Submission

on the

Public Access to Information Bill of Bermuda

ARTICLE 19
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This Submission provides an analysis of the Consultation Draft of the Public Access to Information Bill of Bermuda (draft Bill), dated 15 October 2009. The purpose of the draft Bill, as the name suggests, is to give access to information held by public authorities in Bermuda, or to give effect to the right to information.

This Submission assesses the draft Bill against international standards on the right to information, in particular as set out in two ARTICLE 19 publications: *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 Principles)[1] and *A Model Freedom of Information Law* (ARTICLE 19 Model Law).[2] Both publications represent broad international consensus on best practice in this area. The goal of the Submission is to make a contribution to ensuring that the law which is finally adopted conforms as far as possible to international standards in this area.

ARTICLE 19 strongly welcomes this initiative to adopt a right to information law. The right to access information held by public authorities is a fundamental human right recognised in international human rights law, including the *Universal Declaration of Human Rights* (UDHR).[3] Proper effect can be given to the right to information only through implementing legislation.

[1] (London: June 1999).
[2] (London: July 2001).
[3] UN General Assembly Resolution 217A(III), 10 December 1948.

The right to information is important to promote democratic participation and respect for other rights. Enhancing the flow of information helps to promote government accountability and a sense of trust amongst the people about the government and public authorities. It is also a key tool in combating corruption and other forms of public wrongdoing. The right to information is, therefore, a key public policy too for promoting good governance and other social benefits.

The draft Bill is generally a very progressive document. Important positive features include the extension of access to information held by contractors to public authorities, the fact that all information provided in response to a request shall be made available on a proactive basis, and that personal information does not extend to information about the functions of public officials. At the same time, the draft Bill could still be further improved to better reflect international standards in this area. Key areas which merit further attention include:

- The fact that the law only applies to information created after it was adopted.
- The absence of a framework for fees for access.
- The fact that pre-existing secrecy laws prevail over the right to information law.
- The lack of a harm test for all exceptions and the failure to extend the public interest override to all exceptions.
- The lack of protection for good faith actions by civil servants pursuant to the law.

1. Scope

The main guarantee of the right of access is contained in section 12(1), which gives every person the right to access any record held by a public authority, other than an exempt record. Section 2 sets out a progressive list of purposes for the law, including to give the greatest possible effect to the right to information, to eliminate unnecessary secrecy, and to inform the public about the activities of public authorities and the manner in which they make decisions. This could be further bolstered by referring to some of the downstream benefits of greater openness such as greater participation and ownership, an increase in the accountability of public authorities and the exposure of corruption.

A 'record' is defined in section 3(1) as information held by a public authority " in connection with its functions", regardless of the form in which it is held. This qualifier is unnecessary and may lead to undue restrictions on the right of access. Far more serious is the provision, in section 13, that the right of access only applies to information created after the law comes into force. That is a very serious and extensive limitation on the right of access. We note that the vast majority of other right to information laws apply to all information held, regardless of the date of creation, and that to limit the right in this way is simply not legitimate.

The Schedule to the draft Bill provides a list of public authorities, including the Governor, the prosecutor's office, the legislature, every government department, all bodies created by statute and carrying out public functions, municipal bodies and all bodies owned or controlled by the government, or substantially funded by the legislature. This is a broad definition but it is not clear that it covers the courts generally or all bodies substantially funded from the public purse (even if the funding does not flow through the legislature).

The reference in section 12 to everyone would appear to include non-citizens as well as citizens, in accordance with better practice in other laws.

Recommendations:

- Consideration should be given to including some of the wider benefits of the right to information in the purposes section, such as fostering participation and bolstering accountability.
- The definition of a record should cover all information, whether or not this is considered to be connected to the functions of a public authority.
- The right of access should apply to all information held by public authorities, regardless of when the information was created.
- The definition of a public authority should include the courts and all bodies which are substantially publicly funded.

2. Procedural Rules

Pursuant to section 14 of the draft Bill, requests must be in writing and identify the record requested. Requesters are not required to give reasons for their requests (section 12(3)) and assistance must be provided to requesters (section 12(2)(a)). Public authorities are given ten days to acknowledge receipt of a request, or to transfer it to another public authority which holds the information requested (section 14(4)). Third parties shall be given an opportunity to make representations regarding release of information provided by them, but only where release is being contemplated under the public interest override (section 40).

Pursuant to section 15(1), public authorities have 28 days to respond to requests. This may, pursuant to section 16, be extended for a further 28 days, but only where more time is needed to consult, to search through a large volume of information or to locate the information, or where responding within the original timelines would "substantially or unreasonably interfere" with the work of the authority.

Requesters may specify the form in which they would like to access the information, including a copy, a transcript, an electronic version, an opportunity to hear or view the record, or provision of a decoded copy (section 18(1). The law does not appear to provide for simple inspection of documents. The requester shall be given access in the form requested unless another form would be "significantly more efficient", or giving access in the form requested would be detrimental to the record, would breach copyright not owned by the authority, would conflict with a legal duty or would affect the protection of an exempt record (section 18(2)).

Section 21 provides for the payment of fees for accessing information, in accordance with regulations on this by the minister. No fee may be charged simply for making a request or where another statute provides for the payment of a fee.

Ten days simply to acknowledge or transfer a request seems unreasonably long. Similarly, 28 days to respond to a request is probably unnecessarily long, particularly given the relatively wide grounds for extending this. The grounds for refusing to provide access in the form sought, which include that provision in another form would be more efficient and that this would affect the protection of an exempt record, neither of which are found in other right to information laws, are also too broad.

It would be preferable to specify in the primary legislation at least a framework of rules regarding fees. This could, for example, provide that only the actual costs of reproducing and sending information may be charged, that the rate for these costs will be centrally set, so as to

avoid a patchwork of fees across different public authorities, and that no fees will be charged for impecunious requesters or for requests in the public interest.

Recommendations:

- A shorter timeframe, say or 3 working days, should be set for acknowledging or transferring requests and consideration should be given to reducing the time limit for responding to requests for information.
- Inspection of records should be added to the list of possible forms of access.
- The grounds for refusing to provide access in the form sought should be narrowed down and consideration should also be given to narrowing the grounds for extending the time limit for responding to a request (for example to exclude cases where the authority cannot easily locate the information).
- A framework governing fees should be added to the primary legislation.

3. Proactive Disclosure

The system for proactive disclosure in the draft Bill comprises an obligation to publish an annually updated "information statement" (section 5) and the provision of other information (section 6). Pursuant to the former, public authorities must keep copies of the information statement at their offices, provide copies to the Bermuda National Library and Bermuda Archives, and make it available electronically on their websites, if they have one. The statement must include information about the structure of the public authority, its functions and powers, the services that it provides, a description of its manuals and policies, a description of the types of information it holds and the contact details of its information officers. The Information Commissioner may provide guidance to public authorities regarding these information statements and review statements to see if they comply with the rules, failing which it may make a binding order to them to bring themselves into compliance with the rules (section 7).

Section 6 calls on public authorities to be proactive in publishing information, so as to minimise the need for individuals to resort to requests. All information which has been provided in response to a request must be made available, along with quarterly expenditures, the details of all contracts over a value of $50,000 (the Bermuda dollar is pegged at equal value to the US dollar), and a list of all public officer positions, along with their salary range. Once again, the Commissioner has a monitoring and guidance role, along with the power to make binding compliance orders.

These are generally progressive proactive disclosure provisions, in particular inasmuch as they grant the Commissioner important powers in this area. At the same time, the list of information required to be published is relatively modest compared to some other modern right to information laws, some of which have taken a very strong position on proactive disclosure (see, for example, the laws of India and Peru). In particular, many countries have required extensive proactive publication of financial and budget information.

Another mechanism which might be considered is a system for levering up the amount of information to be made available proactively over time, as public authorities gain capacity in this area. This may already be implicit in the oversight powers of the Commissioner in the draft Bill, but it would be useful to make this explicit, for example, by giving the Commissioner the power to increase the lists of information which must be made available either through the information statement or otherwise. This might also include a power to

require public authorities to establish a website, with the longer-term goal of every public authority having one over time.

Recommendations:

- Consideration should be given to extending the proactive disclosure requirements, in particular to include more financial information.
- Consideration should also be given to granting the Commissioner the specific power to extend the proactive disclosure obligations over time, as the capacity of public authorities grows, and to require them to establish a website.

4. Exceptions

Systemic Issues

Pursuant to section 38 of the draft Bill, information is not subject to disclosure if it is rendered secret by any other legislation. The minister is given the power to repeal, by order, any such legislation. Furthermore, legislation adopted after the right to information law comes into force will only override the latter if it states explicitly that this is its intention. These are positive limitations on the section 38 rule, but overall this is still an unfortunate provision. Better practice right to information laws, such as those of India, South Africa and Pakistan, override secrecy rules. Otherwise, the impact of the new openness legislation can be expected to be seriously undermined. In almost all cases, earlier secrecy laws were not adopted with modern notions of openness in mind, and their provisions are very much at odds with the approach of the right to information law.

Many of the exceptions in the draft Bill do incorporate a harm test, but a number do not, and thus establish so-called class exceptions. These include the exceptions in favour of personal information, Cabinet documents, internal deliberations and the responsibilities of the Governor.

Section 22 sets out a public interest override to the effect that the public interest test involves considering whether, on balance, the public interest would be better served by disclosure than by non-disclosure. All of the exceptions in the draft Bill except three incorporate the public interest override, namely Cabinet documents, the Governor's responsibilities and secrecy provisions in other legislation. These are among the exceptions for which the public interest override is the most important.

Section 17 sets out a number of grounds for refusing a request, including if the record does not exist, if publication of the information within three months of the request is required by law, if the request is, in the opinion of the head of the authority, frivolous or vexatious, if the fee has not been paid, if the request is not clear enough or if satisfaction of the request would cause "substantial and unreasonable" interference with the work of the authority. The last two may not be invoked unless the authority has provided assistance to the requester with a view to addressing them, but without success.

For the most part, these are legitimate. However, the test of a frivolous or vexatious request should be objective, not a matter for the opinion of the head of a public authority. Care also needs to be taken to ensure that the power to refuse requests on the basis that compliance would interfere with the work of the authority is not abused.

Section 19 includes a severability clause, whereby if only part of a record is exempt, the rest should still be disclosed. The draft Bill does not include a provision on historical disclosure. This is important to ensure that information does not remain classified for unduly long periods of time. It has proven particularly useful in relation to difficult and often abused exceptions, such as those in favour of national security or internal deliberations.

Particular Exceptions

Pursuant to section 4, records obtained by a number of public authorities – including the Prosecutor, Auditor-General, Ombudsman and Information Commissioner – during the course of an investigation, along with the judicial functions of courts, are excluded from the scope of the law. Rather than exclude these categories of information, it would be preferable to cover all of the activities of these authorities and then apply the exceptions to protect legitimate confidentiality interests (for example, section 35 relating to law enforcement).

Many of the specific exceptions listed in the draft Bill conform to international standards. Indeed, this is an area where the draft Bill generally reflects better practice. At the same time, a few exceptions could still be narrowed down further. As noted, the exception in favour of Cabinet documents (section 28) lacks a harm test. Furthermore, it goes beyond Cabinet documents to include all records that "consist of draft legislation". This is quite unreasonable and it is not an exception that is found in better practice right to information laws. It is legitimate to protect the free and frank exchange of ideas within Cabinet but there is no requirement that a draft law is even intended to go before Cabinet, Cabinet documents are already comprehensively protected and there is another exception to protect ministerial responsibility.

The exception in favour of deliberations (section 30) is far too wide, although there is at least a list of exceptions to this exception. Subject to that, however, it purports to apply to all deliberative information, instead of being limited to information the release of which would undermine the deliberative process or the provision of free and frank advice. Furthermore, the draft Bill already protects the performance by a public authority of its functions (section 31).

Similarly, the exception relating to the Governor's responsibilities (section 34) is too wide. It covers all information relating to his or her responsibilities, as well as all communications with the government of the UK, much of which could be expected to be of significant public interest, while not warranting any secrecy protection.

Finally, section 39 provides for the non-disclosure of the existence or non-existence of a record if this would be contrary to the public interest. This is both unnecessary and unfortunate. It is appropriate to refuse to confirm or deny the existence of a record where this would itself cause harm to one of the legitimate interests protected by the law. It is not necessary to condition this instead on a vague and potentially much broader term, namely the public interest. Furthermore, the use of the public interest to block disclosure is likely to create confusion about the role of this concept in the context of a right to information law, which is mainly to facilitate disclosure.

Recommendations:

- The right to information law should, to the extent of any inconsistency, override secrecy provisions in other laws, rather than it being the other way around, as is currently the case.
- All of the exceptions in the law should be subject to a harm test.

- The public interest override should apply to all exceptions.
- Consideration should be given to narrowing down the ground for refusing requests and, in particular, an objective test should be applied when considering whether a request is frivolous or vexatious.
- A rule on historical disclosure should be included in the law, which would create a strong presumption that information will be disclosed after, for example, twenty years.
- No categories of information should be excluded entirely from the ambit of the law. Instead, all information held by all public authorities should be included, and all legitimate confidentiality interests should be protected through the regime of exceptions.
- The exception in favour of Cabinet records should be narrowed, in particular by removing the wording on draft legislation from its ambit.
- The exception in favour of deliberations should be narrowed down to apply only to information the disclosure of which would undermine a legitimate interest, such as the free and frank exchange of advice.
- The exception in favour of the Governor's responsibilities should also be narrowed down by identifying a harm sought to be avoided and protecting it, rather than ruling out whole categories of information relating to the Governor's public functions.
- The power to refuse to confirm or deny the existence of a record should be limited to cases where this would of itself harm a legitimate interest protected by the law.

5. Appeals

Pursuant to section 41 of the draft Bill, requesters may ask for an internal review where they are not satisfied, among other things, with the information provided (or refused), the form of access, a decision to transfer a request, an extension of the time limit, the fee charged or the time taken to respond to a request. In most cases, the review will be conducted by the head of the authority, who must respond within 21 days (section 43).

A requester may then appeal against this internal review to the information commissioner (section 45), who shall provide the requester, the public authority and any concerned third party with an opportunity to make representations, before concluding the appeal as soon as practicable (sections 46-47). The Commissioner has the power to "affirm, vary or reverse" the decision of a public authority, or to make any other order that he or she deems appropriate, and the decision of the Commissioner is binding (section 48). In conducting a review, the Commissioner has the power to compel witnesses and evidence in the same manner as a judge of the Supreme Court, to enter any premises and to examine any record (section 54).

The Commissioner is appointed for five years, renewable once, by the Governor after consultation with the Premier, who shall him- or herself first have consulted with the Opposition Leader. The Commissioner shall not be subject to the direction or control of any other person or authority (section 49). Funding for the work of the Commissioner shall be appropriated directly by the legislature (section 53).

These are all progressive appeal provisions. The manner of appointment of the Commissioner is clearly designed to protect his or her independence and the office is given adequate powers to conduct its business effectively. One possible improvement would be to provide that the name of a new proposed Commissioner shall be published and the public given an

opportunity to comment. Alternatively, some other system to allow for public input should be devised.

Recommendation:
- Consideration should be given to ways to promote wider public involvement in the appointment of the Commissioner.

6. Sanctions and Protections

Section 52 protects the Commissioner and his or her staff from any civil or criminal proceedings in relation to the discharge of their functions under the law, unless it is shown that they acted in bad faith. Pursuant to section 62, anyone who knowingly acts in contravention of the law is guilty of an offence, punishable by a fine of up to $5,000 and/or imprisonment for up to six months.

These protections and sanctions should help ensure proper implementation of the law. At the same time, all officials who act in good faith to disclose information pursuant to the right to information law should be protected against sanction. This is important to give civil servants, who have often been used to operating in a culture of secrecy, the confidence to disclose information.

Furthermore, consideration should be given to incorporating at least rudimentary whistleblower protection into the right to information law. Such protection is important to act as an information disclosure safety value and to help ensure that information of importance reaches the public. The adoption of a right to information law provides a valuable opportunity to adopt such rules.

Recommendations:
- Protection for good faith disclosures should be extended to cover not the Commissioner and his or her staff, but all civil servants.
- Consideration should be given to including protection for whistleblowers within the ambit of the right to information law.

7. Promotional Mechanisms

The draft Bill includes a number of promotional mechanisms. Pursuant to section 55, the Commissioner is mandated to keep the operation of the law under review and, within a period of two years, to carry out an investigation into implementation, and to report on this investigation. The Commissioner also has the power to carry out investigations at any point, as well as to prepare and publish commentaries on the operation of provisions of the law (section 56). The Commissioner is also tasked with preparing an annual report on his or her activities, to be laid before parliament (section 57).

The minister is given the power to make regulations governing the management of records by public authorities, and to issue codes of practice relating to the same, as well as generally regarding the administration of the law (sections 58 and 59). The minister is also tasked with ensuring that staff of public authorities receive appropriate training to implement the law properly (section 60). Finally, the minister is also tasked with reporting on implementation of

the law within two years of its coming into force, as well as reporting annually to the legislature on implementation.

These are useful promotional tools. However, they seem to reflect some uncertainty as to the respective roles of the Commissioner and minister, as well as some overlap and repetition. It is probably sufficient, especially in a small country like Bermuda, for only one review to be conducted after two years and for only one annual report to be prepared, preferably by the Commissioner. However, the scope of the annual report should be expanded significantly to include information on overall implementation of the law, as well as an overview of the requests that have been made and how they have been dealt with. To facilitate the production of such a report, every public authority should be required to provide the Commissioner with a report on their own activities to implement the law.

The draft Bill also fails to require public authorities to appoint or identify dedicated information officers, with a primary responsibility to ensure proper implementation by the public authority of the law, as well as to serve as a central point for receiving requests for information. Finally, the draft Bill fails to require public authorities generally, or one central body, such as the Commissioner, to undertake a programme of public education to raise awareness about the new law and individuals' right to access information. A key element of such a public awareness-raising programme could be the publication and wide dissemination of a simple guide on how to use the law.

Recommendations:

- The reporting obligations under the law should be simplified and concentrated in one body, preferably the Commissioner. They should also be expanded so that the annual report to parliament provides an overall overview of implementation of the law by all public authorities.
- Consideration should be given to requiring public authorities to appoint dedicated information officers.
- Consideration should also be given to giving a central body, such as the Commissioner, the responsibility of promoting public awareness about the right to information law, including by publishing a guide on how to use it.

About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: http://www.article19.org/publications/law/standard-setting.html.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/publications/law/legal-analyses.html.

If you would like to discuss this Submission further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us at the address listed on the front cover or by e-mail to law@article19.org