

**Summary Submission to the Joint Parliamentary  
Committee Conducting the Review of the Access to  
Information Act**

**Submitted by:**

**The Access to Information Advisory Stakeholders Committee**

**May 28, 2009**

## TABLE OF CONTENTS

Introduction .....	3
The Role and Staffing of the Access to Information Unit.....	5
Administration .....	6
Public Education .....	7
Role of the ATI Unit .....	7
Recommendations .....	8
The Title of the Act.....	9
Recommendation .....	9
Repeal of the Official Secrets Act.....	9
Recommendation .....	9
The Public Interest Test .....	9
Recommendation .....	11
“Reasonableness” and its use under the Act.....	12
No Further Exemptions .....	12
Recommendation .....	12
Requests Made Via Telephone.....	12
Recommendation .....	13
Payments and Verification Throughout the Island.....	13
Recommendations .....	14
Time Limit on Exemption Certificates.....	14
Recommendations .....	15
Review and/or appeal from transfers .....	15
Recommendations .....	16
The Role of the Access to Information Appeals Tribunal .....	16
The Structure and Operation of the Secretariat and Tribunal.....	17
Recommendation .....	17
Powers of the Tribunal .....	18
a. Jurisdiction.....	18
Recommendation .....	18
b. Power to Carry out Inquiries and Investigations .....	18
Recommendation .....	19
c. Power to Mediate.....	19
Recommendation .....	19
The Rules of Appeal.....	19
Recommendation .....	20
Publication Schemes.....	21
APPENDICES.....	23
Appendix A: Publication Scheme Outline (adapted from Scottish publication scheme) .....	23
Appendix B: The Chronological History of the Joint Select Committee to Review the Access to Information Act (2002) .....	27

## **Introduction**

1. The Access to Information Advisory Stakeholders Committee (AIASC) is grateful for the opportunity to make submissions to this honourable Joint Select Committee of Parliament considering the Review of the Access to Information (ATI) Act.
2. The ATI Act has been implemented on a phased basis since January 5, 2004. On July 05, 2005, all Ministries and Agencies were brought under the provisions of the ATI Act. Moreover, by virtue of section 38(2), the Act stipulates that there shall be reviewed from time to time by a committee of both Houses of Parliament and that the first such review shall be conducted not later than two years after the appointed day. The first phase of the four phase implementation of the ATI Act began on December 12, 2004. In respect their obligations as found in section 38(2) of the Act, the government passed a motion to appoint the first Joint Select Committee to Review the ATI Act on May 06, 2005. Unfortunately, the committee was dissolved without completing its review. A second motion was moved through both Houses of Parliament to appoint the newly Reconstituted Joint Select Committee to Review the ATI Act on March 27, 2008, but unfortunately this committee never met. In 2009 a newly reconvened committee held its first meeting on March 26, and made a call for submissions. The AIASC is grateful to present the following submission.
3. This submission aims at providing the Reconstituted Joint Select Committee to Review the ATI Act, the terms of reference of the AIASC and a synopsis of the recommendations provided to the first Joint Select Committee in February 2006. It is our hope that this document can be a useful tool for the Reconstituted Joint Select Committee upon which to base the future recommendations as part of their Parliamentary review.
4. First a little background on the AIASC. This committee came together on the invitation of the Access to Information Unit of the Ministry of Information in January 2004. The formation of the AIASC coincided with the phased implementation of the Act. The committee is comprised of representatives of the Media Association of Jamaica, the Caribbean Examinations Council, the Jamaican Bar Association, the Jamaica Civil Service Association, Jamaicans For Justice, the Joint Committee for Tertiary Education,

the Press Association of Jamaica, CARIMAC, Farquharson Institute of Public Affairs, the Independent Jamaica Council for Human Rights and others.

5. Our mandate, as stipulated in the Terms of Reference, is:

- To monitoring and evaluating the implementation and administration of the ATI Act;
- To interact with the Minister responsible for Information and the ATI Unit on matters pertaining to the administration of the Access to Information Act;
- To liaise with the Executive at the ATI Association of Administrators, as necessary, on matters pertaining to the administration of the Access to Information Act;
- To receive information on and assessing the administration of the ATI Act;
- To identify aspects of the administration of the ATI Act as may be in need of strengthening and/or modification and the making of recommendations in respect thereof To the responsible Minister;
- To provide recommendations on/and support for an Access to Information Public Education Programme;
- To offer recommendations to the ATI Unit on the improvement of the ATI Guidelines and;
- To make proposals on new and existing areas on the ATI Act requiring enactment/amendment.

6. It is in keeping with our mandate, and the work we have done over the past seven (7) years, that we provide the following observations on the ATI Act to guide this honourable committee.

## **The Role and Staffing of the Access to Information Unit**

7. The Advisory Stakeholders Committee has grave concerns about the role and resources provided to the Access to Information Unit of the Ministry of Information.
8. The ATI Advisory Stakeholders Committee would wish to list for this Committee the many roles that a functioning ATI Unit could and should play in the administration and monitoring of the ATI Act 2003. The Unit could and should play the major role in:
  - Helping Applicants to:
    - ❖ know their rights under the Act
    - ❖ make requests
    - ❖ know where to direct their requests
    - ❖ know how to phrase their requests
    - ❖ Know their recourses for non-compliance by Ministries and Agencies under the Act
    - ❖ Mediate any difficulties in interactions with Responsible Officers
  - Helping Access Officers to:
    - ❖ Understand their role as cultural change agents
    - ❖ Understand their responsibilities under the Act
    - ❖ Develop better customer relations skills
    - ❖ Resolve questions of interpretation of requests and of sections of the Act
    - ❖ Ensure the production of useful and user-friendly Publication Schemes by All Ministries and Agencies under the Act.
    - ❖ Mediate any difficulties in interactions with the General Public
  - Helping the General Public by:
    - ❖ Undertaking Public Education activities
    - ❖ Data gathering and monitoring the implementation of the Act across Ministries and Agencies
    - ❖ Ensuring uniformity of understanding and application of the Act across Ministries and Agencies
    - ❖ Resolving questions of interpretation (in consultation with the Attorney General's Department where appropriate)

- ❖ Dissemination of relevant information to the Public and to the Responsible Officers (such as, for example, decisions made by the Appeals Tribunal)
  - ❖ Continuous evaluation and re-evaluation of the processes of implementation to identify problems and make recommendations for solutions
- Helping the Government by:
    - ❖ Gathering, and publishing quarterly, reports on usage of the Act and response times and performances of Agencies and the Tribunal, as well as recommendations for improvement in administrative problems.
9. When the ATI unit was initially established it had a staff compliment of three. This fluctuated over time and with the onset of the implementation in January 2004 and the addition of monitoring and reporting responsibilities, as well as the responsibility of serving as the Secretariat for the Tribunal and overall responsibility for implementation activities and sorting out any difficulties arising with the implementation, the initial staff complement proved inadequate. This inadequacy became a crisis in July 2005 when both the Executive Officer and the Public Relations Officer resigned and the remaining staff member was completely unable to cope with the demands imposed by the large mandate of the Unit.

### **Administration**

10. From July 2005 until a few months ago, when the ATI Unit staff complement was increased and Mr. Damian Cox was appointed as the Executive Officer for the unit, the public officers charged with administering the Act had an inadequately staffed unit to go to for advice and interpretation, so simple issues are often not dealt with adequately or uniformly across Government. Points of clarification and interpretation have remained unresolved for long periods awaiting the intervention of someone with experience and authority.
11. Performance monitoring has also suffered from the years of inadequate staffing of the ATI Unit. As a result, there have been spotty and uneven implementation performances between and among Public Authorities and quarterly reports from 2008 and 2009 remain outstanding.

12. Similarly, with the dysfunction of the unit, the public has been left with no one to go to in order to resolve simple issues ranging from ignorance of Access Officers of the law, to lack of uniformity of performance across government ministries and agencies, to unnecessary bureaucratic obstacles to assessing information (such as delaying processing of requests until a request is signed though the law specifically allows telephone requests), or simply a place to which to address complaints of poor service or perceived inappropriate conduct of access officers.

### **Public Education**

13. A major weakness in the implementation of the Act until recently has been the absence of a sustained and consistent programme of public education.

14. Access to information represents a significant cultural shift, moving as it does from a context of a great divide between the governors and the governed, reinforced by an Official Secrets Act, to one where the public has a right to know and public authorities the duty to disclose.

15. This is a new experience both for civil servants and the members of the public. Public education is therefore essential for both groups. The last few months have seen a significant improvement in the staff compliment of the Unit and the public education undertaken by it, however, significant challenges remain in terms of mandate and resources.

16. The ATI Advisory Stakeholders Committee believes that many of the procedural difficulties that have been experienced to date in the implementation of the Act could have been easily resolved if everyone had been better informed.

### **Role of the ATI Unit**

17. All the above has thrown into stark relief the need for the Act to contain provisions mandating the establishment, maintenance and functions of a dedicated monitoring and implementation agency, if the Act is to fulfil its promise of increased accountability and transparency in governance.

18. A properly staffed and funded ATI Unit is absolutely vital to ensuring that the Act is implemented and continues to operate in a way which increases the confidence of the public, and the civil service, that the objects of the Act will be met and that the fulfilment of these objectives will in the medium term result in strengthening of our Democracy.

### **Recommendations**

19. The ATI Advisory Stakeholders Committee would strongly urge this Parliamentary Review Committee to recommend amendments to the Act to include as a statutory provision an Access to Information Unit charged with monitoring and implementation functions as outlined above and, critically, sufficient power to ensure compliance with its directives across Public Authorities.

20. In addition we would suggest that the ATI Unit NOT be tasked with serving as the Secretariat for the Tribunal as the potential for conflict of interest with that arrangement is huge.

21. It is recommended that the ATI Units duties include mandatory annual publishing of ATI reports to the public from the Unit.

22. The ATI Advisory Stakeholders Committee recommends that following this review process concerted public education and internal training programmes need to be implemented on an enhanced and ongoing basis.

23. The training of civil servants should include:

- a) the sharing of best practices amongst government ministries and agencies;
- b) legal ATI training and customer service skills amongst government agencies and ministries
- c) the development of guidelines on the obligations to provide information and
- d) protections available to government officials.

24. To support the administration of requests it is recommended that specialised library or documentation centre staff be appointed to the post of Access to Information Officer in the respective ministries and agencies in order to better supervise document inspection and retrieval and provide assistance to requestors.

### **The Title of the Act**

25. A proposal was made to change the name of the Act to *Access to Official Documents Act*. Changing the name and narrowing the definition to “government information” would create more difficulties than it would resolve.

#### **Recommendation**

26. The ATI Stakeholders Committee rejects the recommendation for a name change.

### **Repeal of the Official Secrets Act**

27. The long promised repeal of the Official Secrets Act is urgently needed. This was a commitment given by the then Administration prior to the passage of the Access to Information Act which remains outstanding. Presently, the Act says persons have a right to information and another law, the Official Secrets Act, which says there is an obligation to hold official secrets. They cannot exist together.

#### **Recommendation**

28. Legislation is needed to repeal the present Official Secrets Act and replace it with a more appropriate system of criminal and disciplinary sanctions for unauthorised disclosure of official information of different degrees of sensitivity and that is complementary with the Access To Information Act.

29. The repeal of the Official Secrets Act should be accompanied by the enactment of ‘whistleblower’ legislation, generally acknowledged internationally to be a necessary leg of the stool of modern Governmental transparency, accountability and commitment to empowered informed citizenry upholding a vibrant democracy. We acknowledge the steps taken in this direction by the present administration and urge them to speedily enact the legislation.

### **The Public Interest Test**

30. Section 6 (1) of the ATI Act creates a legally enforceable right to obtain access to a document of a public authority in accordance with the Act, but does not give rise to an automatic statutory right of access.

31. The exemptions, set out in Part III of the ATI Act, cover issues such as security, defense, international relations, formulation of government policy, commercial confidentiality and legal professional privilege. Some of these exemptions are subject to a “public interest test” which requires a public authority to balance the competing interests; *the general public interest in disclosure and the public interest in maintaining the exemption*.
32. The ATI Act does not define “public interest” and the concept is typically not defined in ‘freedom of information’ legislation throughout the world. This is because public interest will change over time and according to varying circumstances.
33. The application of the public interest test is set out in section 2 of the ATI Act, which states:
- “subject to exemptions which balance that right (to general access) against the public interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature”.
34. A public authority should have a procedure in place to objectively evaluate a request, but each decision should be made on its own merits, taking into account the different factors which may influence the decision.
35. The concept of the public interest is deliberately flexible and may consider the following factors as guidelines for its application:
- a. Promoting public debate of current issues;
  - b. Promoting accountability in decision-making on public expenditure;
  - c. Allowing individuals to understand decisions of government and, in some cases, assisting individuals in challenging these decisions;
  - d. Bringing to light information affecting public safety.
  - e. The general public interest in accessible information;
  - f. Whether disclosure would contribute to the administration of justice or enforcement of law;

- g. Whether disclosure would inform the people of any danger to public health or safety;
- h. Whether disclosure would contribute to a debate of importance; and
- i. Whether disclosure would prejudice a person's privacy rights.

36. Factors which should NOT be taken into account include:

- The possible embarrassment of public authorities or other officials;
- The possible loss of confidence in government or a public authority;
- The seniority of persons involved; and
- The risk of an applicant misinterpreting the information.

37. The section 2 the public interest test applies in the ATI Act only under sections 10, 19 and 21. Other jurisdictions have made more exemptions subject to the public interest test. In India's Act, The Right to Information Act, 2005 at section 8(2) all of the exemptions set out in subsection (1), are subject to the public interest test in the following words:

“(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interest.”

### **Recommendation**

38. As the public interest lies at the heart of freedom to information legislation, it is RECOMMENDED that the ATI Act should be amended to include an over-riding public interest test, similar to the Indian section 8(2), with respect to all the exemptions in Part III and not just the few referred to above.

39. Guidelines should be issued by an administrative body and/or by the Appeal Tribunal that will assist public authorities in the application of the public interest test and enable them to respond quickly and within the statutory timetable in the Act.

40. A public authority should be made to list, and keep a record of, all the factors it took into account in applying the test and coming to the decision to deny access. This will assist the applicant to assess whether the public authority applied the test properly and therefore whether a review or appeal is warranted.

### **“Reasonableness” and its use under the Act**

41. It has been suggested that officials should be given a discretion to reject applications if processing them interferes with their work. We strongly disagree. The label of “reasonableness” should not be attached to a request and any attempt to do so would be highly subjective. Access to information is a right and this issue should not arise.

### **No Further Exemptions**

42. The value of access to information legislation comes from its importance in establishing a framework of open governance. While it is well accepted that there can be a small number of legitimate exemptions in many access regime, exemptions should be kept to an absolute minimum and should be narrowly drawn.

43. Currently, section 35(2) allows provisions relating to the non-disclosure of information set out in other Acts to overrule the disclosure provisions in the Act. This provides a significant loophole which could seriously diminish the effect of the Act over time if future governments pass new legislation that further narrow disclosure of government information.

### **Recommendation**

44. Section 35(2) needs to be amended to require that confidentiality provisions in other Acts cannot override the ATI Act. This has particular reference to repeal of the Official Secrets Act.

### **Requests Made Via Telephone**

45. Telephone requests are an important innovation in the Jamaican Access to Information Act. They allow ease of making requests for information for individuals:

(a) who are geographically remote from the relevant public authorities (eg, many government agencies are headquartered or solely located in Kingston);

(b) whose resources do not allow them the means to access instantaneous communication methods or

(c) who are unable for a number of other reasons to attend to a post office. This goes a far way towards ensuring that a wide range of Jamaicans can use the Act.

### **Recommendation**

46. Greater clarity is needed as to the effect of regulation 8 of the Access to Information Regulations 2003 that outlines the procedure for the making/receiving of requests by telephone. It must be clear that an obligation is imposed on the Access Officer who receives the request to record it in writing, and/or whether it must be substantiated (in writing and on the application form attached as a Schedule to the Act) at a later date e.g. when the applicant comes to pick up the information and provides identification.

### **Payments and Verification Throughout the Island**

47. The Access to Information Act 'Cost Regulations' prescribes the method of payment of fees by the public. Fees are to be charged for the cost of copying the documents and NOT for searches or for grant of the right to access. This is a commendable provision of the law and has worked well.

48. There is one area, however, in which the inclusion of a new fee might be justified; that is to allow an applicant to decide to pay for the information to be delivered by registered mail instead of requiring that the documents be collected personally. This is especially significant where the public authority and the applicant for information are remote from one another.

49. Attention is drawn to the fact that there is absolutely no system for persons outside of Kingston to pay for and collect the documents they have requested. There is also no universal system of payment. In the frequent cases where documents are to be photocopied and delivered to the applicant, the process of sending payment by cash,

often via bearer and in a circular route (eg, To Access Officer; then to Cashier; then back to Access Officer) is both time consuming and inefficient.

### **Recommendations**

50. As follows:

- (a) There is an urgent need for a system to allow payment for photocopies, or diskettes or whatever form the information is being supplied outside of a specific agency or Ministry. Similarly there is an urgent need for the Access Officers to be able to collect extra fees (with the agreement of the requestor) to mail the information to the requestor.
- (b) The ATI Advisory Stakeholders Committee also recommends that an amendment to the Act (or regulations) to allow for payment for copies of documents/information requested to be made at the nearest Post Office, Postal Agency or Tax Collectorate. Our preference would be for a system which allowed payment at the Post Office or Postal Agency as there are many more Postal Agencies and Post Offices across the island
- (c) A similar amendment to the Act (or regulations) should be made to allow Access Officers to charge costs for postage (if desired by requestor as a means of collecting the information) as a sensible facility under the Act.

### **Time Limit on Exemption Certificates**

51. Section 23 of the ATI Act relates to the issuance of a certificate to the effect that a document is an exempt document. The Appeal Tribunal has been denied jurisdiction to nullify this certificate by section 32 (6) (b) of the Act.

52. The Exemption Certificate applies to Cabinet documents (s.15(1)), documents affecting security, defense or international relations ( s. 14), documents relating to law enforcement (s.16) and documents affecting national economy (s. 18). Presently there is no time limit to the duration of an exemption certificate.

53. While section 5(2) of the Act does allow for a Minister by order subject to negative resolution to declare that the Act shall apply to a document that has been exempted this places the initiative on the Minister.

### **Recommendations**

54. As follows:

- (a) It is submitted that these sections should be subject to an over-riding public interest test (see section 3 above). It can be argued that highly sensitive information and documents, the release of which would not harm the public interest but which would precipitate a public accountability debate, is exactly the sort of documents which the ATI Act is designed to give access to because it involves responsibility at the highest levels of government. The public interest test can be used to exempt documents that are particularly sensitive in nature and should not be released.
- (b) Where an exemption certificate is issued there should be an automatic re-assessment of it every two years. The Prime Minister or responsible Minister should be required to reassess the relevant document every two years (or more) and he or she would be required to take into account any changes in the circumstances that may mean the document can be released and that the exemption certificate is no longer necessary.

### **Review and/or appeal from transfers**

55. The Review and Appeal provisions of the ATI Act are set out in sections 30 – 32.

Nowhere in these three sections is the right to an internal review or an appeal allowed where a public authority **transfers** an application under section 8.

56. In some cases, an applicant has a belief or actual knowledge that the document he seeks access to, is in fact with the authority to whom the application has been addressed and the transfer therefore amounts to a refusal. The applicant presently has no right to challenge the transfer to another authority, nor to which other authority.

## **Recommendations**

57. As follows:

- (a) Section 30 (1) should be amended to include a subsection (e) to allow for an internal review of a decision to transfer an application or such part of it as may be appropriate to another public authority. The actual wording of the amendment could include the following: “ transfer the application, where the applicant contends that the public authority has the document(s) or some of the documents specified in the application in its possession, custody or control.”
- (b) An applicant should also be allowed to appeal the decision to transfer an application. This can be easily achieved by an amendment to section 32 (2) (b) by stating that matters referred to in paragraphs (a) to (e) of section 30(1) can be appealed.

## **The Role of the Access to Information Appeals Tribunal**

58. The Jamaica Access to Information (ATI) Appeals Tribunal is a body of five persons appointed by the Governor-General after consultation with the Prime Minister and Leader of the Opposition. The Appeal Tribunal has the power to make binding decisions in relation to appeals against public authorities for refusal of access, deferment, or related to fees for access to information.

59. Persons using the Act have several difficulties concerning the procedure for bringing appeals before the Appeals Tribunal. These problems have included:

- Lengthy delays in receiving responses from the Tribunal (in one case an appellant waited four (4) months before getting an acknowledgement of the lodging of an appeal);
- Lengthy delays in getting dates set for hearings before the Tribunal;
- Lengthy delays in handing down decisions;
- Excessively formalistic, onerous and legalistic forms and procedures;
- Short notice periods for hearings; and
- Onerous other requirements, such as service of documents.

60. The Access to Information Advisory Stakeholders Committee proposes several recommendations to enable the Tribunal to more effectively carry out its mandate.

### **The Structure and Operation of the Secretariat and Tribunal**

61. All the members of the Tribunal have full-time occupations outside of their role as members of the Tribunal. This has led to severe scheduling difficulties for meetings of the Tribunal.

62. Further the Tribunal does not have a staff and a budget dedicated solely to the support of its proper functioning. There is no provision in the Act, Second Schedule or the Rules for the establishment of a Secretariat for the Tribunal.

63. Presently the Secretariat for the Tribunal is housed in the Office of the Prime Minister where the current ATI Unit is also operating. There is an inherent conflict in an ATI Unit which is serving as advisor to Government Ministries and Agencies also making decisions, including denial of documents (which could then be subject to appeals to the Tribunal), and which is also serving as Secretariat to the Tribunal and advising the Tribunal and the public about appeals.

64. The Tribunal should play in giving effect to the objects of the Act namely “to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely...governmental accountability, transparency and public participation in national decision-making”. In practice, delays in appeal hearings undermine the objectives of the Act.

### **Recommendation**

65. The ATI Advisory Stakeholders Committee submits that the second schedule in the Act which outlines the composition and functioning of the Tribunal needs to be amended to ensure that the Tribunal is strengthened with the resources of support and personnel necessary for it to do its work. Specifically, the Act should be amended to ensure the appointment of one full-time Tribunal member supported by an adequately staffed, independent Secretariat established outside the Office of the Prime Minister. There are

examples of more operable structures in other jurisdictions: Some countries (e.g Scotland) have an Information Commissioner whose role is similar to that of the Tribunal and others (UK) have both a Tribunal and Commissioner whereby the decision of the Commissioner can be appealed to the Tribunal.

## **Powers of the Tribunal**

### **a. Jurisdiction**

66. Currently section 32 of the ATI Act states that the Appeal Tribunal may make any decision which could have been made on the original application. There are a number of decisions by the public authorities that appear exempt from review by the Tribunal, such as the issuance of a certificate of exemption or transfer of a request. This is more limiting and a broader jurisdiction can be found in other jurisdictions. The Act is also seriously weakened by the absence of comprehensive offences and penalties.

### **Recommendation**

67. The Appeal Tribunal should be vested with specific powers such as the right to issue a decision when the statutory period has elapsed, the ability to recommend sanctions, and the ability to review and reverse a certificate of exemptions.

68. The Appeals Tribunal should be empowered to impose sanctions including against officials in their personal capacity. Fines should be sufficiently large to act as a serious deterrent to non-compliance

69. The Act should provide a more detailed list of provisions that are comprehensive and identify all possible offences committed at all stages of the request process. For example, unreasonable delay or withholding of information, knowingly providing incorrect information, concealment or falsification of records, obstruction of the work of any public body under the Act and/or non-compliance with the Act.

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

70. In the Act there is only a provision to **allow the Tribunal to** inspect exempt documents but no power to carry out investigations. The Rules also do not address in any detail the power of the Tribunal to carry out investigations and inquiries. Most access to

information laws provide extensive powers for the decision-maker to carry out formal inquiries and investigations as to how and why a document was created or destroyed and investigate allegations of altering of records and refusal of access.

### **Recommendation**

71. The Tribunal would benefit from a specific power to serve the public authority with a notice (sometimes called an “information notice”) requiring it to furnish the Tribunal with specific data or documents within a specified time period. Provisions could also be added to ensure the power to carry out an inquiry to the same extent as a superior court of record, i.e. to summon and examine on oath any person who, in the Tribunal’s opinion, may have information relating to the hearing.

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

72. There are no provisions for mediation in the Act, even though mediation is recognised and used in the Jamaican Supreme Court and Resident Magistrate Courts. Mediation is an opportunity for an applicant and a public authority to try to negotiate a settlement of their dispute with a neutral third party’s assistance.

### **Recommendation**

73. Mediation can be mandatory or the Chairperson of the Tribunal can be given the power to decide that the case should go to mediation before the hearing or provision for mediation when all parties agree. Binding mediation efforts could be undertaken at any stage of the hearing process, and if the matter is not resolved through mediation, it would then proceed to a hearing.

## **The Rules of Appeal**

74. The Rules as presently promulgated are neither effective nor user-friendly and should be revised.
  - a. Rule 3 - The form for the lodging of an appeal is mandatory and is very complex for an ordinary citizen to complete. This may lead to severely limited access to the Tribunal.

- b. The Rules do not provide a time frame for acknowledgement of the receipt of the notice of appeal in Rule 4 or for the setting of a date for the appeal in Rule 6.
- c. Rule 16 - The Tribunal's decision shall be in writing and should be sent to the parties not later than 21 days after the decision, but fails to set a time limit for the making of a decision after the hearing of the appeal. This has contributed to serious delays in obtaining decisions.
- d. Rule 17- The decisions of the Tribunal are to be published in the Gazette or in a daily newspaper circulating in Jamaica. There is no time limit for publication.
- e. Rules 9 and 10 allow for the Tribunal to hear an appeal in the absence of any or all of the parties. These Rules could deny a citizen the right to present his case to the Tribunal.
- f. Rule 10(b) allows the Tribunal to award costs on an application. This application arises where an applicant was absent and the Tribunal heard the appeal in his absence and he applies for the appeal to be re-considered in his presence. Rule 15 (2) concerns adjournments and again speak of costs.
- g. Rule 18 speaks to the right of parties to inspect and obtain a copy of the notes of appeal, but makes no reference to the public at large having a right to request a copy of the notes.
- h. Rule 19 does not state that service by registered post is deemed to be served within 2 or 3 days after it is registered. The Rules do not include facsimile as a method of service.
- i. Rule 24 concerning the dismissal by the Tribunal of frivolous appeals, does not give the appellant a right to be heard before his appeal is dismissed.

### **Recommendation**

75. We urge the Tribunal to look again at its rules and see if they could be re-drafted in a more people- friendly form taking into account the following:
- a. A friendlier Notice should be drafted and an appeal should be received and heard once it is in writing even if not in the prescribed form.
  - b. The Rules should be amended to provide a time frame for acknowledgement of the receipt of the notice of appeal in Rule 4; the time suggested is 2 to 3 days. In addition, a time frame is suggested for the setting of a date for the appeal in Rule 6- the suggested time is within 14 days.

- c. The Rules should include a time limit for the Tribunal to make its decisions after the hearing of the appeal.
- d. The Rules should include a timeline for the publication of decisions of the Tribunal in the Gazette so that the public is aware of and can refer to the Tribunal's decisions.
- e. Where the Tribunal hears an appeal in the absence of any party, the Rules should include provisions for service, time for service and provisions for the Secretariat to contact appellants and public authorities before hearings.
- f. The Civil Procedure Rules for the Supreme Court at Rule 56:15 (5) says : “ *the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considered that the applicant has acted unreasonably in making the application or in the conduct of the application.*” Costs are therefore inappropriate in these Rules.
- g. The Rules should include a provision allowing the public access to the notes of hearings. It cannot be in the spirit of the ATI Act to refuse access to these notes.
- h. The Rules (Rule 19) should state that service by registered post is deemed to be served within 2 or 3 days after it is registered. Further, technology has provided an easy, sure and inexpensive way to service documents via facsimile. This method of service should be allowed in the Rules.
- i. The Rules should give the appellant a right to be heard before his appeal is dismissed in instances where the Tribunal considers the appeal to be frivolous. This is only fair and in accordance with the rules of natural justice.

### **Publication Schemes**

76. Section 4 of the Act requires Ministries and Agencies to publish Publication Schemes.

The form for gazetting of the Publication Schemes leaves much to be desired. Concerns were previously raised by the Library and Information Association of Jamaica (LIAJ) and include:

- a They were concerned that the section was relegated to a schedule rather the body of the Act as obtains in The FIOA Acts for Australia, Belize and Trinidad and Tobago.
- b There were also concerns that the wording of the clauses did not provide “very specific guidelines on the procedures and systems to be put in place...expressed simply and clearly”.

- c LIAJ also were concerned that the general scheme envisioned by the clauses of the First Schedule to the Act would not “provide sufficient information for members of the public to identify the particular documents they require” under the Act. They recommended that “the clause be expanded to say something like, ‘A Statement of the categories of documents that are maintained in the possession of the Agency’”.
- d The LIAJ also made the point that the Publication Schemes should provide particulars of the “officer or officers to whom, and the place or places at which, initial inquiries concerning access to documents may be directed” and pointed to similar provisions in the Acts of Trinidad and Tobago and South Africa.
- e They urged amendment of the Schedule to ensure that the Statements would be more useful to the public (and the Access officers) in identifying which authority had which documents and where and how to access publicly available material.
- f Finally the LIAJ urged that this information to be published by Public Authorities should be given wider publication than in the gazette which reaches only the tiniest handful of the population, by making these statements available at “these service points of organizations such as the Jamaica Library Service, Post Offices and the Jamaica Information Service”.

77. All the problems identified with the wording of the clause affect the publication schemes that have been gazetted to date. These include a failure of these schemes to help the public and the access officers to know what documents are contained in each Ministry or Agency and which are freely available, and how to go about asking for them. The UK FOIA and the development of guides to publication schemes by the Scottish Information Commissioner are instructive. A template based on the Scottish publication scheme is attached as Appendix A. (Note: where necessary sentences have been paraphrased or omitted to fit the Jamaican context).

## **APPENDICES**

### **Appendix A: Publication Scheme Outline (adapted from Scottish publication scheme)**

#### **1. INTRODUCTION**

1.1 Introduce the public authority adopting this scheme.

1.2 Set out the general purpose of the Access to Information Act (ATIACT).

1.3 Explain why the adopting authority has a publication scheme citing the relevant article in the ATIACT.

1.4 Set out the purposes and aims of the scheme and what you hope to achieve with the scheme. For example, improving access to information and increasing public involvement.

#### **2. ABOUT THE MODEL PUBLICATION SCHEME**

2.1 Explain that this publication scheme is based on the Model Publication Scheme developed by [insert name of responsible authority]. Provide some information about the responsible authority and why it is qualified to draw up the Model Publication Scheme.

2.2 Explain the steps taken by the responsible authority to prepare the publication scheme, referring to any consultation carried out or to other steps taken to consider what information should be included in the publication scheme. Reference should also be made to any information audit carried out by the responsible authority.

2.3 State that the authority by citing the relevant articles in the ATIACT is duty-bound to indicate:

- The services provided by the authority;
- The costs of those services;
- The standard attained by those services;
- The facts which form the basis of decisions taken by the authority which are of importance to the public; and
- The publication of reasons for decisions made by it.

#### **3. ABOUT OUR PUBLIC AUTHORITY**

3.1 Insert a field so that the full title of the adopting authority can be included.

3.2 Explain the main functions and responsibilities of the adopting authority. Where these vary among adopting authorities set out optional sections.

#### **4. RESPONSIBILITY FOR THE PUBLICATION SCHEME**

4.1 Insert a field for the name, job title and contact details of the individual at a senior level who holds responsibility for the scheme on behalf of the adopting authority.

4.2 Insert a field for the name, job title and contact details of the individual who has responsibility for maintaining the scheme on a day to day basis at the adopting authority.

Contact details should include email address and postal address.

## 5. EXEMPTIONS

5.1 Unless the responsible authority intends to define each class of information in such a way as to make it clear what information will be exempt from that class of information, insert a statement in the preamble about how information believed to be exempt under the Act will be treated

## 6. ARCHIVING POLICY

6.1 Insert details about the adopting authorities' archiving policy, if available. Information about the adopting authority's document retention policy should be inserted here.

## 7. COPYRIGHT

7.1 Explain what people accessing information under this publication scheme can and cannot do with material which is copyrighted.

## 8. ACCESSING INFORMATION UNDER THE PUBLICATION SCHEME

8.1 Explain how people can access information under the publication scheme. Some information may be available via the adopting authority's website, in which case it may be helpful to explain how to search for information. If information is available in hard copy, explain how the information can be requested.

8.2 Information accessible on a website must normally be available in hard copy too. This should be stated explicitly in the scheme (if relevant).

8.3 Not all formats may be relevant to every authority adopting the scheme. Therefore provide for adopting authorities to delete sections that are not relevant.

8.3 Show a willingness to assist individuals who have difficulty in identifying the information they require or formulating their request by inserting a field where the adopting authority can provide a contact name of the person who will help with preparing a request.

## 9. CHARGING POLICY

9.1 Details about the charging policy should be provided here and about methods of payment, where applicable. Each scheme must specify whether the material is, or is intended to be, available to the public free of charge or on payment.

9.2 Where a charge is to be made, state what the charge will be or how the charge will be calculated (e.g. cost per photocopy).

9.3 Wherever possible, a standard charge(s) for all adopting authorities should be agreed. This charge(s) should be inserted into the Model Publication Scheme.

9.4 Where a standard charge across all adopting authorities has not been agreed, a field should be inserted so that the charge(s) can be inserted by each authority adopting the scheme.

9.5 Charges for information in the publication scheme should be reasonable and not excessive. (Cite relevant article from ATIACT)

9.6 Where relevant, authorities should indicate that certain publications will be available at a cover charge.

## 10. COMPLAINTS

10.1 Give information about how complaints about the publication scheme can be dealt with. This should include full contact details of the person responsible.

10.2 Refer to the role of the Principal Officer

## 11. FEEDBACK

11.1 To help review how the publication scheme is working, authorities may wish to set up a procedure to allow people to comment on the publication scheme, including whether they found the information easy to locate and whether there is any additional information which should be made available through the publication scheme. This should include full contact details for the person responsible.

## 12. CLASSES OF INFORMATION

12.1 Insert here the classes of information to be made available under the publication scheme. You should define your classes clearly, remembering to refer to any exemptions if a general statement about exemptions in the pre-amble to the scheme (see above) is not included.

Authorities should not simply provide a list of documents. However, it can be useful to provide examples of documents included in a class.

12.4 Include classes of information which are not currently made available, but which it is intended to make available, including the date from which they will be available.

12.5 For each class, provide a list of formats the information is available in, where the information can be found and the charging arrangements, if not already clear from the preamble to the publication scheme.

## **Appendix B: The Chronological History of the Joint Select Committee to Review the Access to Information Act (2002)**

In 1998

- The Hon. Prime Minister P.J. Patterson requested the assistance of The Carter Center and with the support of local organisations working on governance issues in Jamaica, to undertake a project on the drafting of an access to information law.

In 2001-2002

- The original Joint Select Committee to review the Access to Information Act was created to consider the proposed Access to Information Act (2002) and held twelve meetings between December 11, 2001 and March 12, 2002.
- On March 12, 2002, the Joint Select Committee tabled the “Report of the Joint Select Committee on the Bill Shortly Entitled “The Access to Information Act, 2002 in the House of Representatives.
- The Committee received submissions from a multitude of government such as United Kingdom, Australia, Canada, United States, South Africa, Belize, New Zealand and others, as well as interested members of the civil society organisations working on access to information. (OPTIONAL)
- On July 22, 2002 The Access to Information Act was adopted with the advice and consent of the Senate and House of Representatives of Jamaica. Initially, the Act was to be implemented across the whole of government.

In 2004

- On December 12, 2004, Hon. Minister Whiteman introduced an Act to Amend the Access to Information Act, 2002. This permitted the ATI Act to be implemented in four phases throughout the government. The first phase began in January 05, 2004.
- As stipulated in Section 38 (2) of the Access to Information Act, the first review process shall be conducted not later than within two years after appointment day.

#### In 2005

- On May 06, 2005 a motion moved by the leader of the Government Business Resolution was passed to appoint a Committee to report on the operations of the Access to Information Act, (2002) and to make recommendation relative to the review of the legislation.
- On July 05, 2005, All Ministries and Agencies were brought under the provisions of the Access to Information Act.

#### In 2006

- Between January 11, 2006 and March 22, 2006, the Joint Select Committee held five meetings and, amongst other things, examined the administration and public servicing of the ATI Act.
- On March 22, 2006, the Joint Select Committee provided the Summary Report of their deliberations relative to the review of Access to Information Act (2002).
- On March 31, 2006, the Parliament was prorogued because of the change in government, which resulted in the dismantling of the first Joint Select Committee.

#### In 2008

- On February 22, 2008, the Honourable Minister Grange met with the Access to Information Advisory Stakeholders Committee to discuss, amongst others issues, the reconstruction of the Joint Select Committee, the table of stakeholders issues and responses to the ATI Advisory Stakeholders Committee's Report 2007.
- On March 27, 2008, the motion to reconstitute the Joint Select committee to review the Access to Information Act (2002) was moved in the House of Parliament by the leader of the house and seconded by Mr. Othneil Laurence.
- On March 27, 2008, the motion to reconstitute the Joint Select Committee to review the Access to Information Act (2002) was moved through the Senate by leader of government business and seconded Senator Sloley.
- On April 01, 2008, a letter of appreciation was sent to Hon. Olivia Grange on behalf on the ATI Stakeholders Advisory Committee and the sitting schedule of the Joint

Select Committee to review the Access to Information Act (2002) was requested. No response was provided by the minister or her office.

In 2009

- March 26, 2009 the first sitting of the reconvened Joint Select Committee was held.

**Submitted by:**

**The Access to Information Advisory Stakeholders Committee**

**May 28, 2009**