

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2
3 Cause No: G 0003/2013

4
5 IN THE MATTER OF THE FREEDOM OF INFORMATION LAW 2007

6 AND IN THE MATTER OF AN APPEAL AGAINST THE DECISION TO DISCLOSE
7 RECORDS HELD BY A PUBLIC AUTHORITY

8 AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
9 PURSUANT TO O.53 OF THE GRAND COURT RULES 1995

10 BETWEEN:

11 THE GOVERNOR OF THE CAYMAN
12 ISLANDS

13 APPLICANT

14
15 AND:

16 THE INFORMATION COMMISSIONER

17
18 RESPONDENT

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21 Appearances:

22 Mr. Charles Bourne instructed by Ms.
23 Colette Wilkins and Ms. Joanne Verbiesen
24 of Walkers for the Applicant

25
26 Ms. Monica Carss-Frisk Q.C. instructed by
27 Ms. Denise Owen and Mr. Kyle Broadhurst
28 of Broadhurst LLC for the Respondent
29

30 Before:

Acting Justice Sir Alan Moses

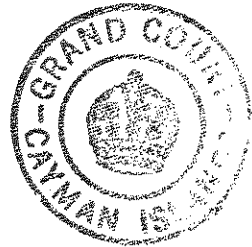
31 Heard:

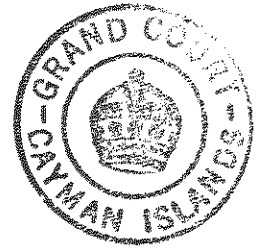
30th and 31st October 2013

32 Draft Judgment:

20th November 2013

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35 JUDGMENT
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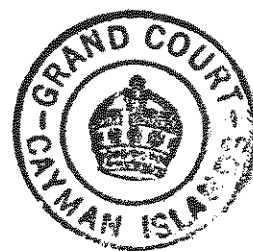
THE COURT

1. On 8 February 2012, Mr. John Evans requested disclosure from the Governor's office of a complaint relating to sections of the Cayman Islands judiciary and the Governor's response to that complaint under the Freedom of Information Law 2007. The Governor's office refused that request on the grounds that it contained defamatory material and was thereby exempt from disclosure pursuant to s.54(1)(a) of the Law.
2. On the 22 November 2012, the Information Commissioner overturned the decision of the Governor to withhold those documents pursuant to s.43(3)(b) of the Law and ordered that the complaint and the Governor's response setting out in detail his reasons for summary dismissal of that complaint should be disclosed.
3. This is an appeal by the Governor by way of judicial review of the Commissioner's decision pursuant to s.47(1) of the Law. I shall need to consider the nature of that appeal by way of judicial review later in this judgment.

1 **BACKGROUND**

2 4. The facts relating to this request were set out in the introduction to the
3 Commissioner's decision. In particular she cited the special report of the Auditor
4 General dated October 2009.

5 *“In September 2007 His Excellency the Governor Stuart Jack accepted*
6 *a recommendation from Larry Covington, the law enforcement adviser*
7 *in the Foreign Commonwealth Office and then Police Commissioner*
8 *Stuart Kernohan, to conduct a special investigation into a complaint of*
9 *a corrupt relationship between Deputy Police Commissioner Anthony*
10 *Ennis and the editor of the Cayman Net News Desmond Seales. A team*
11 *of London Metropolitan Police officers were brought to the Cayman*
12 *Islands by approval of the Governor's office and operated covertly to*
13 *investigate the complaint. The team was led by Martin Bridger, the*
14 *senior investigating officer. The name given to this operation was*
15 *'Operation Tempura'.”*



16 5. The special report then goes on to detail the early part of the investigation which led
17 to the Police Commissioner, the Deputy Commissioner and a Detective Chief
18 Superintendent being removed from active duty and put on required leave in May
19 2008. It records that the investigation was made public in March 2008 and that the
20 senior investigating officer, who by then had retired from the Metropolitan Police,
21 was engaged as a consultant. It then records that members of the public came
22 forward to report additional allegations of wrongdoing and that a consultant firm
23 was engaged to record the complaints. It also refers to the arrests of a number of
24 individuals, including Mr. Justice Henderson, one of the presiding judges on the

1 Cayman Islands. It sets out further history relating to those investigations and
2 recalls that the nature of Operation Tempura and the succeeding operation,
3 Operation Cealt, were unique. There had never been a police corruption
4 investigation of this magnitude in the Islands.

5 6. The immediate events leading to the subject matter of this appeal were recorded by
6 the Governor in the skeleton on his behalf. One of the legal advisers to Operation
7 Tempura was Martin Polaine. Mr. Justice Henderson had complained against him
8 and that had led to his being disbarred in the United Kingdom. He made a
9 complaint to the Governor's office following his disbarment concerning aspects of
10 the investigation. He made what the Governor describes as "serious and sensitive
11 allegations" of unlawful behaviour against three serving members of the Cayman
12 judiciary connected with the unlawful arrest of Mr. Justice Henderson. He alleged
13 that the judges had unlawfully interfered with the Operation Tempura investigations
14 to which he had been at the time a legal adviser. He abandoned the allegations but
15 they were taken over by the senior investigating officer of Operation Tempura,
16 Martin Bridger.

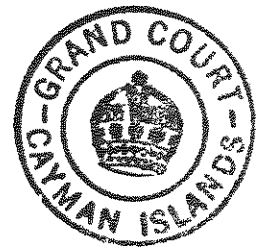
17 7. The Governor has acknowledged that allegations concerning Operation Tempura
18 had been referred to in the press both in the Cayman Islands and elsewhere. When
19 he had been seized of the allegations of Mr Polaine, the then Governor, His
20 Excellency Duncan Taylor, issued a statement on 21 January, 2011. It read:

21 *"In early summer 2010 Mr. Martin Polaine made a complaint to the*
22 *Foreign and Commonwealth Office about certain aspects of the*
23 *Operation Tempura investigation in the Cayman Islands. The*
24 *complaint was referred to me as Governor for consideration."*



1 It continues:

2 *"I was not the Governor during the period of Operation Tempura and*
3 *did not have first-hand knowledge of events which had transpired*
4 *during those years. Due to the factual and legal complexity of the*
5 *complaint and the large amount of documents which had to be*
6 *considered, in late August 2010 I instructed independent Queen's*
7 *Counsel from London to advise me on how to proceed. I have now*
8 *received detailed legal advice in respect of the complaint. I am still*
9 *considering some aspects of that advice but I have reached a*
10 *conclusion in regard to the complaint as it touches on the judiciary. I*
11 *have dismissed all the complaints made against the judiciary; namely,*
12 *those complaints made against the Chief Justice, Mr. Justice*
13 *Henderson and Mr. Justice Cresswell. I have seen an article in the*
14 *Financial Times dated 13 January 2011 touching upon some of these*
15 *matters. The allegations referred to in that article appeared to be*
16 *similar to certain allegations in the complaint. I consider that any*
17 *allegations raised against the judiciary of the Cayman Islands in that*
18 *article inferring that they have conspired to frustrate or interfere with*
19 *Operation Tempura are unfounded and without justification."*



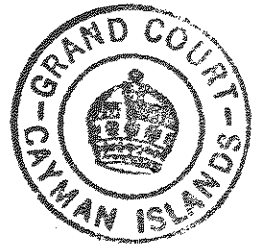
20 8. I should point out at this stage that the nature of the allegations obtained in the
21 *Financial Times'* article, the author of which had plainly received a copy of
22 Mr Polaine's complaints, included details of the allegations against the three judges.
23 The Governor said this, and continued:

1 *"I would like to take this opportunity to make clear that I have every*
2 *confidence in the judiciary of the Cayman Islands."*

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4 9. On 15 March 2011, as he had forecast, he made a further statement in which he
5 said:

6 *"I have now concluded my consideration of that complaint and the*
7 *legal advice I have received in relation to it. I have dismissed all*
8 *aspects of the complaint. I have provided detailed written reasons for*
9 *my decision to the complainant, Mr. Bridger. Because of the sensitivity*
10 *of some of the material in the written reasons, I do not propose to make*
11 *these public. In the circumstances, at my request, Mr. Bridger has*
12 *signed a confidentiality agreement in which he undertakes not to share*
13 *the reasons with any other person except his legal representative."*



14 10. The subject matter of the appeal, the request for the complaint and the report, were,
15 as I have said, the allegations made by Mr. Polaine and the Governor's response to
16 it.

17 11. On 16 February 2012, the person who had sought disclosure, Mr Evans, appealed to
18 the Information Commissioner. By that time the Governor relied not only on the
19 fact that the documents contained defamatory material but a number of other
20 grounds in addition. The Information Commissioner concluded that none of the
21 sections of the Freedom of Information Law relied upon by the Governor entitled
22 him to withhold the requested documents and she ordered that they be disclosed.

1 12. On 7 January 2013, the Governor issued an application for leave to apply for
2 judicial review of the decision - it was cased in terms of traditional judicial review -
3 and he filed a notice of originating motion on 19 February 2013 together with
4 further supporting evidence. I should note that on the 1st of March 2013 Mr. Evans
5 withdrew his information request. It was plain that he was concerned about how he
6 could afford to attend these proceedings and he also withdrew his appeal against the
7 Governor's decision not to disclose the requested documents.

8 13. The substantial ground of the originating motion and the forefront of the argument
9 criticising the decision of the Information Commissioner was the contention of the
10 Governor that she was entitled to withhold the information on the basis of s.54(1) of
11 the Law. This reads:

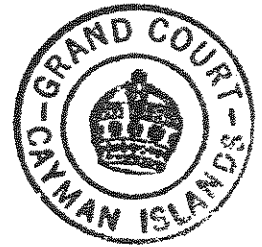
12 “54. (1) Nothing in this Law shall be construed as authorising
13 the disclosure of any official record-

- 14 (a) containing any defamatory matter; or
15 (b) the disclosure of which would be in breach of
16 confidence or of intellectual property rights.”

17 (2) reads:

18 “54. (2) Where access to a record referred to in (1) is granted
19 in the bona fide belief that the grant of such access is required by this
20 law, no action for defamation, breach of confidence or breach of
21 intellectual property rights shall lie against-

- 22 (a) the Government or public authority minister or public
23 officer involved in the grant of such access by reason of the
24 grant of access or of any re-publication of that record; or
25 (b) the author of the record when the other person who has
26 supplied the record to the Government or the public
27 authority in respect of the publication involved in or
28 resulting from the grant of access by reason of having so
29 supplied the record.”



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(3) reads:

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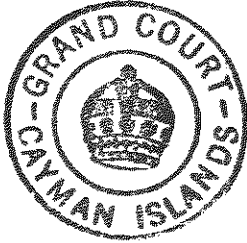
“54. (3) The grant of access to a record in accordance with this law shall not be construed as authorisation or approval-

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(a) for the purposes of the law relating to defamation or breach of confidence of the publication of the record or its contents by the person to whom access is granted;

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(b) for the purposes of any law relating to intellectual property rights of the doing by that person of any Act comprised within the intellectual property rights in any way contained in the record.”

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14. Since the Governor had concentrated so fundamentally upon those provisions, by far the greatest proportion of the Commissioner's decision was devoted to consideration as to whether s.54(1)(a) provides what the Governor now describes as an "absolute exemption" in relation to an official record containing any defamatory matter. This was not surprising. It was the ground on which the Governor had initially relied in refusing to disclose the material requested. It formed the basis of the first ground in the Governor's final submissions to the Information Commissioner.

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15. The Commissioner commented that, as the Governor had submitted, s.54(1) appeared to impose a categorical ban on disclosure of any defamatory material, (see paragraph 26 of her decision). She then proceeded to explain why that apparently wide ban did not apply to the documents sought. Her attempt to qualify and erode the apparent effect of s.54 revealed, so the Governor submitted in these proceedings, ten errors of law and gave rise to a dismissive portentous criticism that her statutory function was to apply and not to rewrite the Freedom of Information Law. The force of this remark in paragraph 109 of the skeleton argument on behalf

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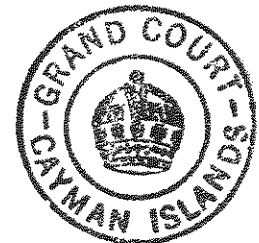
1 of the Governor, however, rebounds if the Information Commissioner was herself
2 led into a fundamental error of construction by the Governor herself.

3 **SECTION 54**

4 16. It is now submitted that s.54 does not exempt any records whatever. Indisputably,
5 the complaint and the Governor's dismissal of the complaint contain defamatory
6 material. They contain allegations which would have a tendency to lower those
7 against whom they were made in the estimation of the ordinary reader irrespective
8 of whether the plaintiff would win in an action for defamation, irrespective of the
9 defences available, or indeed the truth of the statement, or the public interest in its
10 publication. See *National Roads and Motorists Association Limited v. Snodgrass*
11 (2002) 42 ACSR 622. The Governor persists in contending that being defamatory,
12 the documents are exempt from disclosure. It is, therefore, necessary to determine
13 the correct construction of s.54(1) in the context of the statutory scheme as a whole.

14 17. The Governor's submission that s.54 exempts from disclosure documents
15 containing any defamatory matter does not have a promising beginning. Section
16 6(1) and s.6(2) of the Law confer a right to access to all records save those
17 identified as exempt. They read s.6(1):

18 "6. (1) Subject to the provisions of this Law every person shall
19 have a right to obtain access to a record other than an exempt record."



1 The correlative duty to that right is contained in s.7(3)(c):

2 “7. (3) A public authority to which an application is made
3 shall-
4 (a) ...
5 (b)
6 (c) grant to the applicant access to the record specified in the
7 application if it is not an exempt record.”

8 “Exempt record” is defined in s.2 to mean:

9 “a record referred to in Part III.”

10 Part III then identifies exempt records. For example, under section 17(b)(i) an
11 official record is exempt from disclosure:

12 “17. An official record is exempt from disclosure if-
13 (a)...
14 (b) the disclosure would-
15 (i) constitute an actionable breach of
16 confidence;”

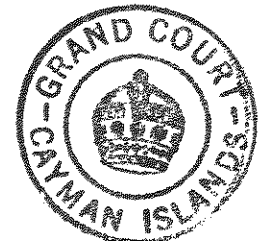
17 Under section 20(1)(d) a record is exempt from disclosure:

18 “20. (1) A record is exempt from disclosure if-
19 (a)
20 (b)
21 (c) ...
22 (d) its disclosure would otherwise prejudice or be
23 likely to prejudice the effective conduct of public
24 affairs.”

25 There is no reference to documents containing defamatory material in Part III. If
26 such material was exempt one might expect to find it amongst those categories
27 identified under Part III.

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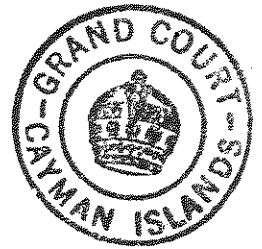


1 18. On the contrary there is no reference to defamatory material until that part of the
2 Act headed 'Miscellaneous' - that is part IX. The Governor contends that the
3 reference to authorising the disclosure of any official record in s.54(1) is
4 synonymous with requiring. It is nonsense, Mr. Bourne submits on behalf of the
5 Governor, to think that the Act may require disclosure under s.6(1) and s.7(3) but
6 not authorise it. So he contends s.54 must be read as explaining that the Act does
7 not require disclosure of any official record containing defamatory material. I
8 should add that although the Law sometimes refers to "record" it also sometimes
9 refers to an "official record" but there is no discernible difference, at least no
10 difference that was ever explained to me.

11 19. There are a number of difficulties in the way of the Governor's submission quite
12 apart from the fact that it is incomprehensible why, if it was intended to include in
13 the category of exempt records, records containing defamatory material, the Law
14 did not say so. There is a good explanation of what s.54(1) does mean and what it
15 is seeking to achieve in the side note to s.54 of the Law which reads:

16 *"Protection from liability re: defamation, breach of confidence and*
17 *intellectual property rights."*

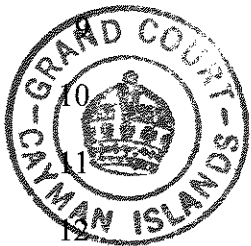
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19 20. In the fifth edition of *Bennion on Statutory Interpretation* he refers to the use to
20 which side notes or marginal notes may be put, pointing out that like anything else
21 in what Parliament puts out as its Act, a side note or heading is part of the Act
22 despite dicta to the contrary. He also cites Upjohn LJ in *Stephens v. Cuckfield*
23 [1960] 2 QB 373 for the proposition that it is permissible to have regard to the
24 marginal note to consider the general purpose and the mischief of the section in



1 question while, of course, the side note cannot control the language used in the
2 section, (see pages 747, 748 of Bennion). If the words do not yield the meaning
3 contended for, then the side note cannot cure the problem. But, in my view, the
4 side note in the instant case explains accurately and correctly the purpose of s.54(1).
5 Section 54(1) tells the reader not to construe the Law as authorising disclosure.

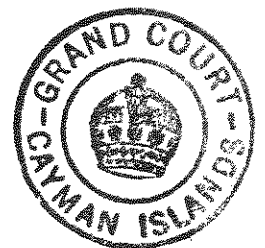
6 21. There are a number of provisions within the Law which require disclosure, of
7 which one example is s.7. One must, at least, start on the basis that the Law is
8 drawing a distinction between the imposition of a requirement and authorisation. It
9 is of note that s.54(2) refers to the grant of access as required by law, and s.54(3)
10 refers to the grant of access in accordance with the law. Such expressions are
11 distinguished within the same section from authorisation. That distinction does
12 make sense in the context in which the distinction is made; namely, in relation to
13 defamatory matter. A person is liable if they authorise publication, (see Gatley on
14 Libel and Slander, 11th edition 2008 paragraph 6.4). Accordingly, where a section
15 in the Law imposes an obligation or requirement it is, s.54(1) tells us, not to be
16 construed as authorising that which the person is required to do by the law.

17 22. On the contrary, it makes no sense to construe s.54(1) as imposing the exemption.
18 If it did then it was unnecessary to do so in relation to breach of confidence since
19 documents, the disclosure of which would constitute actionable breach of
20 confidence, are exempt from disclosure under section 17(b)(i). Nor is it coherent to
21 provide for a defence under s.54(2) where access is granted in the belief that it is
22 required by the law in circumstances where, if the Government's construction is
23 correct, there is no question of any requirement of disclosure in the first place.
24 Equally, s.54(3) assumes circumstances in which access is granted in accordance



1 with the law. How could such access be in accordance with the law if it is exempt
2 and therefore, as the Commissioner believed, categorically banned? A construction
3 which does recognise that disclosure of defamatory material may be required, but in
4 such circumstances provides a defence under (2) and under (3), limits that defence
5 so that those to whom access is granted may not republish with impunity, does
6 make sense and is coherent. I conclude that s.54(1) provides no exemption
7 whatever in relation to the material it identifies and that it was not open to the
8 Governor to rely on the fact that the material was defamatory.

9 23. That conclusion means that the attempts by the Commissioner to construe the
10 section in a way which avoided an exemption of so wide a scope were unnecessary.
11 She was right to observe the impact of such an exemption which would remove the
12 obligation to disclose defamatory material, however justified its disclosure, and
13 however unusual and surprising such an exemption would be. But it is, in light of
14 the view I have reached, unnecessary for me to comment on those attempts. It is
15 sufficient to say that if the Governor's construction had been correct, the valiant
16 attempts of the Commissioner to ameliorate its heavy impact on freedom of
17 information would, in my view, have failed. I need not decide whether the
18 Governor's construction is within the objectives of the law in section 4 or the
19 constitution in clause 22 of the Cayman Islands Constitution Order 2009. Certainly
20 I have not rejected the Governor's construction on that basis but at least the
21 construction I have favoured is unarguably consistent with the objectives of the law
22 and of the constitution.



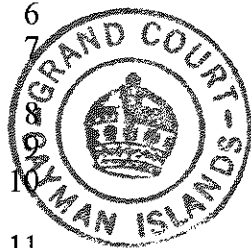
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APPEAL BY WAY OF JUDICIAL REVIEW

24. Before considering the exemption which is relied on under s.21(d) it is necessary to identify the role of this Court in these proceedings. Sections.47(1) and (2) read:

“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 s.43 or 44 or an order pursuant to s.45(1).

(2) In any appeal from a decision pursuant to section 43, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under the law.”



25. It is necessary to decide what is meant by an appeal by way of judicial review of a decision. Plainly, as Mr. Bourne submitted on behalf of the Governor, it is more than merely judicial review since if the only means of challenge for a disappointed applicant or a public authority was judicial review then there exists already a system of judicial review within the Cayman Islands. Moreover, the existence of s.47(2) referring as it does to an appeal from a decision pursuant to s.43, into which category the decision in the instant case falls, is powerful indication that the right conferred by s.47(1) is a right to appeal and not merely to judicial review of the decision of the Commissioner.

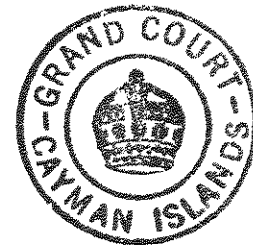
26. I conclude that the Court is concerned to determine an appeal and is not merely considering judicial review. This is, as Ms. Carss-Frisk, on behalf of the Commissioner, pointed out, somewhat startling in the light of the form in which this appeal was launched, which was redolent of traditional judicial review, but I cannot overlook the reference to an appeal by way of judicial review which is, in my view, of importance.

1 27. The provision in s.47(1) indicates to me the type of appeal available for one who
2 challenges a decision of the Commissioner. The appeal is not an appeal *de novo* in
3 which the parties can start again at a re-hearing on the basis of new evidence and
4 arguments based on that new evidence. In that respect, the powers of this Court on
5 an appeal under s.47 are similar to those exercisable by the First-Tier Tribunal
6 under the United Kingdom Freedom of Information Act 2000, s.58. Under those
7 provisions, the Tribunal is required to consider whether the notice of the
8 Commissioner, against which the appeal is brought, is in accordance with the law or
9 whether the Commissioner should have exercised his discretion differently. The
10 Tribunal must allow the appeal or substitute such other notice as could have been
11 served by the Commissioner (see s.58(1)).

12 28. By s.58(2) the Tribunal may review any finding of fact on which the notice in
13 question was brought.

14 29. Section 50 identifies the decision which the Commissioner must take, namely,
15 whether the public authority has, in responding to a request for information, acted
16 in accordance with the requirements contained within the 2000 Act.

17 30. Section 57 confers the right of appeal. It is important to note that in the United
18 Kingdom the First-Tier Tribunal is confined to consideration of the Commissioner's
19 decision, though it may substitute its own view as to where the balance lies between
20 conflicting interests.

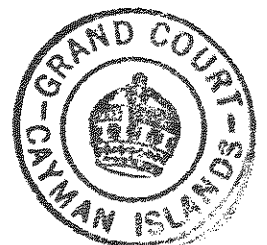


1 31. In the Cayman Islands Law, s.47(2) requires the Court not just to consider the
2 decision of the Commissioner but also to decide whether the public authority has
3 satisfied the burden of proof that it acted in accordance with its obligations under
4 the Law; in other words, has refused to grant access to documents which were not
5 exempt. But s.47(2) is not a licence to the public authority to start all over again as
6 if there had been no consideration by the Commissioner. The appeal is against her
7 decision. The decision of this Court on appeal must be based on the evidence and
8 material before the Commissioner. It is not, I repeat, an appeal *de novo*. Fresh
9 evidence is only legitimate on ordinary Ladd and Marshall principles, and failure
10 to advance that evidence earlier must be explained. New arguments based on that
11 evidence would, however, be permitted provided it is based on evidence and
12 material before the Commissioner at the time of her decision.

13 32. The provision in s.47(2) as to the burden of proof serves to echo and underline
14 provisions earlier in the Law making clear that throughout consideration of
15 disclosure it is for the public authority to justify a refusal of access (see s.6(5) and
16 s.43(2) of the Law).

17 33. The essential question, both for the Commissioner and for the Court on appeal by
18 way of review, is to consider whether the Governor complied with her obligations.
19 Unless she shows that she had, then there must be disclosure. In the instant case
20 that means she must show that the material, i.e., the documents were exempt and
21 even if prejudice to the effective conduct of public affairs is established, access
22 would nevertheless not be in the public interest (see s.26).

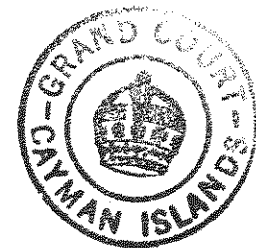
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1 34. This Court must, therefore, consider whether the Commissioner was right in
2 concluding that the complaint and response were not exempt from disclosure. It is
3 open to this Court to disagree, provided it is satisfied that the decision was wrong.
4 This Court is not confined to consideration as to whether the Commissioner was
5 entitled to reach her conclusion. In short, it is not confined to a traditional judicial
6 review approach. The Court must, however, bear in mind that the Commissioner is
7 an expert on considerations of where the balance is to be struck between rival
8 aspects of the public interest, but the Court must also bear in mind that appropriate
9 weight must be attached to evidence from the Governor as to the prejudice likely to
10 be caused by disclosure of the documents in issue. The approach is identified in the
11 First-Tier Tribunal decision in the United Kingdom *Cole v. Information*
12 *Commissioner and the Ministry of Defence*, EA/2013/0042 & 0043, (30 October
13 2013) in which a number of authorities, well known as they are, were cited for the
14 proposition at paragraph 29 that appropriate weight needs to be attached to
15 evidence from the executive branch of the Government about the prejudice likely to
16 be caused by disclosure of particular information. I also add that the reference in
17 the law to judicial review indicates the appropriate procedure for launching an
18 appeal and the remedies available to the Court. Rather than merely allowing or
19 dismissing the appeal it is open to this Court to quash the decision with or without
20 order for reconsideration.

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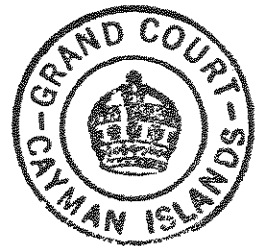
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1 37. Section 36 is different from s.20(1)(d) of the Law because it refers to the reasonable
2 opinion of a qualified person as defined in s.36(5) of the United Kingdom Act;
3 namely, for example, a minister. There is no such provision in Cayman Islands
4 law, so the Court is not confined to consideration of whether the Governor's view
5 was reasonable. The extent of the risk and how that is to be judged is identified in
6 *McIntyre* amongst other cases. It means a real and significant risk of prejudice.

7 38. The reasons given for the view reached that there was a real and significant
8 prejudice to the effective governance of the Cayman Islands were the subject of
9 dispute. The Commissioner says that that which is now advanced had not
10 previously been urged, but raised after the decision of the Commissioner had been
11 given. Either it should not be permissible for the Governor to rely on those reasons
12 now or at least it casts doubt on their cogency and force. I must therefore consider
13 the reasons now advanced for fearing damage to the effective Government on the
14 Islands and whether it is right to suggest that they are only relied upon when
15 previous arguments have failed. The essential argument now advanced is recorded
16 in paragraph 115 of the written argument, the skeleton on behalf of the Governor.
17 It is said:

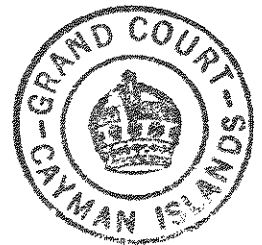
18 *“In reaching this conclusion, the Commissioner 115.1 failed to have*
19 *regard to the need to safeguard the independence of the judiciary.*
20 *115.2 failed to have regard to the sensitivity of dealing with complaints*
21 *against members of the judiciary and 115.3 failed to have regard to the*
22 *substantial public interest in preserving the confidentiality of the*
23 *investigation of a matter involving such complaints. It was, with*
24 *respect, obvious the disclosure of the complaint to the report would*



1 *have these effects. They contain serious allegations against serving*
2 *members of the judiciary. Moreover, since the allegations have not*
3 *been upheld there can be no public interest in disclosing them because*
4 *they cannot add anything of value to what has already been the subject*
5 *of public discussion in relation to the Tempura and Cealt*
6 *investigations.”*

7 39. This ground and the basis of the fear is based at least in part on what Mr. Hinds, a
8 staff officer to the Governor says in his second affidavit dated 19 February 2013.
9 He says that publication of the complaint and the report would tend to damage
10 public confidence in the administration of justice in the Cayman Islands. He
11 continues:

12 *“The effective administration of justice requires that the public have*
13 *confidence in the integrity and independence of the men and women*
14 *who serve within the judiciary. It also requires that this confidence is*
15 *not eroded by unmerited or unfounded allegations made against them.*
16 *The complaint contains serious and sensitive allegations of unlawful*
17 *behaviour on the part of three named members of the judiciary and*
18 *concerns events which involve the arrest of a judge. The allegations*
19 *are made against serving judges who currently preside over criminal*
20 *and civil cases in the Grand Court. The allegations have been*
21 *carefully considered by the Governor and summarily dismissed as*
22 *being unfounded and unjustified. But the Governor's report, of*
23 *necessity, makes reference to the allegations in dismissing them.*



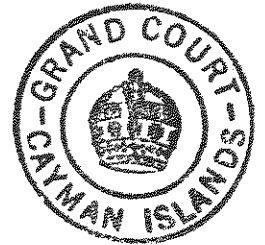
1 9) *Notwithstanding their dismissal, the Governor believes that the*
2 *disclosure of these unmerited allegations, which would undoubtedly be*
3 *widely reported and commented upon in the press, would negatively*
4 *affect the public's perception of the judges concerned and the judiciary*
5 *generally. He believes that there is a real and significant risk that*
6 *disclosure would unnecessarily undermine the public's confidence in*
7 *the independence and integrity of these judges in the judiciary*
8 *generally and negatively impact on their ability to effectively*
9 *administer justice in the Cayman Islands."*

10 He continues at paragraph 10:

11 *"He is convinced that the overriding effect of the disclosure of the*
12 *complaint in the Governor's report and their subsequent treatment in*
13 *the press would be likely to give public currency to the unmerited*
14 *allegations they contain, rather than to clarify the position or promote*
15 *greater public understanding of his decision."*

16 In short, raking over the coals of summarily dismissed allegations would, so she
17 fears, only revive unfounded and malign attempts to undermine public confidence
18 in the judiciary.

19 40. The question then is whether it is right to regard this as a new ground for reliance
20 on s.20(1)(d). When the Governor first announced he would maintain the secrecy
21 of the reasons for the summary dismissal, he referred to the sensitivity of the
22 allegations. In submissions that he relied upon, coloured by his reliance on s.54, he
23 stressed the defamatory nature of the material. This was unfortunate because it led



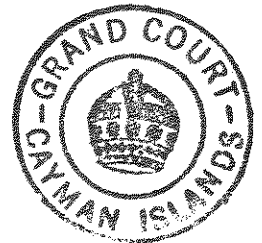
1 to scant reference to s.20(1)(d). However, in his submissions to the Information
2 Commissioner, he did refer at paragraph 28 to the fact that disclosure would
3 significantly harm the privacy of the individuals named in the documents, result in
4 the dissemination of unfounded allegations which would nevertheless discredit and
5 undermine the offices of public officials and expose the government to damages in
6 an action for breach of confidence, defamation, as well as the possibility of
7 damages under the FOI Law (see paragraph 28). The argument was therefore based
8 upon s.17(1)(b) rather than on section 21(d), but it is at least possible to identify a
9 fear as to the problems created by the dissemination of unfounded allegations in
10 that passage.

11 41. At paragraph 29, again not focussing on 21(d), the Governor did argue before the
12 Commissioner that release would:

13 *"...adversely impact the effectiveness of the various institutions in*
14 *Government involved, as their integrity would be questioned by the*
15 *public, notwithstanding the findings of the Governor that the complaint*
16 *was without merit."*

17 At paragraph 38 he referred to the need:

18 *"...to effectively conduct public affairs, the institutions of government*
19 *are required to operate in an environment where the integrity of its*
20 *public officials are not eroded by unmerited or unfounded allegations*
21 *against these individuals. The disclosure would likely result in the*
22 *offices of public officials being undermined and discredited, thereby*



1 *creating an adverse impact on their ability to effectively deliver the*
2 *services required.”*

3 He refers in paragraph 39 to the prejudice the effect of conduct of public affairs
4 because:

5 *“...the effectiveness of the justice system and other systems of*
6 *Government is built on the public's confidence in the integrity of the*
7 *men and women who serve within this system.”*

8 He then adds passages relating to the effect on current proceedings which are now
9 no longer pursued. In paragraph 43 under the heading "public interest" he does
10 make reference to those matters in favour of disclosure including:

11 *(1) promotion of greater public understanding of the processes of decision*
12 *of the Governor's office;*

13 *(2) promotion of accountability of and within Government; and*

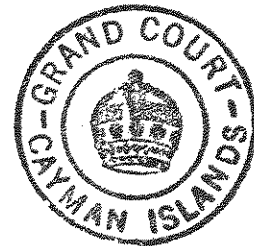
14 *(3) deterrence or revelation of wrongdoing or maladministration.”*

15

16 That is the short and only, which I can discover, reference to the transparency of the
17 Governor's own decision. It is no more than a quotation of the definition of public
18 interest contained within the Freedom of Information General Regulations (2008
19 revision) at clause 2.

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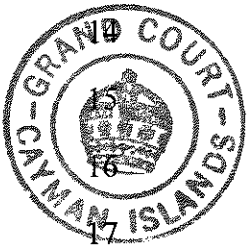
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1 42. The response of the applicant, Mr. Evans, at the time was lengthy and detailed. He
2 repeatedly drew attention to the public discussion of allegations which had already
3 taken place. He referred to the *Financial Times'* article of 12 January 2011 and at
4 page 95 of my bundle, stated that the material was "out there and it was only a
5 matter of time before it became public".

6 43. In my view, the Governor failed to apply any adequate focus on the risk as she now
7 puts it at the forefront of the reasons for fearing prejudice to effective Government.
8 But, as it seems to me, he did articulate the reasons that she now advances to a
9 limited extent and it would not be fair to describe the points she now seeks to
10 advance as being new or merely an afterthought.

11 44. Equally, the Commissioner herself is not to be blamed for not focussing on this
12 ground. She was led by the Governor to concentrate on s.54 and other grounds now
13 abandoned. It is, therefore, not surprising that the main focus of her decision was
not on the ground of exemption under s.20(1)(d). Indeed, in these proceedings
most of the criticisms against her relate to her decision under s.54 and only three
relate to this ground. Inevitably, this appeal's focus changed once the true
construction of s.54 came into issue. I wish, therefore, to emphasise that the
Commissioner is to be acquitted of all blame if insufficient concentration was not
placed on the question under s.20(1)(d) now before this Court. The decision
devotes most of its 23 pages to a thorough consideration of the defences to
disclosure advanced by the Governor other than those under s.20(1)(d). She
dismissed the defence under s.17(b)(i) but added for the avoidance of doubt that
even if disclosure would have been an actionable breach of confidence, public
interest demanded it. It was, she said, in the public interest to disclose the report.



1 At paragraph 84, she notes the public interest factors in favour of disclosure
2 identified by the Governor and adds the applicant's submission that:

3 *“The continuing secrecy surrounding Operation Tempura, Cealt*
4 *coupled with evidence that both investigations achieved absolutely*
5 *nothing is doing immeasurable harm to the reputation of the Cayman*
6 *Islands and public confidence in the police and the Foreign and*
7 *Commonwealth Office.”*

8 At 86 she continued:

9 *“I add the additional factors in favour of disclosure.”*

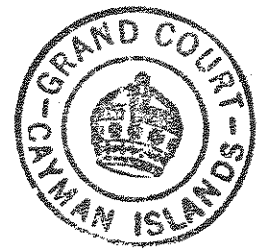
10 And in bullet points:

11 *“ - Disclosure would document the reasons for the Governor's decision*
12 *to dismiss the complaints made by Mr. Bridger.*

13 *- Disclosure would promote the accountability of Government in*
14 *relation to the public funds expended in the Tempura, Cealt*
15 *investigations; in particular, the over 300,000 dollars of public funds*
16 *reported to have been spent on the report. [That is the report to the*
17 *Governor in relation to the complaint.]*

18 *- Disclosure would help to preserve the reputations of the judiciary and*
19 *other Government institutions.”*

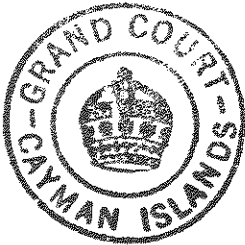
20 She continued at 87:



1 *"I note, but do not necessarily support, a number of general public*
2 *interest factors in favour of withholding the report put forward by the*
3 *Governor's office:*

4 -*The public interest in preserving confidences.*

5 -*Harm to the privacy of individuals named in the documents.*



6 -*The possibility that the effectiveness of various Government*
7 *institutions could be adversely affected as their integrity could*
8 *be questioned by the public.*

9 -*The dissemination of unfounded allegations which would*
10 *discredit and undermine the offices of public officials.*

11 -*Exposure of the Government to damages for breach of*
12 *confidence and defamation."*

13 And she concludes at 88:

14 *"Having balanced the public interest arguments in favour of and*
15 *against disclosure and having taken into consideration the higher*
16 *threshold required by the common law public interest in respect of*
17 *confidence, I find that it is in the public interest to disclose the report."*

18 The fourth bullet point under paragraph 87 is now the main argument in this appeal.

19 45. She returned in her decision to s.20(1)(d) and accurately records the principles I
20 have already cited in *McIntyre* at paragraph 98.

1 46. She then deals with other matters in paragraph 99 which she was led to consider
2 and which are now no longer pursued by the Governor.

3 47. Under "Discussion" she returns to consideration of s.20(1)(d):

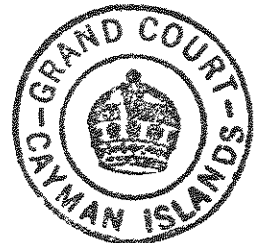
4 *"104. Whilst I accept that the disclosure of the complaint on its own*
5 *might negatively affect the public's perception of the public officers and*
6 *authorities involved, the threshold required in the application of this*
7 *exemption is quite high. It requires that disclosure would, or be likely*
8 *to, prejudice the effective conduct of public affairs. This level of*
9 *certainty or likelihood has not been demonstrated.*

10 *105. With respect to the report, I do not lend much credence to the*
11 *claim that its disclosure would or would be likely to harm the public*
12 *officers concerned. The Tempura and Cealt investigations have been*
13 *discussed in public forum for several years now and it is my opinion*
14 *that further credible information on the matter would help to clarify*
15 *many outstanding questions."*

16 48. In my view, her reference to a high test in 104 does not assist. Rather, the position
17 is, as explained in *McIntyre*, that what she had to consider was whether there was a
18 real and significant risk of prejudice. The conclusion she reaches does not refer
19 back to the earlier passages I have quoted on where the public interest lies and
20 therefore appears to be without reasons.

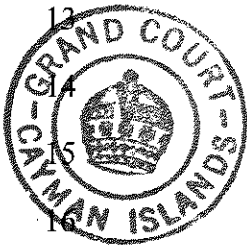
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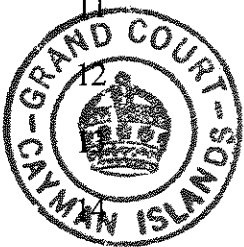
1 49. Her conclusion in 105 is that credible information would help clarify many
2 outstanding matters. She probably meant that the reasons why the Governor
3 summarily dismissed the allegations were matters which, in the interests of
4 transparency and accountability, should be revealed, but her brief sentence hardly
5 makes that clear. I repeat, however, it was not her fault. If the armoury of the
6 Governor was directed at so many other targets, the Commissioner is not to be
7 blamed when she gave short consideration to this point. But it is of significance, as
8 she identified, that there had been continuing public discussion, to which the
9 applicant at the time had drawn attention, quite apart from the article in the
10 *Financial Times* in 2011.

11 50. In an affidavit dated the 3rd of May 2013, the Commissioner responded to what
12 appeared to be a suggestion by the Governor that she should have considered an
13 exemption under s.20(1)(b). It is understandable that she should have done so since
14 the Governor was at that time saying that this was a fresh point she ought to have
15 considered. She refers to a number of publications that were collated before her at
16 the time of the decision. They included a *Cayman News Service*: "Polaine Stands
17 By Advice" article dated the 1 May 2009, the same news service article: "Bridger
18 Pursues Complaint re: Operation Tempura" 13 January 2011, "Bridger's Complaint
19 Dismissal Remains A Secret" 15 March 2011, "UK Cops Complaint Defamatory
20 Says Governor" 5 April 2011, *The Observer on Sunday* "Who Was Really In
21 Charge Of Operation Tempura?" 13 November 2011, *Caymanian Compass*
22 "Governor Taylor: No More Enquiries into Tempura" 13 March 2012, *The*
23 *Independent Cayman Islands* "The Met's Caribbean Connection" 1 May 2012,
24 *Caymanian Compass* "Report Cost \$335,000 Kept Under Wraps" 24 August 2012.
25 There was a considerable amount of material that shows that the matter was



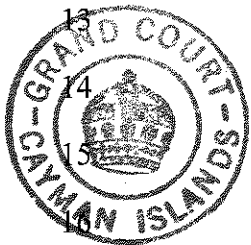
1 referred to and discussed in the Press up until 2013. In the documents before this
2 Court there was substantially more material taking matters up to the 23 April 2013.

3 51. The Commissioner was plainly right to take into account that the subject matter of
4 the report by Mr. Aina, and a member of the Governor's staff, had not gone away
5 and was still being discussed. The decision not to publish the reasons for the
6 summary dismissal of the allegations against the judiciary had to be considered in
7 that context. The Commissioner was entitled to take the view that disclosure could
8 not simply be dismissed on the basis that it would merely rekindle flames which
9 had long since died away. They had not. Equally, no one could sensibly dismiss
10 the views of the Governor as to the dangers of publishing reasons for the summary
11 dismissal of the complaints. The allegations summarily dismissed concerned the
12 majority of the Cayman Islands judiciary at the time, including its Chief Justice.
13 The malicious and malign would probably rejoice in the re-publication of the
14 allegations and ignore the fact that they had been dismissed after consideration of a
15 445 paragraph report of some 185 pages, which considered the facts and the
16 relevant law in great depth. This report was reproduced as the Governor's reasons
17 for summary dismissal. Indeed, it is hardly accurate to regard the dismissal as
18 summary after such detailed and lengthy consideration. The Governor, as the
19 report points out, was acting in a quasi-judicial function in deciding whether the
20 complaints should be referred to the Judicial and Legal Services Commission. It
21 advises that limited disclosure shall be given to the complainant, to Mr Bridger, the
22 Chief Justice and the Attorney-General. But the report did not, because it was not
23 tasked with it, consider the issues which the Commissioner and this Court has to
24 consider under s.20(1)(d). It was not within the remit of the report.



1 52. The report also discusses the offence of scandalising the judiciary at common law
2 in the context of the need to investigate the authorship of the letters in the press
3 criticising the judiciary in July 2007, which it was believed was bogus. The report
4 cites *Ahnee v. DPP* [1999] 2 AC 294 at 305H - as to the need for the offence of
5 scandalising the judiciary, particularly on a small island, in that case Mauritius. It
6 refers to the real risk of undermining public confidence in the administration of
7 justice and to the fact that the Cayman Islands are small islands and it is the small
8 judiciary which is less able to withstand a campaign of potentially fictitious
9 criticism. I should emphasise that the report is referring to the letters in 2007 but it
10 underlines the fear relevant to the issue in this case.

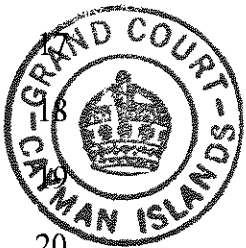
11 53. The Governor referred to the importance of upholding confidence in the judiciary
12 as informing the decision in *Sittampalam v. The Information Commissioner and*
13 *Ministry of Justice*, EA/2011/0277, a decision of the First-Tier Tribunal
14 (Information Rights) in the United Kingdom. This was not drawn to the
15 Commissioner's attention by the Governor at the time. In that case a Recorder had
16 been criticised for remarks she made when sentencing. A complaint was made and
17 the conclusion reached that disciplinary action was not necessary. It had been
18 concluded that she was not guilty of misconduct but nevertheless was given
19 informal advice. The applicant sought disclosure as to the content of the
20 consideration by the Office of Judicial Complaints and the nominated judge. The
21 relevant Minister had been of the reasonable opinion that such material should not
22 have been disclosed. It is of note in that decision that the Information
23 Commissioner, in responding to the request as recorded by the Tribunal, argued that
24 the public interest in disclosure was tempered by the fact that the publicity given to
25 the Recorder's original remarks at the time indicated that a public debate had taken



1 place about their appropriateness without disclosure of the information now being
2 sought. He also drew attention to the fact that the performance by a judge of his or
3 her role is subject to public scrutiny simply as a result of the public nature of the
4 court processes. This, I interpose, is in contrast to the allegations made against the
5 judges which were not in relation to their behaviour in Court. The Commissioner,
6 in that case, argued that those factors added to the additional information disclosed
7 in response to the information request, provided substantial assistance to those with
8 an interest in understanding the decision taken by the Lord Chief Justice and the
9 Lord Chancellor, and the handling of the decision by the Office of Judicial
10 Complaints.

11 54. The importance of that decision, therefore, is the emphasis placed upon and the
12 recognition of the need for the public to understand the reasons for the decision
13 made in that case. That requirement was, in that case, satisfied.

14 55. The case of *Sittampalam* is some distance away from the question the
15 Commissioner and this Court has to consider. There is no information whatever in
16 the public domain as to why the Governor summarily dismissed the allegations
17 which, in some respects, related to conduct of members of the judiciary where the
18 primary facts, as referred to in previous decisions of this Court, were known and
19 established. I repeat, *Sittampalam* acknowledges the need to understand, at least to
20 some extent, the reasons for the decisions that were taken. It is that aspect of
21 *Sittampalam* which seems to me to be of some weight but appears to have had little
22 weight in the consideration of the Governor. True it is that he refers at paragraph
23 43(1) and (2) of his submissions to the Commissioner to the definition of public
24 interest in the 2008 Regulations but there is no further reference to the need to



1 understand why the allegations, aired over a number of years, should be summarily
2 dismissed without any reasons at all given to the public.

3 56. The importance of giving reasons hardly needs emphasis in the context of judges
4 but may need underlining to those responsible for administration and to the public
5 generally. The giving of reasons provides a framework of discipline for the
6 decision-maker and compels the decision-maker to justify his conclusions. Of
7 particular significance in this case, the giving of reasons provides satisfaction to the
8 public that the decision-maker has approached his task carefully and
9 conscientiously in proportion to the importance of the issues he is called upon to
10 decide.

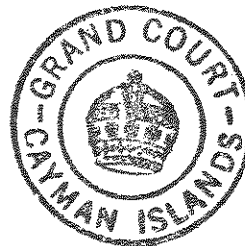
11 57. The allegations in the instant case were not merely of concern to the complainant
12 but to the public in the Cayman Islands who by now were well familiar with them.
13 The public, it might fairly be said, was entitled to know that the summary dismissal
14 was the result of a conclusion reached after thorough and reasoned consideration.
15 That that factor is of great importance finds statutory support in the Cayman Islands
16 Law itself. By s.27:

17 *“27. Public authorities shall make their best efforts to ensure that*
18 *decisions and the reasons for those decisions are made public, unless*
19 *the information that will be disclosed thereby is exempt under this*
20 *Law.”*

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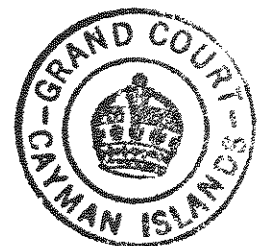
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1 58. There is, so far as I have seen, no reference to that provision either by the Governor
2 or by the Commissioner. What had to be balanced was the public interest in
3 ensuring that the summary dismissal was reasoned and transparent against the
4 dangers of repetition of dismissed complaints. In my view, the Commissioner
5 failed to strike that essential balance either in her consideration under s.20(1)(d) or
6 under s.26 because even if she decided that there would be prejudice to the effective
7 conduct of public affairs, she was still required to consider where the public interest
8 finally lay. Yet again, I repeat, it was not her fault that she did not do so. The issue
9 was never properly laid before her. Nonetheless I do not regard the paragraphs to
10 which I have referred as an adequate discussion of where the balance lay between
11 those two aspects of public interest, repetition of the complaints and, on the other
12 hand, open and clear explanation of the Governor's reasons for summary dismissal.

13 59. In the light of that conclusion I must consider the appropriate remedy. I say at once
14 that I reject the suggestion that I should myself decide that the Governor satisfied
15 the burden upon her. The decision should, in my view, be taken by the official
16 tasked by the law to make such decisions; the Commissioner. She, after all, has the
17 expertise of conditions in the Cayman Islands. Whilst I cannot rule out another
18 appeal, clearly it is far better if she strikes the balance rather than the Court. It was
19 suggested that if, as I have done, I found the decision defective, I should merely
20 quash it in the light of the fact that the original applicant has abandoned his claim to
21 access to the documents. I reject that suggestion. The issues are far too important
22 to leave matters without final resolution. My view is that the Commissioner should
23 reconsider the exemption claimed under s.20(1)(d).

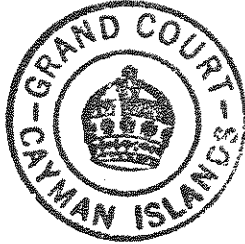


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60. I hope I have identified the important issues which fall to be decided without indicating where I believe the balance should be struck. If others think I have nudged the Commissioner one way or the other, they are mistaken. I also consider, subject to submissions as to orders that I should make, that the Governor should be permitted to put in further written argument should she be so advised to make good her claim. There was, during the course of submissions, some discussion as to the part the judiciary on the islands may have played by way of formal or informal requests in the decision reached by the Governor. I say no more about that. There is no evidence one way or the other and it is up to the Commissioner, with her powers of investigation, to choose whether she wishes to investigate the extent to which the views of the judiciary played or should have played a part in the decision as to withholding the reasons given for the summary dismissal of the allegations.

61. I shall hear further argument in light of the decision I have reached as to the order I should make. For the reasons I have given I allow the appeal in relation to the order of disclosure and remit the question of disclosure for further consideration of the exemption under s.20(1)(d).

Dated this the 23rd day of December 2013



Acting Justice Sir Alan Moses
Acting Judge of the Grand Court