

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2  
3 Cause No: G 0188/2014

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

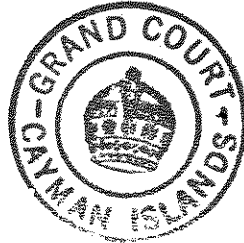
13 APPLICANT

14  
15 AND:

16 THE INFORMATION COMMISSIONER

17  
18 RESPONDENT

19  
20  
21 Appearances:



22 Mr. Ian Paget-Brown Q.C. instructed by  
23 Ms. Anne-Marie Rambarran and Ms. Dawn  
24 Lewis of the Attorney General's Chambers  
25 for the Applicant

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

30  
31 Before:

The Hon Justice Timothy Owen (Actg.)

32 Heard:

10<sup>th</sup> and 11<sup>th</sup> February 2015

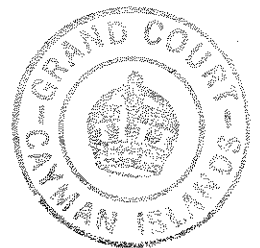
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## INTRODUCTION

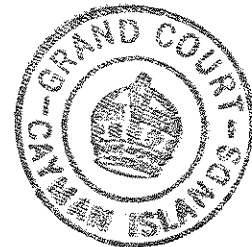
1. In September 2007, the Governor of the Cayman Islands, Mr. Stuart Jack, accepted a recommendation from Larry Covington, the Law Enforcement Advisor in the Foreign and Commonwealth Office, and Police Commissioner Stuart Kernohan to conduct a special investigation into a complaint of a corrupt relationship between Deputy Police Commissioner Anthony Ennis and the editor of the Cayman Net News, Desmond Seales. A few weeks later, on 19<sup>th</sup> October 2007, the Governor gave his assent to the enactment of the Freedom of Information Law 2007 (Law 10 of 2007) ("the Law") which provided for a new framework of law governing the duty on public authorities to publish certain information and to ensure that all decisions by public authorities and the reasons for those decisions are made public (save where such information would be exempt) as well as conferring on each citizen a right to apply for access to records held by public bodies (see s.7 of the Law).

2. This appeal arises from the impact of the 2007 Law on one product of the special investigation approved by the Governor (which came to be known as Operation Tempura). It is the second occasion on which the Grand Court has been asked to resolve what is a fundamental difference of view between the Governor and the Information Commissioner concerning the proper approach to a request for access to two documents, namely, a complaint relating to a section of the Cayman Islands judiciary and the Governor's response to that complaint ("the records").



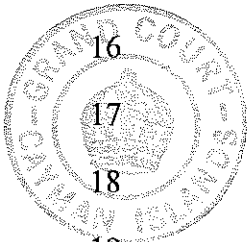
1 The complaint consists of a 16 page document lodged in June 2010 by Martin  
2 Polaine, a former legal advisor to the Cayman Islands Government, and later  
3 adopted by Martin Bridger, the former senior investigating officer (“SIO”) to  
4 Operation Tempura. The Governor’s response to that complaint is dated 7<sup>th</sup> March  
5 2011, runs to some 185 pages and bears the signature of former Governor Duncan  
6 Taylor. I have read both documents although, for obvious reasons, I shall not cite  
7 any passages from them within my Judgment in view of the nature of the dispute  
8 between the parties as to whether the Law requires that disclosure of their contents  
9 should occur either forthwith (as the Commissioner submits), never at all (as the  
10 Governor submits) or, potentially, at some future point when no relevant exemption  
11 based on potential prejudice to an active criminal investigation can be maintained  
12 (as is the possible result of one of the Governor’s objections to disclosure).

13 3. The first appeal pursuant to s.47(1) of the Law was heard by Acting Judge Sir Alan  
14 Moses in October 2013 and resulted in a judgment handed down on 23<sup>rd</sup> December  
15 2013. In order fully to understand the sequence of events that has led to this second  
16 appeal it is necessary to read the whole of Moses Ag. J’s judgment<sup>1</sup>. But for  
17 present purposes it is possible to summarise the essential background facts as  
18 follows.



<sup>1</sup> ([2013] (2) CILR 421)

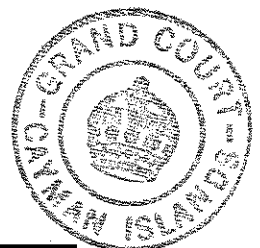
1        4.        The original request for disclosure of the records was made by a Mr. John Evans on  
2                8<sup>th</sup> February 2012 and was refused by the Governor's office on 14<sup>th</sup> February 2012  
3                on the grounds that they contained defamatory material and were thereby exempt  
4                from disclosure pursuant to s.54 (1) (a) of the Law. On 22<sup>nd</sup> November 2012, the  
5                Information Commissioner ("the Commissioner"), Ms. Jennifer Dilbert MBE, JP,  
6                overturned the Governor's decision pursuant to s.43 (3) (b) of the Law and ordered  
7                that the records be disclosed. The Governor appealed by way of judicial review the  
8                Commissioner's decision pursuant to s.47 (1) of the Law. Leave was granted to  
9                apply for judicial review on 8<sup>th</sup> February 2013. By letter dated 1<sup>st</sup> March 2013 Mr.  
10              Evans wrote to the Governor's Office stating that he withdrew both his information  
11              request and his appeal against the Governor's decision not to disclose the records.  
12              Notwithstanding Mr. Evans's withdrawal, by Order dated 11<sup>th</sup> June 2013 Moses  
13              Ag. J. directed that the proceedings should continue on the basis that Mr. Evans had  
14              ceased to be a directly affected party. The Governor raised no objection to this  
15              direction and made no submission to the effect that Mr. Evans' withdrawal deprived  
16              the Court of jurisdiction to adjudicate on what was, by this stage, a dispute solely  
17              between the Governor and the Commissioner albeit one triggered by Mr. Evans'  
18              original request pursuant to s.7 of the Law. In a letter to Walkers (who were then  
19              acting for the Governor's office in the litigation) dated 12<sup>th</sup> March 2013, Mr. Kyle  
20              Broadhurst on behalf of the Commissioner set out in some detail why the  
21              Commissioner's view was that Mr. Evans' withdrawal from the appeal process did  
22              not impact on the judicial review. He pointed out that on 22<sup>nd</sup> November 2012 the  
23              Information Commissioner had decided that the Governor had not acted in  
24              accordance with his obligations under the Law and overturned the Governor's  
25              decision not to disclose the records.



1           “As such” Mr Broadhurst opined “the appeal of Mr Evans to the Information  
2           Commissioner has been determined, that decision stands and it cannot be  
3           undermined or negated by a change of stance by him at this stage”. The letter then  
4           went on to make the following point:

5           *“The decision made by the Information Commissioner has far wider public*  
6           *interest significance than simply answering the request of one individual, albeit*  
7           *that it was that request which started the appeal process in this case. This is*  
8           *clearly reflected at section 46 of the Law which allows the Commissioner to*  
9           *conduct an investigation and reach a decision on her own initiative. Even if*  
10          *Mr. Evans had withdrawn his appeal before it had been determined, the*  
11          *Information Commissioner could have continued the process of her own*  
12          *volition.”*

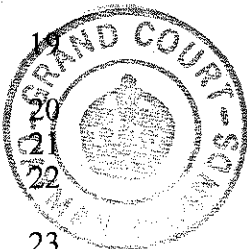
- 13          5.       The main ground originally relied upon by the Governor in the first appeal was that  
14                   he was entitled to withhold the records from disclosure on the basis of s.54 (1) of  
15                   the Law which deals with protection from liability in relation to defamation and  
16                   breach of confidence arising from the grant of access to records pursuant to the  
17                   Law. As Moses Ag.J. held, this reliance was misconceived as nothing in s.54  
18                   provides any basis for an exemption against disclosure by reference to the  
19                   defamatory nature of the records in issue and, accordingly, it was not open to the  
20                   Governor to rely on the fact that the material was defamatory (as Moses Ag J.  
21                   found it was).



1 Having rejected the Governor's principal ground of appeal, Moses Ag. J considered  
2 the alternative arguments advanced by the Governor to the effect that disclosure of  
3 the records would prejudice, or would be likely to prejudice, the effective conduct  
4 of public affairs so that they were exempt from disclosure pursuant to s.20 (1) (d)  
5 and s.26 of the Law. While acquitting the Commissioner of any blame for her  
6 failure fully to address the issues that arose under this ground in view of the way  
7 the Governor had originally advanced his case before the Commissioner, Moses  
8 Ag. J. held that the Commissioner had failed to strike the right balance in her  
9 consideration of the issues under both s.20 (1) (d) and s.26 of the Law because even  
10 if she decided that there would be prejudice to the effective conduct of public  
11 affairs she was still required to consider where the public interest finally lay (see  
12 para 58, judgment of 23/12/13).

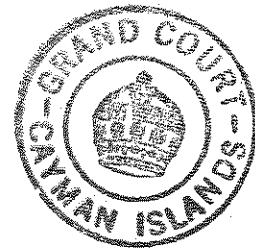
13 6. Accordingly, the issue of the application of s.20 (1) (d) was remitted for further  
14 consideration by the Commissioner on the basis that, as things stood, that was the  
15 only tenable basis for arguing that the records were exempt from disclosure. The  
16 terms of the Order made by Moses Ag. J. were as follows:

- 17 "1. *It is declared the requested documents are not exempted from*  
18 *disclosure by virtue of s.54 (1) of the Law.*
- 19 2. *The order of certiorari to quash the decision is granted.*
- 20 3. *The decision is remitted back to the Respondent to reconsider whether*  
21 *the requested records are exempt from disclosure by reason of s.20 (1)*  
22 *(d) of the FOI Law.*
- 23 4. *It is declared that on remission the Respondent is to use such*  
24 *investigative powers pursuant to the FOI law as she considers*  
25 *necessary and for the purpose of her reconsideration is to receive such*  
26 *written or oral submissions as the FOI law permits and, consistent with*  
27 *that law, she considers necessary."*
- 28



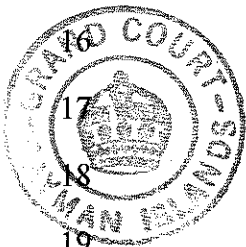
1 It is to be noted that in the course of argument, the Governor had submitted that if,  
2 as he eventually did, Moses Ag.J. found the Commissioner's decision to be  
3 defective he should merely quash it in light of the fact that the original applicant  
4 had abandoned his claim to access to the documents. But this submission was  
5 firmly rejected by Sir Alan who observed that "the issues are far too important to  
6 leave matters without final resolution. My view is that the Commissioner should  
7 reconsider the exemption claimed under s.20 (1)(d)" (para 59).

8 7. If the Governor was of the view that Mr Evans' withdrawal of his complaint back in  
9 March 2013 had indeed deprived the Court of jurisdiction to continue to adjudicate  
10 upon the issue of disclosure of the records, the Governor could and should have  
11 appealed the Order made by Moses Ag.J. (as well, of course, as making a  
12 submission to that effect at the outset of the hearing before Sir Alan). But no such  
13 appeal was pursued and accordingly the process of reconsidering the issue of  
14 disclosure of the records was commenced by a new Commissioner, Acting  
15 Information Commissioner Jan Liebaers, who had taken up his post following the  
16 retirement of Ms. Dilbert. It is the product of this reconsideration which has  
17 generated this second appeal to the Grand Court.



**THE GOVERNOR'S SUBMISSIONS TO THE INFORMATION COMMISSIONER ON HIS  
RECONSIDERATION OF THE DISCLOSURE DECISION**

8. It is important to understand precisely how the Governor's case was presented to the Commissioner following the Notice of Hearing dated 4<sup>th</sup> March 2014 in which the Commissioner, pursuant to s.43 (1) of the Law, invited the Governor to make written submissions "on the sole basis of the application of the exemption in section 20 (1) (d) of the FOI Law". In a 20-page written submission in response lodged on 7<sup>th</sup> April 2014, the Governor's office asserted in unqualified terms that the only basis for exemption relied upon was s.20 (1) (d)<sup>2</sup> and proceeded to identify five reasons why that section was engaged. Having set out the Governor's case under s.20 (1) (d), the submission then proceeded to assert that although the relevant date for assessing whether a public authority was under an obligation to disclose is the time when the request was first dealt with, i.e. 14<sup>th</sup> February 2012 (see *Evans v. Information Commissioner*<sup>3</sup>), the Commissioner nonetheless had a discretion to allow a public authority to rely on an exemption even if it did not rely on that exemption when initially refusing to disclose (see *APPGER v. Information Commissioner and Ministry of Defence*<sup>4</sup>). Having asserted the existence of this discretion, the Governor then proceeded to submit that it "appeared" that circumstances now existed which meant that the records would be exempt from disclosure under two fresh headings of exemption, namely sections 16 and 17 of the Law.



<sup>2</sup> "of [sections 17 (b) (i), 23(1) and 20(1) (d)], only section 20 (1) (d) is now relied upon", see para 16 Governor's Submissions, 7<sup>th</sup> April 2014.

<sup>3</sup> [2012] UKUT 313 (AAC)

<sup>4</sup> [2011] UKUT 153 (AAC)



1 9. The basis for the s.16 exemption was said to arise from the fact that the Governor  
2 had learned that allegations of criminal conduct were made on 19<sup>th</sup> January 2014 by  
3 Mr. Martin Bridger against Larry Covington, the Attorney General and former  
4 Governor Stuart Jack which were connected to the subject matter of the records in  
5 issue. Section 16 of the Law provides that:

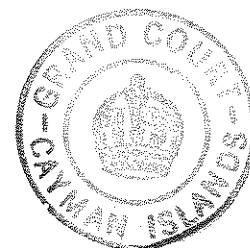
6 *"Records relating to law enforcement are exempt from disclosure if their*  
7 *disclosure would, or could reasonably be expected to –*

8 ...  
9 *(b) affect-*

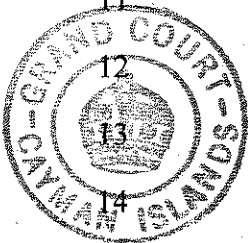
10 (i) *the conduct of an investigation or prosecution of a breach or*  
11 *possible breach of the law; or*

12 (ii) *the trial of any person or the adjudication of a particular*  
13 *case."*

14  
15 10. The Governor explained that the records relate to law enforcement because they  
16 concern the conduct of judges, the Operation Tempura investigation and the  
17 conduct of Larry Covington who was at the relevant time the Law Enforcement  
18 Advisor for the Caribbean for the FCO. "Plainly" it was submitted "disclosure [of  
19 the records] would or could reasonably be expected to affect the conduct of an  
20 investigation pursuant to the allegations which have now been made" and reference  
21 was made to a short statement appended to the Governor's submissions from the  
22 Commissioner of Police for the RCIPS, Mr. David Baines, setting out his view of  
23 the likely impact of release of the requested records on what was said to be the  
24 "current" RCIPS investigation.



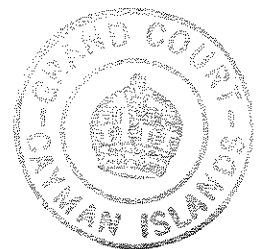
1 11. Mr. Baines' statement made clear that in addition to criminal allegations made  
2 against the Governor, Mr. Covington and the Attorney General, he had received  
3 counter allegations of criminal conduct on the part of Mr. Bridger who, it was  
4 alleged, had made false allegations of criminal conduct, had wasted police time and  
5 was guilty of misconduct in public office while undertaking his duties as the SIO in  
6 the Tempura investigation. It was in the context of allegation and counter  
7 allegation that Mr. Baines explained that he had reviewed what he described as the  
8 Aina report. This was a reference to a document prepared by a London Silk, Mr.  
9 Benjamin Aina QC, at the request of the Governor to assist him in the discharge of  
10 his Constitutional duty to determine whether a complaint of misbehavior against a  
11 member of the judiciary should be referred to the Judicial and Legal Services  
12 Commission. As I was told by Mr. Paget-Brown QC on behalf of the Governor in  
13 the course of the hearing, the Governor's report at the heart of this appeal is in all  
14 essential respects identical to the Aina report. In short, apart from one or two minor  
15 changes and the insertion of the Governor's name by way of substitution for that of  
16 Mr. Aina QC, the Aina report and the Governor's report are identical, the Governor  
17 having simply adopted Mr Aina's reasoning and conclusions as his own without  
18 any apparent qualification. I will address the implication of this fact later in this  
19 judgment when I consider the Governor's claim that former Governor Taylor's  
20 response to the complaint is covered by legal professional privilege and thus  
21 exempt from disclosure pursuant to s.17 of the Law. But for present purposes the  
22 significance of Mr. Baines having read the Aina report is that he had, in practice,  
23 read the very document which lies at the heart of this appeal. Having read it, he  
24 made the following observations:



1           *"It is too early for me to determine if a criminal investigation is warranted or*  
2           *not due to the further analysis required, however I can state that the publication*  
3           *of the Aina report would interfere with any investigation that were launched,*  
4           *not least as its contents cover some of the issues [which are the] subject of*  
5           *controversy; in addition to being contradictory in their position to the earlier*  
6           *legal decisions pronounced by the DPP, Chief Justice and others.*

7           *The release would I consider be contrary to the rule of natural justice as it*  
8           *would enable one version of events relating to the subject matter and deny those*  
9           *subject of and named in the report an opportunity to counter the version of*  
10          *events and defend themselves. It should be noted that some named persons have*  
11          *been privy to the contents of the report, the majority of individuals subject to*  
12          *comment have not been canvassed or made aware of the contents.*

13          *....I trust this position assists in determining the response to the FOI request. I*  
14          *am willing to meet with the Information Commissioner to provide a verbal*  
15          *briefing and provide sight of the complaints received and other documentation*  
16          *that would assist in making a decision based on all the factual matters and*  
17          *context of the FOI matter in light of the interconnectivity to previous legal*  
18          *actions, current legal actions in train and potential future criminal*  
19          *investigations."*



1       12.     As for the Governor's suggestion that exemption from disclosure might arise  
2             pursuant to s. 17(b)(ii) of the Law, reference was made to an Order made by Justice  
3             Williams in the Grand Court in Cause 486 of 2011 which had recently been brought  
4             to the Governor's attention. It was explained that the Order restrained Martin  
5             Bridger from permitting various identified persons to inspect or copy a list of  
6             specified documents and the Governor explained that she was "advised that a  
7             number of the documents listed in the document schedule are referred to and/or  
8             have excerpts set out in the [Aina] Report because the documents were provided by  
9             Mr. Bridger to Mr. Aina QC during the investigation into the complaint". The  
10            Governor said that she did not have access to the document schedule and thus could  
11            not verify the extent of any overlap but said that "if and to the extent that  
12            documents contained in the document schedule are set out in the Report, disclosure  
13            of the Report in such circumstances could constitute contempt of the [Williams J.]  
14            Court order." Having cited the relevant terms of s.17 (b) (ii) of the Law<sup>5</sup>, the  
15            Governor submitted that:

16                   *"It therefore appears that the Report may be subject to an absolute exemption*  
17                   *under s.17 (b) (ii) of the FOI Law and the Governor requests that the*  
18                   *Commissioner takes this exemption into account when exercising his discretion*  
19                   *as to whether or not disclosure should not be ordered under section 44 (2)."*

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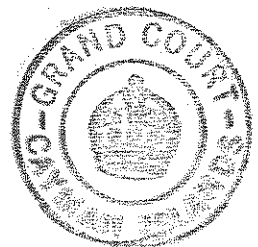
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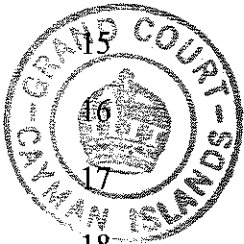
<sup>5</sup> s.17 An official record is exempt from disclosure if –

...  
(b) the disclosure thereof would –

...  
(ii) be in contempt of court."



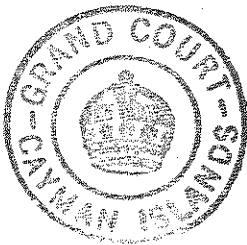
1       13.   The final section of the Governor's submission focused on why, if a qualified  
2           exemption applied, the public interest in disclosure did not require access to be  
3           given to the information, i.e. that s.26 of the Law did not compel disclosure even if  
4           the provisions of s.20(1)(d) were engaged by the nature of the material under  
5           review. Four reasons were advanced under this heading. First, that prejudice caused  
6           by the disclosure would have a significant negative impact on public confidence in  
7           the Cayman judiciary. Secondly, that disclosure would jeopardise the integrity of  
8           future investigations into alleged judicial misbehavior. Thirdly, that some of the  
9           relevant facts concerning the complaints were already in the public domain. And,  
10          fourthly, that the quality of the decision making in the Governor's report had  
11          already been given the seal of approval by the Grand Court so that the public  
12          already had a substantial degree of reassurance in relation to the Governor's  
13          decision summarily to dismiss all the complaints against the judges. In the event  
14          however Mr. Paget-Brown QC made clear in the course of the hearing before me  
15          that he did not seek to advance as a freestanding ground of appeal that the  
16          Commissioner had, on the basis of the material he had taken into account pursuant  
17          to his s.20(1)(d) reconsideration, erred in law in his decision to require disclosure of  
18          the disputed records<sup>6</sup>. Accordingly, it will not be necessary to spend time in this  
19          judgment considering the issue of whether there was any basis in law for interfering  
20          with the Commissioner's decision as to whether a s.20(1)(d) exemption had been  
21          made out by the Governor and his assessment of whether, if s.20(1)(d) did apply,  
22          access to the records should still be granted by reference to the public interest.



<sup>6</sup> Mr. Paget-Brown QC also made clear in the course of the hearing that he did not seek to advance the submission, briefly covered in paragraph 61 of his Skeleton Argument, that the Commissioner's decision was flawed on what were described as "human rights" grounds by reference to the provisions of Article 10 of the European Convention on Human Rights. Ms Carss-Frisk QC described this submission as "hopeless" and I agree with that description.

1 *THE COMMISSIONER'S FRESH DECISION*

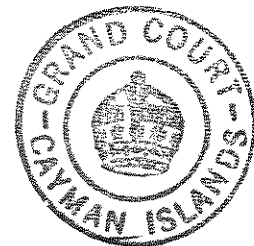
2 14. The Commissioner's fresh decision was ultimately handed down on 10<sup>th</sup> July 2014  
3 and runs to 28 pages of detailed reasoning as to why (save in relation to a single  
4 identified segment on page 13 of the complaint document) he had decided to  
5 overturn the decision of the Governor's office to withhold the requested records by  
6 virtue of s.20 (1) (d) of the Law. Before summarising the basis for his decision, it  
7 is important to refer to a passage in the First Affidavit of the Commissioner dated  
8 8<sup>th</sup> December 2014 in which he explains why he declined the invitation from the  
9 Governor's office to meet with Police Commissioner Baines for a briefing on the  
10 matters raised in Mr Baines's statement which were said to be relevant to a new  
11 ground of exemption pursuant to s.16 of the Law. The Commissioner's explanation  
12 is as follows:



13 "18. The final paragraph of Mr Baines's report offers a meeting with him  
14 "to provide a verbal briefing and provide sight of the complaints  
15 received and any other documentation that would assist in making a  
16 decision based on all the factual matters and context of the FOI matter  
17 in light of the interconnectivity to previous legal actions, current legal  
18 actions in train and potential future criminal investigations". I also  
19 received an email on the 29<sup>th</sup> April 2014 from the Governor's office  
20 asking whether I would like to extend the deadline for my Decision so  
21 that I could "receive Commissioner Baines's briefing". This invitation  
22 was also reiterated through Commissioner Baines' personal assistant.  
23 A private meeting with one party to a dispute would, in my view, be  
24 contrary to the ethos of a fair and impartial FOI process. The

1                   *procedure requires that submissions be made in writing and this had*  
2                   *already been done by the Governor's Office. The Registrar of*  
3                   *Hearings responded the same day explaining that it would be highly*  
4                   *unusual for the Commissioner to meet with a party, particularly after*  
5                   *written submissions had been presented and requesting that future*  
6                   *correspondence be sent via the Registrar."*

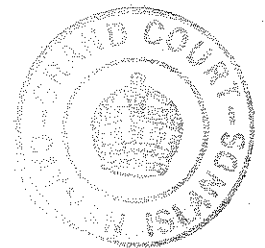
7       15.   Of course by the time the Commissioner was conducting his reconsideration, the  
8           original applicant, John Evans, had abandoned his application and withdrawn from  
9           the process. It follows that the only "parties" to the process flowing from the order  
10          of Moses Ag J. were the Information Commissioner and the Governor. In these  
11          circumstances I take the view that the Commissioner's reason for refusing to meet  
12          with Commissioner Baines was mistaken. In circumstances where there was no  
13          longer an individual applicant seeking disclosure and where the Order of Moses Ag  
14          J. had specifically referred to the Commissioner using "such investigative powers  
15          pursuant to the FOI Law as she considers necessary and for the purpose of her  
16          reconsideration is to receive such written *or oral* submissions as the FOI Law  
17          permits" I consider that not only would it have been permissible for the  
18          Commissioner to accede to the request for an oral briefing but it would have been a  
19          sensible, indeed highly desirable, step to take in view of the points raised in Police  
20          Commissioner Baines's written statement. I will address the implications of the  
21          Commissioner's refusal to entertain the offer of a meeting with Mr Baines when I  
22          turn to the issues that arise for my consideration in this appeal.



1       16.     Under the heading "Issue under review in this hearing" the Commissioner explains  
2             why he intended to confine his reconsideration solely and strictly to the issue of  
3             whether s.20 (1) (d) of the Law was engaged by the nature of the information  
4             contained in the records in issue and that he would not consider any other potential  
5             exemption raised by the Governor. Having cited from the Order of Moses Ag J.  
6             and quoted from the Governor's written submission where she appeared to accept  
7             that she was relying only on the exemption in s.20 (1) (d) of the Law, the  
8             Commissioner stated as follows:

9  
10            "16.     Yet despite the explicit, singular focus of the current reconsideration  
11                    the Governor's Office also asks me to consider additional exemptions  
12                    which it claims are relevant, namely the exemptions in sections  
13                    16(b)(i), 16(b)(ii) and 17((b)(ii). In support, the Governor's Office  
14                    states that the Commissioner has discretion to allow a public authority  
15                    to rely on any exemption even if it did not rely on that exemption when  
16                    initially refusing to disclose, following *APPGER v Information*  
17                    *Commissioner and Ministry of Defence [2011] UKUT 153 (AAC)*.

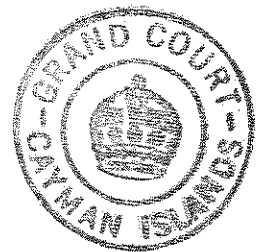
18            17.     I will not consider the new exemptions raised, for the following  
19                    reasons. Firstly, this reconsideration stems directly from the Judge's  
20                    unambiguous Order which is very clear to the effect that my  
21                    reconsideration should only be concerned with the application of  
22                    section 20(1)(d).





1                   18.   *Secondly, as the Governor's Office points out, the relevant date for*  
2                   *assessing whether the public authority is under an obligation to*  
3                   *disclose a requested record is "the time when the request was first*  
4                   *dealt with", as confirmed by the UK's Upper Tribunal in Evans v*  
5                   *Information Commissioner [2012] UKUT 313 (AAC), which, it says, in*  
6                   *this case, was 14 February 2012. I agree that the relevant date in this*  
7                   *regard is the time when the request was received and initially dealt*  
8                   *with by the Governor's Office in February 2012. The circumstances*  
9                   *briefly described by the Governor's Office in support of the additional*  
10                  *exemptions in sections 16(b)(i), 16(b)(ii) and 17((b)(ii), now being*  
11                  *claimed, had at that time not yet materialized.*

12               19.   *Consequently, I will not consider the new exemptions raised by the*  
13               *Governor's Office, and the sole issue to be determined in this Decision*  
14               *is whether the two responsive records, i.e. the complaint originally*  
15               *filed by Mr. Martin Polaine, subsequently taken over by Mr. Martin*  
16               *Bridger, and the Governor's response to the complaint, are exempt*  
17               *from disclosure by reason of section 20(1)(d)."*



1       17.     The bulk of the Commissioner's decision then proceeds to address point by point  
2             the five arguments raised by the Governor in relation to the s.20 (1) (d) issue and  
3             decides in each case that the exemption is not engaged by any one of them save for  
4             the single short passage on p.13 of the Complaint document. Although not strictly  
5             necessary (save in relation to the single short passage in the Complaint) the  
6             Commissioner then proceeds to consider whether the overall balance of the public  
7             interest means that, in the event that s.20 (1) (d) was (contrary to his primary  
8             finding) engaged in relation to the records as a whole, access should be granted on  
9             the basis that it would "nevertheless be in the public interest" pursuant to s.26 of the  
10            Law. Having identified what he describes as factors in favour of disclosure and  
11            factors in favour of non-disclosure, he concludes as follows in para 128 of his  
12            Decision:

13                   *"Although I am not required to conduct a public interest test in relation to those*  
14                   *parts of the responsive records which are not exempted under section 20(1)(d),*  
15                   *for the avoidance of doubt I have nonetheless done so. I have balanced the*  
16                   *public interest factors, and I find that the factors in favour of disclosing*  
17                   *outweigh the factors in favour of withholding. I therefore find that, even had the*  
18                   *exemption applied, access should nonetheless have been granted in the public*  
19                   *interest."*

20

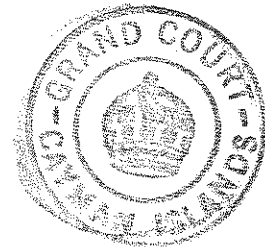
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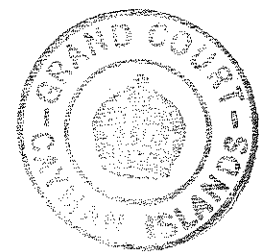


*THE APPLICATION FOR LEAVE*

18. By Notice of Application lodged on 25<sup>th</sup> August 2014, the Governor sought leave to apply for judicial review of the Commissioner's decision of 10<sup>th</sup> July 2014 whereby (a) he refused to consider whether he should decline to order the disclosure of the requested records in light of the fact that, if requested today, they would now be exempt from disclosure under ss.16(b) and 17(b)(ii) of the 2007 Law, (b) he held that the requested records are not exempt under s.20(1)(d) of the Law and (c) ordered the Governor's office to disclose the requested records. The grounds on which relief was sought included the assertion that in refusing to consider any factual matters mitigating against disclosure which arose after the date of the request (and after the order of Moses Ag J.) the Commissioner erred in law. Specific reliance was placed on the issues of potential prejudice to a "live" criminal investigation together with the issue of potential contempt in relation to the order of Williams J. Also relied upon was an alleged error of law in applying the balancing test inherent in s.20(1)(d) of the Law. Finally, a wholly new basis for declining to order disclosure was relied upon, namely that the Governor's report into the original complaint "mirrors the content of legal advice" so that the report attracts legal professional privilege under s.17(a) of the Law. An add-on ground of *Wednesbury* unreasonableness was also identified although not developed in detail within the Grounds.



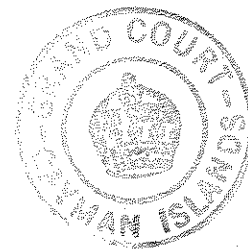
1       19.    By letter dated 29<sup>th</sup> August 2014, Messrs Broadhurst on behalf of the Commissioner  
2           wrote a letter to the Court raising a number of issues, including a concern that the  
3           Governor had not fully discharged her duty of disclosure to the Court in lodging  
4           what was, at that stage, an *ex parte* application for leave. In light of that letter I  
5           directed that there be an oral directions hearing before me on 4<sup>th</sup> September 2014  
6           and, having heard from the parties and considered the history of this matter, I  
7           directed that the case be listed for a “rolled up” hearing with the substantive hearing  
8           to follow in the event that leave were to be granted. I did so in view of the  
9           inevitability of a renewed oral application if leave were to be refused on the papers  
10          and the obvious importance of achieving an early resolution to the Governor’s  
11          challenge to the legality of the Commissioner’s decision. In the event, having heard  
12          argument from both parties over the two days of the hearing on 10-11<sup>th</sup> February  
13          2015 I indicated that I would grant leave while reserving Judgment on the  
14          substantive issues for determination.



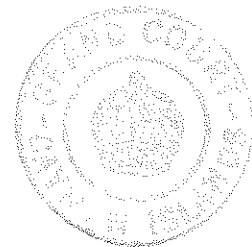
*THE ISSUES*

20. By the date of the rolled up hearing, it was clear from the Skeleton Arguments, the amended Grounds and the evidence lodged that the following issues fell to be resolved:

- a. Is leave in fact required for an appeal pursuant to s.47 (1) of the Law and, if so, what is the source for this requirement?
- b. Is it permissible now for the Governor to raise a jurisdictional objection to the Commissioner's 10 July 2014 decision on the basis that the FOI Law does not apply once an application for access to records and a consequent appeal has been withdrawn?
- c. Did the Commissioner act lawfully in limiting his consideration of the disclosure request to the s.20 (1) (d) dispute, thereby refusing to consider any matters that arose after the date of the original request?
- d. Is there any merit in the "fresh" grounds for not disclosing the records, namely the issues of contempt, legal professional privilege and potential prejudice to a live criminal investigation and, if so, what consequences flow from this?



1        21.     As indicated above, it was made clear by Mr. Paget-Brown QC in the course of  
2               argument that he did not seek to rely on what I will describe as the straightforward  
3               challenge to the Commissioner's exercise of his s.20 (1) (d) assessment and his  
4               consideration of the public interest balancing test in s.26. I confess I found this  
5               somewhat surprising as it seemed to me that there was merit in some of the  
6               arguments potentially open to the Governor on this ground and in light of the fact  
7               that the jurisdiction of the Court on a s.47 appeal is not confined to conventional  
8               judicial review grounds (see the Judgment of Moses Ag J. at paras 25-33). But it is  
9               not the job of the Court to persuade one party to maintain a ground that s/he has  
10              distinctly abandoned after what was, I must assume, thorough consideration and in  
11              any event I heard no argument on this issue from Ms. Carss-Frisk Q.C.  
12              Accordingly, I will say no more on this matter save to observe that absent any  
13              current alternative basis for exemption, the Commissioner's 10<sup>th</sup> July 2014 decision  
14              on the application of s.20 (1) (d) and the public interest assessment under s.26 of  
15              the Law would lead to the release of the records to the public at large.



1 *IS LEAVE REQUIRED FOR AN APPEAL PURSUANT TO S.47 OF THE FOI LAW?*

2 22. This was an issue which I myself raised with the parties at the outset of the “rolled  
3 up” hearing, it not having been disputed in the proceedings before Moses Ag J. that  
4 the normal judicial review procedure set out in Order 53 of the Grand Court Rules  
5 1995 applied to any appeal pursuant to s.47 of the Law. Section 47 states as  
6 follows:

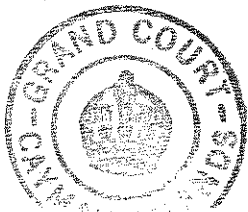
7 “47 (1) *The complainant or the relevant public or private body may,*  
8 *within 45 days, appeal to the Grand Court by way of judicial*  
9 *review of a decision of the Commissioner pursuant to s.43 or*  
10 *44 or an order pursuant to section 45 (1).*

11 47 (2) *In any appeal from a decision pursuant to section 43, the*  
12 *burden of proof shall be on the public authority to show that it*  
13 *acted in accordance with its obligations under the law.”*  
14

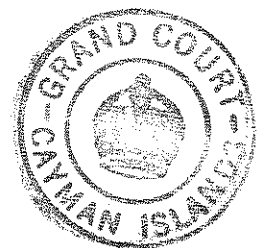
15 23. My reason for raising whether in fact the requirement to obtain leave in O.53, r.3  
16 applied to the statutory appeal process in s.47 of the Law arose from the  
17 observations of Moses Ag J. in paragraphs 25-26 of his Judgment in which he said  
18 as follows:

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

29 26. *I conclude that the court is concerned to determine an appeal and is*  
30 *not merely considering judicial review. This is, as Ms Carss-Frisk on*  
31 *behalf of the Commissioner pointed out, somewhat startling in the light*  
32 *of the form in which this appeal was launched which was redolent of*  
33 *traditional judicial review, but I cannot overlook the reference to an*  
34 *appeal by way of judicial review which is, in my view, of importance?*  
35 *(emphasis added)”*



1       24.     Sir Alan's reference to s.47(1) as conferring a "right to appeal and not merely to  
2             judicial review" is on one view inconsistent with there being any requirement for an  
3             aggrieved appellant to obtain leave at all. Moreover Order 53, r.3(1) states that "no  
4             *application* for judicial review shall be made unless the leave of the Court has been  
5             obtained in accordance with this rule" (emphasis added), and it can fairly be argued  
6             that this is inapt to cover what is, as Sir Alan held, a right to *appeal* rather than a  
7             mere right to pursue an application for judicial review. The parties disagreed on the  
8             true construction of s.47 and the procedural consequences that flowed, with the  
9             Governor submitting that Sir Alan's analysis was incompatible with a requirement  
10            to obtain leave and the Information Commissioner submitting that the legislature  
11            could have provided for a discrete appellate process but instead chose to indicate  
12            that the statutory right to appeal would be subject to the procedural requirements of  
13            judicial review as already provided for by O53 of the Grand Court Rules. In my  
14            view, Ms Carss-Frisk was right to emphasise the legislative options available when  
15            enacting the 2007 Law and I find that the specific reference to a s.47(1) appeal  
16            being brought "by way of judicial review" was intended to engage the procedural  
17            requirements of O.53, including the requirement in O.53, r.3 to obtain leave from  
18            the Grand Court as a precondition of pursuing any appeal. The fact that O.53  
19            imposes a disciplined timetable on potential applicants for leave and enables  
20            hopeless cases to be weeded out at an early stage is obviously beneficial to good  
21            administration and it cannot be said that to require leave defeats the legislative  
22            intent when crafting the 2007 Law.





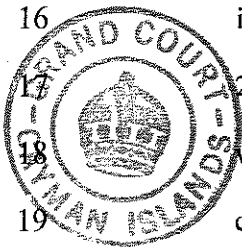
1 ***DID THE COMMISSIONER LACK JURISDICTION TO ISSUE HIS 10<sup>TH</sup> JULY 2014***

2 ***DECISION IN VIEW OF THE DECISION OF THE ORIGINAL COMPLAINANT TO***

3 ***WITHDRAW HIS APPLICATION FOR ACCESS TO THE RECORDS?***

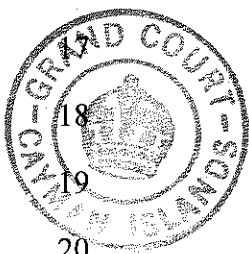
4 25. Mr. Paget Brown QC made clear both in his Skeleton Argument and in oral  
5 submissions that his principal ground in favour of quashing the Commissioner's  
6 decision is that the decision of the original applicant, Mr. John Evans, to withdraw  
7 his application for access and his appeal against the Governor's refusal meant that  
8 the Commissioner lacked any statutory authority to order the Governor to provide  
9 access to the records. I am however quite clear that to permit the Governor to raise  
10 this jurisdictional challenge at this stage would be an abuse of the process of the  
11 Court and that, in any event, it is an argument wholly lacking in merit. My reasons  
12 are as follows.

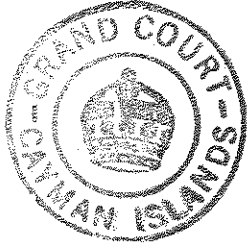
13 26. The submission that Mr. Evans' withdrawal of his application for access and his  
14 appeal deprived the Commissioner and the Court of any power to adjudicate on the  
15 issues raised by the original request for access was never advanced by the Governor  
16 in the original proceedings that culminated in the hearing before Moses Ag J. in  
17 2013. Indeed, as I pointed out in paragraph 4 above, after Mr. Evans gave notice of  
18 withdrawal of his appeal, Moses Ag. J. directed that the proceedings should  
19 continue on the basis that Mr. Evans had ceased to be a directly affected party. No  
20 objection to this direction was raised by the Governor and indeed the only reliance  
21 later placed by the Governor on the fact of Mr. Evans's withdrawal was in the  
22 context of the consequence of any finding that the Commissioner's decision fell to  
23 be quashed.



1 The Governor submitted that if Moses Ag J. held that the decision was unlawful –  
2 as of course he ultimately did – he should merely quash it in the light of the fact  
3 that the original applicant had abandoned his claim to access to the documents. In  
4 other words, it was suggested that the withdrawal of Mr. Evans was relevant to the  
5 Court’s discretion to withhold relief. As stated above, Moses Ag J. firmly rejected  
6 this submission because he concluded that the issues raised by the case were far too  
7 important to be left without final resolution. No doubt in concluding as he did, the  
8 learned Judge was in agreement with what Mr. Broadhurst had asserted in his 12<sup>th</sup>  
9 March 2013 letter to Walkers as to the wider public interest significance attaching  
10 to the Information Commissioner’s decision and the fact that s.46 of the Law  
11 empowered the Commissioner to conduct an investigation and reach a decision on  
12 her own initiative.

13 27. No appeal was pursued by the Governor against Moses Ag J.’s decision to direct a  
14 reconsideration by the Commissioner of the exemption claimed under s.20(1)(d) of  
15 the Law although if the Commissioner lacked power to decide this issue (as is now  
16 boldly submitted by Mr. Paget-Brown QC) then the Governor was duty bound both  
17 to advance this submission before Moses Ag J. and to appeal his decision to remit  
18 the matter for further reconsideration. Yet, remarkably, not only was no appeal  
19 pursued against Moses Ag J.’s order, the jurisdiction argument did not even feature  
20 in the original Notice of Application filed by the Governor in August 2014 (and  
21 drafted by Mr. Paget-Brown). It first raised its head in the Notice of Originating  
22 Motion dated 31<sup>st</sup> October 2014 which (in addition to adding what were described  
23 as “human rights” arguments to the Governor’s assault on the 10<sup>th</sup> July 2014  
24 decision) asserted the following new ground:





1           “6.    *The applicant has withdrawn the request under the Freedom of*  
2           *Information Law 2007 and therefore the Information Commissioner*  
3           *should have considered and then declined to order the disclosure of the*  
4           *requested records on the ground that the applicant, Mr. John Evans,*  
5           *withdrew his request for the records that are the subject of the*  
6           *Information Commissioner's decisions.”*

7       28.    It is to be noted that the way the argument was framed in the Governor's 31<sup>st</sup>  
8           October 2014 pleading was not in the form of a hard edged jurisdictional challenge  
9           to the Commissioner's power to make an order of disclosure. Rather it was said  
10          that the Commissioner had power to consider the issue of disclosure but that in  
11          view of Mr Evans' disappearance from the stage, he should decline to order  
12          disclosure. The first occasion on which the full blooded jurisdictional challenge  
13          was formulated was in Mr. Paget-Brown's Skeleton Argument dated 6<sup>th</sup> January  
14          2015 in which he developed a detailed submission to the effect that the repeated  
15          reference within the 2007 Law to an “applicant” and an “application” in the context  
16          of the right of access to public records meant that, absent any “applicant” or  
17          continuing “application” the Information Commissioner simply lacks power to  
18          order access to documents. He relied on s.10 of the Law (which deals with the  
19          different forms in which access may be afforded to an applicant) and the Australian  
20          case of *Marke v. Victoria Police*<sup>7</sup> as supporting his submission that where there is  
21          no individual applicant for access to a record, it would be absurd to uphold an order  
22          providing disclosure to the whole world.

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<sup>7</sup> [2007] VSC 522

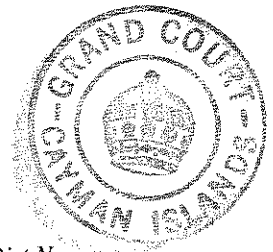
1 Reliance was placed on two US authorities in which, under rather different freedom  
2 of information legislative schemes, American Courts had concluded that absent a  
3 “contested case” or a “real dispute” the relevant information commissioners had no  
4 power to issue final decisions<sup>8</sup>. By analogy, it was submitted that Mr. Evans’  
5 abandonment of his appeal rendered any dispute moot and deprived both the  
6 Commissioner and the Grand Court of jurisdiction to make any order requiring  
7 disclosure of the records in issue.

8 29. In my view, the Information Commissioner was right to submit that the final  
9 version of the jurisdiction argument advanced by the Governor is both  
10 misconceived in law and an abuse of process given its timing. It is misconceived  
11 as a matter of law because there can be no argument but that the Commissioner had  
12 jurisdiction under s.43 of the Law to make the original decision that was the result  
13 of Mr Evans’s original appeal pursuant to s.42. There is equally no doubt that the  
14 Grand Court had jurisdiction to entertain an appeal pursuant to s.47 (1) of the Law  
15 as commenced by the Governor on 7<sup>th</sup> January 2013 with leave being granted on 8<sup>th</sup>  
16 February 2013 (i.e. a few weeks before Mr. Evans withdrew his access request).  
17 The outcome of the Governor’s appeal was that the Court ordered a reconsideration  
18 of the original decision. In these circumstances, it follows that the Commissioner’s  
19 reconsideration as required by Moses Ag J. was part and parcel of the appeal  
20 process, clothing both the Commissioner and the Court with necessary power to  
21 adjudicate on the issues arising for consideration under the 2007 Law.

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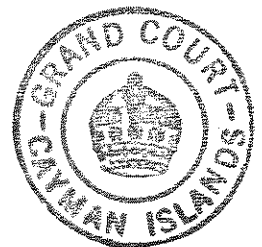
<sup>8</sup> *Dept of Pub Safety v. Freedom of Info Comm’n* 103 Conn.App, 571, 930 A.2d 739. *Unified Sch Dist No 259, Sedgwick Cnty, Kan v. Disability Rights Ctr of Kansas*, 491 F.3d 1143, 1147 (10<sup>th</sup> Circuit, 2007).



1 30. Moreover, as Ms. Carss-Frisk QC pointed out in her submissions to me, the  
2 Commissioner's powers under the Law are not confined to determining appeals  
3 under s.43. Part VII of the Law, entitled Enforcement by Commissioner, identifies  
4 additional powers which may provide the Commissioner with the necessary power  
5 to ensure compliance by a public authority with the Law. Section 44(1) confers a  
6 broad power on the Commissioner to decide that a public authority has failed to  
7 comply with an obligation under the Freedom of Information Law quite separate  
8 from an appeal under s.42 brought by an aggrieved individual. Pursuant to s.44 (2)  
9 the Commissioner may require the public authority "to take such steps as may be  
10 necessary or expedient to bring it into compliance with its obligations under the  
11 Law" and this includes a power to order the publishing of certain information or  
12 categories of information. I accept the Commissioner's submission that if he  
13 concludes that a public authority has failed to comply with its obligations under the  
14 FOI Law by wrongly invoking an exemption, he has the power to rectify matters by  
15 ordering disclosure. As to what obligations are generated by the Law, the  
16 provisions of s.27 are in my view plainly relevant:

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

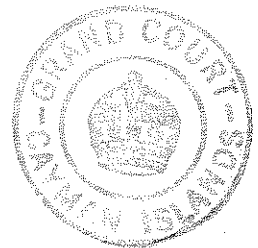
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21 This is a very broad duty and one which applied to the Governor's Report of 7<sup>th</sup>  
22 March 2011 whereby he decided summarily to dismiss all the allegations of  
23 misconduct laid against identified members of the judiciary.



1        31.     Section 27 of the Law establishes that disclosure of information should be the  
2                default setting for government – in other words, information should be kept private  
3                only when there is a good reason and it is permitted by the Law. In short, when the  
4                Governor issued his report, he ought to have been aware that absent being able to  
5                establish a relevant exemption his report was liable to be disclosed to the people of  
6                the Cayman Islands in the event that an access request were to be lodged and no  
7                exemption applied to maintain the confidentiality of the requested records. It was  
8                no doubt for precisely this reason that Moses Ag J. refused merely to quash  
9                the Commissioner’s decision on the last occasion this matter was before the  
10              Court (“the issues are far too important to leave matters without resolution”,  
11              para 59) and directed a reconsideration of the exemption claimed under s.20  
12              (1) (d). Moses Ag J. was plainly aware that there was no longer any  
13              individual applicant pursuing access to the records and that the outcome of a  
14              future decision to the effect that they were not exempt under the Law would  
15              result in disclosure in effect to the whole world. Section 10 of the Law and  
16              the decision in *Marke v. Victoria Police* relied on by Mr. Paget-Brown do  
17              not establish that in an appropriate case the Commissioner may never,  
18              pursuant to s.43 of the Law, direct disclosure of records “to the whole  
19              world”. Indeed such a submission is flatly in conflict with the fundamental  
20              principle of openness which informs s.27 of the Law.

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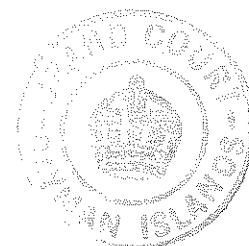
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1       32.    In addition to the power under s.44, the Commissioner also has a broad power  
2           pursuant to s.46 on his own initiative to conduct an investigation “into any matter  
3           and where he does so, the matter shall be treated as an appeal to the extent  
4           practicable”. I accept that this provision provides further support for the  
5           Commissioner’s submission that the scheme of the 2007 Law is to provide the  
6           Commissioner with wide powers to ensure public access to information which is  
7           not an exempt record. To argue in these circumstances that the fact of the  
8           withdrawal by Mr Evans of his original access request deprived the Commissioner  
9           of jurisdiction to order disclosure of the records is quite impossible in my view. As  
10          for the two USA authorities relied on by the Governor, neither is of relevance to the  
11          issue I have had to decide, not least because the legislative schemes are different.  
12          Unlike the US schemes under consideration, there is no provision in Cayman law  
13          that confines the Commissioner’s powers to “contested cases” and accordingly  
14          there can be no jurisdictional objection to the Commissioner’s decision-making  
15          power in the appeal before me.

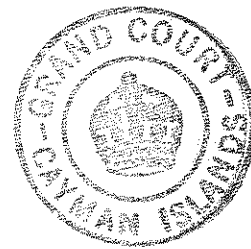
16       33.    Regardless of the lack of merit in the Governor’s so-called jurisdictional  
17           submission I consider it is an argument that is simply not open to the Governor to  
18           advance at this stage. If it had any merit, it could and should have been advanced in  
19           the course of the appeal before Moses Ag J. and for the Governor now to seek to  
20           deliver this “knock out” punch offends against the principle enunciated as long ago  
21           as 1843 in *Henderson v. Henderson*<sup>9</sup> in which the rule was stated as follows:

<sup>9</sup> (1843) 3 Hare 100, 67 ER 313



1                   “...a claimant is barred from litigating a claim that has already been  
2 adjudicated upon or which could and should have been brought before the  
3 Court in earlier proceedings arising out of the same facts. Parties are expected  
4 to bring their whole case to the court and will in general not be permitted to re-  
5 open the same litigation in respect of a matter which they might have brought  
6 forward but did not, whether from negligence, inadvertence or even accident.”

7  
8       34.     In light of my view of the merits of the Governor’s jurisdiction argument it is not  
9 necessary for me to embark on lengthy citation from the various authorities relied  
10 on by the Commissioner concerning the distinction between a tribunal’s  
11 constitutive and adjudicative jurisdiction and the principle that parties “cannot by  
12 agreement or conduct confer upon a tribunal a jurisdiction which it does not  
13 otherwise have” (per Lord Hoffman, para 30 in *Watt (formerly Carter) v. Ahsan*<sup>10</sup>.  
14 I am entirely satisfied that in circumstances where the Governor acceded to the  
15 jurisdiction of the Grand Court to determine this appeal pursuant to s.47 (1) of the  
16 Law, considerations of fairness, justice and effective case management mean that it  
17 is not an issue that can properly be raised within the instant appeal proceedings.



<sup>10</sup> [2007] UKHL 51 [2008] 1 AC 696. See *R (Hill) v. Institute of Chartered Accountants in England and Wales* [2013] EWCA Civ 555; *R (Nirula) v. First Tier Tribunal (Asylum and Immigration Chamber)* and *anr* [2012] EWCA Civ 1436); *Anwar and Adjo v. Sec of State for the Home Department* [2010] EWCA Civ 1275.



1 *DID THE COMMISSIONER ACT LAWFULLY IN LIMITING HIS CONSIDERATION OF THE*  
2 *DISCLOSURE REQUEST TO THE S.20 (1) (D) DISPUTE, THEREBY REFUSING TO*  
3 *CONSIDER ANY MATTERS THAT AROSE AFTER THE DATE OF THE ORIGINAL*  
4 *REQUEST?*

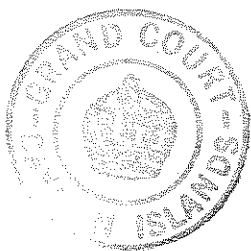
5 35. In paragraph 14 above I have cited the relevant passage from the Commissioner's  
6 10<sup>th</sup> July 2014 decision in which he explained why he declined to consider the  
7 additional exemptions relied upon by the Governor in her 7<sup>th</sup> April 2014  
8 submissions to the Commissioner. In argument before me, Ms Carss-Frisk QC  
9 sought to support the Commissioner's stance by reference to a passage from the  
10 judgment of Moses Ag J. in which he compared and contrasted the powers of the  
11 Grand Court on an appeal under s.47 of the Law with those exercisable by the First-  
12 Tier Tribunal under the UK Freedom of Information Act 2000 s.58. Having  
13 summarised the relevant provision of UK law, Sir Alan stated as follows:

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

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

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

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



32  
33 36. On the basis of Sir Alan's analysis and the fact that under UK law the First-Tier  
34 Tribunal is empowered to receive and consider fresh evidence not before the  
35 Information Commissioner, Ms. Carss-Frisk argued that although Mr. Evans  
36 original request for access was made as long ago as February 2012, the sole and  
37 exclusive focus of the Commissioner's reconsideration of the original decision to  
38 disclose was strictly confined to the narrow parameters of s.20(1)(d) of the Law, i.e.  
39 exemption from disclosure on the grounds that to disclose "would otherwise  
40 prejudice, or would be likely to prejudice, the effective conduct of public affairs".

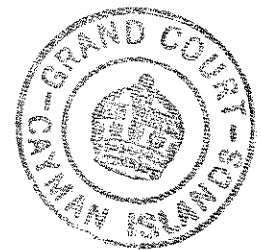
1 She further submitted that the flexibility under UK law whereby a public authority  
2 is entitled to rely as of right on exemptions that were not previously raised in a  
3 refusal notice or internal review before the Information Commissioner and the First  
4 Tier Tribunal has no bite under Cayman law in view of the different legislative  
5 structure (see *DEFRA v. Information Commissioner and Simon Birkett*<sup>11</sup> and  
6 *Information Commissioner v. Home Office*<sup>12</sup>; *Birkett v. Department for the*  
7 *Environment, Food and Rural Affairs*<sup>13</sup>). The implication of Ms. Carss-Frisk's  
8 submission is that even where the evidential basis for a new exemption arises after  
9 the original decision in favour of disclosure has been made and before the  
10 conclusion of the s.47(1) appeal process, the Commissioner enjoys no discretion to  
11 take into account the new material even though it is clear that a requested document  
12 is plainly exempt from disclosure.

13 37. I do not accept that either the terms of Moses Ag J.'s order dated 23<sup>rd</sup> December  
14 2013 or the nature of the appellate process under Cayman freedom of information  
15 law requires such a rigid approach to the Commissioner's powers to consider  
16 whether any relevant exemption applies to requested records. The issue of whether  
17 a public authority may rely on a new exemption on appeal where no mention of it  
18 had been made to the Commissioner prior to the decision to order disclosure was  
19 not strictly before Moses Ag J. because, as I read his judgment, all the Governor's  
20 objections to disclosure before Moses Ag J. had been raised in one form or another  
21 prior to the Commissioner's original decision (see para 35, Judgment of Moses Ag  
22 J.).

<sup>11</sup> [2011] UKUT 39

<sup>12</sup> [2011] UKUT 17

<sup>13</sup> [2011] EWCA Civ 1606

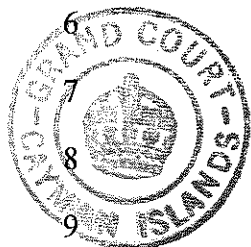


1 Moses Ag J. heard no argument on whether Cayman law prevented a public  
2 authority from relying on a new exemption the basis for which had arisen since the  
3 original decision and in my view there is nothing in the Cayman legislative scheme  
4 or the Judgment of Moses Ag J. that establishes such a rigid, inflexible approach.

5 38. But in any event, the sequence of events in the instant case is, to say the least,  
6 unusual and does not present a conventional factual matrix against which to test the  
7 flexibility of the 2007 Law against UK FOI law. In my view the real question is  
8 whether, in quashing the Commissioner's original decision (thereby nullifying it as  
9 invalid) and ordering remittal to reconsider whether the requested records are  
10 exempt from disclosure by reason of section 20(1)(d) of the FOI Law, Moses Ag J.  
11 was to be taken to be excluding in all circumstances the possibility of the Governor  
12 relying on any new basis for exemption that had arisen since the original decision in  
13 February 2012, including one which had arisen after his Judgment was handed  
14 down in December 2013. Nothing in his Judgment suggests such an intention and  
15 indeed in paragraph 60 Sir Alan stated:

16 *"...subject to submissions as to orders that I should make...the Governor*  
17 *should be permitted to put in further written argument should she be so advised*  
18 *to make good her claim".*

19  
20 I consider that in light of the fact that the original request for access had been made  
21 in February 2012, it would be surprising if Sir Alan intended to confine the  
22 Governor's ability to rely only on the exemption(s) available as long ago as 2012  
23 when the appeal process against the reconsideration decision would stretch into  
24 2015 and where new objections to disclosure might arise in light of the continuing  
25 saga of Operation Tempura and its fallout.



1 This would be especially surprising bearing in mind the fact of Mr. Evans'  
2 withdrawal of his request in March 2013 and the Commissioner's own reliance on  
3 his broad powers under s.44 and 46 of the Law as justifying his continuing "roving"  
4 remit to review the legality of the Governor's refusal to disclose the requested  
5 records. In order for such a rigid outcome to be sanctioned, I would require clear  
6 and compelling language in Moses Ag J's Judgment and final Order and I find none  
7 such. The fact that the Order of 23<sup>rd</sup> December 2013 only referred to  
8 reconsideration of exemption under s.20(1)(d) was no doubt because that was, at  
9 the time, the only exemption which it was envisaged could apply to the requested  
10 records. To read the Order as imposing a straitjacket on both the Governor and  
11 Commissioner would be contrary to good public administration and common sense.

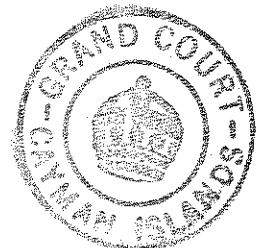
12 39. As for Sir Alan's analysis of the nature of an appeal under s.47(1) of the Law, I do  
13 not accept that by permitting the Governor to rely on a new exemption which had  
14 arisen since the original decision (and indeed since the handing down of Sir Alan's  
15 Judgment in the case of the concern as to prejudice to a criminal investigation) this  
16 amounts to watering down the principles identified by Sir Alan in paragraph 31 of  
17 his Judgment concerning the nature of the appellate process under s.47(1). Subject  
18 to normal principles of fairness and case management, I therefore conclude that the  
19 Governor was entitled to raise new bases for exemption of the records from  
20 disclosure as part of the reconsideration process flowing from the quashing of the  
21 original order. In my view the Commissioner erred in law in deciding that he could  
22 not lawfully consider any new exemption, confined as he was by Moses Ag J's  
23 Order strictly to the circumstances as they stood in February 2012 and the single  
24 ground for exemption in s.20(1)(d) of the Law.

1                    *IS THERE ANY MERIT IN THE “FRESH” GROUNDS FOR NOT DISCLOSING THE*  
2                    *RECORDS, NAMELY THE ISSUES OF CONTEMPT, LEGAL PROFESSIONAL PRIVILEGE*  
3                    *AND POTENTIAL PREJUDICE TO A CRIMINAL INVESTIGATION AND, IF SO, WHAT*  
4                    *CONSEQUENCES FLOW FROM THIS?*

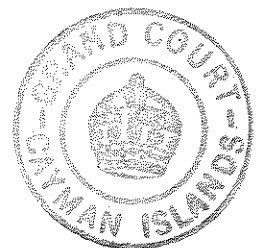
5            40.    In oral argument before me, Mr. Paget-Brown QC sought to rely on three fresh  
6            bases for exemption, one of which (the claim to legal professional privilege) had  
7            never featured in the Governor’s submissions to the Commissioner in the context of  
8            the reconsideration process in 2014. Two of the three objections to disclosure are,  
9            in my view, utterly misconceived but the third alleged exemption has merit and  
10           requires lengthier consideration.

11                    *The contempt exemption*

12           41.    The basis for this claimed exemption pursuant to s.17(b)(ii) of the Law was  
13           somewhat tentatively set out in the Governor’s April 2014 submissions to the  
14           Commissioner (see paragraph 10 above). The witness statement of the former  
15           Assistant Solicitor General, Douglas Schofield, dated 19<sup>th</sup> December 2014 set the  
16           matter out in greater detail. In short, it was submitted on behalf of the Governor  
17           that disclosure of the requested records would “breach an order of the Grand Court  
18           restraining Martin Bridger from permitting anyone to inspect or copy certain  
19           documents, some of which are thought to be referred to and/or quoted in the  
20           Governor’s decision on the complaint” (see para 57 (ii), Appellant’s Skeleton  
21           Argument).



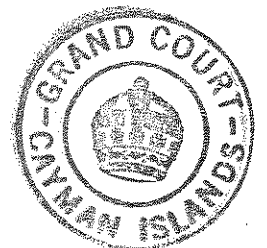
1 By reference to an order made by Williams J. in separate civil proceedings brought  
2 by the Attorney General of the Cayman Islands against Martin Bridger (whereby  
3 Mr. Bridger was prohibited from allowing any party to that litigation and their  
4 attorneys from inspecting or taking copies of a number of documents listed in three  
5 discrete Tables of materials) it was the Governor's submission that the simple fact  
6 of this injunction directly engaged the s.17 exemption. The basis for the injunction  
7 issued by Williams J. against Mr. Bridger was that legal professional privilege  
8 attached to a number of documents that Mr. Bridger proposed to disclose within the  
9 civil action against him (on the basis that they were relevant to his defence to the  
10 claim in misfeasance in public office brought by Stuart Kernohan) and that this  
11 privilege was not Mr Bridger's to waive. Mr. Schofield's witness statement asserts  
12 that the documents identified in the Tables referred to by Williams J. in his 8<sup>th</sup>  
13 November 2013 Judgment and 12<sup>th</sup> December 2013 Order run into many hundreds.  
14 Neither the Aina Report itself nor the Governor's report of 7<sup>th</sup> March 2011 is  
15 apparently included in any of the Tables but what is said is that because many  
16 paragraphs in the Governor's report contain references to or summaries of  
17 documents that *are* listed within the Tables, it would be contrary to – indeed  
18 somehow a breach of – the order of Williams J. to permit disclosure of the  
19 requested records within these appeal proceedings.



42. In my view the Governor's submission is fundamentally misconceived. If it is proper under the 2007 Law to order disclosure of the requested records, it is quite impossible for any such order to amount to a breach of the Order of Williams J. which is directed solely and exclusively at Martin Bridger and arises from a discrete finding that the Attorney General had established a proper claim to privilege in relation to a list of identified documents in circumstances where Mr. Bridger had failed in his attempt to go behind that privilege (see para 151, Judgment of Williams J., 8<sup>th</sup> November 2013). The sole basis for objecting to the disclosure of the records in the instant case is that they are exempt from disclosure under Cayman freedom of information law. If they are exempt, then they cannot lawfully be disclosed. If they are not, the fact of the Order made by Williams J. in November 2013 cannot otherwise prohibit their disclosure. In my view the fact of the Order against Mr Bridger is irrelevant to the issues I have to decide.

### *The privilege exemption*

43. For the first time in his Skeleton Argument, Mr. Paget-Brown QC sought to raise a completely new basis for exemption from disclosure, never raised before Moses Ag J. in the first appeal process despite the fact that, if it was a good point, it was a complete answer to the disclosure issue. Nor did it feature in grounds for judicial review originally lodged in August 2014 in the instant appeal or in the Notice of Originating Motion lodged on 31<sup>st</sup> October 2014. Indeed it was not even raised in the December 2014 witness statement of Mr. Schofield as a discrete basis for exemption.



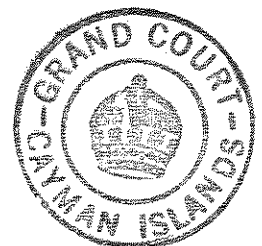


1 I refer to the submission at paragraph 59 of Mr. Paget-Brown QC's Skeleton  
2 Argument that the whole report of the Governor dated 7<sup>th</sup> March 2011 is exempt  
3 from disclosure pursuant to s.17(a) of the Law, i.e. "it would be privileged from  
4 production in legal proceedings on the ground of legal professional privilege".

5 44. Anyone who has ever been an advocate has probably had the experience of thinking  
6 up their best argument as they walk to Court on the first day of the hearing and  
7 sometimes such last minute thoughts are indeed the devastating nuggets of gold that  
8 carry the day. But where an advocate decides to take a point that could and should  
9 have been taken at the outset of proceedings that began some two years earlier and  
10 is one which, if correct, was staring everyone in the face, it is always sensible to  
11 reflect on whether in truth the point is a good one. The Court is also entitled to  
12 expect that such a last minute point of fundamental principle would be developed  
13 with care and after proper legal research. Yet Mr. Paget-Brown's submission in  
14 relation to the belated claim to privilege was limited in his Skeleton Argument to  
15 the following bare statement:

16 *"Further or in the alternative the Respondent should not have ordered*  
17 *disclosure of the Report, because the report was privileged. The report*  
18 *precisely mirrors the contents of legal advice. The report therefore attracts*  
19 *legal professional privilege under s.17 (a) of the FOI Law."*

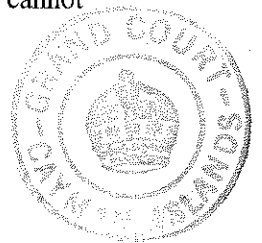
20 No authority was cited in support of this submission and in oral argument before  
21 me Mr. Paget-Brown did not expand upon it.



1 In short, his submission was that because Mr. Schofield asserts in his witness  
2 statement that “the Aina Report was plainly intended to be legal advice provided to  
3 the Office of the Governor....and cannot be released without the Cayman Island  
4 Government’s consent” and the Governor’s 7<sup>th</sup> March 2011 report adopted the Aina  
5 report *verbatim*, the Commissioner and the Court are bound to accept that the  
6 Governor’s report is exempt from disclosure under s.17(a) of the Law.

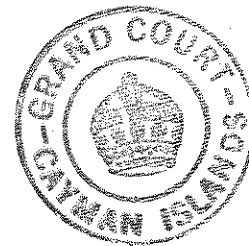
7 45. I reject the claim to legal privilege attaching to the Governor’s report. Even  
8 accepting that the circumstances in which the Governor sought the assistance of Mr.  
9 Aina QC in the discharge of his constitutional duty to determine whether a  
10 complaint of misbehavior against a member of the judiciary should be referred to  
11 the Judicial and Legal Services Commission were such as to attract legal  
12 professional privilege (as to which see the judgment of Moore-Bick J. in *Goodridge*  
13 *v. Chief Constable of Hampshire Constabulary*<sup>14</sup>) the simple fact is that the issue  
14 of disclosure in the instant appeal is focused upon the Governor’s report and not  
15 Mr. Aina’s advice. The fact that the Governor decided (perhaps unwisely it might  
16 be said) simply to adopt in full Mr Aina’s report, merely substituting his own name  
17 for that of Mr. Aina QC, does not mean in my view that the Governor’s report is  
18 exempt from disclosure on the ground of legal professional privilege exemption  
19 pursuant to s.17 (a) of the Law. Ms. Carss-Frisk QC relied on the following  
20 passage in the current edition of *Passmore on Privilege* (3<sup>rd</sup> ed, para 2-181) in  
21 support of her submission that the Governor’s response to the complaint cannot  
22 itself attract privilege:

23  
<sup>14</sup> [1999] 1 All ER 896 at 902D-903H



1           *"The result of a lawyer's work product: "fruits of advice": privilege does not*  
2           *operate "to put beyond the reach of the law documentary or other material*  
3           *which has an existence apart from the process of giving or receiving legal*  
4           *advice or the conduct of litigation""<sup>15</sup>. Accordingly privilege does not protect*  
5           *documents that are the means of carrying out, or are evidence of, transactions*  
6           *which are not themselves the giving or receiving of advice or the conduct of*  
7           *litigation. Such documents may be outwith the privilege because instructions to*  
8           *do a particular thing, such as prepare a legal document, do not necessarily*  
9           *amount to a request for advice. But even where advice has been given, the end*  
10           *product – or the "fruits" – of the legal advice given by the lawyer will usually*  
11           *not be privileged."*

12  
13       46.   In my view this principle is directly relevant to the situation here where the  
14           Governor's report represents the product of such legal advice as was sought from  
15           Mr. Aina QC. By adopting the views of Mr. Aina for inclusion in his formal report  
16           by way of response to the complaints made by Martin Polaine, the Governor was  
17           not and is not able to rely on the protection of privilege attaching to the original  
18           Aina report so as to render his report exempt from disclosure under s.17 (a) of the  
19           Law. Although apparently identical in content, the Governor's response dated 7<sup>th</sup>  
20           March 2011 is *not* the Aina report and it cannot claim to be protected from  
21           disclosure on the basis that it is a privileged document.

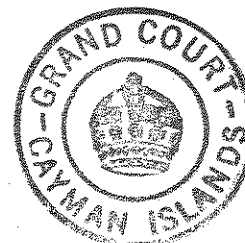


<sup>15</sup> Per Dawson J in *Baker v. Campbell* (1983) 153 C.L.R. 52 at 122-123.

*The “records relating to law enforcement” exemption*

47. I have already set out in paragraphs 9-10 above the factual basis for Governor’s claim that the records are exempt from disclosure pursuant to s.16 (b) of the Law. And in paragraphs 14-15 I have expressed the view that the Information Commissioner’s reasons for refusing to meet with Commissioner Baines to receive a verbal briefing as to why publication of the records would potentially engage the s.16 (b) exemption revealed a mistaken understanding of the legitimate scope of his investigative powers following the quashing of the original decision concerning disclosure of the records. Before explaining why I consider this to be the case it is necessary to say more about the context in which this new exemption was being raised as a reason for non-disclosure.

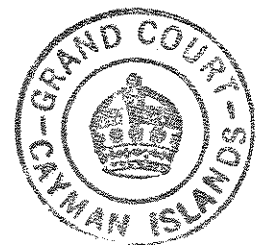
48. Whatever criticism may be laid against the Governor’s office for the way in which her case has been advanced both before Moses Ag J. and before me in terms of the constantly shifting positions adopted in relation to potential exemptions from disclosure, no blame attaches in relation to the contention that the records are *at the moment* exempt from disclosure pursuant to s.16 (b) on the basis that the Governor’s 7<sup>th</sup> March 2011 response is a “record relating to law enforcement”<sup>16</sup> whose disclosure “...could reasonably be expected to affect the conduct of an investigation or prosecution of a breach or possible breach of the law or the trial of any person or the adjudication of a particular case”.



<sup>16</sup> There is no definition in the 2007 Law of the meaning of a “record relating to law enforcement” and the Commissioner did not seek to contend that the records were incapable in law of being such records.

1 This is because it was not until January 2014 that allegations of criminal conduct  
2 were made by Martin Bridger against Mr. Covington, the Attorney General, Sam  
3 Bulgin, and former Governor Stuart Jack relating to the subject matter of the  
4 original complaint and the Governor's report. By the time the Governor's  
5 submissions were lodged with the Information Commissioner on 7<sup>th</sup> April 2014 (as  
6 Commissioner Baines explained in his statement exhibited to the Governor's  
7 submissions) counter allegations of criminal conduct on the part of Mr. Bridger had  
8 been received. These all related to his discharge of his duties while acting as the  
9 SIO in Operation Tempura. In these circumstances, it could not have been foreseen  
10 at the time Moses Ag J. handed down his Judgment in December 2013 that a  
11 potentially new basis for exemption might arise for consideration.

12 49. In his Affidavit sworn in these proceedings and dated 8<sup>th</sup> December 2014, the  
13 Information Commissioner repeated the explanation contained in his 10<sup>th</sup> July 2014  
14 decision as to why he took the view that the claimed s.16 (b) exemption was not  
15 something he was required or indeed lawfully able to take into account, stating that  
16 the Order made by Moses Ag J. was very clear in confining his reconsideration  
17 solely to s.20(1)(d) and that, in effect, he had no discretion to consider any  
18 developments that may have occurred since the original request made by Mr. Evans  
19 in February 2012 (see paragraph 14). I have already explained why, in my view,  
20 this was an error of law on the part of the Commissioner.



1       50.     The Commissioner then proceeds to explain that although he did not consider that  
2             he should address the new exemptions invoked by the Governor, he did give  
3             thought to whether there was any merit in the Governor's substantive arguments  
4             based on these exemptions. He concluded that the Governor had failed to discharge  
5             the burden of proof resting on her to prove that the requested documents are exempt  
6             under s.16 (b), citing three reasons. First, it is said that the Governor's submissions  
7             in relation to the applicability of s.16 are "ambiguous and unparticularised" and that  
8             the Governor had failed to address the asserted connection between the allegations  
9             made by Mr. Bridger and the subject matter of the requested records. Secondly, it  
10            is said that Mr. Baines's statement had itself explained that it was too early to  
11            determine whether a criminal investigation was warranted, let alone a prosecution  
12            and that the allegations and counter allegations of criminal conduct were non-  
13            specific. Thirdly, it was pointed out that Mr. Baines had referred to the potential  
14            damage caused by publication of the Aina Report but that "this was not the subject  
15            of the FOI request' and in any event the mere assertion of an overlap between the  
16            issues covered in the requested documents and a potential investigation "is  
17            insufficient to engage the exemption" (see paragraph 17 of Mr. Liebaers'  
18            Affidavit).

19       51.     In relation to Mr. Baines' offer to meet with the Information Commissioner to  
20             provide a verbal briefing and to give sight of the complaints received and any other  
21             documentation that would assist in making a decision, the Commissioner explained  
22             that in his view "a private meeting with one party to a dispute would....be contrary  
23             to the ethos of a fair and impartial FOI process".



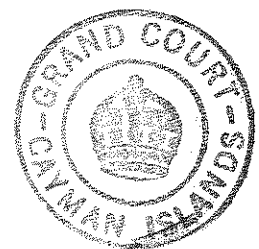
1 The Information Commissioner points out that after his decision was made on 10<sup>th</sup>  
2 July 2014, the Royal Cayman Islands police released a statement on 1<sup>st</sup> August  
3 2014 stating that the allegations made by Mr Bridger had been fully investigated,  
4 found to be baseless and that no further action would be taken on them. However  
5 the statement also made clear that “counter allegations made against Mr Bridger  
6 remain the subject of continued inquiry, although no further information is given  
7 about these counter allegations”. In other words, while Mr. Bridger’s original  
8 allegations of misconduct leveled against others had been dismissed, Mr. Bridger  
9 himself remained very much “in the frame” for potential criminal misconduct.

10 52. In my view the Information Commissioner was wrong to reject the offer of a  
11 meeting with Commissioner Baines whereby he might be provided with further and  
12 better particulars of the criminal inquiry then underway into the allegations and  
13 counter allegations flowing between Mr. Bridger and those against whom he had  
14 complained. As I have explained, the Order of Moses Ag J. had specifically  
15 referred to the Commissioner’s investigative powers and the possibility of receiving  
16 both written and oral submissions. The Commissioner’s reference to it being  
17 inappropriate to meet one party to the dispute overlooked the fact that there was  
18 only one party to the dispute, namely the Governor.



1 As Mr. Liebaers pointed out in paragraph 9 of his Affidavit, there was no FOI  
2 applicant in the proceedings following Mr. Evans's withdrawal from the process  
3 and, in these circumstances, I can see no prejudice or unfairness in the  
4 Commissioner agreeing to meet with M. Baines in order fully to understand the  
5 basis for the perceived s.16 (b) exemption. Indeed, if the meeting had taken place,  
6 one of the things that I presume would have become clear to the Commissioner is  
7 that the Aina report and the Governor's report are all but identical so that the  
8 Commissioner's dismissal of the relevance of Commissioner Baines having read  
9 the Aina report was mistaken. As for the suggestion that the Governor, through Mr  
10 Baines, had failed to discharge the burden of showing why the requested documents  
11 were exempt under s.16 (b), this point overlooks the very real possibility that by  
12 meeting with Mr Baines, the Commissioner might have gained a much clearer  
13 understanding of the strength of the claimed s.16 (b) exemption in light of contents  
14 of the requested records.

15 53. The Affidavit of Mr. Schofield seeks to update the Court as to the current state of  
16 play concerning the investigation into Mr. Bridger's potential criminal conduct  
17 arising from his role as SIO of Operation Tempura. At paragraph 16 of his 19<sup>th</sup>  
18 December 2014 Affidavit, Mr. Schofield states as follows:

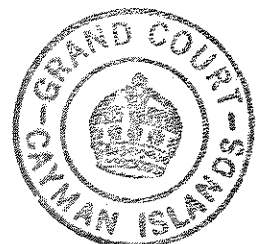




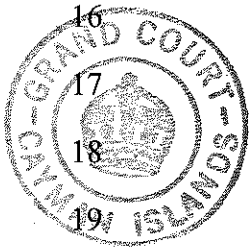
1                   *"16.....the Court should be aware that Martin Bridger is currently under*  
2                   *criminal investigation as a result of his conduct and actions during Operation*  
3                   *Tempura. At 09.45 today, 19<sup>th</sup> December 2014, I spoke with David Baines,*  
4                   *Commissioner of the RCIPS. Mr Baines has read the entire Aina report and he*  
5                   *advises me that there is material in the report that supports and will be relied*  
6                   *upon in the criminal investigation currently on foot. Mr Baines has authorised*  
7                   *me to advise the Court that Bridger is currently being investigated for the*  
8                   *following offences: (1) misconduct in public office, contrary to common law (2)*  
9                   *providing false information to a public officer contrary to s.120 of the Penal*  
10                  *Code (3) willfully misleading a police officer contrary to s.123 (g) of the Police*  
11                  *Law (4) making a false report to a police officer contrary to s.124 of the Police*  
12                  *Law. In addition and in connection with the UK High Court civil action*  
13                  *referenced at paragraph 15 (c) above, Bridger is under investigation for*  
14                  *potential criminal charges in either the Cayman Islands or the UK relating to*  
15                  *(5) theft of police property (6) handling and/r possession of stolen property;*  
16                  *and (7) breaches of the UK's Data Protection Act 1998. I personally assisted*  
17                  *the Commissioner of Police in the preparation of a file for preliminary review*  
18                  *by DPP Cheryl Richards and I was present at the DPP's office on 28 November*  
19                  *2014 when the Commissioner delivered that file directly into her hands."*

20  
21                  Having summarized the current position, Mr. Schofield proceeds to give his opinion  
22                  that "release of operation Tempura evidence and correspondence contained,  
23                  exhibited or referred to in the Aina Report is likely to affect the conduct of a  
24                  criminal investigation and any eventual trial arising from that investigation."

25                  54. Ms. Carss-Frisk QC was scathing in her criticism of what she implied was a  
26                  desperate, barrel-scraping effort by the Governor to block the release of the  
27                  requested records by reference to vague allegations of prejudice to a potential  
28                  criminal investigation. However when I asked her whether she was suggesting that  
29                  no weight could or should be attached to the evidence from Commissioner Baines  
30                  and Mr. Schofield because their evidence was incapable of belief or advanced in  
31                  bad faith, she made clear that that was not her position.



1 In my view, it is quite impossible for me to dismiss as baseless the concern that  
2 publication of the Governor's report, identical in content to the Aina report as it is,  
3 has the potential to interfere with what is plainly an active criminal investigation  
4 into Mr. Bridger's alleged commission of a wide range of criminal offences. It is  
5 equally impossible to dismiss the possibility that, were Mr. Bridger to be charged,  
6 the wide publicity that would inevitably be given to the Governor's response to the  
7 complaints pursued by him and Mr. Polaine has the potential to prejudice a fair  
8 trial. Having read the records myself, it is clear that insofar as the Governor's  
9 response summarily dismisses the allegations pursued by Messrs. Polaine and  
10 Bridger against identified members of the judiciary, the former Attorney General  
11 and Mr. Covington - and does so in great detail by reference to a complex series of  
12 events that can fairly be assumed to overlap with at least some of the issues that  
13 will be addressed in the current criminal investigation into Mr. Bridger's conduct -  
14 a credible basis for the engagement of s.16(b) of the Law is made out on the  
15 evidence. In my judgment, one of the issues that might usefully have been  
16 considered by the Information Commissioner in light of the concerns expressed by  
17 Commissioner Baines was whether a redacted version of the Governor's 7<sup>th</sup> March  
18 2011 report might be capable of being published with a view to avoiding prejudice  
19 to the current criminal investigation while upholding basic principles of FOI law.  
20 However the Information Commissioner's blanket refusal to contemplate a meeting  
21 with Commissioner Baines, combined with his view that he could not lawfully  
22 consider the claim to a s.16(b) exemption, prevented any such consideration and in  
23 my view that is a further reason why I consider that the 10<sup>th</sup> July 2014 decision was  
24 unlawful and falls to be quashed.  
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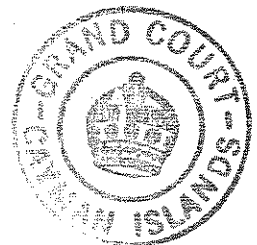


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*CONCLUSION*

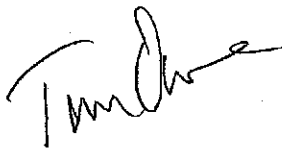
55. The Information Commissioner's view that the Order of Moses Ag J. dated 23<sup>rd</sup> December 2013 prevented him from taking into account any new exemptions claimed by the Governor, including the newly asserted s.16 (b) exemption that had arisen only after Sir Alan handed down his decision, was wrong in law. I also consider that the Information Commissioner was wrong to reject the invitation from Commissioner Baines for an oral briefing on the precise basis for the claimed s.16 (b) exemption prior to issuing his 10<sup>th</sup> July 2014 decision. The Governor's submissions to me in this appeal (based on s.16(b) of the Law) do not seek to raise issues that were not raised in the original submissions lodged in April 2014 albeit that there is fresh evidence from Mr. Schofield that relates back to the s.16(b) submission originally advanced in relatively skeletal form in April 2014 on behalf of the Governor. And I can find no prejudice to any individual or the overall conduct of public administration flowing from a legal obligation on the Commissioner to take into the account the content of Commissioner Baines's statement and concerns. Accordingly, I see no basis for arguing that it is contrary either to the spirit or letter of paragraph 31 of Moses Ag J.'s judgment to allow the Governor to rely on s.16(b) in the context of the appeal before me.

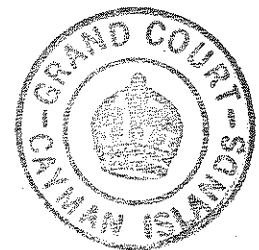
56. In these circumstances, I have concluded that the Governor's argument on the single s.16 (b) exemption is made out with the consequence that the Information Commissioner's decision of 10<sup>th</sup> July 2014 must be quashed.



1 I will hear further submissions on the terms of the Order that properly flows from  
2 my conclusion. My provisional view is that, in light of Mr. Paget-Brown's  
3 abandonment of what I will describe as the broad s.20(1)(d) challenge to the  
4 Commissioner's 10<sup>th</sup> July 2014 decision (as developed in paragraph 58 of his  
5 Skeleton Argument), it is not open to the Governor now to challenge or require  
6 reconsideration of the Commissioner's decision pursuant to the requirements of  
7 s.20 (1) (d) and s.26 of the Law. Subject to any genuinely new exemption arising  
8 for consideration (by which I mean an exemption that is based on new factual  
9 developments rather than a revised view of what legal submission might be  
10 advanced on "old" facts), the only tenable basis for exempting the requested records  
11 from disclosure under the 2007 Law is that the current active criminal investigation  
12 into Mr. Bridger's conduct *prima facie* engages the s.16 (b) exemption. Whether  
13 ultimately it prevents publication of the whole of the Governor's report (or merely  
14 identified parts of it) or whether future events wholly undermine the basis for the  
15 s.16(b) exemption are all matters for the Information Commissioner to reconsider in  
16 light of all relevant considerations and in light of the full exercise of his  
17 investigative powers. The appeal is allowed to this extent.

18 **Dated this the 16<sup>th</sup> day of March 2015**

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21 



21 **Honourable Mr. Justice Timothy Owen Q.C. (Actg.)**  
22 **Acting Judge of the Grand Court**