November 30, 2009

The Cabinet Secretary
Ref: PATI
The Cabinet Office
105 Front Street
Hamilton HM 12

Dear Sir,

Re: Public Access to Information (PATI) Draft Bill Consultation
United Bermuda Party Submission

On behalf of the United Bermuda Party, I am pleased to submit our initial recommendations and analysis on the draft Bill entitled "Public Access to Information Act 2009." We appreciate this opportunity for public consultation in advance of the formal introduction of the final Bill to Parliament. As further revisions of the Bill occur in response to the anticipated public feedback, we may offer additional comment and recommendations.

Our concerns and consequent recommendations on the draft PATI Bill focus on four main areas:

1. **Lack of Retroactivity**
2. **Precedence over existing legislation**
3. **Public interest override – the Harm Test**
4. **Whistleblower protection for civil servants**

In addition, to these four areas, we have included comments on a number of other specific issues in the draft Bill for consideration and we provide recommendations on these later in our submission.

1. Lack of Retroactivity

Section 13 states that access shall be limited to records created after the Act comes into force. We believe that there should be no such limitation. We note that this is a serious limitation and not in keeping with best international practice as set out in most other freedom of information laws. Furthermore, it undermines the stated purpose of the Bill in Section 2 (a) -

> "The purpose of this Act is to – give the public the right to obtain access to information held by public authorities ***to the greatest extent possible***…"

We recommend the approach taken in **The Freedom of Information Law, 2007** of the Cayman Islands ("the Cayman Act") in which it is stated that the Act applies to "records, regardless of the date when they were created" (s.3(1)(b)).

2. Precedence over Existing Legislation

Section 38 states that any record is exempt from disclosure if its disclosure is prohibited by any other statutory provision. We do not believe that pre-existing secrecy laws should prevail in this all-encompassing way over the public's right to information. As noted by others[1], earlier secrecy laws were not adopted with modern concepts of openness in mind, and their approach is at odds with the basic purpose of PATI legislation.

We recommend that PATI should take precedence over the **Official Secrets Act** and non-disclosure clauses found in other legislation. Requests for any such information should be subject to the harm and public interest tests under PATI.

3. Public Interest Override and the Harm Test

We have stated above that we believe the right to information should override secrecy provisions in any other Bermuda legislation.

We also believe that the public interest override, in combination with the harm test, should apply to all exceptions including Cabinet documents, matters within the Governor's responsibilities and personal information.

In this regard, **we would recommend** that the exception in favour of Cabinet deliberations be narrowed to apply only to records or information that would undermine legitimate interest, such as the free and frank exchange of advice among Cabinet members as well as with public officers in the course of their duties.

We do not understand why, nor do we accept the provision that draft legislation should be expressly excluded from disclosure. Similarly, **we would recommend** that the exception in favour of the Governor's responsibilities be narrowed to set out the harm PATI seeks to protect rather than expressly excluding wholesale categories of information.

[1] Article 19; http://www.article19.org/pdfs/analysis/bermuda-submission-on-public-access-to-information-bill.pdf

In addition, **we recommend** the adoption of a principle contained in the Cayman Act, which requires that decisions should favour disclosure, when other factors are equal:

"Where the factors in favour of disclosure and those favouring non-disclosure are equal, the doubt shall be resolved in favour of disclosure but subject to the public interest test prescribed under section 26" [s.6(5)] (See too, 5(ii) below)

4. Lack of Whistleblower Protection for Civil Servants

We note the statutory protection provided the Information Commissioner and staff under **Section 52** as well as the sanction through criminal prosecution provided by **Section 62**. This is reasonable, right and proper. However, we also note the lack of protection for good faith disclosure by civil servants pursuant to law, more commonly known as 'whistleblower protection.'

We strongly believe that civil servants who act in good faith to disclose information under PATI should be protected against sanctions. Toward this end, **we recommend** the adoption of the following provision taken from the Cayman Act:

> *"50. (1) No person may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment-related obligation, for releasing information on wrong-doing, or that which would disclose a serious threat to heath, safety or the environment, as long as he acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrong-doing or a serious threat to heath, safety or the environment.*
>
> *(2) For the purposes of subsection (1), 'wrong-doing' includes but it is not limited to:-*
>
> *(a) the commission of a criminal offence;*
> *(b) failure to comply with a legal obligation;*
> *(c) miscarriage of justice; or*
> *(d) corruption, dishonesty, or serious maladministration."*

5. Other Specific Issues

We have the following further specific comments on various provisions in the draft PATI Bill:

(i) **Purpose of PATI Legislation: Section 2** purports to set out the purpose of PATI. The draft Bill lists four sub-paragraphs (a) (b)

(d) and (h). It therefore appears that something is missing. In any event we prefer and recommend the wording of the statement of purpose as set out in the Cayman Act:

> *"4. The objects of this Law are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely-*
>
> *(a) governmental accountability;*
>
> *(b) transparency; and"*
>
> *(c) public participation in national decision-making,*
>
> *by granting to the public a general right of access to records held by public authorities, subject to exemptions which balance the right against the public interest in exempting from disclosure governmental, commercial or personal information."*

(ii) **Lack of a Definition of Public Interest:** We note that the "public interest" is not defined in PATI. We believe that public interest should be defined as broadly as possible, but nonetheless in a way that makes a clear statement and gives direction. **We recommend** something along the lines of the following definition from the Cayman Island, **Freedom of Information (General) Regulations 2008:**

> *"public interest" means but is not limited to things that may or tend to-*
>
> *(a) promote greater public understanding of the process or decisions of public authorities;*
>
> *(b) provide reasons for decisions taken by Government;*
>
> *(c) promote the accountability of and within Government;*
>
> *(d) promote accountability for public expenditure or the more effective use of public funds;*
>
> *(e) facilitate public participation in decision making by the Government;*
>
> *(f) improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;*
>
> *(g) deter or reveal wrongdoing or maladministration;*
>
> *(h) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or*

(i) reveal untrue, incomplete or misleading information or acts of a public authority."

(iii) **All publicly funded bodies**: We do not agree with the exceptions in **Section 4**. We believe the definition of a public authority should include the courts and all bodies, which are substantially publicly funded. As noted earlier, all requests should be subject to the public interest and harm tests as well as provisions for confidentiality.

(iv) **Inspection**: We concur with those[2] who have recommended that access in **Section 18** be amended to include the option of 'inspection' of records and documents.

(v) **Fees:** We note that pursuant to **Section 21** fees are to be determined by the public authorities in accordance with regulations made under **Section 58**. We believe it would be more helpful to establish in the main legislation guidelines for a fee structure to ensure consistency in fees and that costs will not be burdensome. If Government nonetheless elects to provide for this by way of regulations we have included further comment below on their method of adoption.

(vi) **Lack of a Sunset clause**: We note the absence of a sunset clause in the PATI Bill. We believe that most jurisdictions feature a requirement that all documents, including exempted documents, can be made public after a certain period of time. We therefore recommend that a provision on "historical disclosure" be included in the PATI Bill, and clearly state that records will be accessible after a certain period of time has elapsed. We believe that twenty years is a reasonable period – which is also the case in The Cayman Act.

(vii) **Information Commissioner:** We have already gone on record as endorsing the independence provided this important office under **Part 7 of PATI**. We believe however, that this office could be further strengthened and enhanced by adopting principles similar to those which appear in the Cayman Act:

"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-

[2] Article 19; http://www.article19.org/pdfs/analysis/bermuda-submission-on-public-access-to-information-bill.pdf

(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 Governor in Cabinet

(2) No-one may be appointed Commissioner if he-
(a) holds office in, or is an employee of a political party, or holds an elected or appointed position in central or local government, elective or otherwise; or
(b) has been convicted of a violent crime or a crime of dishonesty or theft, for which he has not been pardoned."

As the purpose under PATI is to establish an Information Commissioner independent of Ministerial influence or interference of any sort, which we support wholeheartedly, we further believe that this independence could further be enhanced both in appearance and in fact by having the post-holder report directly to the Legislature as is the case under the Cayman Act. **We recommend** the following provision of the Cayman Act:

"36 (1) The Commissioner shall have all powers, direct and incidental, as are necessary to undertake his functions as provided for under this Law.

(2) In the exercise of his powers, the Commissioner shall be responsible to the Legislative Assembly"

(viii) **Regulations:** The Minister responsible is given the power to make regulations under **Section 58** that cover a broad range of matters, which are also critical to the operation of the Act and its application. We do not believe that this power should be subject to negative resolution procedure – as is currently the case in Section 58(2) – but rather believe strongly it should be subject to debate and scrutiny in the Legislature by way of the affirmative resolution procedure. The affirmative resolution procedure would also be consistent with, and underscore the commitment to the openness and transparency which PATI is attempting to bring about.

(ix) **Implementation:** The Companion Guide to the draft Bill suggests that the PATI legislation will require 2-3 years for implementation following its commencement. We believe that this is too long a delay and would suggest an implementation timetable of 1-2 years at most. In this regard, we prefer that **Section 63** provide for a date certain for commencement.

(x) **Judicial Review**: We did not see a provision in PATI which expressly provides for judicial review. We believe that there ought to be and **we recommend** something along the lines of that found in the Cayman Act:-

> *"47(1) The complainant, or the relevant public or private body, may, within 45 days, appeal to the Grand Court by way of judicial review of a decision of the Commissioner pursuant to section 43 or 44, or an order pursuant to section 45(1)."*

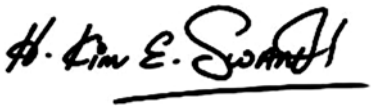
(xi) **Clear Policy**: We also rather liked the following provision found in the Cayman Act which sets out clearly the approach public bodies should take with respect to the disclosure of information generally and on an on-going basis, and **we recommend** the inclusion of a similar provision in PATI:-

> *"27. Public authorities shall make their best efforts to ensure that decisions and the reasons for those decisions are made public unless the information that would be disclosed thereby is exempt under this Law."*

In closing, we wish to note that we reviewed the PATI Bill analysis undertaken by Article 19 (Toby Mendel) whose submission you have already received and which is posted on their website (http://www.article19.org/pdfs/analysis/bermuda-submission-on-public-access-to-information-bill.pdf). Subject to our comments above, we endorse the analysis and commend to the Government its recommendations. Article 19 are leading practitioners in the area of freedom of information laws throughout the world. Bermuda has fallen behind in many matters of governance and the implementation of effective PATI legislation would demonstrate our commitment to international best practice.

We trust that you will give our recommendations your favourable consideration and would be pleased to provide any further clarification or information you may require.

Respectfully submitted,



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Opposition Leader and Leader of the United Bermuda Party