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**ADDRESS TO PARLIAMENT
BY PRIME MINISTER
RT. HON. P.J. PATTERSON, Q.C., M.P.
ON
ACCESS TO INFORMATION ACT, 2002
TUESDAY, May 28, 2002**

BACKGROUND

On April 15, 1991, pursuant to a Cabinet Decision, a Committee headed by the Contractor General, Mr. Gordon Wells, C.D. was appointed to make recommendations for appropriate legislation relating to:

- a) The interception of communication
- b) Freedom of Information
- c) Data protection

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A Progress Report was tabled in Parliament and circulated to media houses and other bodies in November 1995. The Committee at the presentation of its final Report on June 14, 1996 indicated that it had received only two (2) responses from these groupings. From the final Report entitled "Freedom of Information: A Door to Open Government", Cabinet issued drafting instructions for the preparation of the "Freedom of Information Act".

The draft was subject to consultations over a period exceeding two (2) years and finally the Access to Information Act 2001 was tabled in Parliament on December 2001 and immediately referred to a Joint Select Committee. The Committee sat over three months and tabled a Report in Parliament on March 12, 2002 recommending some sixty (60) amendments and deletions.

The organisations appearing before the Joint Select Committee included:

- Jamaicans for Justice,
- The Farquharson Institute of Public Affairs
- Transparency International (Jamaica)
- Norman Law School Students Association
- CARIMAC, University of the West Indies
- Media Association of Jamaica
- Press Association of Jamaica
- Jamaican Bar Association
- Jamaica Civil Service Association
- Jamaica Bauxite Institute
- National Heritage Trust
- The Bank of Jamaica
- Cabinet Office
- Ministry of National Security
- National Environmental and Planning Agency
- The Library and Information Association of Jamaica
- STATIN
- Professor Alasdair Roberts, Campbell Institute of Public Affairs, Syracuse University and;
- Dr. Richard Calland, Executive Chair, Open Democracy Advice Centre, South Africa

SCHEME OF LEGISLATION

Underlying the concept of Freedom of Information are three (3) fundamental principles on which democratic governments are based, namely, accountability, openness and public participation. These are the principles reflected in the legislation and:

- gives every person a legally enforceable right of access to official information in documentary form held by central government, local government, all government agencies and departments, and such other bodies as may be prescribed;
- provides for exemptions and exclusions necessary for the protection of essential public interests;
- requires that information concerning the operations of government agencies, particularly rules and practices, affecting members of the community be made publicly available.

Chapter 4 of the Wells Report specifically recommended the exclusion of the office of the Governor General and the non-administrative areas of the court. These exclusions have been drafted in Clause 5 (6) of the Bill. However, there is additional provision to exclude the operational and strategic intelligence of the security forces and a clause 5 (6) (d), which provides a mechanism to extend the exclusions to other agencies subject to Parliamentary approval.

Exclusions are a feature of several jurisdictions, but is disliked by civil society groupings who feel that documents should not be excluded or exempted as a class but rather should be dealt with on a case-by-case basis according to content. This is, of course, an administrative nightmare, and, in practice, generally leads to more exemptions than when documents are excluded as class.

EXEMPTIONS

The proposed Access to Information Act will give a right of access to official documents, other than documents, which are exempt from disclosure by the Act.

The objects of the Act, as stated in Clause 2 of the Bill, are “to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely –

- (a) governmental accountability;
- (b) transparency; and
- (c) public participation in national decision- making,

by granting to the public a general right of access to official documents held by public authorities, ***subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature.***”

There are therefore two conflicting public interests, which must be balanced – the public interest in the disclosure of information contained in official documents on the one hand, and on the other hand, the public interest in the concealment or maintenance of confidentiality of information of a sensitive nature. Legislation, which grant to the public access to official records recognize the need for this balance. Accordingly, it is usual for such legislation to deny or restrict access to certain types of official records.

This is the approach followed in the proposed Access to Information Act. Among the categories of documents exempt under the Act are Cabinet documents (Clause 15) and documents relating to the deliberative process of government (Clause 19).

Clause 15 –Cabinet Documents

Clause 15 of the Bill exempts from disclosure Cabinet documents - and these are identified - they are Cabinet Submissions and Decisions, Cabinet Notes, other documents which are created for submission and are submitted or intended to be submitted to the Cabinet for its consideration, and any other official records of any deliberation of the Cabinet.

The exemption of Cabinet documents from the general right of access is not unusual in legislation of this nature. Cabinet documents are similarly treated in many jurisdictions including the Freedom of Information and Protection of Privacy Act of Ontario, the Australian Freedom of Information Act 1982, the Belize Freedom of Information Act, 1994, South Africa promotion of the Access to Information Act 2000 and the United Kingdom Freedom of Information Act, 2000.

This exemption seeks to protect the confidentiality of deliberations of the Executive arm of government. It is also supportive of the principle of the collective responsibility of the Cabinet that decisions of the Cabinet are not to be attributable to individual members but all members of Cabinet are accountable for every decision taken by the Cabinet.

It should be noted that the exemption under the proposed Act does not cover any document appended to a Cabinet document that contains material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature or a document by which a Cabinet decision has been officially published. This qualification did not appear in the Bill that was tabled. This amendment was recommended by the Joint Select Committee, and it has the effect of making the exemption narrower than that applicable under some of the comparable legislation studied.

Clause 19- documents relating to government's deliberative process

Clause 19 of the Bill exempts from disclosure an official document if it contains –

- (a) opinions, advice or recommendations;
- (b) a record of consultations or deliberations, prepared in the course of or for the purpose of discharging government functions.

As in the case of Cabinet documents, this exemption does not extend to documents, which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature.

This, also, is a usual exemption that is found in the comparable legislation of a number of other jurisdictions, including Australia, Canada, South Africa and the United Kingdom. It is directed at the kind of advice, opinions, and reports usually provided by public servants, for the purpose of informing policy formulation and decision. The thinking is that the grant of unrestricted access to such documents would inhibit the full, free and frank expression of views as persons would be fearful of being identified with particular viewpoints and consequently being drawn into political debates.

The overall purpose of this exemption and that applicable to Cabinet documents is to prevent the disclosure of any information, which could prejudice the deliberative processes of government. This rationale is evident in the corresponding provisions of some Acts. For example the New Zealand Official Information Act provides that official information shall be made available unless there is good reason for withholding it (s. 5), and the good reasons for withholding official information include the need “to maintain the effective conduct of public affairs through –

- (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organization in the course of their duty; or
- (ii) the protection of such ministers, members of organizations officers, and employees from improper pressure or harassment.”

Provisions in a similar vein are to be found in the U. K. Freedom of Information Act, 2000. Under that Act information is exempt “if in the reasonable opinion of a qualified officer, disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice or would be likely to prejudice, the effective conduct of public affairs” (s. 36(2)).

It has been suggested that the names of the public servants could be deleted before making the documents available to the public. However, the deletion of the name would not by itself be an effective safeguard, as it could still be possible to trace the source from which a particular advice, opinion or recommendation came, having regard to subject matter or area of expertise involved. Moreover, even if it were not possible to pinpoint the public servant or servants involved, the speculations as to their identity could be equally harmful and distressing to the individuals implicated. We know only too well that this is a highly probable scenario in our society.

It should be noted that the exemption from disclosure of this category of documents is not absolute. Even if a document is caught by the exemption, the public authority, which holds this document, is obliged to grant access to it if it is satisfied, having regard to all the circumstance of the case, that, on balance, disclosure of it would be in the public interest. The overriding balancing of interests test can therefore displace the exemption of this category of documents.

Having said all that it is to be admitted that clause 19 is wide since it exempts opinions, advice or recommendations prepared in the course of or for the “ purpose of discharging government functions” . Indeed it could be said to be unnecessarily wide since it could affect even discussions between agencies.

I would, therefore, suggest that it could be narrowed in keeping with the other exemptions under Part III of the Bill. The Minister of Information will propose the appropriate amendments at the Committee stage.

A final point, which it is important to note - and this applies to all categories of exempt documents - is that, the exemption is not of indefinite duration, but will normally cease on the expiration of a period of 20 years after the creation of the document. The Minister is empowered to shorten or extend the duration of the exemption by order subject to affirmative resolution.