



Freedom of Information Bill, 2015

Town Hall Meeting

Freedom of Information Act Working
Committee


Overview of Presentation

- Purpose of presentation is to provide an overview only of the 2015 Bill:
- What is freedom of information?
- Who has the right to access and how?
- What exemptions are there?
- What if you are unhappy with the decision of the public authority?
- What is the Office of the Information Commission?
- What measures are there to promote openness?

BACKGROUND

- The Freedom of Information Bill, 2015 will replace The Freedom of Information Act, No. 10 of 2012 which was passed but never brought into force.
- Some members of the public were highly critical of the number of classes of information which are exempt from disclosure under the Act. It was against this backdrop that the Ministry of Education along with the Office of the Attorney-General formed a Committee to benchmark and review the existing Freedom of Information legislation.

- Consequently, several suggested changes have been made to the Freedom of Information Act, 2012, namely, but not limited to the following:
 1. Expanding the right of access to information to bodies with a nexus to The Bahamas;
 2. Expanding the class of accessible documents to include factual and statistical policy documents;
 3. Narrowing the class of documents that are exempt from disclosure;

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4. Recommendation for a stand-alone Whistle blowing Legislation and review of the Official Secrets Act;
 5. Removal of the Minister's veto power;
 6. Information Commissioner's decision is now subject to external review by Courts;
 7. Implementation of a Public Interest Test.

Benchmarking and points of reference

In our review of the existing legislation, we have considered and made recommendations based on a number of model laws, analyses and best practice principles, including but not limited to, the following:

- The Organisation of American States' Model Inter-American Law on Access to Public Information and its Implementation Guidelines;
- The Commonwealth Human Rights Initiative: A Preliminary Analysis of the Bill and Recommendations for Improvement;
- Comments from Citizens For A Better Bahamas
- Freedom of Information Legislation of:

- ❖ United Kingdom
- ❖ Jamaica
- ❖ Australia
- ❖ Canada

The Cayman Islands
Trinidad & Tobago
New Zealand

What is freedom of information?

- Freedom of information is an extension of freedom of speech;
- Inter-American Court of Human Rights via *Claude Reyes et al. v Chile* (2006) decided that access to information is a part of the fundamental right of freedom of expression;
- Usually protected through an Act of some kind;
- Provides rights of individuals to request information from 'public authorities'.



IACHR

Inter-American
Commission on
Human Rights



Why is it important?

- Promotes greater accountability by Governments;
- Promotes transparency;
- Helps to engage citizens more fully in the decision-making process
- Hallmark of any modern democracy.



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Who has the right of access to information? S. 6

- Bahamian citizens;
- Permanent residents;
- Body corporates registered in The Bahamas;
- Partnerships or other unincorporated associations under laws of The Bahamas;
- Any other person who has an office, branch or agency in The Bahamas.



What can you ask for?

A record:

- Which is not exempt;
- Which is held by public authority in connection with its functions;
- Any record over 30 years old is not subject to any exemptions (s6(3));
- If part of a record is exempted, partial disclosure is made (s12).




How do I request information? S. 7

Such persons who wish to obtain access to a record shall make an application.

The application must be:

- Made in writing;
- Addressed to the Information Manager of the particular Public Authority ; and
- Provide information concerning the record as is reasonably necessary to enable the Public Authority to Identify it.



Public Authority shall acknowledge receipt of the application and once approved, grants the applicant the record within the specified time. (30 days)

If the application is refused or access is deferred, the Public Authority shall state the reasons why and the options available

What are the other measures to promote openness?

- Each public authority must have an information manager who receives requests for information and promotes best practices on record maintenance – Section 46;
- Protections for whistleblowers – Section 47;
- Code of minimum best practices for records management to be published for public authorities to comply with – Sections 48 & 49;
- Training to be provided to public officials – Section 50;
- Offence to alter, deface, destroy, block, erase or conceal records with fine of \$10,000 or six months imprisonment – Section 52.

What is a Public Authority?

- Certain classes of information excluded which are not disclosable under certain Acts (Central Bank Act, Securities Industries Act, Insurance Act, Financial Transactions Reporting Act);
- Minister may by order additional body or classes of information as excluded.

What is a Public Authority?

- Minister may be Order expand the entities covered as public authority (which provide services of public nature/receive regular government appropriations);
- Minister may also make exceptions or modifications to public authority by Order and affirmative resolution of both Houses.

Exclusions to Public Authority

- Judicial functions of court/holder of judicial office;
- Security or intelligence agencies in relation to their strategic/operational intelligence gathering activities (list of agencies can be expanded by Minister in consultation with Minister for National Security);
- Private holdings of national archive under contract.

What information can I obtain ?

Objectives of the Bill:

- governmental accountability;
- transparency; and
- public participation in national decision making,

by granting the public a general right of access to any information held by a public authority, *subject to certain exemptions* which balance the right of access to information against not disclosing information in the *public interest*.

Levels of Access to Information

- Freely Accessible Information
- Access only granted if disclosing the information is in the public interest (Conditional exemptions)
- No access to the information granted (Absolute exemptions)

Approach

- Information you can freely obtain
- What does 'public interest' mean?
- Conditional exemptions
- Absolute exemptions

What information do you have a Right to access? s. 5

Each public authority must publish:

- Functions;
- A list of Departments & Agencies and—
 - (i) locations
 - (ii) business hours
 - (iii) matters handled

Right of access to Information

- Name and contact information for Information Manager
- Manuals or other records containing the Policies, Practices, Rules & Guidelines used for decision making or for any scheme administered by the authority with respect to:
 - Rights or Benefits &
 - Obligations or Penalties

'Public Interest'- what does it mean?

Not defined

However, public interest includes, but is not limited to things that may or tend—

- To promote transparency: greater public understanding of the processes or decisions of public authorities;
- To promote accountability of and within Government;
- To facilitate public participation in decision making by the Government;

'Public Interest'

- To promote improved quality of services and to improve the level of responsiveness to public needs
- To expose and deter wrongdoing, including but not limited to corruption and serious maladministration (Whistleblower provision s. 47)

Public Interest Test s. 15

- Provides for a Public Interest Test, which was not defined in the old Act
- The test of whether the disclosure of information by a public authority is in the public interest is:
 - whether the public interest would, on balance, be better served by disclosing information than by not disclosing information.


Public Interest Guidelines S. 15

The Information Commissioner will, based on international best practices, issue *guidelines* about public interest considerations—

- in favour of the disclosure of information;
and
- against the disclosure of information

Summary of Exemptions

Absolute	Conditional
National security, defence, international relations	National economy/commercial affairs (substantial adverse impact or prejudice to commercial affairs)
Law enforcement (limited)	Prejudice to effective conduct of public affairs
Legal privilege	Commercial interests of third party
Collective responsibility of Ministers	Heritage sites/rare or endangered or commercially important species
Consultations between Governor General and Prime Minister or consultations in Cabinet	Would/likely to endanger physical or mental health or safety of an individual
Opinions, recommendations or advice prepared for Cabinet (excluding factual, statistical data)	
Personal Data (Data Protection Act)	



A FEW EXAMPLES OF CONDITIONAL EXEMPTIONS

Public Interest: National Economy, Commercial Affairs S. 20

Information will not be disclosed:

- Where the premature disclosure of information will have substantial adverse effect on national economy (e.g. premature disclosure of proposed tax, duty, interest rate, exchange rate etc.)
- Where disclosure of certain documents would cause the authority to lose money by giving unreasonable financial advantage to any person (e.g. persons bidding for a contract)

Public Interest: National Economy, Commercial Affairs S. 20

Exception: s. 20(2) (b)

If any information that falls under this exemption presents a *public safety hazard*, that information is disclosable.

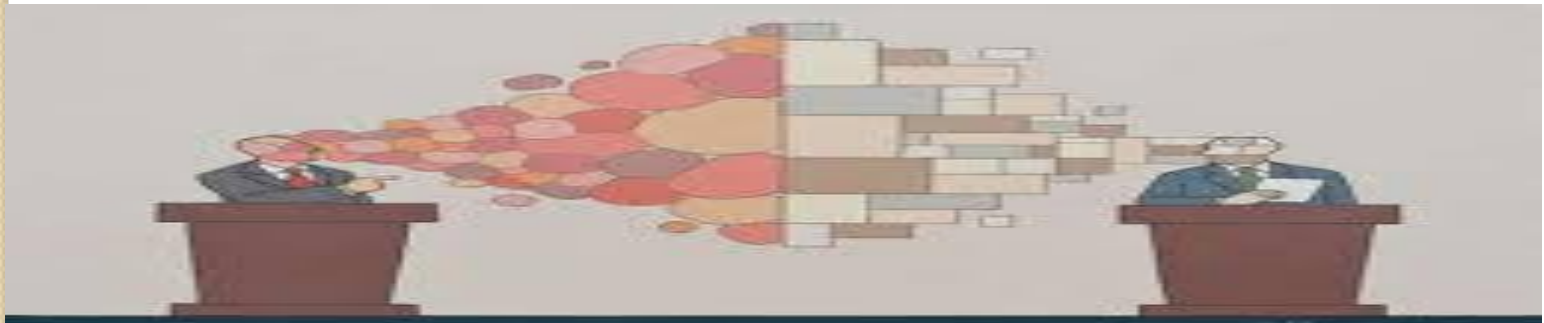
Therefore:

- The results of any investigation; or
- Any information supplied to a public authority, that reveal public safety hazards are discloseable

Public interest: Interference with effective conduct of public affairs S. 22(1)(b)&(d)

Information will not be disclosed where disclosure of would:

- Inhibit free and frank exchange of views for deliberations;
- Prejudice effective conduct of public affairs.



Commercial Interests: s23

- Information acquired from a business, commercial or financial undertaking which:
- Trade secrets or other business, commercial or financial nature of business or public authority;
- Likely to expose business or public authority to a disadvantage;
- Consider:
- If record available to competitors;
- Any public interest considerations in disclosure outweigh competitive disadvantages;
- If would be exempted if produced by public authority;
- Can be disclosed without causing substantial harm.
- Notify the business to seek their views



A FEW EXAMPLES OF ABSOLUTE EXEMPTIONS

Absolute: National Security, Defence or International Relations S. 17

- If disclosure would cause harm to national security, defence or international relations of The Bahamas;
- Information communicated in confidence between the Government and another government or international organization.

Absolute exemption: Law Enforcement S.18(1)

Exempt if disclosure of the information would:

- Endanger life/safety of person;
- Affect conduct of investigation or trial;
- Disclose confidential source;
- Facilitate escape from detention;
- Jeopardize security of prison/detention facility.

Absolute exemption – Law Enforcement S.18(2)

New Insert – The 2015 FOI Bill does not prevent disclosure of:

Any **ILLEGAL** Acts- e.g. Information revealing law enforcement investigation exceeded limits of the law

Absolute: Records Revealing Government Processes S. 21

- Opinions, advice or recommendations prepared for Cabinet. Excludes attached documents which contain-
 - factual information,
 - analysis of factual information, or
 - technical or statistical data
- Cabinet Consultations/deliberations;
- Consultations/deliberations between Prime Minister and Governor-General.

Absolute: Personal Data S. 25

- No personal data or sensitive personal data is to be revealed under this Bill;
- All requests for personal data made under Data Protection Act;
- Records relating to personal data and sensitive personal data are exempted forever.



Public Authority's Decisions will be made Public S. 27

- A Public Authority must make best efforts to make its decisions and reasons for those decisions public.
- This does not apply where the information that would be disclosed thereby is exempt under the Act.

What if I am not satisfied with the decision of a Public Authority? S. 28-29

- Apply to the Minister or Chief Officer for an Internal Review
- No internal review can be conducted if the Minister or Chief Officer made the decision
- The application must be made within 30 days of decision
- Internal review decision made within 30 days of the application

The Information Commissioner S. 30-31

- Appointed by Governor General on advice of Prime Minister after consultation with Leader of the Opposition;
- Must be independent , impartial and accountable
- Must have knowledge in access to information, transparency or public and corporate governance
- Shall be appointed for a term of 5 years, can be reappointed for one term

Cont'd ... The Information Commissioner

- **MUST NOT**
- within the last 5 years have held a political office or served as an official of a political party
- have been convicted of a crime of dishonesty/violence, been declared bankrupt

Powers & Independence of the Information Commissioner S. 33- 45

- Powers necessary to perform his/her functions and shall establish a Freedom of Information Unit to administer the regime
- Independence and autonomy in administering the Unit
- Budget
- Develop rules and procedures to regulate the Unit's affairs

Cont'd.. Responsibilities of Commissioner

- Report to Parliament annually on applications under the Act and his office's activities.
- Monitor Public Authorities to ensure compliance with their obligations under the Act
- Publicize the requirements under the Act and rights and obligations thereunder
- Make recommendations for reforms

Appeal to the Information Commissioner S. 39- 42

- Apply to Commissioner after exhausting the internal review procedure
- Burden of proof on the public authority
- In coming to a decision he/she has power to conduct a full investigation-
 - (i) order the production of evidence;
 - (ii) compel witnesses to testify; and
 - (iii) inspect exempt records

Cont'd... Appeal Proceedings S. 44- 45

- Commissioner's decisions are binding on public authorities
- Further appeal to Supreme Court

Removal of Information Commissioner

s. 31

- The Commissioner may be removed from Office by the Governor-General for:
- Misbehaviour
- Incapacity due to physical / mental illness
- Inability to discharge functions of his office



**Thank you for your kind
attention**

Questions?