OBSERVATIONS OF THE
ACCESS TO INFORMATION ACT 2002 IN JAMAICA

March 2006
The Carter Center

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

service, such as after a privatization process, its information should be defined in the law as "public information" and covered under the Act."[2]

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

2. Implementation Issues

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

a. Need for a Legislated Oversight Body

An oversight body with the responsibility of coordinating implementation efforts across government agencies, promoting training of functionaries and public education, responding to agencies questions, and ensuring consistency and sustainability is critical to the success of any access to information regime. The benefit of the voluntarily established Access to Information Unit in Jamaica is well-known. This Unit served as a

[2] Access to Information Laws: Pieces of the Puzzle, The Promotion of Democracy Through Access to Information, L. Neuman, The Carter Center, 2004.
[3] Freedom of Information: One Year On, Information Commissioner's Office, United Kingdom, January 2006.

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

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

b. Costs

The Jamaica Access to Information Act as presently written fully conforms to emerging international standards and experiences. The general principle with relation to costs is that there should be no fee for the request, search and compilation of information, but that minimal payments should be applied to offset the reproduction costs. There are a number of reasons to limit the fees to reproduction costs only. First, fees for submitting a request for information can serve as an obstacle for many users. For example, when Ireland amended their freedom of information law to include a flat 10 charge for information requests the number of request dropped by almost a third. Second, it is costly for the government to process the fees and they do not recoup the actual costs. In Canada there is a C$5 dollar charge, but it costs the administration significantly more just to process the fee. The Canadian Information Commissioner in his annual report of 2004 stated that "At their current levels and as currently administered, fees for requests under the Act seem designed to accomplish one purpose--and one purpose only: to discourage frivolous or abusive access requests. The fee system is not designed to generate revenue for governments or even as a means of recovering the costs of processing access requests. That is not an acceptable premise on which to build a right of access." Moreover, many experts argue that the provision of information is a fundamental government service,

[5] For jurisdictions with statutory oversight bodies, see, South African Promotion of Access to Information Act, the United Kingdom Freedom of Information Act, Mexico Transparency and Access to Information Act, and Canada Access to Information Act.

much like the police department, libraries or public education and as such should not extract an additional cost.

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

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

c. Automatic Publication

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

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

A number of jurisdictions including India, South Afrfation documen-3.t1 Tf0 .5 -1.15 T30014 Tw -17.47 -1.1

authority publish three statements, in accordance with Sections 7, 8 and 9 of the Act. Where a statement has not been published the Minister under the Act is required to give reasons, published in the Gazette, for the failure to publish. Broadly, the statements must contain the purpose, structure and functions of the authority, type of information they hold and how members of the public may participate in the decision making processes of the authority; a description of those documents that guide the employees of the public authority in doing their work; and a complete list of certain types of documents created after the commencement of the Act. The Act itself sets out clear guidelines and lists the types of documents that must be contained in the statement, as well as where and when it must be published.

The Jamaica Access to Information Act of 2002 provides for a "roadmap," supported by ts that guid9(ent 0 07cess to 001 Tc law]TJ0. Tc-24.000od[ists2

Similarly, the Australian Freedom of Information Act allows a request to be refused when the "Agency or Minister is satisfied that the work involved in processing the request: (a) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or (b) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions".[7] Once again, there are a number of conditions which must be met before such a decision is taken, including written notice and identification of an officer of the agency or member of staff with whom the requester may consult in order to remove this ground for refusal. There is even a specific provision that states that refusal may not be based on the costs of copying or reason for the request, and this decision is appealable.

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

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

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

3. Public Interest Test

information laws, exemptions to the right to access information are narrowly and clearly drafted and explicitly define the public interest that is being protected (and harm avoided) by the disclosure denial. Nonetheless, in ultimately determining whether a document is exempt from disclosure, the best international practice dictates that a second

Commission may "provide any relief that the Commission, at its own discretion, believes appropriate to rectify the de

recently passed or amended laws, there are specific provisions in the Act for mediation prior to litigation. Hearing all appeals cases, whether orally or on the record, is costly,

and responsible officers to review all potentially determinative legislation and regulations, rather than just the Access to Information Act. To ensure greatest consistency with the principles of transparency, and aide the public servant in fulfilling its tenets, a specific provision such as found in the UK law may be considered.

Conclusion

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

Prepared by the Carter Center
March 2006