IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: G 188 of 2014

IN THE MATTER OF THE FREEDOM OF INFORMATION LAW 2007

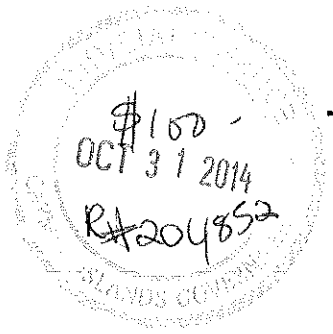
AND IN THE MATTER OF AN APPEAL against the decision to disclose records held by a Public Authority

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

BETWEEN:

THE GOVERNOR OF THE CAYMAN ISLANDS

APPLICANT



THE INFORMATION COMMISSIONER

RESPONDENT

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on the at or as soon as thereafter as Counsel can be heard, by Counsel on behalf of the Governor for the following relief, namely:

Relief sought:

1. An order of *certiorari* to quash Decision No. 41-00000 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 Information Commissioner should have considered and then exercised his discretion to decline to order the disclosure of the requested records and/or (ii) whether the requested records were excluded from the reach of the FOI Law by section 20(1)(d) and/or (iii) whether disclosure should not have been ordered, because the documents were privileged.

3. Costs; and

4. Such further, consequential, or other relief as this Honourable Court deems just.

AND FURTHER TAKE NOTICE that the Decision in respect of which relief is sought:

The Respondent's Decision No.41-00000 made on 10 July 2014 that:

1. he would not 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 section 16(b) and or 17(b)(ii) FOI Law;

2. the requested records are not exempt under section 20(1)(d) of the FOI law; and

3. the Governor's Office be ordered to disclose the requested records.

AND FURTHER TAKE NOTICE that the Grounds on which relief is sought:

1. **Errors of law: The Respondent erred in law when he failed to understand, consider or exercise his statutory discretion not to order the requested records to be disclosed in light of relevant facts put to him -**

   (i) when at paragraphs 17 and 19 of Decision No. 41-00000, the Respondent refused to consider any factual matters mitigating against disclosure, which arose after the date of the

request. The Respondent reasoned that these matters cannot make the information exempt from disclosure. In doing so, the Respondent misunderstood that he was not being asked to consider whether these matters rendered the information exempt from disclosure. As a result, he unlawfully disregarded the fact that under sections 43 and 44 of the FOI Law, he has a discretion as to whether to order the disclosure of any information that is not otherwise exempt from disclosure. As the Upper Tribunal in England recently explained, this discretion requires the Respondent to consider whether exceptional circumstances mean that disclosure should not be ordered despite the information not being exempt: *Home Office v The Information Commissioner and Cobain (Information rights : Freedom of information - absolute exemptions)* [2014] UKUT 306 (AAC) (02 July 2014). The Respondent completely failed to understand, consider or exercise this discretion.

(ii) when, as a result, the Respondent failed to consider whether specific, recent factual matters, explained in the Governor's submissions, would justify his declining to order disclosure. The Governor explained in her submissions that disclosure of the information may now (a) prejudice a potential criminal investigation and/or (b) breach an order of the Grand Court restraining Martin Bridger from permitting anyone to inspect or copy certain documents, some of which are thought to be referred to and/or quoted in the Governor's decision on the complaint. Accordingly, if the request was to be made today, section 16(b) and or 17(b) (ii) of the FOI Law would apply. It is submitted that these matters give rise to circumstances that would justify the Respondent using his discretion to decline to order disclosure.

2. **Errors of law: The Respondent erred in law in applying section 20(1)(d) of the FOI Law -**

(i) when, at paragraph 41 of Decision No. 41-00000, he asserted that section 20(1)(d) of the FOI law cannot apply where another exemption applies, failing to appreciate that the exemptions are not mutually exclusive.

(ii) when, at paragraphs 59-61, he unlawfully refused to have regard to the possible or probable use of the requested information after its disclosure. He stated that *"any presumed future use of a record can have no bearing on its disclosure"*. In reaching this conclusion, he failed to appreciate that the likely use of the information once disclosed is plainly relevant to the question of whether the disclosure is likely to cause prejudice. Otherwise, it would scarcely ever be possible to show that the disclosure would or would be likely to cause any prejudice.

(iii) when, at paragraphs 62-63, he concluded that because the Cayman Islands is a small jurisdiction, a credible refutation of allegations against the judiciary will circulate more easily. In doing so, he misunderstood the Governor's submission that in a jurisdiction with a small judiciary, allegations against a small number of judges affect a larger proportion of that judiciary. Allegations against the same number would not risk the same overall erosion of trust in a judiciary where those accused were only a small fraction of the total.

(iv) when, at paragraphs 65 and 111, he reasoned that Justice Henderson does not appear to have faced any negative consequences as a result of the information already in the public domain concerning allegations against him and their resolution. In giving this reason, the Respondent failed to appreciate that loss of trust in a judge cannot readily be measured. The mere fact that a judge has continued to sit without incident is therefore an irrelevant consideration.

(v) when, at paragraph 75, he concluded that it is highly unlikely that prejudice would be caused by a member of the judiciary failing to cooperate with future investigations by the

Governor. He failed to have regard to the fact that witnesses or interviewees of any kind would be deterred from cooperating with an investigation if they believed that their evidence might be published.

(vi) when, despite acknowledging at paragraph 84 that weight must be given to the Governor's opinion, the Respondent entirely failed to identify what weight he in fact gave to the Governor's opinion.

(vii) when, at paragraph 89, he unlawfully disregarded the Governor's argument that nobody is better placed than her to judge the prejudice likely to be caused by disclosure of the particular information. The Respondent stated that this argument was undermined by the fact that the Governor had sought the views of the judiciary. This conclusion was wholly illogical, and therefore, unlawful. On the contrary, the fact that the Governor had canvassed views from the judiciary demonstrates how well placed she is to obtain such opinions.

(viii) when he failed to give any or any appropriate weight to the views of the judiciary. At paragraph 94, the Respondent found that the Governor's argument that judges are well placed to assess the risk of prejudice is weakened by the Governor's suggestion that nobody is better placed than her to do so. This conclusion is illogical. It is obvious that two parties may be well placed to make an assessment, while one of them is the better placed of the two. The Respondent further rejected the views of the judiciary as being potentially biased, failing to appreciate that as judges, their office requires them to resist this type of bias. Significant weight should have been given to the views of (1) the Governor and (2) the judges, particularly given that they coincide.

(ix) when, at paragraph 103, he found that merely identifying a *"potential"* harm does not explain how there is a *"real and significant risk"* of harm. This was a straightforward error. A

real potential for harm is plainly synonymous with a real and significant risk of harm.

(x) when, at paragraph 107-8, he concluded that no prejudice would be likely to be caused by the fact that judges will be constitutionally restrained from publicly answering slurs against them circulated in public. He reached this conclusion on the basis that *"the issue is not whether the general public should be invited into the Governor's decision making"*. This reasoning wholly misses the point. The Respondent failed to appreciate that circulating slurs against judges when they are in no position to respond is harmful to public perception of the judiciary.

(xi) when, at paragraphs 126-128, he referred to and relied on the flawed reasoning above when reaching the conclusion that the public interest would favour disclosure of the requested records.

3. **Further or in the alternative, the Respondent should not have ordered disclosure of the report, because the report was privileged.**

   The report precisely mirrors the contents of legal advice. The report therefore attracts legal professional privilege under Section 17 (a) of the FOI Law.

4. **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.

5. **Human Rights** – The Information Commissioner should have considered and given sufficient weight to the application of Article 10 of the European Convention on Human Rights for the protection of the reputation or rights of others for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary, and then exercised his

discretion to decline to order the disclosure of the requested records.

6. The Applicant has withdrawn the request under the Freedom of Information Law 2007 and therefore the Information Commissioner should have considered and then declined to order the disclosure of the requested records, on the ground that the applicant, Mr. John Evans withdrew his request for the records that are the subject of the Information Commissioners decisions.

AND FURTHER TAKE NOTICE that the grounds of this application are contained within the affidavit of Gillian Skinner dated and filed 25th August 2014 and the Application for leave for judicial review Grand Court Form 53.

Dated the 31st October 2014

Ian Paget-Brown
Attorney at Law for the Applicant
31st October 2014

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

AND TO: **Ms. Denise Owen**
Broadhurst LLC
Attorneys at Law
40 Linwood Street
Grand Cayman

THIS NOTICE OF ORIGINATING MOTION was **FILED** by Ian Paget-Brown, Boundary Hall, Cricket Square, P.O. Box 2578, Grand Cayman, KY1-1103, Cayman Islands, Attorney-at-law for and on behalf of the Applicant whose address for service is that of its said Attorneys-at-law.