum exemptions in accordance with the public interest, and enables persons to obtain access to records of public authorities, and private bodies where the information is needed for the exercise and/or protection of a right, in a swift, effective, inexpensive and user-friendly manner.*
- *Amend the entire Act to provide access to "information" instead of "official documents"*

Section 3 - Interpretation

8. The Act currently defines and uses the terms "document" and "record" throughout, rather than the broader term "information". As mentioned in paragraph 7 above, it is recommended that the term "information" be included in the definition section and then used in the Act instead of "document" or "record". This approach has been incorporated into the Indian *Right to Information Act 2005*, one of the newest access laws in the world and one of those which enshrines the latest standards in openness. Allowing access to "information" will mean that applicants will not be restricted to accessing only information which is already in the form of a document or hard copy record at the time of the application. The current formulation excludes access to things like scale models, samples of materials used in public works and information not yet recorded by an official but which should have been. The definition could easily be abused by resistant officials to restrict access.

9. The current definition of "prescribed authority" is narrow and will therefore reduce the usefulness of the law for the public by reducing the number of authorities from which they can request information. The definition should be reworked to make it clear that it covers all arms of government. In this context, it is particularly important to recognise that in any modern democracy, it is not appropriate to exempt the judiciary or the Office of the Governor-General from the purview of the Act (see paragraph 12 for further discussion). Section 2(h) of the new Indian *Right to Information Act 2005* provides one model to draw on:

   "public authority" means any authority or body or institution of self government established or constituted:

(a) by or under the Constitution;
(b) by or any law made by the Parliament;
(c) by any law made by the State Legislature;
(d) by notification issued or order made by the appropriate government,

and includes any –

(i) body owned, controlled or substantially financed;
(ii) non-Government organisation substantially financed,

directly or indirectly by funds provided by the appropriate Government".

10. The Act defines the term "responsible minister" and then makes him/her the responsible person for providing information. This approach is favoured by the Australian *Freedom of Information Act 1982*, but it is unnecessarily complicated and adds nothing of practical value. Ministers are not in practice responsible for providing information, their ministries are, and this should be clearly recognised by the law to avoid confusion. All references to accessing information from "the Minister" should be removed and a specific official designated in all public authorities who shall be made responsible for handling all information requests (see paragraphs 22-24 below for further discussion).

11. Section 17 should be reworked into a s.3 definition of the term "access", to clarify the content of the right to "access" information. In this context, the Act should permit access not only to documents and other materials via copying or inspection, but also should allow the inspection of public works and taking of samples from public works. Such an approach has been incorporated into the India *Right to Information Act 2005* in recognition of the fact that corruption in public works is a major problem in many countries, which could be tackled by facilitating greater public oversight through openness legislation.

Recommendation:

- *Amend s.3 to include a definition of the term "information", which incorporates the current definitions of "document" and "record" and then extends them. A model definition could be:*

  "information" means any material in any form, including public contracts, grants or leases of land, or any written or printed matter, any map, plan or photograph, and any article or thing that has been so treated in relation to any sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing, and includes a copy of any such matter, map, plan, photograph, article or thing, but does not include library material maintained for reference purposes, records, documents, file notings, memos, emails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data, material held in any electronic form and any information relating to a private body which can be accessed by a public authority under any law.

- *Amend the definition "prescribed authority" to clarify that it include all arms of government and all agencies funded with public monies:*

  "prescribed authority" means Parliament and its committees and sub-committees, the courts, Cabinet, a Ministry, Department, Executive agency, Ministerial or departmental advisor, statutory body, municipal corporation, local authority (a city council, town board or village council) government corporation, government trust, a body corporate or unincorporated body set up for a public purpose, any government commission or any other agency of Government, whether part of the executive, legislature or judiciary and includes any authority or body established or constituted: (i) by or under the Constitution; (ii) by any other law, bodies which appear to exercise functions of a public nature, or are providing under a contract made with a public authority any service whose provision is a function of that authority to the extent of those functions, and any other body owned, controlled or substantially financed by funds provided directly or indirectly by the Government in relation to that funding"

- *Remove the reference to the term "responsible minister" and replace it with a new requirement for Public Information Officers (PIO) to be appointed to handle requests (see paragraph 22 below for more);*

- *Rework s.17 into a definition of the term "access" under s.3. A model definition could be:*

  "access" to information includes the inspection of works and information, taking notes and extracts and obtaining certified copies of information, or taking samples of material.

Sections 4 and 5 – Non-application of the Act

12. Sections 4 & 5 currently operate as de facto exemptions, excluding the judiciary and Office of the Governor-General from the purview of the Act. This is contrary to best practice and the promotion of open government through maximum information disclosure. While it is understandable that the Government should wish to protect against the disclosure of sensitive/and or private information, this has been adequately provided for under Part IV of the Act, which contains the Act's exemptions regime. It is unnecessary and unjustifiable to go beyond this and simply assume that certain bodies should be placed entirely beyond the scope of the Act.

    - Section 4 seeks to exempt courts, their registries and their staff. However, while it is important that information is protected where its disclosure could undermine a fair trial, this is provided for already by the exemption by ss.24 and 28. There is no need to put the entire court system outside the scope of the Act. At the very least, the courts should be covered in relation to administrative information they hold, for example, court correspondence, recruitment information and financial/budget information.
    - Section 5 exempts the Office of the Governor-General. This is a hangover from when the monarchy reigned supreme and was above the scrutiny of the people. In keeping with modern democratic practice however, such distance from the public is no longer appropriate for the Head of State. Many other jurisdictions have recognised this. For example, in India the President is covered by the Act. In Australia the Governor-General (Head of State) is covered, at least in respect of his/her administrative functions.

Recommendation:

Delete sections 4 and 5 (which exempt the courts and their registries and staff and the Office of the Governor General), or at least amend sections 4 and 5 so that the information relating to the administrative functions of these bodies can be accessed.

PART II – PUBLICATION OF CERTAIN DOCUMENTS AND INFORMATION

Sections 6 and 7 – Publication of information concerning documents

13. It is very positive that the current provisions require the proactive publication of a considerable amount of information. Nevertheless, in the last 10 years the proactive disclosure obligations in freedom of information Act have developed considerably, due to the increasing recognition that proactive disclosure can be a very useful tool for improving public participation and effective governance. Many Acts now required the publication of a much broader range of information. Although the initial effort of collecting, collating and disseminating the information may be a large undertaking, over time it will be worth the investment as it will reduce requests in the long run because people will be able to easily access routine information without having to apply to public bodies.

14. Consideration should be given to extending the categories of information which need to be automatically disclosed under ss.6(1)(a) and 7(1). Section 4 of the new Indian *Right to Information Act 2005* and Article 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* provide excellent models for consideration. They require the disclosure of information such as the recipients of government subsidies, concessions and licenses, publication of all government contracts and information about proposed development works. Such provisions operate to assist the public to keep better track of what the government is doing as well as ensuring key activities of public bodies are always and automatically kept open to public scrutiny.

15. Section 6(1)(b) and 7(2)(c) currently provide for updating information within 12 months of its publication. However, some of the information which is being collected and published may change very often, such that it could be terribly out of date if it is not updated more regularly. Accordingly, a maximum time limit of 6 months should be allowed for updating and the rules should prescribe shorter time limits for specific categories of information, as appropriate (for example, new government contracts should be published weekly or monthly).

16. Sections 6(2) and (3) and section 7(2) deal with how the information should be published and made available. While the Act currently requires the information to be published in the official Gazette at a minimum, in practice, this is not a very useful method of publication because ordinary members of the public are extremely unlikely to ever read the Gazette notification. It is positive at least that s.7(2) requires some information to be available for inspection. However, the Act should specify a more comprehensive dissemination strategy, which takes account of new information technology opportunities, while keeping in mind factors like cost effectiveness, local language and the most effective methods of communication in a region. To facilitate a more informed public, the Act should make it clear that at a minimum, information should be disseminated through newspapers, notice boards, public announcements, media broadcasts, the internet or any other means. This approach has been captured in s.4 of the new Indian *Right to Information Act 2005*.

Recommendation:

- *Combine sections 6 and 7 so there is a single comprehensive proactive disclosure requirement.*
- *Extend ss.6 and 7 to include additional proactive disclosure obligations based on Indian & Mexican laws:*

  (1) Every public body shall

  (a) publish within 3 months of amendments coming into force:

  (i) the powers and duties of its officers and employees;
  (ii) the procedure followed in the decision making process, including channels of supervision and accountability;
  (iii) the norms set by it for the discharge of its functions;
  (iv) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;
  (v) a directory of its officers and employees;
  (vi) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations
  (vii) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
  (viii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;
  (ix) particulars of concessions, permits or authorisations granted by it;
  (x) details in respect of the information, available to or held by it, reduced in an electronic form;
  (xi) the names, designations and other particulars of the Public Information Officers, and appeals bodies under the Act;
  (xii) such other information as may be prescribed;

  and thereafter update there publications within such intervals in each year as may be prescribed;

  (b) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

  (c) provide reasons for its administrative or quasi judicial decisions to affected persons;

  (d) before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interest of natural justice and promotion of democratic principles.

  (e) upon signing, publish all contracts entered into, detailing at a minimum for each contract:

  (i) The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and/or terms of reference;
  (ii) The amount;
  (iii) The name of the provider, contractor or individual to whom the contract has been granted,
  (iv) The periods within which the contract must be completed.

- *Combine and/or amend sections 6(1)(b) and 7(2)(c), which deal with how often information should be updated:*

  (1) Information shall be updated at least every 6 months, while regulations may specify shorter timeframes for different types of information, taking into account how often the information changes to ensure the information is as current as possible.

(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to proactively provide as much information to the public as possible, at regular intervals, through various means of communications so that the public have minimum resort to the use of this Act to obtain information.

- *Combine and or amend s.6(2) and (3) and section 7(2) to set minimum standards on how information should be disseminated:*

  Information should be disseminated through newspapers, notice boards, public announcements, media broadcasts, the internet, in addition to the official Gazette. All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area. Information should be easily accessible, to the extent possible in electronic format with the PIO, available on payment of a fee or at such cost of the medium or in print cost price may be prescribed.

PART III –ACCESS TO INFORMATION

Section 9 – Right to information

17. Section 9 is one of the most important provisions in the Act because it sets out the parameters of the right to access information. In this context, as noted in paragraph 8 above, the right provided by the Act should be to access "information" not just to access "documents of a Ministry or prescribed authority". The latter is much too narrow a right. This change should be reflected throughout the remaining provisions of the law.

18. The Act currently allows access only to information held by Ministries or prescribed authorities (see paragraph 9 for further discussion regarding broadening the scope of the Act by extending the definition of "prescribed authorities"). In accordance with international best practice, consideration should be given to extending the duty to disclose information to all private bodies as well, at least where it is necessary to exercise or protect one's rights. Private bodies are increasingly exerting significant influence on public policy. Many private bodies – in the same way as public bodies – are institutions of social and political power, which have a huge influence on people's rights, security and health. This is only increased by the rise in outsourcing of important government functions and the country is likely to see further outsourcing/privatisation of important services as part of its economic development strategy. It is unacceptable that private bodies, which have such a huge effect on the rights of the public, should be exempt from public scrutiny simply because of their private status.

19. A number of countries around the world have already brought private bodies within the ambit of their right to information regimes. South Africa's law is the most progressive:
    - *South Africa s.50: Information held by or under the control of a private body where access to that information is necessary for the exercise or protection of any right.* [NB: if this formulation is too broad, consideration could be given to limiting the application of the law to private bodies over a certain size (determine according to turnover or employee numbers]
    - *India s.2(h):… Any body owned, controlled or substantially financed……by funds directly or indirectly provided by the appropriate Government.*
    - *Jamaica s.5(3): Bodies which provide services of a public nature which are essential to the welfare of society can be covered by the Act by Order.*
    - *United Kingdom s.5(1): Bodies which appear to exercise functions of a public nature, or are providing any service whose provision is a function of an authority under a contract made with that public authority can be covered, by Order of the Secretary of State*

Recommendation:

- *Reword section 9 to provide "access to information" not just documents of Ministries and prescribed authorities.*
- *Rework section 11 and the remaining provisions in the Act, as appropriate, to allow access to information held by private bodies.*

Section 10 – Procedure for obtaining access for certain documents

20. It is permissible that s.10 requires that where another enactment already sets out a process for obtaining access to information, that process shall be followed. However, an additional clause should be included in the Act requiring that where an applicant submits an application for such information, even if officials reject the application on the basis of s.10, they must include in the rejection notice, guidance as to how the information is to be alternately accessed. In the absence of this requirement, applicants may still be unable, in practice, to work out how they can access the information they want.

Recommendation:

Include an additional clause requiring that where an application is rejected on the basis that the information can be accessed under another enactment, the rejection notice must nonetheless explain to the requester what the process is for obtaining access in accordance with the other enactment.

Sections 12 and 20 – Requests and decisions regarding access

21. Section 12 is a crucial provision because it sets out the actual process for a person to request access to a document. It is commendable that the Act does not prescribe any particular form for information request and thereby adheres to international best practice. It is also very positive that no application fee is envisaged. However, to keep up to date with technological advancements since the Act was passed in 1994, the Act should provide for information requests be sent to public authorities electronically (e.g. by fax or email). The Indian and Jamaican access laws provide for this.

22. As mentioned in paragraph 11 above, it is a problem that s.12(1) fails to identify who exactly is responsible for receiving and managing the application. This could lead to a lack of accountability for processing applications, because no specific officer is legally designated with receiving requests. It could also be confusing for requesters who wish to follow up or discuss their requests because they will not know who to contact within a prescribed authority. In accordance with common practice in other countries, consideration could be given to designating "Public Information Officer(s)" (PIOs) within public bodies who will be responsible for receiving requests and ensuring that they are handled properly and within time. This can also be a useful way of raising awareness of a new access law within a public body because the PIO can be a contact point for other officials who need assistance with implementing the Act. It is also important in terms of decentralising implementation – sub-offices of a public authority should also be required to identify an officer who is responsible for receiving applications so that requesters have local officials that they can talk to about their applications.

23. Section 20 adds another layer of complexity to the regime for processing requests because it specifies that decisions on applications will be made "by the responsible Minister or the principal officer of the Ministry or prescribed authority or, subject to the regulations, by an officer [to whom decision-making power is delegated]". This could be difficult to implement in practice. Ministers and principal officers have too many other responsibilities to be further burdened with handling every information request that is submitted. While the power to delegate is one way of dealing with this problem, consideration should still be given to entrenching a processing system within the Act which ensures that officials and the public are clear on who is primarily responsible within all agencies for handling requests. The model of "Public Information Officers" discussed above could work well in this context.

24. Taking all of the above issues into account, consideration should be given to revising sections 12 and 20 to clarify that:
    - All applications shall be addressed to the Public Information Officer within each public authority, who will then be responsible for handling them. The Act should make it clear that applications will be accepted at all sub-offices of the public authority. Either a PIO should be appointed at each sub-office or officials in those sub-offices should be required to forward applications to the relevant PIO at headquarters. This approach means that the public can very easily identify who they need to address their application to – the PIO in all cases – and all officers within a

department will automatically know to whom applications need to be referred if they happen to receive an information request. The PIO can then also be targeted for special training on the law and can take the lead in ensuring proper implementation.

- The Public Information Officer will be responsible for ensuring that a decision is made on all applications. However, in keeping with the current approach in s.20, the Rules may specify different internal procedures, which permit only officers of a certain rank to make decisions in relation to certain applications (e.g. where the national security exemption may apply). This approach is simpler, because requesters will not have to worry about who within the organisation has had decision-making responsibility delegated to them. They can simply contact the PIO to discuss their application and the decision that was made.

25. Section 12(3) permits the rejection of requests where processing them would "interfere unreasonably with the operations of the Ministry or prescribed authority". This formulation is currently too broad and could be used to deny requests simply because the relevant body has a poor records management system which does not facilitate quick identification and collation of information. It is not fair that the public should be penalised because of a public body is not properly equipped to find its own information.

26. Consideration should also be given to including specific wording in s.12 which makes it clear that the *"internal processes for receiving and processing applications should be designed to promote easy, simple, quick and cheap access to information for the public".*

27. An additional clause should be inserted into s.12, which clarifies that applications can be made either in the official language or Belize's local language(s). It should be the duty of the relevant PIO of the public authority to translate the request into the official language.

Recommendation:

- *Clarify that requests can be made electronically as well as in writing or in person.*
- *Include a clause specifying that "internal processes for receiving and processing applications should be designed to promote easy, simple, quick and cheap access to information for the public".*
- *Permit applications to be made either in the official language or in any common local language(s).*
- *Delete s.12(3) or amend it to permit applications to be rejected only where a request is "requires the collection of such a large number of documents that processing the application within the time limits would unreasonably interfere with the body's other legitimate activities".*
- *Insert a new clause requiring the appointment of Public Information Officers within each public authority, who will be responsible for receiving, assisting with and processing applications.*
  - *(1) Every public authority must designate as many officers as PIOs in all offices and sub-offices as may be necessary to provide information to persons requesting for the information under this Act.*
  - *(2) Public Information Officers will be the central contact within the public body for receiving requests for information, for assisting individuals seeking to obtain information, for processing requests for information, for providing information to requesters, for receiving individual complaints regarding the performance of the public body relating to information disclosure and for monitoring implementation and collecting statistics for reporting purposes.*
- *Amend s.12 to refer to PIOs rather than just the prescribed authority or Ministry.*
- *Amend s.20 to clarify that PIOs will be "responsible for ensuring that a decision is made on all applications, although the Rules may specify that applications relating to certain information will only be decided by officers of a particular rank".*

Section 13 – Transfer

28. It is positive that the Act puts the onus on public bodies to transfer requests where they would be more efficiently handled by another agency. However, the Act should clarify that transfers need to

be made promptly. In practice, public bodies will almost immediately be able to determine whether a particular request should be transferred and can do so without delay. A time limit of no more than 5 working days should be allowed for applications to be transferred. Notification should be provided to requestors if an application is transferred, so that they will know who to follow up with.

Recommendations:

- *Amend s.12(1) to clarify that transfers must be made within no more than 5 working days*
- *Insert a new clause requiring that the requester will be notified of the transfer immediately, and not later than 5 working days after receipt of the applications. Notices should specify the name and contacts details of the new Public Information Officer responsible for processing the request.*

Section 14 – Requests involving use of computers, etc.

29. Section 14(2) should be reconsidered because it is not appropriate to allow a broad discretion to reject applications involving computers where processing them would constitute *'unreasonable interference with the operation of the body'.* This provision could easily be misused by public authorities. At the very least, the meaning of "unreasonable interference" should be clarified and parameters imposed on its interpretation.

30. Section 14(2) should also be cross-referenced back to s.12(5) of the Act, which requires public authorities to assist a requester to reformulate their application before the application can be rejected.

Recommendations:

Delete section 14(2) or at least narrow the ambit of what could be considered "unreasonable interference with the operations of a Ministry or prescribed authority" and then amend s.14(2) to cross-reference back to s.12(5) and require the public authority to assist the applicant to modify his/her request before it is rejected in accordance with s.14(2).

Sections 15 and 16 – Access to be given within time limits

31. To avoid unnecessarily complicated drafting, sections 15 and 16 could be combined. Both sections deal with the time limits for making a decision and providing access to information.

32. Section 16 is currently very clumsily worded and could easily be simplified by removing all of the superfluous references to addresses at which applications can be received. Notably, section 16 currently only requires that "all reasonable steps" are taken to notify requesters of decisions of approval or rejection of request within the set time limit (2 weeks). However, the Act should require that at a minimum, *written notices* are to be given to all requesters regarding the outcome of their application. The content of such notices should be prescribed in the Act. Currently, s.21 of the Act provides for decision notice to be given to a requester only in case of a negative decision. However, decision notices must also be given when an application is approved, in particular because any fees need to be specified and requesters need to know the exact process they need to follow to physically obtain access to the requested information.

33. The time limit in s.16 is appropriate, although consideration should be given to including an additional provision requiring information to be provided with 48 hours where it relates to the life and liberty of a person. This is consistent with s.7(1) of the Indian *Right to Information Act 2005*.

34. Section 15(1) envisages that fees may be imposed on requesters before they can access information. Best practice requires that no fees should be imposed for accessing information, particularly government information, as costs should already be covered by public taxes. However, if the Government chooses to impose fees, the Act should at least make it explicit that rates should be set with a view to ensuring that the costs imposed for access are not so high as to deter potential applicants. Any fees should be limited only to cost recovery, with no additional margin for profit, and a maximum limit should be imposed. Charges should only cover reproduction costs, not search or collation/compilation time. Imposing fees in respect of the latter could easily result in prohibitive

costs, particularly if bureaucrats deliberately drag their heels when collating information in order to increase fees. Also, where the costs of collecting the fees outweigh the actual fee (for example, where only a few pages of information are requested), fees should be waived.

35. Additional provisions should also be included in the Act to allow for fees to be waived in certain circumstances. For example, in line with s.17(3) of the Trinidad & Tobago *Freedom of Information Act 1999*, even where fees can be imposed, if a body subject to the Act fails to comply with the time limits for disclosure of information, access to which the applicant is entitled shall be provided free of charge. Also, fees should be waived where waiver is in the public interest, such as where a large group of people would benefit from release/dissemination of the information or where the objectives of the Act would otherwise be undermined (for example, because poor people would be otherwise excluded from accessing important information). Such provisions are regularly included in access laws in recognition of the fact that fees may prove a practical obstacle to access in some cases. Section 29(5) of the Australian *Freedom of Information Act* provides a good model:

Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account:

(a) *whether the payment of the charge, or part of it, would cause financial hardship to the applicant, or to a person on whose behalf the application was made; and*

(b) whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.

Recommendations:

- *Combine sections 15 and 16 to aid clarity and ease of application*
- *Amend s.16 to include a 48-hour time limit where an application relates to the life and liberty of a person.*
- *Specify that all applicants must receive a notice in writing of a decision on their request within the prescribed time limits. Either insert a new clause specifying the content of approval decision notices at s.16 or cross-reference the notice provisions in s.21 (which currently deals with refusal or deferment of applications) and amend s.21 to specify the content approval decision notices: .*

  Disclosure notice: Where access is approved, the PIO shall give a notice to the applicant informing:

  (a) that access has been approved;
  (b) the details of further fees together with the calculations made to arrive at the amount and requesting the applicant to deposit the fees;
  (c) the form of access provided, including how the applicant can access the information once fees are paid;
  (d) information concerning the applicant's right with respect to review the decision as to the amount of fees charged or the form of access provided, including the particulars of the appellate authority, time limit, process and any other forms
- *Amend s.15(1) to make it explicit that information must be provided to the applicant as soon as possible and within no more than 2 working days, once any payments which are required have been made.*
- *Rework s.15(1) to clarify that any fees charged for provision of information "shall be reasonable, shall in no case exceed the actual cost of providing the information such as making photocopies or taking print outs and shall be set via regulations at a maximum limit taking account of the general principle that fees should not be set so high that they undermine the objectives of the Act in practice and deter applications".*
- *Insert a new fee waiver clause requiring:*
  - *That notwithstanding the fees provisions, information will be provided free of charge where the public authority has failed to maintain the time limits prescribed.*
  - *The waiver or reduction of fees where their imposition would cause financial hardship or where disclosure is in the general public interest.*

Section 17 - Forms of Access

36. As discussed in paragraph 11 above, the right to information provided by the Act should be broadened to allow, not only access to documents, but access to information more broadly, which will include the right to inspect public works and the right to take samples of public works. The forms of access permitted under s.17(1) should be amended to take into account this broader right of access.

37. Section 17(3) deals with how to process an application where the form of access requested could legitimately be considered to be "unreasonably interfering with the operations of the body". What constitutes "unreasonable interference" needs to be more clearly explained, to prevent misused by public authorities. This section should also be amended to cross-reference back to s.12(5) which requires public authorities to assist requesters to reformulate their requests in cases such as this, before their request can be rejected.

38. The Act does not currently address the issue of accessing information in the form of a translated copy of a document. A society which promotes democratic participation and aims to facilitate the involvement of all of the public in its endeavours should ensure that people are able to impart and receive information in their own language and cultural context. Section 12 of the Canadian *Access to Information Act 1983* provides a useful example:

> *Where access to a record or a part thereof is to be given under this Act and the person to whom access is to be given requests that access be given in a particular official language, a copy of the record or part thereof shall be given to the person in that language:*
> *(a) forthwith, if the record or part thereof already exists under the control of a government institution in that language; or*
> *(b) within a reasonable period of time, if the head of the government institution that has control of the record considers it to be in the public interest to cause a translation to be prepared.*

Recommendations

- *Amend s.18 to permit access via inspection of public works and taking samples from public works*
- *Amend s.18(4)(a) to narrow the ambit of what could be considered "unreasonable interference with the operations of a body", and cross-reference back to s.12(5) to require the Public Information Officer to assist the applicant to modify his/her request in such cases.*
- *Insert a new provision requiring the translation of information, at least where it is in the public interest.*

Section 19 – Deferred access

39. It is understandable that in some cases a public authority may genuinely need to defer access because premature disclosure of the information could cause harm to legitimate interests. However, s.18 is currently too broadly worded and could be abused by Governments to withhold politically sensitive information. As such:

- There should be some maximum time limit for deferral on these grounds, after which the public authority should be required to reconsider release. Otherwise, publication could be delayed *ad infinitem* with no recourse for the applicant.
- The deferral provisions should be appealable to the Ombudsman or the courts, on the basis that oversight will minimise the likelihood of abuse of the provision.

Recommendations:

- *Amend s.18 to include a specific maximum deferral time limit – e.g. 28 days – after which time the requested information will be released nonetheless.*
- *Insert a new provision permitting a requester to appeal against a decision to defer provision of the information requested.*

Section 19 – Deletion of exempt matter – Partial disclosure

40. It is positive that section 19 allows for severability of exempt information and partial disclosure of non-exempt information. However, consideration should be given to deleting s.19(2)(b) and requiring instead that the relevant notice to the requestor advising of partial disclosure also include advice regarding the opportunity and process for appealing that decision. This should be worded along the lines of rejection notices in s.21 of the Act.

Recommendations:

Delete s.19(2)(b) and specify that a notice similar to the rejection notice under s.21 must be sent to the requester where partial disclosure is permitted.

Section 20 – Decisions to be made by authorised persons

41. As discussed in paragraphs 21-24 above, s.20 is another example of the confusion throughout the Act in relation to who exactly is responsible for providing information under the law. As recommended earlier, to address this problem, consideration should be given to requiring the designation of Public Information Officers who will be responsible for receiving and processing all applications. If there is still some desire to specify that certain applications can ONLY be handled by Ministers or principal officers, s.20 could be drafted to permit the rules to be used to specify such cases. In the absence of any such Rules however, Public Information Officers would be responsible for making decisions. This will minimise confusion for the public and for other officials within public bodies.

Recommendations:

In accordance with the recommendations at paragraphs 21-24, designate Public Information Officers to be "primarily responsible for ensuring that a decision is made on all applications, although the Rules may specify that applications relating to certain information will only be decided by officers of a particular rank"..

New provision – Deemed refusals

42. Section 37(2) provides for review by the Ombudsman in cases of deemed refusal. Consideration should be given to including inclusion of a specific "deeming" provision under Part III of the Act to bolster s.37(2). The new provision should make it clear that where no decision is made by a public authority within the specified time it will be treated as a refusal of the request, such that the requester then has the right to commence an appeal. Such a clause is crucial to ensure that requesters and public officials are clear at the outset that an appeal shall lie pursuant to s. 37(2) even where no order has been passed.

Recommendations:

- *Insert a specific deeming provision, for example:*
  If an official / Public Information Officer fails to give the decision on a request for access to the requestor concerned within the period contemplated under section 16, the PIO is, for the purposes of this Act, regarded as having refused the request.

PART IV – EXEMPT DOCUMENTS

43. A key principle of access to information is minimum exemptions. The key principle underlying any exemption is that its purpose must be to genuinely protect and promote the public interest. All exemptions should therefore be concerned with whether disclosure would actually cause or be likely to cause harm. Blanket exemptions should not be provided simply because a document is of a certain type – for example, a Cabinet document, or a document belonging to an intelligence agency. The key issue should be whether disclosure would actually cause serious damage to a legitimate interest, which deserves to be protected. Even where exemptions are included in legislation, they should not apply to documents more than 10 years old because at that point they should be deemed to be no longer sensitive and thus declassified.

44. All exemptions should be subject to a blanket "public interest override", whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it (see paragraph 46 below for more). This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the "public interest" is always at the core of a right to information regime.

45. Every test for exemptions (articulated by the Article 19 Model FOI Law) should therefore be considered in 3 parts:
    (i) Is the information covered by a legitimate exemption?
    (ii) Will disclosure cause substantial harm?
    (iii) Is the likely harm greater than the public interest in disclosure?

New section - Public interest override

46. The question of whether or not the public interest is served by disclosure of information should be the primary question guiding all decisions under the Act. All exemptions should be subject to a blanket "public interest override", whereby a document which falls within the terms of a *general* exemption provision should still be disclosed if the public interest in the *specific* case requires it. This ensures that every case is considered on its individual merits and public officials do not just assume that certain documents will always be exempt. It ensures that the "public interest" is always at the core of a right to information regime. Notably, s.8(2) of the recently passed Indian *Right to Information Act 2005* now includes this type of broad public interest override and it is strongly recommended that the Belize Act draw on this best practice.

Recommendation:

- *Insert a new "public interest override" at the start of Part IV as follows:*
  "Notwithstanding the exemptions specified in the Act or any other law in force, including the Official Secrets Act, a public authority shall allow access to information if public interest in disclosure of the information outweighs the harm to the public authority."

General - Delete references to Ministerial/Secretarial certificates

47. The use of Ministerial/Secretarial certificates in ss.22 and 23 is entirely contrary to international best practice, such that it is disappointing that this device has been incorporated into the Act. Even in Australia, one of the few jurisdictions to retain the use of such certificates, Ministerial certificates have often been attacked by parliamentarians and civil society alike, as being contrary to good governance because they allow the Minister to remain unaccountable. In 1978, the Parliamentary Committee which considered the Australian Bill concluded: *"There is no justification for such a system tailored to the convenience of ministers and senior officers in a Freedom of Information Bill that purports to be enacted for the benefit of, and to confer rights of access upon, members of the public…This can only confirm the opinion of some critics that the bill is dedicated to preserving the doctrine of executive autocracy".* In 1994, two officials from the Australian Attorney General's Department concluded that: *"The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents."*[3] In a law which is specifically designed to make Government more transparent and accountable, the use of such certificates cannot be defended.

48. All of the exemptions in the Act, which permit a Minister or Secretary to issue conclusive certificates, should be deleted if the Act is to achieve its accountability objectives. At the very minimum, all of the provisions permitting the use of these certificates should justify the use of a certificate, namely that "the disclosure of the document would be contrary to the public interest". Additionally, consideration should be given to replicate the UK approach, which requires that

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

Ministerial certificates can only be issued by a "Minister who is a member of the Cabinet or by the Attorney General". An additional clause should be added requiring any certificate issued by the Minister or his delegate to be tabled in Parliament along with an explanation. This is the practice in the UK, where the Information Commissioner noted in May 2004 that "issues relating to each and every use of the veto will be brought before Parliament".

Recommendation:

Amend sections 22 and 23 to remove the power for the Ministers or Secretaries to issue conclusive certificates and amend the remainder of the Act accordingly. If this recommendation is not adopted, at the very least, it should be required that where a certificate is issued it must specify how disclosure of the document would be contrary to the public interest, that must be tabled in Parliament.

Section 22 – National security & international relations exemption

49. Section 22(1)(b), which protects information given by a foreign government in confidence, should be deleted because it overlaps with the international relations exemption in s.22(1)(a). Notably, the key issue for any exemption should be whether harm will be caused by disclosure, but s.22(1)(b) only focuses on the confidential nature of the information. Just because information was given to the Belizean Government in confidence does *not* mean that it should necessarily *remain* confidential. At the time it was communicated it may have been sensitive, but at the time it is requested it may be harmless. Why should disclosure be prevented in such cases? As long as the more general protections in ss.22(1)(a), which guards against disclosures that would cause harm to international relations, is retained, the relevant interests will be protected. This also reduces the chances that the provision will be abused by corrupt officials who may connive with foreign officials in confidence but then seek to hide their activities using this clause. What if the confidential information that was passed on relates to a corrupt deal undertaken by a previous administration? Is it really legitimate that it be withheld? What harm will it cause the nation – in fact, will it not be of benefit in exposing corrupt dealings and making government more accountable?

Recommendation:

Delete s.22(1)(b) because it unnecessarily duplicates s.22(1)(a) and includes no harm test.

Section 23 – Cabinet documents exemption

50. Although it has historically been very common to include blanket exemptions for Cabinet documents in right to information laws, in a contemporary context where governments are committing themselves to more openness, it is less clear why the status of a document as a Cabinet document should, in and of itself, be enough to warrant non-disclosure. Considering all of the exemptions already contained in the law, it is not clear in addition why such a broad Cabinet exemption needs to be included. One of the primary objectives of a right to information law is to open up government so that the public can see how decisions are made and make sure that they are made right. The public has the right to know what advice and information the Government bases its decisions on and how the Government reaches its conclusions – particularly in the most important decision-making forum in the country, Cabinet.

51. It is recommended that the Cabinet exemption be deleted and Cabinet documents protected under other exemptions clauses as necessary – for example, national security or management of the national economy. At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. Currently, the provisions are extremely broadly drafted, with s.23(1)(a) protecting even documents simply "prepared…for submission to Cabinet" or a document "which has been submitted to the Cabinet for consideration". This could capture a huge number of documents and could easily be abused by the bureaucracy, who could claim that a vast number of documents "relate" to Cabinet issues! It is notable in this respect that even some MPs in some other jurisdictions have complained that broad Cabinet exemptions have been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption.

52. It is also not clear why s.23(1)(b) protects "official records of the Cabinet". These records are presumably vetted by Cabinet before they are finalised – and if Cabinet members sign off on them as a legitimate record of discussions then why should they be worried about their release? So long as they capture Cabinet discussion accurately, they should be open to public scrutiny (unless some other exemption applies). Section 23(1)(d) should also be deleted on the basis that the deliberation or advice of the Cabinet for decision-making processes should be able to stand up to public scrutiny – unless openness would harm another legitimate interest, such as international relations or law enforcement.

53. A provision should be added that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public after the decisions have been taken and the matter is complete. Section 8(1)(i) of the Indian *Right to Information Act 2005* provides a good example of such a clause.

Recommendations:

- *Deleted s.23 entirely or at the very least amend the entire section (particularly s.23(1)(a)) substantially to tighten the protection provided to prevent abuse. Consider replacing s.23 with the following:*
  "A public authority may refuse to release information, where to do so would, or would be likely to:
  (a) cause serious prejudice to the effective formulation or development of government policy; or
  (b) seriously frustrate the success of a policy, by premature disclosure of that policy; and
  (c) disclosure would be contrary to the public interest.
- *Insert an additional provision requiring that once a decision of Cabinet is made, the decision along with reasons and materials upon which the decision was made shall be made public (unless an exemption applies) and all related materials shall be accessible upon request (unless and exemption applies).*

Section 24 – Law enforcement exemption

54. Section 24 is a common provision. However, s.24 should be more tightly drafted to ensure that only information which would harm "lawful" law enforcement methods will be protected. In particular, s.24(a) should protect only "lawful" investigations and s.24(d) should protect only "lawful" methods and procedures.

Recommendation:

Amend ss.24(a) and (d) to ensure that all of the sub-clauses explicitly protect only "lawful" methods of law enforcement.

Section 25 – Exemptions if secrecy provisions of other enactments apply

55. This provision of the Act is actually directly contrary to international best practice, which requires that a right to information law should set out all openness and secrecy requirements. Section 25 should be deleted and a new provision inserted which explicitly provides that this Act overrides all other inconsistent legislation. A right to information law should be comprehensive, both in the right it extends and the restrictions it recognises. The list of exemptions included in the law should be exhaustive and other laws should not be permitted to extend them. This is a matter of principle and good practice – public officials could be very confused when trying to apply the law, and the law could be inadvertently undercut by unrelated legislation, which imposes contrary secrecy obligations. Any new provision should make it clear that that law overrides all other statutory or common law prohibitions on access to information. Section 22 of the Indian *Right to Information Act 2005* provides a good model.

Recommendation:

- *Delete s.25 and insert a new provision making it clear that the Act overrides all other statutory or common law prohibitions on access to information:*

"*The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act…and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

Section 26 – Documents concerning operations of Ministries

56. Section 25, which protects against disclosures which would have a substantial adverse effect on the financial, property, staff management issues or efficient and economical conduct of affairs of the Ministry/prescribed authority, is much too broad. It goes well beyond what is necessary to protect key national interests.

- The protection in relation to "financial management issues" is much too broad. What national interests does it attempt to protect? Would it permit the withholding of departmental budget information? Or salary information about top civil servants? Or staff employment agreements? More appropriately, a protection should be provided in the Act for information, which would harm Belize's public economic interests and the legitimate commercial interests of public bodies. Article 19's Model FOI Law contains a useful provision at s.31.
- Attempting to protect information which would adversely affect "staff management issues" is also a provision which is ripe for abuse. Could this clause be used to cover up cases of nepotism or favouritism in promotions, or instances of transfers being used as punishment? Could this clause be used to hide bad staff management practices? This provision is unnecessary because any genuinely sensitive personnel information could be protected under s.27 which protects personal private information.
- To protect against disclosures adversely affect the "efficient and economical conduct of affairs" of a body is such a broad discretion that it could in reality be utilised to undermine the whole law. With such a large discretion to judge what affects the performance of the agency, one could easily imagine that resistant bureaucrats will interpret the law so that any information which reflects negatively on the performance of the agency or its responsible Minister will be classified as exempt on this basis! The provision is the equivalent to giving officials a carte blanche to withhold any document they do not wish to make public and should be deleted.

Recommendation:

Delete s.25 and rely on other exemptions to protect genuinely sensitive information.

Section 27 – Personal privacy

57. While it is common to exempt the disclosure of information that would constitute an unwarranted invasion of personal privacy, nonetheless the exemption at s.27 is too broad. In particular, it is worrying that the section could be misused to permit non-disclosure of information about public officials. It is vital to government accountability that public officials can individually be held to account for their official actions. As such, a new provision should also be inserted in s.27 making it clear that in certain instances privacy rights must still give way to openness. The privacy exemption in s.26 of the Uganda *Access to Information Act 2005* provides a useful model.

Recommendation:

- *Insert an additional sub-clause in s.27 to permit disclosure where:*
  - *(a) the third party has effectively consented to the disclosure of the information;*
  - *(b) the person making the request is the guardian of the third party, or the next of kin or the executor of the will of a deceased third party;*
  - *(c) the third party has been deceased for more than 20 years; or*
  - (d) *the individual is or was an official of a public body and the information relates to any of his or her functions as a public official or relates to an allegation of corruption or other wrongdoing*

Section 28 – Legal proceedings or professional privilege

58. In light of the fact that s.24(b) already protects against disclosures which would prejudice a fair trial and s.28(2) protects legal professional privileged documents from disclosure, it is not clear why

such a broad exemption has been included in s.28(1) to protect against disclosures which would harm Belize interests in pending or likely legal proceedings. This clause should be deleted or at least it should be reworded to make it clearer what "interests" are to be protected under the clause.

Recommendation:

Delete s.28(1) or amend s.28(1) to protect only against "disclosures which would have substantially undermine the ability of the Belize Government to properly prosecute or defend an action in the domestic or international courts".

Section 29 – Documents relating to trade, secrets, etc

59. It is legitimate to include exemptions to protect sensitive commercial information, but it is problematic that s.29(1)(a) currently attempts to broadly protect disclosures which would cause "disadvantage" to a company, rather than restricting the clause to protect against '*competitive* disadvantage to a company's *legitimate and lawful undertakings*'. Section 29(1)(b) should also be clarified to ensure that information will only be protected where release might impair the ability of the Government to collect similar information in future AND *"the supply of the relevant information is necessary to the lawful functions of the agency".* This will minimise the potential for abuse of the provision by colluding officials and private bodies.

60. To make absolutely sure that the exemption is not abused, it is absolutely imperative that s.31 is made subject to a more explicit public interest override (even if the general recommendation in paragraphs 46 above is not implemented). The public interest override should either require the general balancing of all public interests or at the very least require the release of information if it relates to a proven or suspected human rights violations, public health, safety or environmental risk. This is justified because private bodies today have such a huge impact on public life that the public increasingly feels the need to exercise their right to know in respect of private business information. It is an indisputable fact that most of the corruption that occurs in Government happens at the public/private interface – most commonly a private body contracting with a public authority makes an agreement for both sides to divert public money. Allowing access to key business information from private bodies is one way of supporting the agenda to promote greater corporate social responsibility.

Recommendation:

- *Amend s.29(1)(a) to protect against "competitive disadvantage to a company's legitimate and lawful undertakings."*
- *Amend s.29(1)(b) to permit non-disclosure only where "the supply of the relevant information is necessary to the lawful functions of the agency".*
- *Insert an explicit public interest override, or at least to require release "if it relates to a proven or suspected human rights violations, public health, safety or environmental risk".*

Section 31 – Confidential information

61. Section 31 could be tightened by specifying that it will protect only against a "legal" breach of confidence. Otherwise, a lower colloquial standard could see the provision being abused to protect information simply because a document has "confidential" stamped on it. Nonetheless however, the provision should be made subject to a public interest override, because sometimes it will be in the national interest to release even confidential information, particularly if time has passed since the information was initially supplied. The public interest override should either requires the general balancing of all public interests or at the very least require the release of information if it relates to a proven or suspected human rights violations, public health, safety or environmental risk.

Recommendation:

- *Amend s.31 to specify that it protects only against a "legal" breach of confidence.*

- *Insert an explicit public interest override, or at least to require release "if it relates to a proven or suspected human rights violations, public health, safety or environmental risk".*

Section 32 – Contempt of National Assembly/contempt of Court

62. Consideration should be given to deleting s.32(c), which exempts documents that infringe the privileges of the National Assembly. While parliamentary privilege is a recognised Westminster convention it is not clear how disclosure could undermine said privilege. This appears to be a hangover from the time when the public had no right to review the actions of their representatives. However, today parliament operates in full view of the public, with many parliaments even going so far as to televise their proceedings, while almost all jurisdictions reproduce speeches and submissions in the Parliamentary Hansard.

Recommendation:

Delete s.32(c), because it is not clear how disclosures will breach parliamentary privilege.

Section 33 – Crown privilege

63. Withholding documents on the basis of Crown privilege is not appropriate in an age where the Crown/Executive are increasingly being scrutinized. Consider the developments at international and domestic law where former Heads of State can now be prosecuted for crimes they committed when in power. The protection in s.33 is a hangover from the days when the monarch was supreme, but this is no longer an appropriate approach to good governance.

Recommendation:

Delete s.33 to remove the protection for Crown privilege.

PART V – REVIEW OF DECISION

64. Oversight via appeals to 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. 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 mandate to review refusals to disclose information, compel release and impose sanctions for non-compliance.

65. It is encouraging that the Belize Act includes an appeal process, with a first internal appeal and a second appeal to the Ombudsman. However, there are a number of deficiencies in the appeals mechanism as currently drafted. It is strongly recommended that the drafter look at Parts IV and V of the new Indian *Right to Information Act 2005* which drew on a range of international legislative best practice provisions in developing its appeals regime. Model clauses relating to most the issues below can be found in that Act.

Section 36 – Internal review

66. Considering that the Act requires that an internal review is required to be undertaken before an appeal can be made to the Ombudsman, s.36 should be the first provision in Part V, to make it easier for the public to understand how the appeal process works.

67. Section 36(1) is a key provision because it sets out the ground of internal appeal. As such, it is important that the provision is broadly drafted to ensure that appeal bodies have a wide remit to review non-compliance with the law. At the very least, an additional catch all provision should be included which allows appeals on "any issue related to disclosure". This will ensure that the types of appeals are not inadvertently limited. Section 88 of the Queensland (a State of Australia) *Freedom of Information Act 1992* and s.31 of the Canadian *Access to Information Act 1982* provide good models.

Recommendations:

Amend s.36 to broaden the appeal ground available to requesters, as follows:

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

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

Section 35(1) – Applications to Ombudsman

68. It is very positive that the Act gives the Ombudsman the power to hear appeals. As discussed earlier, best practice international standards require that access regimes include an appeals mechanism, which is independent of government, as well as cheap, quick and procedurally simple. While the courts satisfy the first criteria of independence, they are notoriously slow and can be difficult to access for the common person. Experience from a number of Commonwealth jurisdictions, including Canada, England, Scotland and Australia, has shown that such independent bodies have been very effective in raising the profile of the right to information and balancing against bureaucratic resistance to openness.

69. As discussed in paragraph 68 above, it is essential that the appeal grounds are clearly stated so there is no ambiguity about the breadth of the appeal bodies' powers. As such, if the recommendation in paragraph 68 is not implemented, at the very least, s.35(1) should be amended to make it clear that the Ombudsman has the power to hear appeals "*in respect of any other matter relating to requesting or obtaining access to records under this Act".*

Recommendations:

Amend s.35(1) as recommended in paragraph 68 above, or at least broaden the Ombudsman's appeal remit by stating that "the public can lodge an appeal with the Ombudsman in respect of any other matter relating to requesting or obtaining access to records under this Act".

New section – Investigation Powers of the Ombudsman

70. To ensure that the Ombudsman can properly discharge their appeals functions, the law should clarify its investigation powers. The Ombudsman must explicitly be granted the powers necessary to undertake a complete investigation and ensure enforcement of his/her orders. The powers granted to the Canadian Information Commissioner under s.36 of the Canadian *Access to Information Act 1982* provides a useful model. This new section could be combined with s.42 of the current Act, which deals with how the Ombudsman can deal with witnesses.

Recommendations:

Clarify the investigations powers of the Ombudsman, as follows:

(1) The Ombudsman has, in relation to the carrying out of the investigation of any complaint under this Act, power:
(a) to summon and enforce the appearance of persons and compel them to give oral or written evidence on oath and to produce such documents and things as the Ombudsman deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;
(b) to administer oaths;
(c) to receive and accept such evidence and other information, whether on oath or by affidavit

or otherwise, as the Ombudsman sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Ombudsman under this Act as the Ombudsman sees fit; and

(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Ombudsman may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from any the Ombudsman on any grounds.

Sections 35(2) & (3) and section 39 – Ombudsman's decision-making powers

71. Section 35(2) gives the Ombudsman the power to make any decision that a Ministry or prescribed authority could have made, while s.39 gives the Ombudsman the power to make any order he thinks fit. These two provisions should be combined and then elaborated upon to strengthen the Ombudsman's powers by leaving no ambiguity as to what orders he/she can make. In accordance with best practice evidenced in a number of jurisdictions (e.g. the State of Queensland in Australia, Mexico), the Ombudsman should have the power to make binding determinations, compel parties to take action, enforce compliance with orders and impose penalties as appropriate. Without strong powers, the Tribunal could easily be ignored and sidelined by a bureaucratic establishment, which is determined to remain closed. Section 88 of the Queensland *Freedom of Information Act 1992* (which is replicated in paragraph 55 above), as well as s.82 of the South African *Promotion of Access to Information Act* and ss.42-43 of the Article 19 Model FOI Law provide very useful examples.

72. Section 35(3) currently provides that if it is established during the proceedings that a document is an exempt document, the Ombudsman does not have the power to grant access to it. However, in keeping with the recommendations in paragraph 47, even if an exemption is found to apply to certain information, the Ombudsman as an independent arbiter should have the power to look at whether the public interest in disclosing the information outweighs the public interest in withholding the information and to decide to release information on that basis. This will ensure that an impartial judge is responsible for deciding what is in the public interest – which is preferable when one considers that officials too often confuse the general national public interest with the Government's interests.

73. As discussed in paragraphs 48-49 above, all references to ministerial/secretarial certificates should be deleted, including s.35(4). The Ombudsman should have the power to look into the reasons for the issue of any such certificate and allow disclosure of information in cases where the public interest in disclosure outweighs the harm to protected interests.

74. A new provision should be inserted making it explicit that written notice is given to all requesters of the outcome of their appeal. The content of such notices should be prescribed in the Act.

Recommendations:

- *Sections 35(2), (3) and 39 should be combined and then replaced with the following provision, in order to clarify the Ombudsman's decision making powers:*

  (1) The Ombudsman has the power to make any order he/she see fit including to:

  (a) require the public authority to take any such steps as may be necessary to bring it into compliance with the Act, including by;

  (i) providing access to information, including in a particular form;

  (ii) appointing an information officer;

  (iii) publishing certain information and/or categories of information;

(iv) making certain changes to its practices in relation to the keeping, management and destruction of records;
(v) enhancing the provision of training on the right to information for its officials;
(vi) providing him or her with an annual report, in compliance with section X;
(a) require the public body to compensate the complainant for any loss or other detriment suffered;
(b) impose any of the penalties available under this Act;
(c) reject the application.
(2) Decisions of the Information Commissioner shall be binding on all parties.

- *Insert a new clause giving the Ombudsman the power to "disclose document even where they are exempt, where the public interest in disclosure outweighs the public interest in withholding the information".*
- *Delete section 35(4) which deals with Ministerial Certificates.*
- *Insert a new clause clarifying that written notice of the Ombudsman decision:*
  The Ombudsman shall serve notice of his/her decision, including the reasons for the decision, the provisions of the Act being relied upon in the decision and any rights of appeal, on both the complainant and the public authority.

Section 37 - Time for applications to the Ombudsman

75. Sections 37(1) and (2) are drafted in a very complicated style and should be simplified. As discussed in paragraph 43 above, a much simpler "deeming" provision could be included to replace s.37(2) and make it clear that, "where no decision is received from an Information Officer or internal appeal body within 14 days of receipt of an application or complaint respectively, a decision will be deemed to have been made and an appeal may be lodged with the Ombudsman".

76. Section 37(3), which allows the Ombudsman to give bodies extra time to handle a request, should be deleted or at least amended to clarify in what limited circumstances an extension would be warranted. It is not fair that a public body could flout their obligations under the Act, and then, after wasting the requester's time, be given more time to make a decision! If it is felt that an extension provision is warranted, then one should be included in Part III to allow extensions during the application process – whereby the Ombudsman could proactively be asked by a public body for an extension, for example, in cases where so many documents were requested that more time was needed to process the request.

Recommendations:

- *Simplify the wording of sections 37(1) and (2) to make it easier for the public to understand the time limits for lodging an appeal from a decision and where a decision has not been received.*
- *Delete section 37(3) or consider including an "extension provision" in Part III to permit extensions of no more than 14 days for large requests.*

Sections 40 and 41 – Production of exempt documents

77. It is positive that section 40 clarifies that an exempt document may still be seen by the Ombudsman. Such a provision is essential to ensure that the Ombudsman can properly discharge his/her functions. Nevertheless, it could be made more explicit that the Ombudsman can look at "any" document and "*no information may be withheld from any the Ombudsman on any grounds."*

78. In accordance with the recommendation in paragraphs 48-49, the reference in s.40(3) to Ministerial Certificates should be deleted. Section 41 which deals solely with how the Ombudsman handles Ministerial Certificates should also be deleted.

Recommendation:

- *Clarify that ss.40(1) and (2) apply "notwithstanding any other Act of Parliament or any privilege under the law of evidence" and make it explicit that "no information may be withheld from any the Ombudsman on any grounds."*

- *Delete s.40(3) regarding Ministerial Certificates.*
- *Delete s.41 regarding Ministerial Certificates.*

New provision – Ad hoc investigations

79. An additional provision should be included replicating s.30(3) of the Canadian *Access to Information Act 1982*, which gives the Information Commission the power to initiate its own investigations *even in the absence of a specific complaint by an aggrieved applicant*. In practice, this provision is used to allow an Ombudsman to investigate patterns of non-compliance, either across government or within a department and produce reports and recommendations for general improvements rather than in response to specific individual complaints. In the State of Victoria in Australia, the Ombudsman (who performs a similar role) was recently given a similar power because it was recognised that, as a champion of openness within government, he needed to be able to investigate and take public authorities to task for persistent non-compliance with the law.

Recommendation:

Insert a new provision permitting the Ombudsman to initiate his/her own investigations in relation to any matter, whether or not he/she has received a specific complaint, eg. persistent cases of departmental non-compliance.

New provision – Penalties

80. The Act is seriously weakened by the absence of comprehensive offences and penalties provisions, a shortcoming which should be rectified as a priority. Sanctions for non-compliance are particularly important incentives for timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public. Most Acts contain combined offences and penalty provisions. Section 12 of the Maharashtra *Right to Information Act 2002*; s.49 of the Article 19 Model Law; s.54 of the UK *Freedom of Information Act 2000*; s.34 of the Jamaican A*ccess to Information Act 2002*; and s42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.

81. In the first instance, it is always important to clearly detail what activities will be considered offences under the Act. The Act currently does not provide for penalties for certain acts of non-compliance (willful destruction or damage to records/documents). The Act needs to sanction practical problems like a refusal to accept an application, unreasonable delay or withholding of information, and knowing provision of incorrect, incomplete or misleading information. These acts could all seriously undermine the implementation of the law in practice and should be sanctioned to discourage bad behaviour by resistant officials. Offences also need to be created for willful non-compliance, such as concealment or falsification of records, willful destruction of records without lawful authority, obstruction of the work of any public body under the Act and/or non-compliance with the Ombudsman orders.

82. Consideration should also be given to imposing departmental penalties for persistent non-compliance with the law. If an officer fails to comply with the Act, this should be recorded on their public service record because providing access to information should be considered a key indicator of a public servant's commitment to discharging their duties properly. Poorly performing public authorities should be also be sanctioned with penalties for persistent non-compliance with the Act and their bad behaviour even brought to the attention of their Minister who should have to table an explanation in Parliament.

83. 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.

84. When developing penalties provisions, lessons learned from the Indian states with right to information laws are illuminating. In some Indian states for example, penalties are able to be impose on individual officers, rather than just their department. In reality, without personalised penalty provisions, many public officials may be content to shirk their duties, safe in the knowledge that it is their employer that will suffer the consequences. It is therefore important in combating entrenched cultures of secrecy that individual officers are faced with the threat of personal sanctions if they are non-compliant. The relevant provisions need to be carefully drafted though, to ensure that defaulting officers, at whatever level of seniority, are penalised. It is not appropriate for penalty provisions to assume that penalties will always be imposed on PIOs. If the PIO has genuinely attempted to discharge their duties but has been hindered by the actions of another official, the PIO should not be made a scapegoat. Instead, the official responsible for the non-compliance should be punished.

Recommendations:

- *Insert a new provision on penalties, drawing on international best practice, as follows*
  (1) Where any official has, without any reasonable cause, failed to supply the information sought, within the period specified under section X, the appellate authorities and/or the courts shall have the power to impose a penalty of [X], which amount must be reviewed and, if appropriate, increased by regulation at least once every five years, for each day/s delay in furnishing the information, after giving the official a reasonable opportunity of being heard, and the fine will be recovered from the official's salary
  (2) *Where it is found in appeal that any official or appellate authority has-*
  (i) Mala fide denied or refused to accept a request for information;
  (ii) Knowingly given incorrect or misleading information,
  (iii) Knowingly given wrong or incomplete information,
  (iv) Destroyed information subject to a request;
  (v) Obstructed the activities in relation to any application or of a Public Information Officer, any appellate authority or the courts;
  commits an offence and the appellate authorities and/or the courts shall impose a fine of not less than [X] and refer the matter to a Magistrate for consideration as to whether a term of imprisonment of up to two years shall also be imposed, after first giving the official a reasonable opportunity of being heard.
  (3) An officer whose assistance has been sought by the Public Information Officer for the performance of his/her duties under this Act shall be liable for penalty as prescribed in sub-sections (1) and (2) jointly with the Public Information Officer or severally as may be decided by the appellate authority, Information Tribunal or the Courts.
  (4) Any fines imposed under sub-sections (1), (2) and (3) shall be recoverable from the salary of the concerned officer, including the Public Information Officer, or if no salary is drawn, as an arrears of land revenue.
  (5) The Public Information Officer or any other officer on whom the penalty under sub-sections (1), (2) and (3) is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him.
- *Insert a new provision permitting the imposition of departmental penalties for persistent non-compliance.*

PART VI - MISCELLANEOUS

Section 46 - Reporting and Monitoring

85. Section 46(1) makes the Minister responsible for preparing and submitting to the National Assembly an annual report on the operation of the Act. However, the Minister is not an impartial body, such that it would be more appropriate for the Ombudsman to produce the report. Section 46 should then be amended to explicitly require the Ombudsman to include in the report recommendations for improving implementation. Such recommendations are commonly included in reports by Information Commissioners (see Canada for example), or Human Rights Commissions (see South Africa for example) where they are made responsible for annual reporting.

Recommendation:

- *Make the Ombudsman responsible for collating and submitting the Annual Report under s.46.*
- *Insert an additional clause requiring that the Annual Report include: "recommendations for the development, improvement, modernisation, reform or amendment of the Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively"*

New provision – Promotion and Training

86. It is increasingly common to include provisions in the law itself mandating a body not only to monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000* together provide a very good model. The Ombudsman could do this job, in his/her role as a champion of openness in administration. Alternatively, a body within Government may take on the role. For example, in Jamaica and Trinidad & Tobago, Access to Information Units were specifically set up to provide public education and training services. In South Africa, this has been done by the national Human Rights Commission, while in the UK, this role was filled by the Department of Constitutional Affairs.

South Africa*: 83(2) [Insert name], to the extent that financial and other resources are available--*

(a) develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;

(b) encourage public and private bodies to participate in the development and conduct of programmes referred to in paragraph (a) and to undertake such programmes themselves; and

(c) promote timely and effective dissemination of accurate information by public bodies about their activities.

(3) [Insert name of body] may--

(a) make recommendations for--

(i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and

(ii) procedures by which public and private bodies make information electronically available;

(b) monitor the implementation of this Act;

(c) if reasonably possible, on request, assist any person wishing to exercise a right [under] this Act;

(d) recommend to a public or private body that the body make such changes in the manner in which it administers this Act as [insert name of body] considers advisable;

(e) train information officers of public bodies;

(f) consult with and receive reports from public and private bodies on the problems encountered in complying with this Act;

10(1) The [Insert name of body] must, within 18 months…compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.

(2) The guide must, without limiting the generality of subsection (1), include a description of--

(a) the objects of this Act;

(b) the postal and street address, phone and fax number and, if available, electronic mail address of:

(i) the information officer of every public body; and

(ii) every deputy information officer of every public body…;…

(d) the manner and form of a request for…access to a record of a public body…[or] a private body…;

(e) the assistance available from [and the duties of] the Information Officer of a public body in terms of this Act;

(f) the assistance available from the [Insert name of body] in terms of this Act;

(g) all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging--

(i) an application with [the Ombudsman and] a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body;…

(i) the provisions…providing for the voluntary disclosure of categories of records…;

(j) the notices…regarding fees to be paid in relation to requests for access; and

(k) the regulations made in terms of [under the Act].

(3) The [Insert name of body] must, if necessary, update and publish the guide at intervals of not more than two years.

Recommendation:

Insert a new section placing specific responsibility on a body(s) – either a unit in the Ministry responsible for administering the Act or the Ombudsman – to promote public awareness, including through the publication of a Guide to RTI, and provide training to bodies responsible for implementing the Act, and requiring resources to be provided accordingly.

New provision - Protect whistleblowers

87. In order to support maximum information disclosure, the Act should also provide protection for "whistleblowers", that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the pubic interest. Whistleblower protection is based on the premise that individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny.

Recommendations:

- *An additional article be included dealing with whistleblower protection. Section 47 of the Article 19 Model FOI Law provides a good model:*
  - *i. No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.*
  - *ii. For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.*

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