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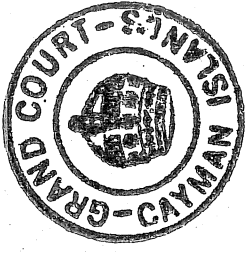
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 346 OF 2008

IN THE MATTER OF THE COMPLAINTS COMMISSIONER LAW
(2006 REVISION)

AND IN THE MATTER OF AN APPLICATION BY THE COMPLAINTS
COMMISSIONER UNDER SECTION 11(6)

Appearances: Mr. Nigel Meeson Q.C. of Conyers Dill & Pearman for
the Commissioner



Before: Hon. Justice Henderson

Heard: August 28, 2008

JUDGMENT

Can the Complaints Commissioner compel a non-governmental entity to disclose private and confidential information about a private citizen while investigating a complaint? That question has been referred to me by the Complaints Commissioner, John Epp, under section 11(6) of the *Complaints Commissioner Law* (2006 Revision) (the "Law") for a determination by declaratory order. The Attorney General has been given notice of this application but has not participated in it.

Facts

The office of the Complaints Commissioner has undertaken an investigation into an allegation that information has been improperly leaked from a government entity. By letter dated May 5th, 2008, Susan Duguay, the Acting Complaints Commissioner,

wrote to Cable and Wireless (Cayman Islands) Ltd. requesting the production of a list of incoming and outgoing telephone calls during December, 2007 and January, 2008 to and from a telephone number belonging to a Cable and Wireless subscriber. The subscriber is a private citizen who was not employed by any government entity at any material time. The Acting Commissioner is authorized by law to perform “any function” of the Commissioner which he authorizes her to carry out: Law, section 6(1).

Cable and Wireless were uncertain about their obligation to comply with the request. It referred the question to the Information and Communications Technology Authority (“the Authority”). The Authority felt unable to offer a conclusive opinion on the matter, and suggested that the Complaints Commissioner apply to this court for a declaratory order. The Authority did provide some comments to Cable & Wireless which it characterized as “guidance.”

Analysis

The purpose of the office of the Complaints Commissioner is to investigate and ascertain “whether injustice has been caused by improper, unreasonable or inadequate administrative conduct on the part of any government entity subject to this law”: Law, section 10(1). The Commissioner is authorized to investigate “any course of conduct or anything done or omitted by any person in the exercise of administrative functions respecting any business of the government” (with certain exceptions): Law, section 10(3). An investigation may be triggered by a written complaint, by a resolution of the Legislative Assembly, or by a determination by the Commissioner

himself that such an investigation would be of "special importance": Law, section 11(1).

Clearly and obviously, the *Law* is remedial legislation, intended by the Legislative Assembly to be given a broad and liberal interpretation. In a unanimous 1984 decision describing the scope of the duties assigned to the British Columbia Ombudsman, the Supreme Court of Canada said:

"The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman 'can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds': *Re Ombudsman Act* (1970), 72 W.W.R. 176 (Alta. S.C.), *per* Milvain C.J., at pp. 192-93. On the other hand, he may find the complaints groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.

In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve."

...

"Read as a whole, the Ombudsman Act of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil. There is an abundance of authority to this effect. See, particularly, *Re Ombudsman Act, supra*; *Re Ombudsman of Ontario and Health Disciplines Board of Ontario* (1979) 104 D.L.R. (3d) 597 (Ont. C.A.); also see *Re Ombudsman of Ontario and Minister of Housing of Ontario* ((1979), 26 O.R. (2d) 434 (H.C.)); *Re Ombudsman for Saskatchewan* (1974, 46 D.L.R. (3d) 452 (Sask. Q.B.)); *Re Board of*

Police Commissioners for the City of Saskatoon and Tickell (1979), 95 D.L.R. (3d) 473 (Sask. Q.B.)” (per Dickson, J, in *British Columbia Development Corporation and another v. Friedmann* [1984] 2 SCR 447).

Any differences between the British Columbia Ombudsman and the Cayman Islands Complaints Commissioner are purely cosmetic. Like his Canadian counterpart, our Complaints Commissioner is expected to investigate a very broad range of bureaucratic errors and abuses and to suggest corrective action. None of this supports interpreting the enabling legislation within a narrow compass; a broad and liberal interpretation is necessary to reflect the intention of the legislators.

The Law contains the following provisions bearing upon the Commissioner’s right to obtain confidential information and documents in the course of an investigation:

“14. (2) Every such investigation shall be conducted in private, but except as herein provided the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case; and in particular the Commissioner may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit, and may determine whether any person may be represented, by his attorney-at-law or otherwise, in the investigation.”

...

“15. (1) For the purposes of an investigation, the Commissioner may require any Minister, officer or member of the government entity concerned, or any other person who, in his opinion, is able to furnish information or produce documents relevant to the investigation to furnish any such information or produce any such document.

(2) Subject as herein, for the purposes of any such investigation the Commissioner shall have the same powers as the Grand Court in respect of the attendance and examination of witnesses (including the administration of oaths or affirmations and the examination of witnesses abroad) and in respect of the production of documents.”

...

“(5) Subject to subsection (3), no person shall be compelled for the purposes of an investigation under this Law to give any evidence or

produce any document which he could not be compelled to give or produce in civil proceedings before the Grand Court.”

...

“(7) Subject to this section, no information, answer, documents or thing shall be withheld from the Commissioner on the ground that its disclosure would be contrary to the public interest.”

Given the breadth of these provisions and their purpose, it can hardly be doubted that the Commissioner is authorized to compel a non-governmental (private) entity to disclose private and confidential information concerning one of its customers, even though that customer is not employed in the government service. Section 15(2) of the Law clothes the Commissioner with the powers possessed by a judge of this court “in respect of the production of documents.” This court can compel the production of relevant documents by private parties who are unconnected with the dispute before the court. In litigation involving a government department or entity, this court has the power to require the production of private and confidential information from an independent third party if the information is relevant. There is no balancing of interests: if the private information is relevant, it is no answer to argue that the evidentiary value of the information is outweighed by the privacy interest at stake. Moreover, it is the court itself which determines the question of relevance.

Applying these principles by analogy to the Complaints Commissioner, I conclude that he may demand the disclosure of private and confidential information from someone unconnected with government, and indeed from someone unconnected with the subject of the investigation, where, in the opinion of the Complaints Commissioner, that information would be relevant to his investigation. He may

demand such information from governmental departments and entities, from non-governmental entities, and from private citizens.

The Complaints Commissioner is not entirely unaccountable. Certain of his decisions may be judicially reviewed in this court: *Regina v. Parliamentary Commissioner for Administration* [1994] 1 WLR 621(QBD). Moreover, some of the guidelines suggested by the Authority (and referred to in passing above) are (contrary to the submission of the Commissioner before me) appropriate and should be adhered to in future requests for information. I agree with the Authority that a request for disclosure should be in writing and under the signature of the Complaints Commissioner or a member of his office whom he has authorized for the purpose. The letter should make explicit reference to the provision(s) of the Law under which the request is made. The letter should confirm that the Complaints Commissioner has initiated an investigation and that the requested information is relevant.

In the present case, Ms. Duguay said in her letter that the investigation was “into an allegation of information being improperly divulged from a government entity.” That was a sufficient statement of purpose in the present circumstances. I prefer to leave for another day the potentially difficult question of whether, and to what extent, the Complaints Commissioner must advise the recipient of his request of the nature of his investigation.

For these reasons, the question posed at the outset — is the Complaints Commissioner

authorized to demand private and confidential information from a non-governmental entity concerning a private citizen? – is answered in the affirmative.

Dated this 4th day of September, 2008

Henderson, J.

Henderson, J.
Judge of the Grand Court

