

Freedom of Information Bill 2016 notes by Bahamas AG & Minister of Legal Affairs

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FREEDOM OF INFORMATION BILL, 2016

2 MARCH, 2017

Madam President,

It is with great pleasure that I rise to speak on the Freedom of Information Bill 2016.

Members are reminded that the Freedom of Information Act 2012 was passed just prior to the General Elections of 2012, but was not called into effect.

The Government is committed to bringing this Act into effect.

The general public expressed much concerns about the 2012 Act and in 2014 the Government formed a Committee, under the auspices of the Honorable Minister of Education, who gave the Committee the mandate to examine the 2012 Act with a view to updating the Act. The Committee consisted of Elaine Toothe, Janice Knowles, Lisa Benjamin, Shane Miler, Shantel Taylor and Shari Moxey – from the Department of Archives, the Ministry of Education, for civil society a Professor from the University of The Bahamas L.L.B. programme, and the Attorney General's Office.

After initial benchmarking the Committee recommended that due to the extensive changes which needed to be made to the 2012 Act, a new Bill should be drafted. The Committee drafted the new bill which was presented to Cabinet, who in turn instructed the Committee to make the Bill available for public consultation.

The Committee undertook an extensive public consultation exercise which consisted of website postings; radio talk shows; information sheets; and town hall meetings held in New Providence (twice); Freeport, Grand Bahama; Marsh Harbour, Abaco; Governors Harbour, Eleuthera; and Georgetown, Exuma.

As a result of the consultative exercise, the public, including civil society, made numerous recommendations on the draft Bill. After careful review of the same, the Committee made its recommendations to Cabinet which are now reflected in the Bill before this honourable place.

Members, freedom of information or the right to access information is considered the cornerstone of a modern democracy. The Model Inter-American Law on Access to Public Information (AG/RES2607) states in its preamble that:

- the Inter-American Court of Human Rights decision in *Claude Reyes v Chile* formally recognized the right of access to information as part of the fundamental right to freedom of expression;
- that access to information is a fundamental human right and an essential condition for all democratic societies; and
- that the right of access to information is based on the principle of maximum disclosure.

Madame President,

The Bill is extensive in its purpose of allowing the general public access to information to further participate in the democratic process. There are a number of safeguards for the protection of an individual's sensitive personal data and carve outs for the protection of national security matters; legal privilege and certain government communications. With the exception of these carve outs or exemptions the Bill seeks to provide the public wide access to records.

Members, clause 2 of the Bill provides that a "record" means

"a record in writing; a map, plan, graph or drawing, a photograph, a disc, tape, sound track or other device in which sounds or other data are embodied."

Members are asked to note that clause 3 of the Freedom of Information Bill provides that the Bill only applies to a "public authority" which is defined under clause 2 of the Bill as meaning —

- (a) a Ministry or Department of Government;
- (b) a statutory body or authority, whether incorporated or not;
- (c) a public corporation which—
 - (i) is wholly owned by the Government or in which the Government holds more than fifty per cent of the shares; or
 - (ii) is specified in an Order under clause 3(2) of the Bill;
- (d) any other body or organization specified in an Order under section 3(2).-

Members should note that Clause 3(2) reads as follows:

- 3(2)- (a) such companies, in addition to those specified in paragraph (c) (i) of the definition of "public authority", as may be specified in the Order;
- (b) any other body or organization which provides services of a public nature which are essential to the welfare of the Bahamian society, or to such aspects of their operations as may be specified in the Order;
- (c) any other body or organization which receives government appropriations on a regular basis.

Members, are also asked to note that the Freedom of Information Bill does not apply to the following:

- (i) judicial functions of a court or the holder of a judicial office,
- (ii) the Royal Bahamas Police Force,
- (iii) the Royal Bahamas Defence Force,
- (iv) the Department of Customs,
- (v) the Department of Immigration, or
- (vi) the Financial Intelligence Unit;

in relation to their strategic or operational intelligence gathering activities, and such statutory body or authority as the Minister may designate by Order.

Madam President,

It is crucial that Members take note of the objects of this Freedom of Information Bill, which are outlined in clause 4. The objects 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 records held by a public authority, subject to exemptions which balance that right of access against non- disclosure of governmental or commercial information in the public interest.

Additionally, Members should note that upon enactment, the provisions of the Freedom of Information Bill will be interpreted so as to further the objects of the Bill and any discretion conferred by the Act shall be exercised, as far as possible, so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

Members, Part II of the Bill deals with the Right of Access to information. Under clause 5, public authorities will be required to publish certain basic information, such as:

- a description of its functions;
- list and address of departments and agencies contained therein;
- types of matters it deals with;

title and address of its information manager;

Etc.

Members, the Bill provides that a public authority must respond to an application for access to a record, not later than 30 days after the date of the receipt of the application for such access.

Madam President,

The concept of the 'public interest' is a central feature of this Bill. Therefore, rather than defining 'public interest' in the Freedom of Information Regulations, it is defined in the Freedom of Information Bill as follows:

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

- (a) promote greater public understanding of the processes or decisions of public authorities;
- (b) promote accountability for public expenditure or the more effective use of public funds;
- (c) promote justice to an individual;
- (d) facilitate public participation in decision making by the Government;
- (e) improve the quality of services provided by the Government and the responsiveness of Government to the needs of the public or any sector of the public;
- (f) deter or reveal wrongdoing or maladministration, including but not limited to the unauthorised use of public funds;
- (g) deter or reveal abuse of authority or neglect in the performance of official duty;
- (h) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
- (i) reveal untrue, incomplete or misleading information or acts of a public authority."

Additionally, Madam President, clause 15 of the Bill provides that -

" (1) For the purposes of this Act, the test of whether the disclosure by a public authority of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure than by non-disclosure."

Clause 15 also provides that -

"(2) The Commissioner shall issue guidelines on public interest considerations—

- (a) in favour of the disclosure of records held by a public authority; and
- (b) against the disclosure of records held by a public authority,

based on international best practices."

Clause 16 provides that despite the fact that certain records are not discloseable under the Freedom of Information Bill, such records will be accessible if access would be in the public's interest.

Members should note the examples of exempt records which may be discloseable if the disclosure is in the public interest; these include, but is not limited to the following-

Records affecting the national economy, commercial affairs and certain documents concerning the operations of public authorities (clause 20);

Records relating to commercial interests; (clause 23); and

Records likely to endanger health and safety of an individual (clause 26).

Madam President,

Clause 17 of the Freedom of Information Bill provides that records are exempt from disclosure if such disclosure would prejudice the security, defence or international relations of The Bahamas.

Clause 18 of the Bill seeks to provide that records relating to law enforcement are exempt from disclosure if such disclosure would endanger a person's life, safety or affect the conduct of an investigation or prosecution etc.

Clause 19 of the Bill provides that records subject to legal privilege are to be exempt from disclosure.

Clause 20 seeks to provide for the exemption from disclosure of records affecting the national economy, commercial affairs and certain documents concerning the operations of public authorities.

Clause 21 of the Bill provides that records revealing the Government's deliberative process are exempt from disclosure. However, this clause provides that certain documents that are appended to such records may be subject to disclosure.

Clause 22 seeks to provide that a record is exempt from disclosure if it prejudices the effective conduct of public affairs.

Clause 23 seeks to provide that a record is exempt from disclosure if such disclosure would reveal trade secrets or if it contains information concerning the commercial interests of any person or organization and such disclosure would prejudice those interests.

Clause 24 of the Bill seeks to provide that a record is exempt from disclosure if such disclosure would result in the destruction, damage or interference with the conservation of any historical, archaeological or anthropological resources; or any species of plant or any animal life that is endangered, threatened or otherwise vulnerable.

Clause 25 provides for the exemption of records relating to sensitive personal data only as defined under the Data Protection Act, Ch. 324A.

Clause 26 seeks to make a record exempt from disclosure if such disclosure would endanger the physical or mental health of an individual or endanger the safety of an individual.

Clause 27 seeks to provide that a public authority shall make its best efforts to ensure that decisions and the reasons for those decisions are made public unless the information that would be disclosed thereby is exempt under this Act.

Part IV of the Bill, which covers clauses 28 and 29, deals with the internal review of decisions of public authorities.

Clause 28 makes provision for application for the internal review of a decision by a public authority.

Clause 29 establishes the procedure for an internal review, which will be conducted by the responsible Minister in respect of certain records and in other cases by the chief officer of the relevant public authority.

Part V of the Bill, which covers clauses 30 through 38, deals with the office of the Information Commissioner.

Clause 30 of the Bill seeks to establish the position of Information Commissioner, who shall pursuant to this Act be appointed by the Governor General on recommendation of the Prime Minister after consultation with the Leader of the Opposition. This is the case in the appointment of:

The Commissioner of Police

The Chief Justice of the Bahamas

The President of the Court of Appeals

The Police Service Commission

Two (2) of the positions on the Judicial and Legal Services Commission

Clause 31 provides for the appointment of one or more Deputy Information Commissioners and Assistant Commissioner.

Clause 32 of the Bill provides that the Governor General acting on the advice of the Public Service Commission may appoint officers and employees as are necessary to enable the Commissioner to perform his functions.

Clause 33 seeks to establish the independence and powers of the Information Commissioner, who shall be responsible to Parliament.

Clause 34 of the Bill provides for the funding of the Freedom of Information Unit.

Additional powers and responsibilities of the Commissioner are outlined in clause 35 of the Bill, which allows the Commissioner to inter alia hear, investigate and rule on appeals filed under the Bill, monitor and report on the compliance by public authorities, make guidelines with regard to the effectiveness of this Bill and make recommendations for reform as may be necessary from time to time.

Clause 36 provides for possible terms and conditions for the removal of the Information Commissioner.

Clause 37 provides for the Commissioner to provide annual reports to Parliament.

Clause 38 provides that the Commissioner and members of his staff are not liable for anything done in the discharge of their functions unless it is shown that the act or omission was in bad faith.

Part VI of the Bill, which includes clauses 39 through 45, deals with enforcement by the Commissioner.

Clause 39 provides that a person who has made a request for a record and who has exhausted the internal review procedure may appeal to the Commissioner for a decision of a public authority's failure to comply with the provisions of the Bill.

Clauses 40 and 41 of the Bill provides for decisions on appeal and for the implementation of the Commissioner's decision respectively.

Clause 42 empowers the Commissioner to conduct investigations, independently of the Minister, including issuing orders requiring the production of evidence and compelling witnesses to testify.

Clause 43 provides for the Commissioner to conduct an investigation on his own initiative.

Clause 44 provides that a complainant or a public authority may appeal to the Supreme Court for review of a decision of the Commissioner.

Part VII of the Bill, which covers clauses 46 to 51, deals with measures to promote openness.

Clause 46 provides that every public authority shall appoint an information manager, who shall promote, within the public authority, the best practices as it relates to record maintenance, archiving and disposing of records and receive requests for records and complaints regarding the performance of the public authority relating to information disclosure.

Clause 47 is the Whistle-blower provision, which seeks to protect any person from releasing information on a public authority's wrongdoing.

Guidance on the duty to publish information is provided for under clause 48.

Clause 49 makes provision for the maintenance of records.

Clause 50 create an obligation on public authorities to report its activities to the Commissioner.

Clause 51 provides for the training of officials under this Act.

Part VIII of the Bill, which includes clauses 52 to 60, deals with miscellaneous matters.

Clause 52 provides that nothing in the Act shall be construed as authorizing the disclosure of any official record containing any defamatory matter; or the disclosure of any record which would be in breach of confidence or of intellectual property rights.

Clause 53 provides for information obtained under this Act can be redistributed without charge.

Clause 54 of the Bill provides for offences under this Act and the penalties.

Clause 55 provides that where a record is disclosed pursuant to this Bill, the person who authorizes the disclosure or actually discloses information, shall not be deemed to be in violation of any terms or conditions of any declaration or form executed under his terms of employment.

On the contrary, if information is disclosure otherwise than in pursuant to this Bill, any obligations relating to confidentiality shall apply.

Clause 56 provides for the matters for which fees will be charged.

Clause 57 of the Bill provides that the Minister, after consultation with the Information Commissioner, may make regulations under this Act.

Clause 58 of the Bill seeks to establish a Parliamentary Committee which shall review the Act from time to time and shall do so no later than eighteen months after the Bill comes into effect.

Madame President and members, I thank you for your attention.