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FREEDOM OF INFORMATION BILL, 2016 ASSESSMENT

Nassau, Bahamas

1. INTRODUCTION

The Freedom of Information Bill, 2016 (the “2016 Bill”) was tabled in Parliament on 14th December 2016. This comes after the draft Freedom of Information Bill, 2015 (the “draft 2015 Bill”) was released to the public for comment and feedback on 18th May 2015. Citizens for a Better Bahamas (CBB) submitted a list of 20 recommendations for the draft 2015 Bill to the Minister responsible for Freedom of Information, Education Minister Jerome Fitzgerald. For ease of reference, kindly see enclosed herewith a copy of our recommendations dated 4th August 2015.

A committee comprising representatives from the Office of the Attorney General, the Ministry of Education, Science and Technology, the College of the Bahamas (LL.B Department), the Archives and the Data Protection Commissioner was established by the Government in June 2015 (the “FOI Committee”) to examine the provisions of the draft 2015 Bill and to determine whether changes would be recommended to Cabinet in accordance with other jurisdictions and international best practices. Notably, no representative from Civil Society Organizations (CSOs) or the media was appointed on the FOI Committee.

In order to gather feedback and recommendations from the public on the draft 2015 Bill, the FOI Committee conducted public consultations and town hall meetings from April 2016 to July 2016 on the islands of New Providence (2), Grand Bahama, Eleuthera, Abaco and Exuma. During this time, a group of over 21 civil society and private industry organizations, representing over 100,000 Bahamians, came together and drafted a consolidated list of 30 recommendations (the “consolidated list”). These recommendations were then submitted to the FOI Committee and ultimately to Cabinet for consideration and approval.

Notwithstanding the fact that Cabinet adopted some of the recommendations submitted in the consolidated list, the primary recommendations were not adopted. Regrettably, **only 7 out of 30 recommendations in the consolidated list were adopted for the 2016 Bill**. Please see enclosed

document for further reference.

Our major concerns remain outstanding, namely, the appointment of the Information Commissioner; the definition of public authority; time limits for exempt records; and time limits for responding to requests for information.

Accordingly, this paper is drafted for the purpose of providing Parliamentarians with a guidance on the international best practices that substantiate the above-mentioned major concerns. Moreover, it is our hope that Parliamentarians will address these international best practices during the upcoming debates on the 2016 Bill.

2. NOTABLE RECOMMENDATIONS INCLUDED IN THE 2016 BILL

The following are recommendations addressed in the consolidated list and approved by Cabinet for the 2016 Bill:

- 1) The provisions of the Act shall be interpreted so as to further the objects set out in the Act (sec. 4(2));
- 2) Introduction of Public Interest considerations (sec. 2);
- 3) Personal data compatible with the objects of the Act - if a person is a public servant and the request is made in respect to Government business, a balance should be struck between privacy and disclosure in the public interest; and
- 4) The Information Commissioner shall provide training to public authorities for implementation and compliance under the Act in accordance with best practices (sec. 35).

3. SUBSTANTIVE DEFICIENCIES THAT REMAIN IN THE 2016 BILL

Notwithstanding the above-mentioned recommendations that were included in the 2016 Bill, there still remains a number of deficiencies that were not addressed, making it short of international best standards. The following are the top four deficiencies in the 2016 Bill, along with the respective recommendations that we submitted:

- 1) Section 30(1): Appointment of the Information Commissioner

Recommendation: The Information Commissioner should be appointed through measures independent of the Government, such as the Judicial Services Committee or a Parliament

Select Committee with representation from the Opposition. Additionally, civil society should be included in the decision-making process either through membership on the Select Committee or the publication of a short-list of candidates and public feedback on the candidates.

2) Section 2: Definition of Public Authority

Recommendation: The definition of “public authority” in section 2 should also include legislative, administrative and non-statutory bodies. The FOI Bill should also cover private organizations that operate with substantial public funds and performing public functions and services.

3) Section 6(3): Exempt records remain exempt for thirty years

Recommendation: Thirty years should be reduced to fifteen years.

4) Section 7(4): Time limit for responding to requests for information - currently up to thirty days with a possible extension of a further thirty days on the basis of “reasonable cause” which is not defined in the Bill. Additionally, a public authority has up to fourteen days to transfer a request.

Recommendation: These time limits for public authorities to respond to requests for information are very excessive. The extension period should be reduced to ten days and “reasonable cause” for such extension should be limited to force majeure events. Furthermore, the transfer period should be no longer than five days

4. INTERNATIONAL BEST PRACTICES

To support our recommendations, the following are examples of specific sections taken from legislations from around the world that are considered as international best standards and would also be applicable with a Westminster system:

4.1 Appointment of the Information Commissioner

<u>COUNTRY</u>	<u>PROVISION</u>
Bangladesh – “Right to Information Act, 2009”	<p>14. Selection Committee.</p> <p>(1) A selection committee shall consist of the following 5 (five) members with a view to providing recommendation for the appointment of the Chief Information</p>

	<p>Commissioner and Information Commissioners, namely :</p> <ul style="list-style-type: none"> (a) a judge of the Appellate Division, nominated by the Chief Justice, who shall also be its Chairman; (b) the Cabinet Secretary of the Government of the People’s Republic of Bangladesh; (c) one member from the ruling party and one from the opposition, nominated by the Speaker while the Parliament is in session; (d) one representative nominated by the Government from among the persons involved in the profession of journalism holding a post equivalent to the editor or a prominent member of the society related to mass communication. <p>15. Appointment, tenure, resignation etc. of the Chief Information Commissioner and other Commissioners.</p> <p>(1) The President shall, on the recommendation of the selection committee, appoint the Chief Information Commissioner and other Information Commissioners.</p>
<p>Cayman Islands –</p> <ul style="list-style-type: none"> i) “Freedom of Information Law (2015 Revision)” ii) “Freedom of Information (Information Commissioner) Regulations, 2008” (see enclosure) 	<p>35. (1) There is hereby established the position of Information Commissioner, the office-bearer of which shall be appointed by the Governor after consultation with Cabinet and after a process conducted in accordance with the following principles-</p> <ul style="list-style-type: none"> (a) participation by the public in the nomination process; (b) transparency and openness; and (c) the publication of a shortlist of candidates, in accordance with such procedures as may be provided for in regulations made by the Cabinet. <p>Information Commissioner Regulations:</p>

	<p>2. (1) The Governor shall appoint a selection panel not exceeding five persons, including at least one member of the official opposition in the Legislative Assembly and a member of the public.</p> <p>6. (1) The selection panel shall review the applications and nominations (made by the public) in accordance with the requirements of section 35 (1) of the Law and the job description, and prepare a shortlist of suitable candidates.</p> <p>(2) Subject to subsection (3), the selection panel shall dispatch written notification to each candidate who has not been shortlisted.</p> <p>(3) After dispatching the written notification referred to in subsection (2), the selection panel shall in the same manner as the job advertisement was placed notify the public of the shortlist of candidates.</p>
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4.2 Definition of Public Authority

<u>COUNTRY</u>	<u>PROVISION</u>
<p>Antigua and Barbuda – “The Freedom of Information Act, 2004”</p>	<p>3. For the purposes of this Act, a public authority means -</p> <p>(a) the Government;</p> <p>(b) a Ministry of the Government and a department, division or unit, by whatever name known, of a Ministry;</p> <p>(c) the Barbuda Council established under section 123 of the Constitution and the Barbuda Local Government Act;</p> <p>(d)) a body-</p> <p>(i) established by or under the Constitution or any other law;</p> <p>(ii) owned, controlled or substantially financed by the Government from public funds;</p> <p>(iii) carrying out a function conferred by law or by executive action, or a public function</p>

	conferred by the Government, only to the extent of that function...
Bangladesh – “Right to Information Act, 2009”	<p>2(b) “Authority” means</p> <p>(i) any organization constituted in accordance with the Constitution of the People’s Republic of Bangladesh;</p> <p>(ii) and ministry, division or office established under the Rules of Business made under article 55(6) of the Constitution of the People’s Republic of Bangladesh;</p> <p>(iii) any statutory body or institution established by or under any Act;</p> <p>(iv) any private organisation or institution run by government financing or with aid in grant from the government fund;</p> <p>(v) any private organisation or institution run by foreign aid in grant;</p> <p>(vi) any organisation or institution that undertakes public functions in accordance with any contract made on behalf of the Government or made with any public organisation or institution; or</p> <p>(vii) any organisation or institution as may be notified in the official Gazette from time to time by the Government;</p>
India – “The Right to Information Act, 2005”	<p>2. Definitions</p> <p>(h) "public authority" means any authority or body or institution of self-government established or constituted—</p> <p>(a) by or under the Constitution;</p> <p>(b) by any other law made by Parliament;</p> <p>(c) by any other law made by State Legislature;</p> <p>(d) by notification issued or order made by the appropriate Government,</p> <p>and includes any—</p> <p>(i) body owned, controlled or substantially financed;</p> <p>(ii) non-Government organisation substantially financed,</p>

	<p>directly or indirectly by funds provided by the appropriate Government</p>
<p>Trinidad and Tobago – “Freedom of Information, 1999”</p>	<p>4. In this Act: “public authority” means— (a) Parliament, a Joint Select Committee of Parliament or a committee of either House of Parliament; (b) subject to section 5(2), the Court of Appeal, the High Court, the Industrial Court, the Tax Appeal Board or a Court of summary jurisdiction; (c) the Cabinet as constituted under the Constitution; (d) a Ministry or a department or division of a Ministry; (i) a company incorporated under the laws of the Republic of Trinidad and Tobago which is owned or controlled by the State; (k) a body corporate or unincorporated entity— (i) in relation to any function which it exercises on behalf of the State; (ii) which is established by virtue of the President’s prerogative, by a Minister of Government in his capacity as such or by another public authority; or (iii) which is supported, directly or indirectly, by Government funds and over which Government is in a position to exercise control;....</p>

4.3 Time limits for Exempt Records

<u>COUNTRY</u>	<u>PROVISION</u>
Canada – “Access to Information Act, 1985”	<p>21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains</p> <p>(a) advice or recommendations developed by or for a government institution or a minister of the Crown,</p> <p>(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,</p> <p>(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or</p> <p>(d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,</p> <p>if the record came into existence less than twenty years prior to the request.</p> <p>(2) Subsection (1) does not apply in respect of a record that contains</p> <p>(a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or</p> <p>(b) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown</p>
Cayman Islands – “Freedom of Information Law (2015 Revision)”	6(2) The exemption of a record or part thereof from disclosure shall not apply after the record

	has been in existence for twenty years unless otherwise stated in this Law.
India – “The Right to Information Act, 2005”	8(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section..
Trinidad and Tobago – “Freedom of Information, 1999”	<i>Exempt documents in respect of Cabinet Documents and Internal Working Documents see: Sections. 24 and 27</i> (2) Subsection (1) shall cease to apply to a document brought into existence on or after the commencement of this Act when a period of ten years has elapsed since the last day of the year in which the document came into existence.

4.4 Time limits for responding to requests for information

<u>COUNTRY</u>	<u>PROVISION</u>
Antigua and Barbuda – “The Freedom of Information Act, 2004”	18. (1) Subject to subsections (2) and (3), an official of a public authority must respond to a request for information as soon as practicable and in any event within twenty working days of receipt of the request if the request has been approved and the applicant has paid the fees required to be paid under section 20. (2) Where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, the official shall provide a response within 48 hours.
Bangladesh – “Right to Information Act, 2009”	9. Procedure for providing information. (1) The designated officer shall, on receipt of a request under sub-section (1) of section 8, provide the information to the applicant within 20 (twenty) working days from the date of receiving the request. (2) Notwithstanding anything contained in sub-

	<p>section (1), if more than one unit or authority are involved with the information sought for, such information may be provided within 30 (thirty) working days.</p> <p>(3) Despite anything contained in sub-section (1) and (2), if the officer in charge, due to any reason, fails to provide the information sought for, he shall inform the applicant the reasons thereof in writing within 10 (ten) working days.</p> <p>(4) Notwithstanding anything contained in sub-section (1) and (2), if a request made under sub-section (1) of section 8 is relating to the life and death, arrest and release from jail of any person, the officer-in-charge shall provide preliminary information thereof within 24 (twenty-four) hours.</p>
Malta – “Freedom of Information Act, 2008”	<p>10. Subject to this Act, the public authority to which a request is made in accordance with article 6 or is transferred in accordance with article 8 shall, as soon as reasonably practicable, and in any case not later than twenty working days after the day on which the request is received by the authority -</p> <p>(a) decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and</p> <p>(b)) inform the applicant accordingly in writing.</p>
United Kingdom – “Freedom of Information Act, 2000”	<p>10.—(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.</p>

5. CONCLUSION

Given that the primary recommendations submitted by civil society and private industry organizations, representing over 100,000 Bahamians, were not adopted and included in the 2016 Bill, it is imperative that Parliamentarians consider these during the upcoming debate. Particular attention should be made on the appointment of the Information Commissioner in the Cayman Islands, as mandated by the Cayman Islands “**Freedom of Information (Information Commissioner) Regulations, 2008**”. These primary recommendations that were submitted are based on international best standards and truly represent the best for all Bahamians.

Furthermore, CSOs must continue to do their part in educating the public on the benefits of a strong Freedom of Information Act in The Bahamas. The continued delay in enacting a strong Freedom of Information Act is a continued delay in granting a fundamental human right to all Bahamians.

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