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Introduction

Eugene Anangwa, "Journalists can't do their work if they are prevented from accessing information ..."

A free and fearless press is essential to the preservation of democracy. A free press ensures that citizens are provided with information necessary for decision making. A free press which has access to information ensures that citizens are provided with ACCURATE information for informed decision making.

Daily the Media are chastised for "irresponsible journalism". This is usually the case when we publish information which contains factual errors. In the current environment in which the media, operate journalists rely on sources regarded as being credible, often to their detriment. Sources will orally provide information concerning matters of public interest which causes a

person or government body embarrassment and/ or exposes corruption or mismanagement, but these sources will not, out of fear, provide the media with documents in support. This fear deters would-be credible sources from assisting the press in informing the public in matters of public interest thus undermining the press' role as the public's watchdog and impedes the media's ability to provide accurate and reliable information.

One cannot discount the value of Freedom of Information and the role of an independent and free press in keeping citizens informed in a democratic society. Freedom of Information and a free press promote accountability, transparency and good governance; empower the society and also expose corruption.

For these and other reasons the liberalisation of our Access to Information Act is of paramount importance to the MAJ.

The Access to Information Unit's (ATI Unit) website acknowledges – and we agree – that, “The Act aims to reinforce fundamental democratic principles vital to:

- Improved, more transparent government;
- Greater accountability of government to its people;
- Increased public influence on and participation in national decision-making; and
- Knowledge of the functions of government.

The Act therefore, signals a ground-breaking departure from an age-old culture of secrecy surrounding government and its day to day activities.”

Unfortunately, despite the recognition by the ATI unit that the ATI Act signals “a ground-breaking departure from an old culture of secrecy surrounding government and its day to day activities,” journalists and media practitioners continue to face a number of challenges in obtaining access to official documents under the Access to Information Act, 2002 resulting in the stated objectives of the Act being undermined.

The Media Association Jamaica (“the MAJ”), in its submission will highlight some of these major challenges and make recommendations on ways to improve the operation of the Act.

Some of the major challenges we have identified include:

1. Lack of response to applications made under the Act;
2. Inordinate delay in obtaining access to documents;
3. Access unreasonably denied by public authorities;
4. Limited categories of documents accessible under the Act;
5. Expense involved in obtaining access to documents;

- 6. Absence of “whistleblower” protection; and
- 7. Inadequate Sanctions

1. LACK OF RESPONSE TO APPLICATIONS MADE UNDER THE ACT

Notwithstanding that section 7(4) provides that a public authority shall respond no later than thirty (30) days after the receipt of an application, public authorities repeatedly fail to adhere to the requirement.

On many occasions months elapse without any acknowledgement of receipt of the application or notification of the decision from public authorities. The only recourse for the applicant is to “wait” indefinitely.

In some instances, despite repeated requests to the public authority for an update on the status of applications, no response is forthcoming.

EXAMPLE 1

For instance, in March 2005 an application was made by The Gleaner Company Limited to the National Land Agency (NLA) requesting official documents containing inter alia, total acreage of state land, along with the location and the value of the land. Despite repeated telephone calls, six (6) months passed without any notification from the NLA regarding its decision on the application. The Company had to make a new application for essentially the same documents which was subsequently granted some four (4) months later.

EXAMPLE 2

An application was made to the Ministry of National Security. Shortly after the request was submitted by fax, the applicant contacted the ATI officer via telephone and she confirmed receipt of the fax. Two months later there was no response. When the Ministry was contacted, the applicant was advised that the ATI officer went on long leave shortly after the request was made and she did not inform anyone in the office of the request.

EXAMPLE 3

On December 11, 2007 Jamaica Observer Limited wrote to the Ministry of Finance requesting information. Initially the request was approved in part by letter dated January 7, 2008 and the Observer applied for an internal review by letter dated January 28, 2008. The Ministry did not acknowledge receipt of the application for internal review until March 27, 2008 when they wrote to advise that the matter was referred to the Attorney General’s Chambers for an opinion. They also did not provide the information which they did not regard as exempt.

There was no further correspondence from the Ministry, so by letter dated June 13, 2008 the Observer wrote requesting an update. On July 16, 2008 the ATI officer replied re-stating, as the Observer was previously informed, that some of the information requested was exempt. They still did not provide the Observer with the documents that were not exempt. No documents

were made available to the Observer until April 9, 2009.

A second set of documents was made available on August 31, 2009 along with a cover letter which stated, inter alia, that “You will be duly notified of the availability of the other outstanding copies of the documents in due course.”

The lack of response over several months creates the perception that there is a lack of appreciation and regard for the provisions of the Access to Information Act on the part of some public authorities. For media houses “time is of the essence” and waiting for ten (10) months or two (2) years to obtain information is not only extremely frustrating but it also serves to deny the Jamaican public of information of vital national importance

RECOMMENDATIONS:

1. The Act currently contains no sanctions or penalties to discourage non-compliance with the deadlines for responding to applicants. Provision should be made for the imposition of sanctions for the failure of public officials or ATI officers to respond to applications within the time periods specified in the Act where a complaint is made.
2. Item XI of the Government of Jamaica’s (GOJ’s) Access to Information Policy & Recommended Practices, provides that “The fulfillment of ATI obligations should form part of Performance Evaluations.” The MAJ agrees with this recommended practice, however, we believe it should be given statutory force.
 - a. Applicants should be provided with a “Performance Evaluation Questionnaire” upon completion of the application process.
 - b. The Performance Evaluation Questionnaire should be:
 - i. one of the forms annexed to the amended legislation,
 - ii. available on all relevant websites, in all relevant offices.
 - iii. executed by the Applicant, at his/ her discretion.
 - iv. submitted to the ATI Unit by either fax, hand delivery or electronic mail.
 - c. The ATI Officer should be provided with a copy of the Performance Evaluation Questionnaire and an opportunity to respond to any negative comments with respect to the execution of his/ her duties.
 - d. The ATI Unit should, on receipt of the Performance Evaluation Questionnaire, assess the Performance Evaluation Questionnaire and determine whether the ATI officer requires

additional training, or should be recommended for removal.

- e. Where an applicant complains about a breach of procedure and the ATI officer refutes the complaint there should be provision for the matter to be heard by the Appeal Tribunal.
 - f. In all instances the principles of Natural Justice ought to be adhered to.
3. The GOJ's Access to Information Policy & Recommended Practices, Item XIV provides that, "Leave for ATI Staff should be co-ordinated in such a way as to ensure maintained presence at any given time." While arrangements should be made to ensure maintained presence of an ATI officer, the regulations should be amended to make it incumbent upon all ATI officers to notify all applicants of the name of the person appointed to act on their behalf where the ATI officer intends to proceed on leave of absence for any period exceeding thirty (30) days to ensure the processing of applications even in the absence ATI Officer.
4. Amend the First Schedule Clause 2 of the regulations to provide for the mandatory certification and continued training of ATI Officers and at least one additional member of staff in each public authority's office by the ATI Unit.
5. Amend regulations to make it compulsory for ALL ATI officers to respond to queries with respect to outstanding applications within five (5) business days of receipt.

2. INORDINATE DELAY IN OBTAINING ACCESS TO NON-EXEMPT DOCUMENTS

The Media are extremely concerned about the long delays experienced when efforts are made to obtain access to non-exempt official documents, especially those which fall under sections 15(2) (a) and 19(2).

- * Documents appended to a Cabinet document
- * Documents which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature (respectively).

Public authorities are usually very reluctant to grant access to official documents which contain exempt matter. Much time is spent deciding whether the non-exempt information is to be made available, and if so, how it is to be made available. They have to be constantly reminded by media practitioners that section 11(1) provides that where the information requested forms part of exempt documents, access is to be granted to a copy of the document with the exempt matter deleted.

The Act facilitates the problem of undue delays in obtaining access to official documents as it contains no express provision as to the time period within which public authorities must grant access to non-exempt official documents.

Section 7(4) only sets out the time period within which a public authority shall respond to an application. Similarly section 7(5) merely requires a public authority to state its decision in its response, whether that decision is to grant, refuse, defer or extend the initial period of thirty (30)

days.

The absence of a stipulated time period within which access should be granted allows public authorities to ignore applications indefinitely, not acknowledge receipt of applications or grant access to a part of a request and ignore another part without explanation, or respond in a manner which sets no deadline for delivery of the information. Often it is an exercise in futility to obtain the remaining documents. It normally means starting the process all over again or seeking interviews with public officials who are never available. In the MAJ's experience, by the time access is granted the particular issue of interest is usually overtaken by events, making the request a waste of time.

RECOMMENDATIONS:

1. Amend section 7(3)(b) to specify the time period (not exceeding five (5) days) within which receipt of every application shall be acknowledged.
2. Amend sections 7(3)(c) and 11(1) to include the time period within which public authorities shall grant access to non-exempt and partially exempt official documents or copies thereof, specified in the application.
3. Include a provision that access to non-exempt documents, requested by the media (for professional reasons) or human rights groups, (for the performance of their registered objectives) or applicants whose lives and liberty are at stake be released within a period not exceeding forty-eight (48) hours of receipt of the application or the next business day if the deadline expires on a holiday or weekend.
4. Amend section 12(1) to include the proviso that applicants shall not be required to pay the cost of reproducing the information requested in circumstances where:
 - a. There is undue delay caused by the public authority
 - b. The applicant is successful on appeal from the decision of the authority
5. Amend the regulations to ensure improved communication by requiring ATI officers, in the event of delay or foreseen delay, to write to applicants setting out:
 - a. The reason for the delay
 - b. The work done to date
 - c. The material which remains outstanding
 - d. How long it will take for the remaining material to be delivered
 - e. How long will it take for available material to be delivered
 - f. The cost for the available material

These recommendations would greatly enhance the smooth and efficient operation of the Act, greatly reduce or end the needless uncertainty and anxiety surrounding the length of time an applicant is expected to wait to be granted access to official documents and improve communication.

3. ACCESS UNREASONABLY DENIED BY PUBLIC AUTHORITIES

Too often public authorities unreasonably deny access to official documents on the basis that they are either exempt or form part of exempt documents when in fact this is not so. This includes the denial of a reasonable opportunity to inspect the documents and/or copies of official documents altered to the extent necessary to exclude any exempt matter.

EXAMPLE 1

Recently an application was made to the Office of the Cabinet for access to documents outlining:

1. The number of meetings held since the Cabinet of the present administration came to office.
2. The number of times each member had attended these meetings.
3. The number of time each member had been absent.
4. The recorded reasons for each time a member had been absent.

Access was initially denied and subsequently granted five (5) months later upon the intervention of the Minister of Information.

EXAMPLE 2

Similarly, in November 2005 The Gleaner Company Limited made an application to the Ministry of National Security for access to documents indicating the amount and type of allowance given to each category of witness in the Witness Protection Programme and the criteria used to determine how much is given to each category.

The application was denied on the basis that the information was confidential and in allowing access the security of the programme would be compromised. The Gleaner Company was, however, advised to pursue its application at the Appeal Tribunal.

A Notice of Appeal was filed and the hearing set for October 24, 2006. On October 17, 2006, (eleven months after the application was made and eight days before the hearing of the appeal) the Attorney-General's Chambers intervened in the matter and granted the Company access to all documents to which access had originally been denied by the Ministry as well as copies of the documents with the relevant exempt material deleted.

RECOMMENDATIONS:

1. The Act should expressly give public authorities the right to seek the advice of the Attorney General's Chambers before making a decision on whether an application for access to official documents should be granted or denied. This would reduce unnecessary costs to the applicant.
 - a. The decision of the public body to seek the advice of the Attorney General's Chambers must be communicated to the Applicant.
 - b. The Attorney General's ruling on the application the Attorney General's ruling must be sent to both the applicant and the public body.
 - c. The amendment must include the time frame within which the Attorney General's Department must respond
2. Where a public authority or the Attorney General determines that information requested is exempt, the public authority and/ or the Attorney General must communicate the following information to the applicant:
 - a. The reasons why the information is exempt – identify the harm that would be caused in each case.
 - b. State whether the information will become available to the public upon or after the occurrence of an event. If so, the event must be disclosed.
 - c. The period for which the information has been exempt.
 - d. The year in which the status of the information is scheduled to be reviewed
5. LIMITED CATEGORIES OF DOCUMENTS ACCESSIBLE UNDER THE ACT

Access to official documents is limited to only those held by public authorities specified in the Act.

RECOMMENDATIONS:

1. The MAJ recommends the widening of the categories of non-exempt documents and public authorities to which applications for access can be made.
 - a. Official documents held by all government Commissions, including the Public Service Commission, the Police Services Commission and the Scientific Research Council should be regarded as non-exempt under the Act.
 - b. Those powers and duties exercised by the Governor-General, disclosure of which would not prejudice the security, defence or international relations of Jamaica should be regarded as non-exempt under the Act.

- c. Basic scientific information which does not relate to national security should not be exempt.
 - d. Amend section 5(6)(b)(i) to specifically exclude the following documents from the list of exempt material: transcripts, all documents filed in civil proceedings in all the Courts within the island of Jamaica, Indictments, No.1 Information, Court Sheets, Criminal Index Book entries, Depositions in Preliminary Enquiries and Coroner's Inquests.
 - e. Police Station Diaries and rulings emanating from the Director of Public Prosecutions Department should not be exempt.
 - f. Information relating to violations of the law or human rights, maladministration or administrative errors, threats to public health or the environment, the health of senior elected officials, statistical, social-economic or cultural information, or that which is merely embarrassing to individuals or organisations should not be classified as a state or official secret.
2. Amend the Act to define "matters of an administrative nature" referred to in Section 5(7).
3. Amend the Act to give the Access to Information Act precedence over any other existing legislation which restricts freedom of information.
4. For the Media, it is very important for "classified" or "exempt" information to have a short life span therefore the Act should include a provision for the review of exempt or "classified" information with a view to declassify every three (3) years.
- 1. The public must be notified whenever "exempt" information is declassified.
 - 2. The public interest in disclosure should be given serious consideration when making a determination.
5. Section 34 should be amended to create an offence where a public officer declares information exempt for the purposes of concealing violations of Law, inefficiency, or administrative error, prevent embarrassment to a person, organization or agency, or prevent or delay the release of information that does not require protection in accordance with the provisions of the Act

6. EXPENSE INVOLVED IN OBTAINING ACCESS TO DOCUMENTS WHERE ACCESS HAS BEEN DENIED

Where the decision to deny access to official documents is taken by a Permanent Secretary, the responsible Minister or other principal officer of the public authority concerned, an applicant cannot apply for an internal review of the decision under section 30(1) as section 30(4) expressly forbids it.

The only option available to an applicant is to lodge an appeal at the Appeal Tribunal. The attendant costs associated with the process of lodging an appeal and appearing before the

Appeal Tribunal only serves to discourage applicants from proceeding with their requests. The average applicant is usually faced with deciding whether the information being sought is worth the expense of having to retain legal counsel to draft, file and serve the necessary legal documents, as well as appear before the Appeal Tribunal on his behalf.

RECOMMENDATION:

The MAJ recommends that public authorities be encouraged to use all resources available at their disposal to provide access to information in a simple, cheap and timely manner.

7. ABSENCE OF 'WHISTLEBLOWER' PROTECTION

The Access to Information Act does not provide protection for 'whistleblowers'. In the absence of such protection journalists and media practitioners will continue to face major challenges in obtaining access to information under the Act.

In the MAJ's experience, no attempt is ever made by public officials to grant access to official documents which fall within sections 14 (documents concerned with security, defence or international relations), 15 (Cabinet documents), 16 (documents relating to law enforcement) and 18 (documents affecting national security). Access is usually denied on the basis that the document requested is exempt or contains exempt material. Applicants are usually advised to apply for internal review by the responsible Minister who has a duty to conduct internal reviews of all applications made under these sections. One possible reason might be the fear of disclosing what may be regarded as official secrets or disclosing information that may result in embarrassment to the relevant office.

RECOMMENDATIONS:

1. The government needs to embark upon further legislative reforms, including the repeal of the Official Secrets Act, 1911 and the provision of "whistleblower" legislation to provide protection for public officials who disclose information in contravention of the law and/or their employment contracts because they disclosure information which is in the public interest.
2. 'Whistleblowers' who disclose secret information of public interest to the media should not be subject to legal, administrative or employment-related sanctions. The test of public interest in the publication should become an integral part of jurisprudence on disclosure of information.
3. Disclosure and publication of state secrets in the public interest should not carry sanctions

of any form, particularly in circumstances where the public interest in knowing the information is greater than the damage that can result from its dissemination.

This would send a strong message to public authorities that the government is serious about moving away from the present culture of secrecy toward a culture where the public has a right to know and public authorities have a duty to disclose.

8. INADEQUATE SANCTIONS FOR DISREGARD OR BREACH OF THE PROVISIONS OF THE ACT

Despite the inclusion of criminal sanctions in section 34 of the Act, the MAJ is of the view that the Act has “no teeth”.

As one peruses the Act the question which arises throughout is, what is the penalty for breach of this clause?

- a. What sanctions can the Access to Information Tribunal impose?
- b. What is the penalty for non-compliance with the ruling of the Access to Information Tribunal?
- c. What is the penalty for an ATI officer failing to respond to an application in time or at all?
- d. What is the penalty when a public authority fails to submit its quarterly report on the operation of the Act to the Minister?

The MAJ is of the view that in the absence of sanctions the Act remains merely a “signal” of a ground breaking departure from an age-old culture of secrecy surrounding government and its day to day activities” and not “actual departure”. To demonstrate the Legislature’s commitment to the stated objectives of the Act, we believe more sanctions should be imposed where public officers or authorities flout the provisions of this Act.

RECOMMENDATIONS:

1. On a successful appeal to the ATI Tribunal the public authority shall be:
 - a. Liable for damages caused by the inability of a media outlet to publish information because a public authority had, without justification, denied or limited its rights thereto. [A cap can be imposed in the Act]
 - b. Liable for the applicant’s costs incurred
 - c. Required to provide the information requested at no cost to the applicant.
2. The Tribunal should be empowered to impose fines upon the authorized person in a public authority or an ATI Officer if the public authority who:
 - a. Discriminates against a journalist or a media outlet by withholding information.

- b. Fails to communicate accurate and complete information
- c. Fails to afford an applicant a reasonable opportunity to inspect the non-exempt document
- d. Refuses to receive a request, fails to inform the applicant of possessing the information requested
- e. Fails to comply with the stipulated deadlines.
- f. Fails to issue a decision on rejecting the request
- g. Refuses to provide the applicants with the necessary assistance.

3. A Resident Magistrate should be empowered to impose fines upon the authorized person in a public authority who:

- a. Fails to publish a directory with the prescribed data on its work (Article 39).
- b. Fails to submit to the quarterly reports with the prescribed data on the activities.
- c. Fails to comply with the ruling of the Tribunal.

OTHER RECOMMENDATIONS

1. Amend section 36 [Reports] to include:

- a. The number of applications transferred from the public authority filing the report to another public authority.
- b. The number of applications transferred to the public authority filing the report from another public authority.

2. ATI Officers should be required to maintain a register of all applications (oral and written)

3. When an ATI officer writes to an applicant advising of the denial of the application (in full or in part) the ATI Officer should indicate in that letter to whom the application for internal review should be addressed.

CONCLUSION

The M.A.J agrees with the public that journalists must endeavour to practice responsible journalism while seeking to give voice to the voiceless and keeping the public informed. However, unjustified denial of access to information and the inefficient operation of the Act undermine the spirit of the legislation and our endeavours to raise the standard of journalism. It is only by working to resolve the issues highlighted above in accordance with the legislative ethos that all stakeholders in this free and democratic society will benefit.