International Day for Universal Access to Information: A Caribbean Perspective

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Media Institute of the Caribbean (MIC) and the United Nations Educational Scientific and Cultural Organization (UNESCO)

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Keynote Address

By

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court of Justice,

on the occasion of

The International Day for Universal Access to Information: A Caribbean Perspective.

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I was very pleased to have been invited by the Media Institute of the Caribbean (MIC) and the United Nations Educational Scientific and Cultural Organization (UNESCO) to speak about the right of universal access to information because I believe that this right reflects and expresses a basic principle of our jurisprudence: the principle of personal autonomy. The notion of personal autonomy goes back to ancient times, but modern western philosophy is usually associated with Immanuel Kant and his 'categorical imperatives'. The Kantian imperative to "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end" was aimed at emphasizing the inherent worth and dignity of the individual. That philosophy was the driving force behind the American, French and Haitian revolutions of the 18th Century and came to be reflected in the rallying cry 'give me liberty or give me death' and in the famous assertion of the right of the individual to 'life, liberty and the pursuit of happiness'.

In the 20th Century, the drive towards individual autonomy came to be reflected in the 1948 United Nations Declaration on Human Rights and in the human rights treaties and institutions which followed in its wake. The Bill of rights in our Caribbean Constitutions are also intended to recognize and support human autonomy and agency. Indeed, there is a direct constitutional link

between the agency of the individual and the right to information. The right to freedom of expression expressly includes the stipulation that the person "shall not be hindered in the enjoyment of his or her freedom of expression, including the freedom to hold opinions without interference, freedom to receive ideas and information without interference…"

I believe that this principle of autonomy and agency is also manifested in the increased access to private information. As is well known, informed consent is a central plank of the doctor-patient relationship. The patient's right to bodily integrity means that he/she can refuse even life-saving treatment. The doctor must give the patient all relevant information that allows the patient to make intelligent choices of the treatment that he or she will accept.

Another example is from the entirely commercial context where the law makes no requirement for disclosure of information. Here the impetus to disclose the information comes from the competition between private entities, often in the context of the revolution in technology. We all remember the old days of international travel when we would call up a travel agency (often we would have to go in and wait for hours) and then be given limited options for travel and hotel accommodation. These days all the relevant information is online. Putting the current COVID-19 episode to one side, we can pre-select the time of flight, the type of equipment we are prepared to fly on, the seat we will occupy and the meals we will consume. And when we arrive at our destination, there is UBER. Richard Barton, the founder Expedia famously said that "putting barriers between people and information is unsustainable in the world of technology". He expressly founded his business vision on enhancing the choices among which individuals could exercise their own preferences.

It seems to me that access to public information is similarly grounded in the notion of supporting and enriching the individual sense of agency; the sense of being able to make choices that give

meaning and value to life. I believe personal autonomy is the best explanation for the legislative provisions which are at the core of regimes of access to information in Trinidad and Tobago and the wider Caribbean. It is especially important that there be the right of access to information to make intelligent choices in one's own interest in times of crisis, such as the pandemic we are currently undergoing.

A word about the general regime. Most of our Caribbean jurisdictions have enacted Freedom of Information Acts ('FOIAs') (sometimes the Acts are called Access to Information Acts ('ATIAs')) which give all members of the public a legal right of access to information in possession of public authorities. This information is normally in the form of documents; accordingly, the legislation often speaks of a right of access to official documents. There are exceptions of course (as there always are in law) notably, exempt documents need not be, and in many cases cannot be, disclosed.

Eight of our Caribbean jurisdictions have FOIAs; the first was enacted in Belize in 1994, (which was the first, not just in the Caribbean but also in the wider Latin America & Caribbean region); and the most recent is the FOIA of St Vincent and the Grenadines enacted in 2018. The FOIA of Trinidad and Tobago is probably among the most advanced of the regional legislation mainly because of how it treats with one of the major challenges to the right of access to information, namely, the exemption of certain documents from the obligation of disclosure.

There is normally a very long list of 'exempt' documents that need not be disclosed. These include documents whose disclosure would prejudice the security, defence, or international relations; and documents containing confidential information communicated to the Government by a foreign government or international institution. Also exempt are document relating to law enforcement; legal privilege; the national economy; revealing government's deliberative processes; relating to commercial business affairs; heritage sites; or to the personal affairs of any persons whether living

or dead. In most countries the minister responsible for information may issue a certificate that a document is exempt; this certificate is "conclusive" evidence of the exemption.

The fact of the matter is that the ministerial embargo on disclosure will often be based upon recommendations from public sector employees and there is still a culture of secrecy in many of our government departments. Accordingly, the regime of exempt documents has been a major obstacle in the way of the individual's right to access information in the public sector.

The position in Trinidad and Tobago is exceptional. The exemption under the Trinidad and Tobago FOIA is not absolute. A "public interest" test that is applicable; that is, the decision-maker (ultimately the courts) must decide whether the public interest in keeping the information secret is outweighed by the public interest in disclosure. There are literally scores of cases decided under Trinidad's FOIA in which the court has rejected the decision to accord exempt status to documents whether they be cabinet documents (*Cumberbatch v Minister of National Security* (2015)) or documents detailing internal meetings in a Ministry of the Government (*Jugmohan v Teaching Service Commission* (2006). As Justice Gobin said in one case:

> "Our legislature in its wisdom, and in keeping with global trends towards demanding accountability of government agencies and public officers and empowering ordinary citizens, has created a right of access to information, subject only to certain exceptions. This is salutary. In construing the provisions of the Act, I think the recognition of this new right ought to be foremost in the mind of the Court. An approach which detracts from this right or limits it in any way which Parliament could not have intended, might amount to an unwelcome encroachment by the judiciary on the preserve of the legislature." (*Bridglal v. The Commissioner of Police (2009)*).

There are other obstacles to universal access to public information. Another has to do with the threshold question of what is public information? Our FOIAs and ATIAs normally cover information held by public authorities i.e., government departments (including local government agencies), statutory bodies, and government companies (companies where governments have a controlling interest). There is not normally automatic coverage of any other entity. This might be unsatisfactory since powerful private sector entities can have a major effect on the life and welfare of citizens. It has been said that "For most citizens, it does not matter whether the government is responsible for their electricity supply or a private entity, what is of concern is that it is accessible, consistent, and affordable." To ensure these objectives it might be necessary to subject the supplier of electricity to the scrutiny of the FOIA or ATIA. More generally the operation of any private sector entities having monopoly (or near monopoly) in providing essential services should be subject to the legislative requirement to grant access to information since competition will not be a driver in those circumstances. There is usually a mechanism within the information Act which allows the Minister to declare the Act applicable to "any other body or organization which provides services of a public nature which are essential to the welfare of the … society". However, the making of the declaration is subject to an affirmative resolution in Parliament. This means that the extension of the Act will often require active advocacy by the Media and other stakeholders.

Records management can also be an important challenge. The government can only give information that is in its possession. If the information is misplaced or lost, then there is nothing to give. Prior to the passage of the FOIA public records were often in a dismal state and without any overarching or institutionalized systems of records management. Records Centers (often referred to as registries) were often disorganised, with poor filing systems making timely retrieval of information difficult. With passage of the Information Act public authorities were mandated to

institute effective records management programmes – these programmes were to ensure that information is retained as long as required and is readily accessible. And the Acts have had a positive effect in elevating record management to the importance and status it truly deserves within the organization and professionally. However ongoing capacity-strengthening and training are required to ensure that records management systems keep pace with the future demands that will be made of it.

The complement of human resources required to service the information regime and the absence of any real penalties for non-compliance with timelines are also issues to be confronted. Costs are not usually an issue as the applicant for information does not pay for the service, although there is usually a fee for any reproduction of copies of documents.

There are special challenges to the access regime in times of crisis, such as represented by the current COVID-19 pandemic. There is often a need for urgency; of getting the information requested into the hands of the member of the public as quickly as possible. Under the FOIA, the public authority must usually respond to the request for information within 30 days. That is the period within which the public authority says whether or not it will grant the request. There is often the possibility of seeking an extension of a further 30 days (if the information is to be given, it is normally given within this additional 30 days).

It could be considered that this time might need to be shortened in times of crisis as there is need for speed in the public getting the desired information. On the other hand, the current lock-downs present real issues in getting public sector employers to the workstations to identify and produce

the requested information. The *UK Coronavirus Act 2020* which extends the period for the production of requested documents has been heavily criticised in some circles precisely on the ground of the need for the public to have information quickly but the pressures on the public sector production of information are equally glaring.

Running alongside the right of individual access, the FOIA/ATIA usually includes an obligation on public authorities to publish as much information as possible. This 'right to know' approach is very useful – especially in a pandemic – because it increases transparency and reduces the cost of access. It also takes the pressure off the formal access to information regime. It seems fair to say that many of our governments have made good use of TV/Internet to publish a great deal of information. Virtual press conferences – often on a daily basis – is a feature of life here in Trinidad and Tobago, and I assume, in many of our countries.

Finally, there is the question of the generation and verification of Information. The obligation on the government is to give access to information in its possession; there is no obligation on the government to generate information. But in times of crisis, a question could arise concerning whether there should be an obligation on governments to generate and verify information that goes out to the public. In our present circumstance, there is so much diversity in the information available on TV and the Internet, and in policy position taken by some policy officials in relation to measures for dealing with the coronavirus. In Florida, the state government has indicated that it is moving to remove all COVID-19 restrictions, but tighter restrictions are being proposed by state governments in New York and California. The governor in each of these states claims to act

according to ‘science’. Should our governments not do their own independent evaluation of the science so as to prescribe appropriate policies for our countries?

And in all the discussion surrounding the need to adopt tough legislative and executive measures to deal with the pandemic it must be remembered that human autonomy requires safeguarding basic constitutional rights. Even in the midst of a crisis – perhaps especially in the midst of a crisis – there is a responsibility to ensure that constitutional rights are not undermined whether by the legislature in enacting draconian legislation or in law enforcement in taking action that interferes with rights which underpin human autonomy and agency. Here again, the Media has an important job to educate and inform. It is true that there has been little encroachment thus far on the constitutional right to disseminate and to received information but as has been said eternal vigilance is the price we pay for liberty.

Thank you.