

IN THE GRAND COURT OF THE CAYMAN ISLANDS

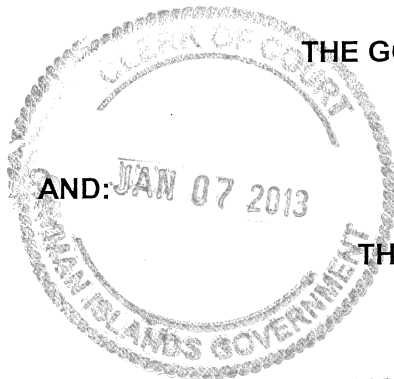
90003
CAUSE NO: OF 2013

IN THE MATTER OF THE FREEDOM OF INFORMATION LAW 2007

AND IN THE MATTER OF AN APPEAL against the decision to disclose records held by a Public Authority

AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW pursuant to Order 53 of the Grand Court Rules 1995

BETWEEN:

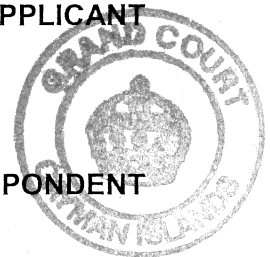


THE GOVERNOR OF THE CAYMAN ISLANDS

APPLICANT

THE INFORMATION COMMISSIONER

RESPONDENT



NOTICE OF EX PARTE APPLICATION
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
Section 47(1) of the Freedom of Information Law 2007

To: The Clerk of the Court
Law Courts Building
George Town
Grand Cayman

Name, address and description of Applicant:

His Excellency the Governor of the Cayman Islands
The Governor's Office
Suite 101
Government Administration Building
Grand Cayman KY1-9000
Cayman Islands

Decision in respect of which relief is sought:

The Respondent's Decision No. 24 - 00612 made on 22 November 2012 that:

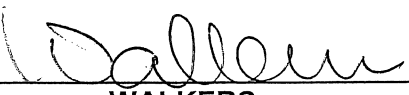
- (1) the decision of the Governor's Office that the requested records fall within the ambit of section 54(1) of the Freedom of Information Law 2007 ("FOI Law") and therefore that the FOI Law did not authorise their disclosure be overturned;
- (2) the requested records are not exempt from disclosure under section 20 of the FOI Law; and
- (3) that the Governor's Office be ordered to disclose the requested records.

Relief sought:

1. An order of certiorari to quash Decision No. 24 - 00612 and send the matter back to the Information Commissioner to be reconsidered and decided in accordance with the findings of the Court;
2. An order of *Mandamus* directing the Information Commissioner to reconsider and decide, in accordance with the findings of the Court, (i) whether the requested record contained defamatory matter and therefore was excluded from the reach of the FOI Law by section 54(1)(a) and/or (ii) to consider, in accordance with the findings of the Court, sections 20(1)(b) and 20(1)(d) of the FOI Law as exemptions relevant to the application for disclosure of the requested record;
3. Costs; and
4. Such further, consequential, or other relief as this Honourable Court deems just.

Name and address of Applicant's attorneys:

Walkers
Walker House
87 Mary Street
George Town
Grand Cayman KY1-9001
Ref: CW/ST



WALKERS
Attorneys at Law for the Applicant

Dated: 7 January 2013

Grounds on which relief is sought:

1. **Errors of law:** The Respondent erred in law in applying section 54(1)(a) of the FOI Law –
 - (i) when at paragraph 28 of Decision No. 24 - 00612 she had regard to the irrelevant factor of “*international best practice*” as an aid to the construction of an unambiguous provision of legislation in section 54(1)(a) of the FOI Law;
 - (ii) when at paragraph 29 she unlawfully had regard to travaux préparatoires as an aid to the construction of section 54(1)(a) despite the lack of any ambiguity in that provision, and further jumped to the irrelevant and unjustified conclusion that section 54(1) “*was copied from the Jamaican Act without appreciation of its potential effect on the workings of the Cayman Islands legislation*”;
 - (iii) when at paragraphs 30-32 she stated that section 54(1) is in contradiction with subsections 54(2) and (3), failing to appreciate that subsection (2) deals with a case where a party wrongly believes that the FOI Law requires access to a document, providing a defence to an action for defamation (etc) in such a case, whilst subsection (3) deals with the separate subject of the subsequent conduct of a person to whom access is granted to a document under the FOI Law, neither subsection being in conflict with subsection (1) which restrains disclosure of records containing defamatory matter;
 - (iv) when at paragraphs 33-35 she concluded that section 54(1)(a), if given its literal meaning, would contradict the FOI Law’s stated intent of giving effect to principles of accountability, transparency and public participation in decision-making, failing to appreciate that section 54(1)(a) would not apply simply to “*any materials that could be construed as being critical of government, of decisions of public authorities, or of actions of public officers*”, in particular because (as she correctly said at paragraph 52) it is not possible to defame a public authority and also because publication of criticism will not found a successful action for defamation where the material published is substantially true or is fair comment;

- (v) when at paragraph 35 she also had regard to the irrelevant factor of the public's right to express information, when the FOI Law is concerned not with the expression of information but with the onward transmission of information once expressed;
- (vi) when at paragraphs 36-38 she stated that section 54(1) is contrary to the fundamental right to freedom of expression in paragraph 11 of the Bill of Rights, disregarding *BBC v Sugar* [2012] UKSC 4, [2012] 1 WLR 439 in which the UK Supreme Court dismissed a similar argument based on Article 10 of the European Convention on Human Rights (which protects the freedom to receive information in the same terms as paragraph 11 of the Bill of Rights), ruling (at [94] per Lord Brown) that where FOI legislation expressly limits the right to a category of information, refusal of access in accordance with such a provision is not an interference with the right to information;
- (vii) when at paragraphs 39-41 she ruled that section 54(1) read literally would be contrary to Clause 122 of the Cayman Islands Constitution Order 2009, failing to appreciate that the section is squarely within Clause 122's provision for "*restrictions and exceptions ... in the interests of ... the rights and interests of individuals*";
- (viii) when at paragraph 54 she referred to statements in the requested record being "*an example of a member of the general public expressing and imparting information that is critical of government, as referred in paragraphs 34 and 35 which must be allowed*" and consisting of "*genuinely held opinion*", failing to appreciate that the requested record contained defamatory allegations against named individuals which had been found to be unjustified;
- (ix) when at paragraph 55 she referred to the report containing findings which could be expected to be "*true, and a fair comment*", failing to appreciate that the report if disclosed would constitute a publication of the defamatory allegations with which it was concerned, and also confusing the defences to defamation claims of justification and fair comment; and

- (x) when at paragraph 56 she had regard to the consideration of the public interest in disclosure which was irrelevant to the application of section 54(1) of the FOI Law.
2. **Errors of law:** Further or in the alternative, the Respondent erred in law in applying section 20 of the FOI Law –
- (i) when at paragraphs 104-105 she concluded that disclosure of the requested record would not prejudice the effective conduct of public affairs or harm the public offices concerned, failing to have regard in particular to the need to safeguard the independence of the Judiciary, the sensitivity of dealing with complaints against members of the Judiciary and to the substantial public interest in preserving the confidentiality of the initial investigation of a matter involving such complaints;
 - (ii) when in rejecting the public authority's reliance on section 20 she failed to appreciate that the need for such confidentiality had been recognised by the UK's First-Tier Tribunal (Information Rights) in *Sittampalam v Information Commissioner and Ministry of Justice* (Case no. EA/2011/0277); and
 - (iii) when she neither applied the exemption under section 20(1)(d), nor the exemption under section 20(1)(b) which she could and should have applied under section 42(4) of the FOI Law.
3. **Wednesbury unreasonable:** Further or in the further alternative, by reason of each and all of the matters aforesaid the Respondent's decision was Wednesbury unreasonable.

THIS EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW was FILED by Walkers, Attorneys-at-Law, Walker House, 87 Mary Street, George Town, Grand Cayman KY1-9001, for and on behalf of the Applicant whose address for service is care of their said Attorneys-at-Law.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: OF 2013

IN THE MATTER OF THE FREEDOM OF INFORMATION LAW 2007

AND IN THE MATTER OF AN APPEAL against the decision to disclose records held by a Public Authority

AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW pursuant to Order 53 of the Grand Court Rules 1995

BETWEEN:

THE GOVERNOR OF THE CAYMAN ISLANDS

APPLICANT

AND:

THE INFORMATION COMMISSIONER

RESPONDENT

ADMINISTRATIVE ORDER

UPON READING the Ex Parte Application for Leave to Apply for Judicial Review filed on 7 January, 2013 and the supporting Affidavit sworn by Tom Hines filed on 7 January, 2013

IT IS HEREBY ORDERED THAT:

1. The application for leave to apply for Judicial Review is granted pursuant to Order 53 of the Grand Court Rules 1995.
2. The Respondent's Decision No. 24 - 00612 made on 22 November 2012 is stayed pending the determination of the Applicant's application for Judicial Review.
3. Costs shall be in the cause.

DATED: _____

FILED: _____

HONOURABLE JUSTICE
JUDGE OF THE GRAND COURT

THIS ORDER was **FILED** by Walkers, Attorneys-at-Law, Walker House, 87 Mary Street, George Town, Grand Cayman KY1-9001, for and on behalf of the Applicant whose address for service is care of their said Attorneys-at-Law.