E – N E W S

Access to Information

Spring Edition Volume 6

ACCESS TO INFORMATION AND ENFORCEMENT

Welcome to Volume 6 of the Access to Information E-News with focus on Access to Information and Enforcement. The objective of *E-NEWS* is to create a forum for the exchange of information and ideas about Jamaica's Access to Information Act and to provide an opportunity to focus on specific issues, themes, and news relating to the public's "Right to Know." We hope that through the distribution of *E-NEWS* we can raise awareness of the Access to Information Act in Jamaica and encourage people to use this new right.

The Independent Jamaica Council for Human Rights has assisted in the preparation of Volume 6 of this *E-NEWS*. In this volume, there is a discussion of the importance of the appropriate model for enforcement of the right to information, a look at what happened at the Parliamentary Review of the Access to Information Act, an analysis of the cases that have been heard by the Access to Information Appeals Tribunal, information about the Volunteer Attorneys Panel and civil societies experience in enforcement of their right to know.

In this edition you will find articles on:

- What happened to the issue of enforcement in the Parliamentary Review of ATIA?
- Civil Societies experience with the Access to Information Appeals Tribunal
- What is the Volunteer Attorneys Panel for ATI
- Implementation Oversight and Enforcement Models
- Access to Information Cases: Is mediation the answer?
- Review of the decisions before the ATI Appeals Tribunal
- Recent and upcoming events
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E – N E W S Access to Information

What happened to the issue of enforcement in the Parliamentary Review of the Access To Information Act?

By Nancy Anderson, Legal Officer, IJCHR.

Civil Societies experience with the Access to Information Appeals Tribunal

By Susan Goffe, Chairperson JFJ

What is the Volunteer Attorneys Panel for Access to Information?

The Carter Center in collaboration with the Independent Jamaica Council for Human Rights and the Jamaican Bar Association has collaborated to form a Volunteers Attorneys Panel to take on cases on a *pro bono* basis before the Appeals Tribunal and the Courts of decisions taken under the Access to Information Act. The Panel consists of 40 attorneys-at-law who work from a Roster. The Carter Center is currently acting as the Secretariat for the Panel and provides administrative and management support for the panel, assisting in publicizing the panel and facilitating the conduct of seminars for the volunteer attorneys to represent the rights of the public in bringing forward cases for appeal or before the courts. Volunteer Attorneys through the Volunteers Attorneys Panel provide high-quality representation in test cases under the Access to Information Act to ensure that there is an appropriate mechanism to enforce the rights established by the law. This allows more people to have effective representation before the administrative and court system to enforce their right to access government held information. The Panel provides an organized opportunity for attorneys to volunteer their time to represent individuals or groups in cases under a new piece of legislation including persons who cannot afford to pay for legal services and have legal representation**.** It is a mechanism that promotes pro bono services for a specialized area of law and is a model that could be copied for other types of human right cases that are heard before administrative tribunals before going to court including asylum and environmental law cases.

The Panel includes a mix of both experienced attorneys in the field of human rights litigation and administrative law and young attorneys who are interested in learning about this field. The Panel aims to ensure mentoring of attorneys with less experience in the conduct of these cases. Three representatives guide the panel from each of the founding organisations, Ms. Laura Neuman, The Carter Center, Ms Nancy Anderson, Legal Officer, Independent Jamaica Council for Human Rights, Ms. Hilary Phillips Q. C. , The Jamaican Bar Association.

The cases for which the Volunteer Attorneys Panel take free of cost are selected based on the following criteria:

- Public Interest in the requested information
- The need for court interpretation of the vague sections of the law
- The incapability of the person affording the cost of representation
- Provision of assistance to civil society organizations, which are part of an informal coalition to assist in monitoring the implementation of the Act through its phased implementation.

The panel works by way of a referral process. Every effort will is made to tailor the procedures to suit the needs of individual lawyers, whether sole practitioners or those in larger firms. Referrals are made to allow minimal disruption to the attorney's existing practice. Attorneys have only been asked to volunteer for one case per year, as there have not been many cases appealed to the Appeals Tribunal or taken to court. Attorneys have been asked to participate in media events on the work of the Panel. To make certain that the volunteer attorneys spend their valuable time most productively, the following services are provided:

Screening - All cases are screened by the Carter Center, Independent Jamaica Council for Human Rights and the Jamaican Bar Association to ensure they are eligible for free legal assistance.

Case Review - All cases are reviewed and an intake form is written up on the facts and issues the case presents.

Referral - Referrals are made by phone, email and /or letter to the attorney and the client. Once the attorney accepts a case the attorney schedules a time to meet with the client concerning their case.

Resources - Assistance to conduct research has been arranged through the process of assigning a senior and junior attorney to each case.

Mentor Link - Experienced volunteer attorneys may also be called upon to help less experienced volunteer attorneys on their cases. The goal of the Panel is to make it as easy as possible to volunteer and still provide excellent results for the client.

Costs - The VAP seeks to provide out of pocket costs for photocopying and other similar services if this is required but pre-approval of the expenses will have to be made.

Training – Continuing Legal Education seminars have been held for attorneys who are part of the VAP to share the international and national experience in conducting these types of cases.

The VAP provides a critical role in the fulfilment of persons right to information. For it to be sustainable resources will have to be found to support its continued role when more Jamaicans learn and appreciate the power of their right to know.

Excerpt from Implementation Oversight and Enforcement Models

By Laura Neuman, The Carter Center

The majority of Latin American countries have a right to information included in their constitution and an increasing number of countries are passing legislation to give the right effect. However, without the full

implementation and effective enforcement these rights, and the legislation that embodies them, may quickly become meaningless. One may consider the establishment of an access to information regime to contain three distinct phases: passage; implementation; and enforcement. The first, the passage of the law, is relatively speaking perhaps the easiest phase. There now exist emerging international norms as to the content of such laws, as well as an awakening civil society dedicated to promoting the passage of such acts. The second phase, the implementation of the law, often proves to be the most challenging premise for government and its functionaries. During this phase, the public administration must set up systems to organize and manage documents, establish procedures and processes for the request, retrieval and provision of information, train public servants, and commence the shift in institutional culture from secrecy to openness. As will be discussed below, experience has demonstrated a clear need for technical support, dedicated expertise and monitoring throughout the implementation stage.

The third period, and in my mind the most critical for the ultimate success of a new transparency regime, is the enforcement phase. It is at this stage that persons can seek to enforce their right to information when a request is ignored or denied. Without an independent review procedure of decisions, the right to information will quickly become discretional and based on the whims and desires of the persons receiving the request. If the enforcement mechanisms are weak or ineffectual it can lead to arbitrary denials, or it can foment the "ostrich effect", whereby there is no explicit denial but rather the government agencies put their heads in the sand and pretend that the law does not exist. Thus, some independent external review mechanism that is critical to the law's overall effectiveness.

The institutional framework and apparatus developed for application and oversight of the right to information vary. Models for monitoring and enforcement range from an absence of statutorily authorized oversight and intermediary enforcement mechanisms to those whereby the bodies are mandated and vested with wide-ranging powers and responsibilities. The decision regarding which model will function best depends greatly on the specific political, economic and social context and needs of the jurisdiction. However, what is increasingly clear is that in order to ensure full and continuing compliance with the law, there is a need for instruments dedicated to the promotion, monitoring and enforcement of the access to information regime.

Without appropriately designed and sufficiently funded oversight and enforcement mechanisms, the effectiveness of an access to information regime will be compromised. As more countries and states pass legislation embodying the right to information, experience is dictating the necessity for entities vested with the power to monitor the administration and compliance of the law, and to take action when necessary.

Access to Information Cases: Is mediation the answer?

By Carole Excell, The Carter Center

Access to Information cases can be very contentious. They can raise issues of accountability and transparency, they can reveal corruption; identify human rights abuses and spot light the failure of agencies. In jurisdictions that recognize a process of appeal of a decision of a government authority to refuse access to information to an Information Commissioner or an Appeals Tribunal there has been interest in the use of Alternative Dispute Resolution as an effective mechanism to resolve contentious and complex cases. A pre-requisite to mediation has been the principle that the decision-making body has order-making powers to make binding decisions on the government authority and appellant.

The use of Mediation to resolve ATI cases has taken many forms including as a process to narrow issues, allow the release of some of the documents in dispute; reducing fees or facilitating the process of identification of additional information. Mediation allows for creative solutions including options for severance, deferral and then release of documents or access granted in different forms. Settling cases without binding decisions has been viewed as having a number of advantages specifically in Access to Information cases. Settlement can result in a speedier resolution of the appeal and earlier access to the contested documents sought. Settlements also do not take away rights but can narrow

differences and establish the issues in dispute even where a matter has to go forward to a hearing for a binding decision. Settlement can also avoid the cost and effort of preparing legal submissions and attendance at public hearings. Traditional appeals, which are legalistic in procedure, can be both time-consuming and expensive. There are some disadvantages to settlement through mediation foremost of which is that fact that no legal precedents are set by the decision making process. Other issues include the fact that mediation usually has to be agreed upon by consent of the parties, mediation comes at a cost which is usually shared by the parties or paid by the state and finally a process of mediation has to be tracked and monitored to be effective.

Mediation has been a preferred process of choice to address the issues arising in Access to Information Cases in a number of jurisdictions. Mediation has the advantage of being a private, usually voluntary, process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), are assisted to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. Its advantages include that it is often seen as a means to ensure settlements for all parties; provision of better service tailored to meet the needs of the parties and a mechanism that can ensure the resolution of complex cases Mediation enables the parties to understand the issues which can result in compromises that produce results satisfactory to both parties. Generally mediation is a less costly and quicker process than more formal methods of dispute resolution. Mediation is utilized most notably in a number of Canadian provinces, but also in the state of Connecticut in the United States, in Western Australia and in Ireland.

The International Experience

In Canada there has had a range of good experiences in the use of mediation to resolve ATI disputes. In Canada ATI cases at the provincial and municipal level where the Information Commissioner has binding order-making power are the most relevant. Four of its largest provinces have commissioners with order making powers, which seek to resolve complaints through mediation that is Quebec, Ontario, British Columbia, and Alberta. The Information Commissioner in the Province of Ontario in particular has over 15 years of experience in mediating appeals. A primary objective of this Commissioner has been to focus on mediation as the preferred method of dispute resolution. In Ontario the Commissioner is given power to use a mediator to effect a settement by virtue of s.51 of the Provincial Act and s.40 of the municipal act which provides that the Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal. The Ontario Comissioner has reported of its success in the use of mediation reporting in 2003 that 92% of requests for review by mediation were resolved fully. In addition the Ontario Information Commissioner has recently published “Best practices for Institutions in mediating Appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protetion of Privacy Act “ alongside the Pivacy Commissioner for Ontario and the Ministry of the Attorney General.

In Ireland the Freedom of Information Act 1997 and 2003 specifically contemplates that the Commissioner having a mediation role - CF s.34.7. The FOI Act provides that at any stage during a review, the Commissioner may try to effect a settlement between the parties on the records to be released. The Commissioner stated in their 2003 report that in some cases, requesters may agree to narrow the focus of the review by agreeing to exclude records which will add little or no value to the information they seek. In others, it might be agreed that additional records outside the scope of the original request be released without the need for arrival at a formal decision in the case. In 2003, 154 cases were settled. This is 21% of all reviews completed in 2003 compared with 25% in 2002 and 16% in 2001.

In Connecticut there has been a Freedom of Information Commission since 1975. It receives 600-700 formal complaints per annum. Mediation is conducted by a member of the Commission's staff assigned to each appeal to act as liaison between the parties through an "ombudsman" program. The ombudsman is given the jurisdiction to attempt to effect a settlement of each appeal even on the date assigned for hearing. But if a settlement is not possible, the matter will proceed to a hearing. Around 50% of the complaints in Connecticut are settled by mediation.

In Western Australia s.71. of the Freedom of Information Act stipulates a requirement for a conciliation mechanism. The Act provides that the Commissioner may, at any stage, suspend inquiries, investigations or other proceedings so that efforts can be made to resolve the complaint by conciliation or negotiation between the parties. The Commissioner may give such directions and do such other things as the Commissioner thinks fit in order to facilitate the resolution of a complaint by negotiation or conciliation. This may be facilitated by the Commissioner nominating a person to act as a conciliator in relation to a complaint who may require the parties to the complaint to attend compulsory conferences; The conciliator does not have power to require the production of the requested documents or to require the provision of information. The emphasis of the commissioner's office is similar to that in Canada, which is to use an informal process for resolution based on conciliation and negotiation to ensure speedy, informal and accessible resolution of cases. In 2004-2005 resolution by mediation was achieved in 73 % of cases involving state government, 50% of complaints from local government and 84% regarding Ministers.

Mediation for ATI cases in Jamaica

Where information is refused by a public authority in Jamaica this refusal may be challenged by an appellant who has a right of appeal to an Independent Appeals Tribunal. The decision of the Appeals Tribunal in Jamaica is binding on the appellant and the public authority. There are currently no provisions to allow mediation under the Access to Information Act or the Appeals Tribunal Access to Information Rules to resolve contentious issues between Appellants and government authorities. The rules contemplate a process where both the Government and the appellant appear before the tribunal in person (there is no specific reference in the Rules for appeals to be heard in writing) and outline their cases orally in an adversarial manner. There is provision for witnesses to be called and examination and cross-examination of statements. In addition in practice the Appeals Tribunal in Jamaica has called for appellants and defendants to outline their case in writing. This has resulted in a procedure, which is very much like a court with opening and closing speeches and arguments being presented by opposing counsel. Of course in adopting the model of an administrative tribunal most persons contemplated a more relaxed and flexible process whereby the rules of evidence and the formal procedures of a court will be relaxed to allow appellants to appear unrepresented before a tribunal which will protect the interests of an appellant as the burden of proof before the tribunal is on the public authority. Adopting a mechanism, which allows the tribunal either to assign one of its members or pay for services of a mediator to seek to resolve cases would be a positive adaptation of the current procedure. Support for this approach for ATI disputes would be an alternative to the current adversarial model in place. Mediation could be conducted by a neutral third party (the mediator) or a member of the Tribunal, however this would preclude involvement of this member in adjudicating the matter should mediation fail. Mediation could be undertaken at any stage of the hearing process, and directions could be given to facilitate resolution. If the matter is not resolved at mediation, it could still proceed to a hearing. However, if successful, an agreement could be reduced into writing and signed by both parties before any matter could be withdrawn from a hearing. Mediated decisions could be declared binding by order of the Tribunal.

The experience learnt from other jurisdictions can be useful in determining whether an Alternative Dispute Resolution model is advantageous in provision of the most accessible, timely, and cost effective mechanism to resolve ATI disputes. The experiences of these jurisdictions seems to suggest that mediation can be very effective in achieving settlements that are acceptable to all parties if best practices are followed in ATI cases.

Review of the decisions of the ATI Appeals Tribunal

By Norman Davis, Lecturer, The Norman Manley Law School

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Recent and Upcoming Events

The Parliamentary Review of the Access to Information Act:-

Presentation at Conservation Training Week: A presentation was made to students at the Northern Caribbean University Communications Department on Access to Information and Investigative Journalism on October 13, 2005. Materials were produced and shared with each student on the use of the Access to Information Act and the basics of starting an investigative journalism project. The Access to Information Student Investigative Journalism Award was introduced to the students who were encouraged to participate.

Presentation to CVM TV: The Access to Information Appeals Tribunal heard two appeals on October 10 & 11, 2005**.** Decisions were handed down for both cases on December 1, 2005.

Lecture to Jamaica Historical Society:- A meeting was held with Access to Information officers and civil society on January 30, 2006 with civil society organisations and Access officers from Government Ministries and Agencies to discuss some of the issues that have arisen in implementation of the Act and suggestions for dialogue and communication on issues to ensure a better working relationship.

Final Carter Center Workshop on Access to Information : The ATI Act, at Section 38, requires that a Parliamentary Committee be appointed for the purposes of reviewing the Act not later than two years after the Appointed Day (Jan. 5, 2004). The Review commenced at the start of January and civil society; members of the public and public authorities have been allowed to prepare submissions to the Parliamentary Committee. It is critical that there is a body of experience created to support the review of the Act and that civil society participates in this review process. For more information on preparations for the Review please contact Jamaicans for Justice at 1 Grants Pen Road, Kingston 8, Telephone: 755-4524-6.

VAP Workshop:

Student Access to Information Investigative Journalism Award:

Civil Society Consortium Meeting on ATI:

Quote of the month on the Right to Know

"As an administrative tribunal, the Commissioner must be competent and credible. Credible with the parties to a particular dispute. Credible with the governments that he or she oversees. And credible with the courts. The

Commissioner is expected to be an expert and to make decisions that are fair, reasonable and supportable…. It's not easy to create and sustain an effective FOI law. Secrecy is inherently attractive to governments, and being held accountable requires courage. Governments need strong leaders who appreciate and accept FOI law as a key component of our democratic system, not as an annoyance that needs to be damage-controlled."

Excerpt from a speech delivered at the Ontario Bar Association Conference, May 10, 2002, by the Honourable Sidney B. Linden former Information Commissioner for Ontario Canada.

ABOUT THE E-NEWSLETTER

Volume 7 of the Access to Information Newsletter will focus on the development of a Right to Know in the Caribbean. We are looking for persons or groups interested in working on Volume 7. Please tell us if you want the newsletter to focus on a specific theme for the month, or if you wish to submit information or articles. We welcome your input, and any information you care to share with us about your special interests.

If you do not want to receive this e-newsletter please e-mail Carole Excell at cartercenterja@mail.infochan.com or call her at 755-3641. Again, we apologize for any cross postings, and are currently working on a database of e-mails to avoid future duplications.

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