APPEAL PROCEDURES FOR ACCESS TO INFORMATION CASES:
The International Experience
and General Observations on the Proposed Jamaican Regulations

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I. Introduction

The Jamaican Parliament identified the passage of the Access to Information Act of 2002 as a "fundamental principle underlying the system of constitutional democracy" with the specific objectives of ensuring government accountability, transparency and public participation in the decision-making process.[1] Access to information, once thought of as either a relative to the right to freedom of expression or as a "luxury" is increasingly recognized as a fundamental human right necessary for the enjoyment of other rights, such as the right to a healthy environment, right to education and housing, and other public benefits.

However, the right to information is only as effective as an individual's ability to enforce it. "If there is widespread belief that the right to access information will not be enforced, this so- called right to information becomes meaningless. 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 external review mechanism is critical to the law's overall effectiveness".[2] Although the review mechanism will differ, depending on the context of the country, in general the appeals procedures should be guided by the principles of:

- Accessibility,
- Timeliness,
- Affordability, and
- Independence.

The best enforcement bodies will allow the petitioner to submit his appeal with minimal formality or cost. As the Freedom of Information Act of Western Australia specifies, the "proceedings are to be conducted with as little formality and technicality, and as expeditiously, as a proper consideration of the complaint will allow." [3] These entities should be tasked with determining the appeal quickly and without the need for attorneys, and their decisions should be binding. Moreover, they will function under the doctrine of natural justice: the decision maker shall have no personal interest in the proceedings; they shall be unbiased and act in good faith; and perhaps most importantly "not only should justice be done, but it should be seen to be done; in other words, legal proceedings should be made public."[4]

The recognition of access to information as a human right portends the obvious implication that this appeal body will differ from other narrowly defined administrative bodies charged with simply upholding an administrative procedure. The functions of an access to information appeals body must be developed and applied within the expansive human rights paradigm. This paper seeks to cull some of the best practices of access to information enforcement bodies around the world, particularly related to

[1] The Access to Information Act, 2002, Jamaica, sec. 2.
[2] Neuman, Laura. "Access to Information Laws: Pieces of the Puzzle," in *The Promotion of Democracy Through Access to Information: Bolivia*, (Atlanta, GA: The Carter Center, May 2004).
[3] Freedom of Information Act 1992, Western Australia, Part 4, Division 3, sec. 70.
[4] See encyclopedia.thefreedictionary.com/Natural%20justice

the function and regulations, and then use these to provide brief observations of the proposed regulations for the Jamaica Access to Information Appeals Tribunal.

II. Enforcement Models[5]

Enforcement of Access to Information Laws is a crucial part of ensuring an appropriate balance between the right to know and the public's interest in guarding certain sensitive information. There is no one approach used around the world in the hearing or review of access to information decisions. In some jurisdictions such as the United States and South Africa, aggrieved information requesters must appeal directly to the Federal Court. In other locations, for example Mexico, Australia, and the US State of Connecticut, the law provides for an intermediary body with the power to hear complaints and order the release of information; and in yet other places such as Sweden and Hungary, the authority of the intermediary body is limited to providing recommendations only. There are, however, commonalities in the practice and procedures used to ensure fairness in the enforcement of the right of access to information and appropriate resolution of disputes between the Government and citizens.

The international trend is to establish an intermediary body, like Jamaica's Appeals Tribunal, to review agency decisions with the power to order the public authority to comply with its findings and decisions. This serves as a more accessible and affordable mechanism for enforcement than those modalities where the first opportunity for a hearing is before the Court. Best practices can now be identified in relevant legislation and rules of procedure found governing the work of ombudsman, commissioners, and tribunals charged with the task of reviewing right to information decisions. It is these core functions that should be defined and developed through procedures and regulations.

III. Appeals Procedures and Regulations

Comprehensive and clear procedures for the hearing of matters in relation to the denial of a request for access to information or the failure to properly implement or apply the law are a critical part of guaranteeing a transparent and accessible process in the resolution of disputed "right to know" cases. Procedures help ensure uniformity in processing of appeals and in the decision-making, and allow for greater efficiency on the part of the appeal body. Regulations and procedures should strive to:

- clarify the broader law,
- support the underlying objectives of the law, and
- provide guidance to both the implementers and the users.

In drafting rules and regulations, an emphasis should be placed on ensuring that there is no conflict or restriction on the provisions of the Act to which it is associated or other relevant laws. Often regulations and procedures are arranged in sections such as scope and powers, procedures, miscellaneous etc. The regulations should use clear, unambiguous language and should be written for the layperson to understand. And in applying the rules, "they shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[6]

As discussed above, although there is great variance among jurisdictions, there have emerged some similarities in practice and procedures, such as:

1. the burden of proof for any denial falls on the agency;
2. flexibility in the rules of procedures to allow for greatest accessibility and ease of use;

[5] This section draws from "Effective Enforcement Models under Access to Information Laws," Calland, R. and Neuman L.
[6] United States Federal Rules of Civil Procedure, Scope of Rules, Rule (1).

3. efforts to reduce costs for petitioners, including the possibility of appealing without the need for attorney representation;
4. broad investigative powers;
5. the power to compel the agency to release documents to the tribunal in a timely manner for review; and
6. the power to sanction agency personnel for noncompliance.

After the passage of governing legislation, regulations or subsidiary legislation may have to be enacted to set out the detailed procedural rules to guide the scope and conduct of the review of the Government's decision.[7] In those jurisdictions where the controlling law provides great detail, the regulations may not be as extensive; the opposite is often true for countries with access to information laws with less procedural specificity. Ultimately, the regulations and procedures for any access to information enforcement body must be crafted to best suit the legal and socio-economic, political context of the specific country.

The following is a brief description of some of the core provisions necessary for an effective and accessible appeals process, based on our interpretation of good international practice and on our own experience in a number of jurisdictions, with observations of how the proposed Jamaican regulations might fit in. This is not an exhaustive list, and the necessary detail and specific provisions will depend greatly on the individual jurisdiction and the needs of Jamaica.

A. Scope

Most access to information laws specify the type of complaints that an appeals body may hear, however, this may be further developed through regulation and procedures. The scope of the review determines the extent of the intermediary bodies' jurisdiction over a matter. Adjudicatory bodies are charged with issuing decisions on matters of interpretation of the law, substantive finding of facts and procedural matters. In practice, it is important that the appeals body be empowered to hear **all** complaints related to the access of information including, but not limited to:

1. Denials (full, partial and severability)

The most common complaints are based on a denial of information, whether an express denial or deemed denial (also called mute refusal). The general basis for this type of appeal is the refusal by a Government Authority to grant a request for a document whether wholly or in part.
This includes either (a) failing to give access to a document by the claim of exemptions under the Act or (b) giving access to only some of the documents requested, (c) deleting parts of the document that have been requested as being exempt information within a document (d) determining that on balance release is not in the "public interest" or (e) claim that document does not exist.

Some Access to Information Acts include provisions for deferral of requests for access; whereby access to the document is refused because the document has not been completed within a specific period as required, or where the document is being reviewed internally at the time of the request. For example, in the South African Promotion of Access to Information Act, where a record is to be published within 90 days of the date of the request, access to that record may be deferred for a reasonable period provided that the requester may make representations as to why he or she needs the record before that time and access shall be provided where the requester is likely to suffer

[7] S.79 of the South Africa Promotion of Access to Information Act provides that the Rules Board for Courts of Law is to prepare rules of procedure for the hearing of applications made by persons aggrieved of decisions of relevant Authorities.

substantial prejudice.[8] Thus, although not an express denial, the deferral of a request has the same ultimate outcome and should be open for appeal review.

The best access to information laws afford for redaction of exempt material, and the provision of the rest of the document. This is often called severability or deletion of material. As this is considered an adverse decision, like any other denial it should be open for appeal.

2. Costs for Receiving Documents

The scope of most access to information appellate bodies includes complaints for fees and costs. Costs are a critical issue for requestors, as it can serve as an obstacle to exercising the right to information. In Ireland, where they recently raised the costs for reproduction of documents, the Information Commissioner has stated that the number of requests dropped by 50%. In many jurisdictions the access to information law or accompanying regulations will provide the potential for a waiver or reduction of costs for reproduction of materials. In others, there is a fixed charge for search and/or reproduction. In the United States, where the federal Freedom of Information Act contains both a schedule of fees and a fee waiver provision, both elements are subject to review. And as with the Information and Privacy Commissioner of Ontario, Canada, the New Zealand Official Information Act Ombudsman, who serves as the intermediary decision-making body, is given the power to investigate and review fees and fixed charges to determine if they are reasonable. The international experience is clear that Commission(er) and Appeal Tribunals must be mandated and vested with the authority to review cases related to costs for requesting and receiving documents, in order to assure public authority compliance with the law and it's regulations.

3. Extension of Time Periods

Grounds for appeal have also been based on questioned time extensions. In most modern access to information laws, the agency has the capacity to extend the time period for completing an information request. However, the requestor often has a right to appeal this decision to the appellate body, particularly when there is a complaint of abuse of process. In New Zealand, the Access to Information Ombudsman is empowered to investigate and rule on "extension of time limits for a reply to a request."[9]

4. Practices that undermine the law

In many jurisdictions there is a catch-all provision for the right to appeal an agencies failure to follow procedural requirements of the law. These may include practices that undermine the law, such as inappropriate use of transfers, a request handled in a manner that dissatisfies the applicant, incomplete responses, or failure to perform an adequate search. In addition to the express ability to review a denial, this provision would also capture those cases where the public authority systematically ignores requests, thus undermining the objectives of the law. This has been one of the greatest problems in implementation of the South African Promotion of Access to Information Law, and experience suggests that the adjudicatory body should have the capacity to review a public authority's systematic and persistent failure to respond to request.

In Scotland's Freedom of Information Act, 2002, the Commissioner is authorized to issue a "practice recommendation" if it is determined that "the practice of a Scottish public authority in relation to the exercise of its functions under this Act does not conform with the code of practice." [10] Good practice is defined as including, but not limited to "compliance with the requirements of this Act and the provisions

[8] The Promotion of Access to Information Act, South Africa. Sec. 24.
[9] See, The Official Information Act 1982 and The Ombudsmen Act 1975.
[10] Freedom of Information Act 2002, sec. 44.

of the codes of practice."[11] The Mexican Access to Information regime authorizes the Federal Access to Information Institute, the body charged with adjudicating complaints, to hear cases related to incomplete information and dissatisfaction.[12] The Ontario Information and Privacy Commissioner's office accepts appeals for "adequacy of agency decision."

5. Miscellaneous

a. Form of Information

The Bulgarian Access to Public Information Act 2000 includes provisions that the information shall be provided in the form requested unless this is not technically feasible, or it results in an unjustified increase in cost. The Tribunal has the authority to review any complaints related to the form in which the information was provided.

b. Use of Information

Information belongs to the citizens, and as thus should never be required to provide a reason or explanation of its use. The New Zealand Official Information Act codifies this tenet by empowering the Ombudsman to review any decision of a Department, Minister of the Crown or organization that imposes conditions on the use, communication, or publication of information made available pursuant to a request.[13]

c. Refusal to provide or amend personal records

Access to information laws, such as Ontario Canada and Mexico, provide a right to appeal the agencies refusal to provide or amend personal records. The appellate body is, thus, responsible to determine such complaints.

d. Issuance of a Certificate of Exemption

In the United Kingdom Access to Information Act 2000, the Minister of the Crown may issue a national security certificate of exemption when required for the purpose of safeguarding national security. This certificate serves as "conclusive evidence" of the documents exempt status.[14] Nevertheless, the issuance of a certificate may be appealed to the Access to Information Tribunal on the grounds that "the certificate does not apply to the information in question."[15] In these cases, the Tribunal has the authority to review the information request and the information for which the certificate was issued.

B. Powers

The powers bestowed on intermediary decision-making bodies, such as an Ombudsman, Commission(er) or Appeals Tribunal can vary from recommendation-only to the full powers of a binding adjudicatory body, such as a court of law. In general, the international experience is demonstrating that the power to make binding orders is critical to meeting the objectives of the body and of the right to information. In countries, such as South Africa, where the law does not provide for an intermediary body with order making powers, the Legislature is seriously contemplating an amendment of the law to allow for the creation of this critical body. Order making power allows an independent decision making authority to resolve disputed cases quickly and in a cost effective manner without reference of all matters to the court for final resolution.

[11] Id. at sec. 43.
[12] Ley de Transparencia y Acceso a la Informacion Publica Gubernamental, articulo 50.
[13] see s. 28 of the Official Information Act New Zealand
[14] Freedom of Information Act 2000, United Kingdom, secs. 23 and 24.
[15] Id. At sec. 60.

Additional powers often include: the power to investigate, to mediate, and to recommend or issue sanctions.

1. General Powers

In jurisdictions with order making powers, it is accepted good practice that the body hearing the appeal enjoys the same attributes as the original decision maker and the judiciary. Generally there are three broad actions available to the body:

- uphold the decision under review (affirm)
- reverse the decision and make their own order (vary and set-aside)
- remand to the agency for further action

In all laws where the enforcement body is vested with order-making powers, they may "provide any relief that the Commission, at its own discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act."[16] This includes a finding that the information is not exempt, or that on balance release of the information is in the public's interest. Moreover, the adjudicatory body may dismiss the case for lack of jurisdiction, failure to exhaust administrative procedures or comply with procedural requirements, abandonment, or frivolousness, unreasonable and/or vexatious appeals.

In addition to the power to order the release of some or all of the requested information or dismiss the complaint, the appeals body may issue an order for: (1) the modification of fee schedule, waiver or costs; (2) the agency to issue a decision on the request, such as where a body has not made a decision within the period required by an Act or has failed to make a decision on a matter; (3) any of the parties to do, or to refrain from doing, any act of which is necessary to uphold the law; (4) adjournment or placement of the case on hold; (5) correction of personal information; (6) compliance with legislative and regulatory procedures; (7) compliance with terms and conditions of a decision; (8) payment of court costs and attorneys fees; (9) quashing of a certificate of exemption; or (10) prosecution of any person for offence contained in the freedom of information act.[17]

2. Power to Carry out Inquiries and Investigations

Most access to information laws and regulations provide extensive powers for the decision-maker to carry out formal inquiries and investigations as to how and why a document was created and why access was not provided. As a first step, the adjudicatory body may serve the public authority with a notice (sometimes called an "information notice") requiring it to furnish the Commission or Tribunal with specific data or documents within a specified time period.[18] In Ireland there is a similar power in section 35 of the Act, which gives the Commissioner the power where he is not satisfied with the statement of reasons for a decision to require the head of the Authority concerned to furnish additional justifications within 3 weeks.

In the Ontario Freedom of Information and Privacy Act, the Commissioner in the course of an inquiry is empowered to summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry to the same extent as a superior court of record s.52 (8). This power allows a Commissioner to carry out further investigations into any matter brought to their attention including the right to utilize the results of such an investigation at the hearing after a copy of

[16] The Connecticut Freedom of Information Act, sec. 1-206(2).
[17] See Trinidad the Judicial Review Act which includes these order making powers for any determination before a court on an Freedom of Information matter; Information and Privacy Commissioner, Ontario Canada; Administrative Review Council, Australia; Information Commissioner, United Kingdom; Information Disclosure Tribunal, Thailand.
[18] Freedom of Information Act 200, United Kingdom.

the same shall be furnished to the appellant. These types of rules are generally utilized where there is a more formal hearing as witnesses may include very senior officials in Government including Ministers. Other countries use less formal powers for the conduct of investigation and inquiry to encourage a more informal resolution of appeals including the power to allow for Conferences and Mediation.

3. Power to Mediate

Hearing all appeals cases, whether orally or on the record, is costly, time consuming and depending on the size of the administration, not realistic. It can also be more cumbersome and intimidating for the appellant. For those reasons, in many jurisdictions the Information Commission(er) or Tribunal has, through regulation, been vested with the power to mediate claims, before they move to the hearing stage. "Mediation can succeed in settling some or all of the issues, reducing the number of records in dispute, clarifying the issues and helping the parties to better understand the Acts."[19] However, included in the mandate to mediate is also the implicit understanding that the mediator will not convert to an adjudicator. As discussed below, safeguards must be considered to ensure the integrity of the mediation and adjudication process and avoid any inherent conflict of interests.

C. Procedures

Procedures on the request, investigation and hearing of an appeal may vary depending on the powers of the review body and whether there is first a process for internal review. For example, where there is no internal review procedure, cases are heard for the first time by a commissioner, ombudsman, court or tribunal on the basis of an agency's preliminary determination. There is generally less of an investigation or record and, thus, more responsibility on the adjudicatory body. In processing appeals, the Commission(er) or Tribunal is often vested the ability to "determine the procedure for investigating and dealing with complaints and give any necessary directions as to the conduct of the proceedings."[20] This may include consolidating claims where there are appeals that involve common questions of law or fact, requesting additional documentation, or requiring pre-hearing mediation or compulsory conferences.

Relevant procedures, such as how to file a complaint and an explanation of appeal rights, should be included in all adverse decision notices, and if more than one copy is necessary this should be clearly indicated and not serve as reason for denial of appeal. The overriding principle relating to any access to information appeals procedure must be simplicity, with minimal formality or unnecessary obstacles. For example, in the case of a denial, a well designed system will allow the intermediary body to receive a simply stated request for appeal, get the document in question from the public authority, review the document, accept representations from the parties with the burden of proof on the agency, and decide on whether or not the information should be released. Carefully drafted regulations will allow for an accessible, user-friendly, and efficient discharge of complaints.

1. Requesting Appeal

In filing a complaint, appellants should be obligated to describe basic information but not be required to use prescribed forms that serve to create rigidity in the appeal process.[21] Guidelines for filing appeals often call for the name, address and telephone number of the appellant, the name of the government agency that issued the adverse decision, the date of the action or inaction, and the arguments or

[19] The Appeals Process and Ontario's Information and Privacy Commissioner, September 2000.
[20] Freedom of Information Act 1992, Western Australia, Part 4, Division 3, sec. 70.
[21] Council on Tribunals Guide to Drafting Tribunal Rules, UK, November 2003

grounds for appeal.[22] If example forms or a boilerplate form for requesting appeal are provided, they should include the minimal details needed to properly file a complaint and an explanation of any alternative dispute resolution mechanisms available. There should also be an explanation for completing forms to aid disadvantaged applicants. As the filing of an appeal can be quite cumbersome and confusing, in many jurisdictions the Commission(er) or Appeals Tribunal staff are directed to assist the petitioner.

Time limits for requesting an appeal vary depending upon the jurisdiction but are often 30 to 60 days, with provision for the adjudicator to extend or waive the deadlines for good cause.[23] In some cases, such as in Thailand, where there is an Information Board or Ombudsman that sends the cases to the adjudication body the time limit for filing may be shorter.

In addition to the basic details, some laws have specific provisions that allow the complainant to request an early hearing of the appeal and the reasons for that request, as part of the initial filing of the complaint.[24]

2. Notice of Appeal and Public Authority Response

Upon the filing of an appeal, unless the regulations dictate that completed filing includes service on the agency, the adjudicator should provide notice to the public authority. Notice to the agency may include details pertinent to the complaint, as well as the timeline for response. It will also notify the agency of the day of the hearing, and if any mediation or informal conference shall proceed the hearing.

The public authority against whom the appeal is taken, may be ordered to submit such documents as a list of relevant correspondence including a copy of the public authorities decision and a copy of the request made; the name and address of any witness whom the respondent wishes to have summoned to give evidence at the hearing of the appeal; specific information related to the document(s) in question; and written arguments. Where the case relates to extension of time, transfers, or costs, detailed information and the basis of the decision must be included in the response.[25] Again, the weight of proving the correctness of the decision is on the public authority, so their burden to produce documents and arguments will be greater.

3. Dismissal of Appeal

The Commission(er) or Tribunal may decide "not to deal with the complaint, or to stop dealing with the complaint" for lack of jurisdiction, frivolousness, abandonment or withdrawal.[26] In all cases, procedures must be in place to notify the complainant in writing of the decision and its basis, and any additional right to appeal.

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[22] See, Administrative Appeals Tribunal Act 1975, Australia and Ley Federal de Transparencia y Acceso a la Informacion Publica Gubernamental, Mexico.
[23] See, Information and Privacy Commissioner, Ontario and US
[24] A request for an early hearing could be considered where there is (1) an imminent threat to the life or physical safety of an individual (2) the loss of substantial due process rights (3) failure to reveal a matter of widespread and exceptional media interest (4) failure to be able to disseminate information which is essential for the public to be informed see American Battle Monuments Commission 36 CFR Part 404 Freedom of Information Act Regulations

[25] Administrative Appeals Tribunal Act 1975, Australia specifies the respondents provide a schedule of the documents to which the claims of exemption relate including (a) date of the document; (b) person or persons by whom the document was created and, where applicable, the person or persons to whom it was directed; (c) A sufficient description of the nature of the contents of the document so as to provide a prima facie justification for the ground or grounds of exemption relied upon; (d) Where applicable, a statement as to the ground or grounds of public interest relied upon in support of the claim of exemption; (e)Where the claim of exemption relates only to part of the document, a concise indication of the part or parts involved (e.g., Para 6 or part Para 6).

[26] Freedom of Information Act 1992, Western Australia, sec. 67.

A case may be determined "abandoned" when the decision-maker issues a finding for failure to appear at the hearing or respond to written requests.[27] The Ontario regulations provide that when an appellant has not responded within 21 days to attempts by the Commissioner to contact him or her, the appeal is considered "abandoned." However, safeguards to the dismissal of a case as abandoned may require that prior to disposing of the appeal, the decision makers must be satisfied that appropriate notice was given to the person who failed to appear or respond, and there should be provision for reinstatement of the application and clear directions for seeking reinstatement.[28] Often, regulations also will provide guidance for withdrawing a complaint. In Ireland, for example, it states that a requestor may by notice in writing given to the Commissioner, at any time before an appeal is determined or discontinued, withdraw the application. In this case, the Commissioner must then notify all parties in writing of the withdrawal.[29]

Even more difficult to determine than abandonment, are the cases of frivolousness and vexation. Frivolousness is considered to be those cases that "without **any** reasonable grounds **and** solely for the purpose of harassing the agency from which the appeal has been taken," and these cases are often subject to both dismissal and monetary fines.[30] (emphasis added).

4. Procedure for Investigation

Included in most countries access to information enforcement procedures is the adjudicator's ability to call for and examine any evidence, including exempt documents.[31] The process for requesting the production of documents from public authorities generally includes written notice from the Tribunal, and a timeline for submission of the material.

The fact that the public authority has asserted a claim that the document is exempt should not deter the Tribunal from reviewing it. In order to make a determination of the document, the information contained in the document and the policy for withholding the information must be examined. Therefore, the process must delineate specific safeguards for physical safety of the documents and protection of sensitive and classified information. Often the regulations provide for either one specified person to review classified documents, such as in Belize whereby the Ombudsman in solely vested with the power, and is mandated to "return the document to the person by whom it was produced without permitting any other person to have access to the document or disclosing the contents of the document to any other person."[32] The person designated to review sensitive documents must have a security clearance commensurate with the national security classification of the document.

Moreover, there may also be provided a requirement that "the Commissioner . . . must ensure the return of the document to the agency that produced it when the complaint has been dealt with."[33] In Ontario, the Information and Privacy Commission's (IPC) Practice Directions proclaim that "the IPC's security arrangements satisfy the security standards of the Ontario Provincial Police."[34] In some rules there is also provisions allowing for entry into premises of a public authority to inspect large documents or documents that are in a poor condition that may contain exempt information[35].

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[27] Ontario Freedom of Information and Protection of Privacy Act (s.19).
[28] Administrative Appeals Tribunal Act of 1975, Australia, sec. 34B.

[30] The Freedom of Information Act , Connecticut, sec. 1-206(2).
31 Administrative Appeals Tribunal Act 1975 of Australia Practice Directions
32 Freedom of Information Act 194, Belize, sec. 40.
[33] Freedom of Information Act 1992, Western Australia, sec. 75.
[34] Information and Privacy Commissioner of Ontario, Practice Direction #1, sec. 11, August 2000.
35 s.52 of the Freedom of Information and Protection of Privacy Act Ontario gives the Information Commissioner the power to enter premises and inspect documents on site .

In Australia, the administrative tribunal rules provide that the public authority must prepare the records in a form determined by the Tribunal including requiring the institution to number the records, number the pages of records, provide legible copies, provide highlighted copies, or provide a detailed index indicating the date of creation of each record, a brief description of the record, the extent to which it was disclosed, and what exemption has been claimed[36]. Similarly in Scotland's Freedom of Information Act the Commissioner may require the submission of additional information if he has concerns that an authority is not complying with the Act. The request for such information will be provided to the agency through written notice, and the public authority may appeal the request to the Court of Session, but only on a point of law.[37]

In its role as "investigator", intermediary bodies in jurisdictions like many of the Canadian Provinces have served to assist the complainant in compiling the necessary record for their case. Often petitioners do not have the capacity or jurisdiction to unearth the necessary documents, and must rely on the Commission(er) or Appeals Tribunal staff for assistance.

5. Service of documents

Good practice indicates that procedures should indicate what types of service of notices and pleadings are accepted, such as registered mail, regular mail, hand delivery or via facsimile. Requirements vary from personal service to post with receipt by authorized representative (of either the appellant or the public authority) or to last known address. In most jurisdictions, recorded delivery is used to ensure proof of posting.

6. Hearings

All laws governing enforcement of the right to information include provisions on how the hearing is to be conducted and the process to make decisions. The purpose of any hearing "shall be to provide to all parties an opportunity to present evidence and argument on all issues to be considered."[38] In general, hearings may be held with representations in person or in writing. Although in Ontario Canada the majority of inquiries are conducted in writing with submitted written representations, like most other jurisdictions the appellant may choose the modality. On appeal, it is customary that the Appeals Tribunal may review any of the public authority's findings of fact or determinations of law.[39] The commission or presiding officer may also choose to consolidate proceedings involving "related questions of law or fact or involving the same parties."[40]

a. Oral Hearings

Regulations relating to the conduct of the oral hearing should be promulgated, seeking to ensure that there is minimal formality and to avoid the need for attorney representation. The complaint should be afforded to opportunity to present argument and respond to the public authority's rationale, again with the burden of proof on the public authority. "To avoid unnecessary cumulative evidence, the commission or presiding officer may limit the number of witnesses or the time for testimony upon a particular issue in the course of the hearing." [41] Regulations may also provide an opportunity for additional written submissions following the hearing, when necessary for due process.

[36] Administrative Appeals Tribunal Act 1975 of Australia

[37] s.50 of the Freedom of Information Scotland Act 2002

[38] Regulations of the Connecticut Freedom of Information Commission, sec. 1-21j-35.

[39] Freedom of Information Act 2000, United Kingdom, secs. 58 and 59.

[40] Regulations of the Connecticut Freedom of Information Commission, sec. 1-21j-18.

[41] Id. at sec. 1-21j-35.

If the appellant chooses to proceed with an oral hearing (rather than on the record), the regulations could provide for either public hearings or in camera. In Connecticut, the hearings of the Freedom of Information Commission are open to the public, except when in camera inspection of documents or testimony is necessary to preserve confidences. In these cases, it is considered that public hearings can contribute to confidence in the tribunal's independence and fairness. Regulations may provide that these proceedings are tape recorded, with some time "off the record" for stipulations and negotiations.

In other jurisdictions, such as British Columbia, the oral hearings may be conducted in private. In Ontario, the law provides that no one is "entitled" to be present during the presentations. The Australian Administrative Tribunal Act provides that all hearings are to be held in public, except under specific circumstances, such as confidential nature of matter or evidence. In these cases, the amount of material taken in private is to be limited and the Tribunal has the discretion to direct which part of the hearing will take place in camera, who may be present, and how the evidence or disclosures will remain confidential.[42]

In either case, the common practice is to publish the findings and final decision. Personal information provided to the Tribunal as part of the proceedings, however, should remain confidential and not be disclosed without that individual's consent. In Canada, the regulations provide that if the public authority on the recommendation of the Commissioner intends to release any third party information he must give that third party a reasonable opportunity to make representations as well.[43]

b. Legal Representation at the Appeal Hearing

Many countries have access to information laws or procedural rules which explicitly provide the right for the appellants to have legal representation or other representation at the hearing. This right also extends to the public authority, witnesses or any third party attending the appeal[44]. Some rules have provided that the person(s) hearing the matter should be made aware of the name and address of the representative of the appellant before the commencement of the hearing. In Australia's Administrative Appeal Act the rules specifically state that the Attorney General is given the jurisdiction for himself or his representative to appear before the Tribunal whenever he considers it expedient in the public interest so to do.[45] Such cases may include appeals of Ministerial certificates of exemption, national security, defence or international relations documents, or the disclosure of deliberations or decisions of the Commonwealth Cabinet or of a committee of the Cabinet.

c. Evidence

In some access to information procedures or regulations there is provided a specific statement that the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as possible and that ordinary rules of evidence are relaxed or do not apply. This may depend, however, at the stage of the inquiry and/or the powers of the body receiving the complaint. In jurisdictions where the Information Commission(er) conducts an inquiry before the case is heard by a Tribunal, the rules of evidence tend to be less rigidly adhered to. Thus, where there is no independent investigation or inquiry before the case reaches the Tribunal, the same theory of flexibility may apply. Moreover, in jurisdictions such as Canada where the Federal law vests the Information Commissioner with recommendation powers only, the Commissioner may accept evidence and other information, whether

[42] Administrative Appeals Tribunal Act 1975, Australia (s.35)
[43] Report of the Access to Information Task Force of Canada "Access to Information: Making it Work for Canadians" and s.27,28 & 29 of the *Access to Information Act*.1980-81-82-83, c. 111, Sch. I "1".
[44] Administrative Appeals Tribunal Act 1975, Australia,(s.32)
[45] Administrative Appeals Tribunal Act 1975, Australia (s.36)

on oath or by affidavit or otherwise whether or not the evidence or information is or would be admissible in a court of law.

d. Calling witnesses

An intermediary body with order powers may serve as the arbiter, inquisitor or both. Thus, regulations should include powers that enable the conduct of this function, including the power to call witnesses and require the production of documents.[46]The Commission(er), Tribunal or presiding officer should also be authorized to subpoena witnesses and administer oaths.[47] In the Australian Administrative Appeal Act powers have also been given to the Tribunal to call their own witnesses, and the Public Authority and the Appellant given an opportunity to cross-examine. This is an important provision for situations in which the adjudicator consolidated cases of similar facts or issues of law. Other jurisdictions include provisions to allow the submission of sworn statements or affidavits to be submitted where witnesses are unable able to attend, with the proviso for a modified cross-examination.

e. Third Party

The modern practice in Access to Information laws is to ensure that the there is a potential for third parties to attend and make representations before a decision making body on right to know cases, particularly when information related to their person or business is at issue. The Australian Act makes provisions for the Tribunal to hear applications by third parties, this may include third parties with a business interest in a document or government agencies with a legitimate interest in a document, or individuals where there is a request that may reveal personal information.[48]

"If the Commissioner is satisfied that another person or body might be affected by a decision made on the complaint the Commissioner may obtain information or receive submissions from that person or body."[49] This provision opens the possibility for Amicus Curie briefs, brief's provided by third parties who have an interest in the matter or who believe that the matter is of supreme public interest and have an important point of view relevant to the issue before a Court or Tribunal. Amicus Curie briefs usually are admitted on condition that the party has standing (some recognizable interest in the matter) and their involvement and expertise may help in the determination of the issue. A specific provision allowing the submission of such brief in access to information cases is an accepted procedural rule both in South Africa before the Court and in Australia before the Administrative Appeal Tribunal. The Connecticut Freedom of Information Act Regulations specifically provide for "intervenor" status upon written petition and when in the interest of justice.

7. Time Periods

In addition to time periods for submitting appeals, regulations in some jurisdictions include time limits for submission of required documentation and even for determination of appeals. For example, the procedures for complaint in British Columbia allow for an inquiry into matters of fact which must be completed within 90 days of the request.[50] A rule prescribing extension of necessary time limits is also important to allow for fair conduct of any hearing. In the Australian Administrative Appeals Act rules make provision for the Tribunal if it thinks fit, extend the time appointed by these rules for doing any act notwithstanding that the time appointed has already expired. On the flip side the rules also state that the Tribunal may in special circumstances reduce the time appointed by the Rules for doing any act,

[46] Council on Tribunals Guide to Drafting Tribunal Rules**,** November 2003
[47] Regulations of the Connecticut Freedom of Information Commission, sec. 1-21j-36.
[48] Administrative Appeals Tribunal Act 1975, Australia , sec..30
[49] Freedom of Information Act, Western Australia, sec. 69.
[50] Freedom of Information and Privacy Act, British Columbia, sec. 56(6).

once there is an agreement of the parties. This allows the Tribunal to determine that if an appellant would or might suffer hardship by compliance with the longer periods set forth in the Act; they may reduce the period for document filing.

8. Decisions and Sanctions

Regulations of Freedom of Information laws often provide the form of a decision including requirements for a decision to be made by a specific number of members, recorded in writing and signed by the Chairman and communicated to both the Appellant and the Respondent within a specific amount of time.[51] In some jurisdictions, such as Connecticut, the decision initially may be made orally, but it is then written and published. The international trend is that all intermediary body decisions should be published.

Often in the conduct of a hearing a decision will be made that contain terms and conditions, including requiring the production a document within a specific time. Some Acts include criminal sanctions for the failure of the public authority to comply with the directions of the tribunal, while others include specific provisions for the Tribunal to find for the petitioner in whole or part or bar a respondent from contesting an appeal. The Thailand Official Information Act, 1997 provides that where there is a failure to comply with a decision of the Official Information Board in relation to the issue of a summons or to produce information this can result in a criminal charge with possibility of imprisonment for up to three months and/or a fine.[52] In British Columbia, the agency has 30 days to comply with the Commissioners order, unless an appeal for judicial review was filed. Similarly in the Irish Freedom of Information Act there are sanctions included in the Act for failure of an Authority to respond to the Commissioner's notice.[53] In this case, the Commissioner may refer the authority to the Court of Session, which can take action against the authority for contempt of court. Under Section 15 of the Contempt of Court Act 1981, the maximum penalty for contempt of court is two years imprisonment or an unlimited fine or both.

D. Miscellaneous

a. Mediation or Conferences

It is important in modern enforcement rules to provide an option for the alternative resolution of disputes. Without a speedier and less cumbersome method for resolving complaints, the adjudicatory body would quickly become overwhelmed and the process inordinately costly. For that reason, regulations governing bodies with order making powers tend to include provisions for meditation or preliminary informally conferences to attempt conciliation and/or reduce the outstanding issues for Tribunal determination. Tribunal Rules in Canada and Australia make specific provision for mediation of a decision on Access to Information cases, if the parties agree.[54] Mediation can 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 (also called conciliation) efforts may be undertaken at any stage of the hearing process, and the Commissioner may give directions to facilitate resolution. If the matter is not resolved at mediation, it should proceed to a

[51] Federal Transparency and Access to Information Law of Mexico Article 55-60 includes specific requirements as to the method of decision making and communication to the appellant. The Jamaica Access to Information Act Schedule one allows one Tribunal member sitting alone to make a decision where the parties to the appeal consent.

[52] s.40 Thailand Official Information Act

[53] The Act provides in s.37 for A person who fails or refuses to comply with a requirement under this section or who hinders or obstructs the Commissioner in the performance of his or her functions to be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 6 months or both.

[54] See, Freedom of Information and Privacy Act, Ontario Canada, Freedom of Information Act 1992, Western Australia.

hearing. However, if successful, the agreement should be reduced into writing and signed by both parties before any matter can be withdrawn from a hearing. Regulations should make clear that the mediated decision is binding.

b. Costs

Costs are inherent in any appeal process including the cost of representation, the costs of preparing documents, costs for the hearing of the matter, etc.[55] Costs can act as a deterrent to appellants. Thus, the well accepted international norm is that there should be no cost for Tribunal hearings and the issuing of cost awards "should normally only be . . .where a party has acted vexatiously or unreasonably or in favour of an appellant where there is a successful appeal against an administrative decision affecting the appellant's livelihood".[56]

If awarding of costs as damages is included there also must be consideration of the manner in which the costs will be assessed, and whether there will be limitations as to the amount of costs awarded. In Access to Information laws that provide a court as the final arbitrator of a "right to know" appeal costs usually are provided to the appellant when the public authority's decision was unreasonable. In countries that have provisions allowing review either by a Commissioner or a quasi-judicial administrative body there has been a general view taken that the appellant shall bear his own cost and expenses of his appeal and that no costs are awarded against the losing party. This reduces the potential costs associated with the decision-making process and allows for a less formalized process for the hearing of an appeal.

c. Annual Reports

The issuing of an annual report that details the number of appeals filed, the number of appeals heard, the type of case, and the final disposition is another mechanism for promoting transparency and has proven critical in establishing confidence in the Commission(er) and Tribunals. In some places, such as the United Kingdom and Australia, these reports are issued annually and laid before the House of Parliament. In Canada the report is submitted to the Speaker of the Assembly, and in Connecticut all decision, opinions and related matter are printed and made available to the public at a reasonable cost.

d. Right to Further Appeal

As with most enforcement matters, the right to further appeal, beyond the Commission(er) or Tribunal decision, varies depending on the jurisdiction and the scope and powers of the adjudicating body. In the United States, both the appellant and the agency have the right to further appeal. In Thailand, the decision of the Information Disclosure Board is binding on the public authority, thus removing the possibility for further appeal. However, if there is an adverse decision against the citizen, he or she may appeal to the judicial court system. Mexico has a similar provision.

IV. Jamaica Proposed Regulations: General Observations

The objective of any intermediary body is to serve as a more accessible, affordable, user-friendly, and timely mechanism for resolving complaints. With these principles in mind, the regulations governing the Appeals Tribunal should be crafted to ensure the most minimal formality or obstacles that could serve

[55] Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review, Michael Adler and Jackie Gulland University of Edinburgh November 2003 Commissioned by the (former) Lord Chancellor's Department and published by the Council on Tribunals
[56] Council on Tribunals Guide to Drafting Tribunal Rules, November 2003

to deter persons from filing an appeal. This, of course, must be balanced with the need to create a sufficient record for full review by the Appeal Tribunal members, and potentially the judiciary.

The Jamaican Access to Information Act (2000) does not provide great detail as to scope, powers or procedures for the Appeals Tribunal. It does, however, mandate the Tribunal to issue regulations to elucidate these issues. Thus, it would be expected that the Appeals Tribunal Regulations would be quite extensive and detailed. In light of the above international experiences, we respectfully provide the following general observations to Second Draft of the Access to Information Appeal Tribunal Rules, 2004:

1. Scope and Powers: The Jamaican Access to Information Act, 2002 in sec. 32 sets out the cases in which a person may lodge an appeal. This section is quite comprehensive, and appears to provide that the Appeals Tribunal enjoys jurisdiction over any adverse decision. However, to clarify the cases that the Appeals Tribunal may hear, including the catch-all clause of a complaint against "any practice that undermines the law", the Regulations may be drafted to delineate the scope of its mandate. This would serve to avoid confusion for both the public authority and the petitioners, and help avoid inappropriate case filings.

As with the scope of jurisdiction, the full range of powers of the Appeal Tribunal should be contained within the regulations. Although the Act states that the Appeal Tribunal may make any decision that could have been made on original application except for nullifying a certificate of exemption, and allows for investigations, it does not expand on all of the Tribunals potential capacities such as calling for mediation. Nor does it define the actions that the Appeals Tribunal may take. All of these, as discussed above, should be captured within the Appeal Tribunal regulations.

2. Simplified Procedural Requirements: International experience has indicated that the procedures regulating the appeals tribunal should be as flexible and relaxed as possible. The function of this body is as an intermediary decision-maker, rather than a court. It serves to provide a more accessible venue, but only if the procedures are drafted in a user-friendly manner.

For example, in the second draft regulations, sections 3 and 4 address the issue of filing of a complaint and providing notice. The regulations call for the lodging of a notice of appeal and include such particulars as a list of the relevant documents, persons who may present evidence, and legal representatives. These sections may be simplified by stating that the petitioner should file a complaint with the Appeal Tribunal Secretariat, who will then send the appropriate notice to the public authority. Moreover, the information required in the petition for review should be only that which is nominally needed to identify the petitioner and state a claim (grounds for appeal). The petitioner may not, at this stage, know the relevant documents or whether there will be a need for witnesses etc. This would more likely arise following the response or an investigation conduct on the behest of the Appeal Tribunal. Moreover, the draft regulations in Section 9 appear to proscribe the use of specific forms. Rather then seeking particular forms, the regulations may benefit from focusing on the information needed regardless of the manner in which presented.

For ease of communication, the notice may also seek not only the petitioners address, but also request a telephone number or other means of reaching the petitioner.

3. Burden of Proof on Public Authority: The Act provides that the "onus of proving the relevant decision was justified or that a decision adverse to the appellant should be made by the Appeals Tribunal, shall lie on the public authority which made the relevant decision."[57] As such the

[57] Jamaica Access to Information Act,2002, sec. 32(5).

regulations should be crafted to ensure that at all stages of the filing of a complaint, the investigation, and the disposition of the appeal that the burden of proof remains on the public authority.

Section 8, as presently written, appears to shift the burden of proof to the appellant to show a *prima facie* case or risk having the appeal dismissed. This provision may be contrary to both international best practice as well as the Jamaican Act. Section 14 may also be amended to more clearly identify that the onus during the hearing is on the public authority.

Moreover, requesting further information or documents from the appellant to substantiate his or her claim may not be fruitful, as it is often the public authority that holds such documents (see Section 8 of draft regulations). Without investigative support from the Tribunal, or its Secretariat, it is unlikely that the appellant will be in possession of or able to compel the release of such documentation. If, however, the appellant is able to make a *prima facie* case against the public authority's decision, the Appeal Tribunal should be empowered to order the public authority to release the information or compliance with any other order, without a need for hearing (see Section 6 of draft regulations).

4. Clear and Established Timelines: The inclusion of clear timelines facilitates the understanding and efficiency of the process for all parties (petitioner, respondent, Secretariat and Appeals Tribunal). For instance, the regulations might state how long the public authority has to respond to the Appeal Tribunal's request for documents, and how many days to implement the findings of the adjudicatory body. There also could be further guidance as to how often the Appeal Tribunal shall meet, how long before a claim must be heard and/or decided, and whether the applicant may request a reduction in time for investigation and move to a "speedy hearing" as discussed above.

5. Investigations: In the experience of other like bodies, the capacity to conduct a thorough investigation and to compel the public authority to respond to investigation requests is critical to the Tribunal's ultimate effectiveness. The regulations may provide a clear statement of the tribunal's legal authority to request and inspect any document, or issue subpoena to any potentially relevant witness. As well as that one of the roles of the Secretariat is to assist appellants in the investigation of their complaint. Details related to the manner in which an investigation will be conducted will help guide the Tribunal members, its Secretariat, appellants and respondents.

However, there must be appropriate safeguards in place for physical security of the documents and to protect the confidentiality of potentially exempt documents, or information relating to third parties. Regulations or practice rules may provide for one, some or all of the Appeal Tribunal members to have the appropriate security clearance, and to view these documents *in camera*. Sections 9 and 10 may serve to frustrate the Act, as it may allow claimants to view potentially exempt documents.

6. Hearings: The regulations, as presently drafted, appear to provide processes mainly for oral hearings. The Tribunal may consider, as a time and cost saving mechanism, allowing the petitioner to choose either an oral hearing or a ruling based solely on written representations. Section 15 of the draft regulations alludes to the possibility to "proceed and act upon evidence given by the Notice of Appeal." Expanding this to allow for additional submissions of argument and evidence, and then a review based solely on these documents could provide an alternative to the more cumbersome oral hearing.

As with Jamaica, many countries allow alternative representation for claimants. Often these are lawyers, but in some cases they may be non-lawyers more capable of making representations than the claimant. Section 13 of the draft regulations accounts for this by allowing appearance through legal representation, but to avoid the implication that this means only lawyers this provision could be clearer by stating "any personal representative."

Section 4 and 14(e) are welcome additions to the regulations. These provisions allow for third party "intervenors" on either the request of parties or the Tribunal. As with other jurisdictions, this could be expanded to allow for third party involvement when a petition is filed indicating a recognizable interest, and granted by the Tribunal. These interventions, whether orally or through *Amicus* briefs, can serve to assist the Tribunal with cases of important public interest or particularly difficult matters of fact or law.

7. Alternative Dispute Resolution (ADR): As a means of reducing the burden on both the Tribunal and the appellant, the regulations may serve to incorporate alternative dispute resolution mechanisms such as mediation, pre-hearing conferences or reconciliation into the appeals process. In so doing, the regulations may need to identify the mechanisms for ADR and who will be vested with the authority to conduct the mediation or pre-trial conferences. To avoid a conflict of interest, the regulations could call for an independent outside mediator, or identify one member of the Tribunal as playing this role. The process should allow for complaints to be resolved, when possible, without need for a full hearing but should not serve as an obstacle or means of slowing down the adjudication of a claim. For that reason, ADR mechanisms may be voluntary (up to the petitioner) or include set timelines for completion.

8. Capacity to Dismiss Cases: Clear guidelines should be established to direct the process for dismissing a case. As stated above, failure for the appellant to present a *prima facie* case should not be sufficient cause for dismissal of a matter where the burden of proof is on the public authority. However a case may be dismissed on the grounds of it being, frivolous, vexatious or abandoned. Providing definitions and a process for dismissing such claims will help reduce the Tribunal docket and ensure that vexatious cases are not awarded with the time and energy of the relevant parties. Sections 11 and 12 address the situation in which one (or both) of the parties do not attend the hearing. Provision for rehearing the case in certain circumstance is welcome, but may benefit from additional details as to under what situations this may be applied.

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9. Decision and Sanctions: The Appeals Tribunal may benefit from further guidance, whether through regulations or practice directives, as to the content and form of decisions. In addition, the regulations may need to include a provision as to what recourse is available upon receipt of an adverse decision. Moreover, specific provisions as to the Tribunal, or its Secretariat's, capacity to compel documents from the public authority, and specified sanctions for failure to comply with all orders will underpin the body's authority.

10. Costs for Appeal: The draft regulations, in sections 12 and 23 allude to the issue of costs for appeal. As discussed above, the international trend is to not apply costs, or the awarding of costs, for complaints heard before an intermediary body. The application of costs, may serve to undermine the objectives of accessibility and affordability of the Tribunal, and create an inappropriate deterrent to appeals.

In general, the regulations as presently drafted provide a framework for processing complaints. They include important provisions on how the Secretariat will handle the administration of appeals and procedures for the Tribunal in making its decision. However, as illustrated above, these regulations, and those who will be implementing and using them, may benefit from less formality and more specificity as to the scope and powers of the Tribunal, the procedures for requesting a hearing, investigation the claims and resolution of the complaint, and timelines to ensure an equitable and flexible process.