



CENTRE FOR LAW  
AND DEMOCRACY

## **Bermuda: Statement on the Public Access to Information Bill 2010**

**May 2010**

**Centre for Law and Democracy  
info@law-democracy.org  
+1 902 431-3688  
www.law-democracy.org**

### **1. Introduction**

In October 2009, the Consultation Draft of the Public Access to Information Bill of Bermuda was released for public comment. The Bill, as the name suggests, is intended to give effect to the right to access information held by public bodies (the right to information). A revised draft Bill on Public Access to Information 2010 (draft Bill) was released on May 2010.

The right to information, which has been recognised by international courts and in many national constitutions, is a foundational democratic right, key to promoting participation and ensuring respect for all rights. It also helps promote government accountability and is a key tool in combating corruption and other forms of public wrongdoing. The Centre for Law and Democracy (CLD) therefore very much welcomes official efforts to adopt a right to information law in Bermuda.

The draft Bill is a progressive document, which largely accords with international standards, and which reflects many of the comments made by international organisations

on the earlier draft.<sup>1</sup> Some of the important changes in this draft include expanding the section on purposes and the definition of a record, reducing the time to acknowledge a request from 10 to 5 days, adding more harm tests to the exceptions and a public interest override for the exception regarding the Governor, adding a rule on historical disclosure, clarifying and simplifying the system for reporting on implementation and adding a requirement for all public authorities to appoint information officers.

CLD welcomes these changes but, at the same time, believes that the draft Bill could still be further improved. This Statement outlines five key issues which we urge parliamentarians and other decision-makers in Bermuda to address.

## **2. Five Key Areas for Further Attention**

### **1. Exclusions**

Section 4 of the draft Bill excludes various public authorities – namely the courts, the Auditor General, The Human Rights Commission, the Information Commissioner, the Ombudsman and the Department of Public Prosecutions – from the ambit of the law in relation to their non-administrative functions. Better practice is to include all activities of all public authorities within the scope of the law, and then to cover all confidentiality needs through the regime of exceptions. For example, the primary definition of public authorities in Article 1(2)(a) of the Council of Europe’s Convention on Access to Official Documents is limited in respect of judicial and legislative bodies to their administrative functions. But the same article also envisages the possibility of States extending application to the other functions of these bodies, recognising this as better practice.

### **2. Third Parties**

Section 3(1) of the draft Bill defines third parties as including anyone who provided information to a public authority or to whom information in a record held by a public authority relates. Pursuant to section 39, where a public authority intends to release a record, it must give notice of this fact to all relevant third parties, giving them 14 days to either consent or make representations as to why the information should not be released.

Pursuant to section 14, where a third party objects to disclosure, information will only be released after the 28-day period for lodging an internal appeal has expired. This effectively doubles the time for releasing information. Furthermore, where a third party makes an appeal, the information cannot be released until after his or her appeal options (internal and to the Information Commissioner) have been exhausted. In this way, a third party can delay release of the information for a very considerable time (28 days for the initial consideration, 28 days to lodge an internal appeal, 21 days for the internal appeal to be decided, 28 days for an appeal to the Information Commissioner to be lodged,

---

<sup>1</sup> See, for example, the analysis by ARTICLE 19, available at: <http://www.article19.org/pdfs/analysis/bermuda-submission-on-public-access-to-information-bill.pdf>.

however long it takes the Commissioner to decide the case, and potentially further delay caused by an appeal to the courts).

This is contrary to better practice in two key ways. First, better practice right to information laws only assign rights to third parties who provided the information, or who have at least treated the information as confidential. This is the case, for example, under the Indian Right to Information Law 2005 (section 11). Otherwise, a very large number of persons might be deemed to be affected by a proposed to release information.

Second, better practice laws only allow third parties to make representations as to why information should not be released, and do not allow them to delay the release of information. The rules on this in the draft Bill are highly problematical, and allow third parties to significantly delay access, simply by lodging appeals, however groundless.

### **3. Fees**

Section 20 of the draft Bill precludes fees being charged simply for making a request, but otherwise imposes no restrictions on the amount that may be charged for a request. Fees must, however, be in line with any regulations adopted by the Minister under section 59, which refers to regulations prescribing what fees may be charged and how they are to be calculated, circumstances in which fees may be waived and the maximum fee.

The potential scope of the regulations is broad, but unless and until they are adopted, public bodies are free to charge whatever fees they wish. Better practice laws provide at least a framework for fees in the primary legislation. Thus in the Indian law, the primary legislation states that any fee must be ‘reasonable’ and that no fee may be charged to those living below the poverty line (section 7(5)). In Mexico, the fees may not exceed the cost of the materials used to reproduce the information and with the cost of sending it (Article 27 of the 2002 Federal Transparency and Access to Public Government Information Law).

### **4. The 30-year Rule**

Section 40 of the draft Bill lifts all of the exceptions after thirty years, except those in favour of personal information and information rendered secret by another law. This is an important improvement that was introduced in this draft of the Bill.

At the same time, thirty years is a long time period for historical disclosure. Traditionally, thirty years was a common period, it is now being recognised that this is unnecessarily long. Thirty-year periods in the United Kingdom and Scottish laws, for example, have recently been replaced by twenty and fifteen year periods, respectively.

### **5. The Regime of Exceptions**

There are still a number of problems with the regime of exceptions, two of which are highlighted here. First, the section 38 rule on non-disclosure of the existence of a record applies whenever a record, if it were to exist, would itself be exempt. In better practice

*The Centre for Law and Democracy is a non-profit human rights organisation working internationally to provide legal expertise on foundational rights for democracy*

laws, the rule applies only where confirming the existence or non-existence of the record would itself engage one of the exceptions.

Second, section 37 of the draft Bill preserves secrecy laws, even where they conflict with the provisions of the right to information law. The draft Bill does provide that the Minister may by order repeal, revoke or amend any statutory provision which restricts the disclosure of information. Better practice laws, however, provide that, in case of conflict, the right to information law prevails (see, for example, section 22 of the Indian law and section 5 of the South African Promotion of Access to Information Act 2000).

**Specific Recommendations:**

- All of the functions of all public bodies should be included within the scope of the law, with any necessary confidentiality interests being protected through the regime of exceptions.
- The requirement to consult with third parties should be limited to persons who have provided the information to the public body and where they treated the information as confidential. Third parties should only have a right to be consulted, not to delay release of the information by lodging appeals.
- At least a general framework of fees should be set out in the primary legislation, for example stipulating that only reasonable fees to cover the cost of reproduction and sending information may be charged.
- Consideration should be given to reducing the time period for historical disclosure to fifteen or at most twenty years.
- The rule on non-disclosure of the existence of a record should apply only where such disclosure would, of itself, breach the regime of exceptions.
- The right to information law should prevail over any inconsistent secrecy provision.