Information Commissioner's Office

ICO Hearing 24 – 00612
Decision

The Governor's Office

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands

22 November 2012

Summary:

An Applicant was refused access to documents relating to a complaint to His Excellency the Governor on Operation Tempura and the Governor's response to the complaint.

The Information Commissioner overturned the decision of the Governor's Office that the records fall within the ambit of section 54(1) and as such the FOI Law did not authorize the disclosure of the records. She overturned the decision of the Governor's Office that the responsive records were exempt from disclosure under sections 17(b)(i), 23(1) and/or 20(1)(d) and ordered that the Governor's Office disclose the records.

Statutes[1] Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
Penal Code (2007 Revision)
The Defamation Law (1995 Revision)
The Cayman Islands Constitution Order 2009

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[1] In this decision all references to sections are to sections under *the Freedom of Information Law, 2007* unless otherwise specified.

A. INTRODUCTION

[1] On 8 February 2012 the Applicant made a request to the Governor's Office under the Freedom of Information Law 2007 ("FOI Law") for:

1. *A complaint originally filed by Martin Polaine, former legal advisor to Operation Tempura, alleging interference in the investigations conducted by that operation. According to Mr Polaine, "my complaint related to sections of the judiciary, to the Attorney General's Chambers and the FCO (Foreign and Commonwealth Office)." This complaint was taken over by Martin Bridger, former SIO of Operation Tempura, after Mr. Polaine refused to accept the terms under which the investigation into the allegations was* [sic] *to be conducted.*

2. *The Governor's response to the complaint, which I understand was based on the findings of an investigation conducted by Benjamin Aina, QC and was released to Mr. Bridger in March 2011.*

[2] The Governor's Office responded to the Applicant on 14 February 2012, withholding the responsive records, claiming that they contain defamatory material to which section 54(1)(a) applies.

[3] On 16 February the Applicant appealed to the Information Commissioner's Office ("ICO"). As per ICO policies and procedures, an informal resolution process was commenced on 20 February 2012. However, on 6 March 2012 the ICO ceased the informal stage of the appeal since the Governor's Office insisted that the responsive records could only be made available to the Information Commissioner personally, and not to my staff. A few days later, the Governor's Office reversed its position and agreed to release the records in dispute for inspection by ICO staff. The Applicant agreed that the informal stage of the Appeal would be reopened.

[4] During the course of the investigation of this appeal, the Applicant proposed the redaction of all names, locations and contact information. However, the Governor's Office rejected this offer claiming that individuals would still remain identifiable, and the resulting documents would be incoherent. In addition they raised the following new exemptions: 17(b)(i), 20(1)(d) and 23(1), relating to actionable breach of confidence, prejudice to the effective conduct of public affairs and personal information respectively.

[5] On 20 April 2012 the ICO requested a number of clarifications of the position in respect of the new exemptions claimed, and on 22 June 2012, after several reminders, the ICO closed the informal process due to lack of progress on the part of the Governor's Office, and the matter was referred for a formal Hearing before the Information Commissioner.

B. BACKGROUND

Operations Tempura and Cealt

[6] Excerpts from published sources, including the Special Report of the Auditor General on the Review of Expenditures for Operations Tempura and Cealt, and statements from His Excellency

the Governor Duncan Taylor give a background to Operations Tempura and Cealt and the circumstances leading up to the documents that are the subject of this appeal.

[7] From A Special Report of the Auditor General, dated October 2009, and available on the Office of the Auditor General's website[2]:

> *In September 2007, HE The Governor Stuart Jack accepted a recommendation from Larry Covington, the Law Enforcement Advisor in the Foreign Commonwealth Office and then 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.*
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> *A team of London Metropolitan Police officers were brought to the Cayman Islands by approval of the Governor's Office and operated covertly to investigate the complaint. Initially, there was only a team of two officers that conducted a "scoping study". The team was led by Martin Bridger, the Senior Investigating Officer. The name given to this operation was Operation Tempura.*
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> *During the early part of the investigation, there were matters of concern which came to light in respect of the Police Commissioner, the Deputy Commissioner and a Detective Chief Superintendent that led to their being removed from active duty and put on required leave with pay by the Governor in March 2008. The three officers were placed under formal investigation in May 2008. This led to the appointment of an acting Police Commissioner.*
>
> *In March 2008, the investigation was made public and has continued to operate through to the date of this report. Shortly after the investigation was made public, the Senior Investigating Officer retired from the London Metropolitan Police (May 2008) and was engaged by the Cayman Islands Government as a consultant. The Senior Investigating Officer informed the audit team that it was his intention to retire when he commenced the assignment in September 2007. He said he made his intentions clear to the Governor that he would seek other employment in the United Kingdom, but was encouraged to stay on as a consultant in the role of Senior Investigating Officer.*
>
> *We were informed by the Senior Investigating Officer that in March 2008, after the senior police officers were put on required leave, members of the public voluntarily started coming forward to report additional allegations of wrongdoing by police officers. In June 2008, a second phase of the operation commenced to record confidential information from persons alleging wrongdoing. While the objectives of the second phase have been made public, the means by which the investigation team was conducting this work was not publicized until March 2009. A consultant firm called BGP Training and Consultancy was engaged in June 2008 to record the complaints.*
>
> *The first phase of the investigation led to the arrests of several individuals including presiding judge, His Lordship Alexander Henderson, JP, Lyndon Martin, former Police Inspector Burmon Scott and Deputy Commissioner Rudolph Dixon. The arrest of Judge Henderson led to civil proceedings and settlement in February 2009 which required the Government to pay him $1,275,000 in damages and legal costs resulting from his unlawful arrest.*

[2] www.auditorgeneral.gov.ky

In March 2009, James Smith, Acting Commissioner of the Cayman Islands Police Service, announced that a new investigation was commencing to look into the allegations of police misconduct that were uncovered during phase 1 of Operation Tempura. Called Operation Cealt, the responsibility for project management of this investigation lies with the Royal Cayman Islands Police Service. While formally announced in March 2009, as noted earlier, work actually started on this investigation in March 2008.

Since February 2008, both investigation teams have been housed in a secure office facility on Grand Cayman. The investigations that started operations in September 2007 with two Metropolitan Police Officers have fluctuated in size over the course of the investigation. At times, there have been as many as eight members of the Metropolitan police force on duty. With the contract to BGP Training and Consultancy in September 2008 who have had as many as seven individuals assigned to the project, contracting three former Metropolitan Police officers including the Senior Investigating Officer, lawyers supporting the team, and a project administration officer, there have been as many 19 individuals working directly for the project plus several others working part-time in the Government ministries providing administrative support.

The nature of the Operations Tempura and Cealt are unique. The audit team was informed that there has never been a police corruption investigation of this magnitude which involved the ouster of the complete higher command of the Royal Cayman Islands Police Service.

[8] On 21 January 2011 His Excellency the Governor Duncan Taylor issued the following statement:

In early Summer, 2010 Mr Martin Polaine made a complaint to the Foreign and Commonwealth Office about certain aspects of the Operation Tempura investigation in the Cayman Islands. The complaint was referred to me, as Governor, for consideration. Mr Martin Bridger later asked to be considered a joint complainant. Mr Polaine subsequently withdrew his complaint and Mr Bridger took full ownership of it.

I was not the Governor during the period of Operation Tempura and did not have first-hand knowledge of events which had transpired during those years. Due to the factual and legal complexity of the complaint and the large amount of documents which had to be considered, in late August 2010 I instructed independent Queen's Counsel from London to advise me on how to proceed.

I have now received detailed legal advice in respect of the complaint. I am still considering some aspects of that advice but I have reached a conclusion in regard to the complaint as it touches on the Judiciary. I have dismissed all the complaints made against the Judiciary, namely those complaints made against the Chief Justice, Mr Justice Henderson and Mr Justice Cresswell.

I have seen an article in the Financial Times dated 13 January 2011 touching upon some of these matters. The allegations referred to in that article appear to be similar to certain allegations in the complaint. I consider that any allegations raised against the Judiciary of the Cayman Islands in that article inferring that they had conspired to frustrate or interfere with Operation Tempura are unfounded and without justification.

In due course and once I have concluded consideration of all aspects of the complaint I shall make a further statement.

I would like to take this opportunity to make clear that I have every confidence in the Judiciary of the Cayman Islands.

[9] On 15 March 2011 the Governor issued a further statement:

I issued a statement on 21 January 2011 in relation to a complaint by Mr. Martin Bridger about certain aspects of the Operation Tempura investigation in the Cayman Islands. I have now concluded my consideration of that complaint and the legal advice I have received in relation to it. I have dismissed all aspects of the complaint.

I have provided detailed written reasons for my decision to the complainant, Mr. Bridger. Because of the sensitivity of some of the material in the written reasons I do not propose to make these public; in the circumstances, at my request, Mr. Bridger has signed a confidentiality agreement in which he undertakes not to share the reasons with any other person except his legal representative.

[10] There have been several civil and criminal cases before the Cayman and UK Courts in relation to these matters, a number of which are ongoing at this time.

[11] The same responsive records which form the subject of this Hearing were requested from the Foreign and Commonwealth Office (FCO) under the Freedom of Information Act 2000 on 21 March 2011. The FCO denied access claiming that the disclosure of the records would prejudice international relations under section 27(1)(a) of the UK statute. This decision was upheld by the UK Information Commissioner in part on the basis that "the Cayman Islands authorities… would… be likely to hold a strong preference for this information not to be disclosed.".[3] In the current case, the Governor's Office has not sought to apply the parallel exemption under the FOI Law.

C. PROCEDURAL MATTERS

[12] The initial reluctance of the Governor's Office to disclose the responsive records to the ICO staff assigned to process the appeal must be noted. The Governor's Office proposed that the records would only be made available to myself as Information Commissioner, but upon further instruction and explanation the records were provided to the relevant ICO staff. This was not the first time that the ICO has had difficulty obtaining records from a public authority in the course of an appeal, and it is worth pointing out the following.

Section 45(1) states:

In coming to a decision pursuant to section 43 or 44, the Commissioner shall have the power to conduct a full investigation … in the exercise of this power he may call for an inspect an exempt record, so however, that where he does so , he shall take such steps as are necessary or expedient to ensure that the record is inspected only by members of staff of the Commissioner acting in relation to that matter.

[3] Information Commissioner's Office (UK) *Decision Notice Foreign and Commonwealth Office* FS50423409 13 December 2012

[13] This shows that such a record should be made available to the Commissioner's staff where applicable. Section 45(2) goes on to state:

> *The Commissioner may, during an investigation pursuant to subsection (1), examine any record to which this Law applies, and no such record may be withheld from the Commissioner on any grounds unless the Governor, under his hand, certifies that the examination of such record would not be in the public interest.*

[14] I take the view that it is clear that the ICO must have access to all responsive records as a part of the Commissioner's obligation to decide an appeal as set out in section 43(1). Unless the Governor certifies otherwise, as provided in section 45(2), public authorities must provide access whenever the ICO requests it. Until my views in this respect are challenged in the Grand Court, and I see no reason why they should be, I will continue to insist that records are provided in a timely manner.

D. ISSUES UNDER REVIEW IN THIS HEARING

[15] The issues to be decided in this Hearing, in the order argued by the Governor's Office, are:

1. **Section 54(1)(a) –** Can the responsive records be withheld on the basis that they contain any defamatory matter?

2. **Section 17(b)(i) -** Are the responsive records exempt from disclosure because their disclosure would constitute an actionable breach of confidence?

3. **Section 23(1) -** Are the responsive records exempt from disclosure because their disclosure would involve the unreasonable disclosure of personal information of any person, whether living or dead?

4. **20(1)(d) –** Are the responsive records exempt from disclosure because their disclosure would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs?

E. CONSIDERATION OF ISSUES UNDER REVIEW

[16] In the below discussion responsive record 1 is referred to as "the complaint" and responsive record 2 as "the report".

1. Section 54(1)(a)

This section provides:

> *54. (1) Nothing in this Law shall be construed as authorizing the disclosure of any official record-*
>
> *(a) containing any defamatory matter;*

The Position of the Governor's Office

[17] The Governor's Office submits that the responsive records contain defamatory matter and that the provisions of the FOI Law ought not to be construed as allowing disclosure of the record. They argue that "where section 54(1)(a) becomes applicable the issue of the record's disclosure …pursuant to Part III of the FOI Law would not arise". In other words, where a record contains any defamatory matter, the general right of access does not apply and specific exemptions do not need to be applied in order to withhold the record.

[18] The Governor's Office does not attempt to define "defamatory matter", but provides a definition of a defamatory allegation, from **Defamation Law, Procedure and Practice, price and Duodu, 3rd Edition: "***A defamatory allegation is one that tends to make reasonable people think the worse of the claimant … This incorporates an element of discredit or moral blame".* They contend that "the records fall within the ambit of section 54(1)(a) as the allegations contained therein would tend to make reasonable people think worse of the persons named, and they also seek to discredit or cast moral blame.

[19] They go on to state that the Governor's Office would be exposed to an action for defamation if the records were released under the FOI Law notwithstanding its knowledge that the allegations in both records are of a defamatory nature.

The Position of the Applicant

[20] While it is helpful for any applicant to put forward arguments to support their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.

[21] With respect to the complaint, the Applicant submits that "the claim that the material is defamatory fails a basic test in that, [the allegations] having already been published, it cannot "make reasonable people think worse of those named"". The Applicant questions why, if defamatory comments have been made about members of the judiciary, which is an arrestable offence under Cayman Islands Law, has nothing been done about it. They state that if the comments were defamatory the three members of the judiciary named also had recourse to civil action in the UK courts, but no action has been taken.

[22] The Applicant goes on to state:

> *…Under the provisions of ECHR Article 6 anyone referred to in a defamatory manner … has an absolute right to be informed of the allegations made against them and respond to them... As that never happened because the Governor's Office failed to contact everyone named … their human rights … were clearly breached.*
>
> *Under Cayman Islands Law the issues of criminal defamation and false accusation of wrongdoing cannot simply be ignored or conveniently tucked away under a veil of secrecy. To do so would place the Governor and any member of staff who became involved open to charges of misfeasance.*

[23] Also included in the Applicant's submission are various arguments and allegations with respect to the actions or inactions of the Governor in response to the report, and other persons involved in the Tempura Investigation.

Discussion

[24] The Applicant submits that the complaint has been widely circulated. While The Financial Times newspaper in the UK, as well as The Independent, states that it has had sight of the complaint,[4] I have no concrete evidence to support the Applicant's claim. With respect to the report, this appears to have had very limited circulation, and the Governor stated from the onset that he did not intend to make it public.

[25] The Applicant makes various allegations concerning the actions of various parties in the investigations. However, it is not within my remit as Information Commissioner to examine or discuss these allegations.

Discussion of section 54 of the FOI Law:

[26] Section 54(1) appears to impose a categorical ban on the disclosure under the FOI Law of any defamatory matter, either directly by a public authority, or by order of the Information Commissioner.

[27] As further discussed below, I consider this provision to be:

a) Contrary to international best practice;

b) Contrary to the intent of the drafters of the FOI Bill 2007;

c) In contradiction with the other subsections within section 54 of the FOI Law;

d) Fundamentally in contradiction with the intent and objects as set out in section 4 of the FOI Law;

e) Contrary to the Fundamental Right to Freedom of Expression in paragraph 11 of the Bill of Rights; and,

f) Contrary to the Constitution.

a) Contrary to international best practice:

[28] I have conducted an extensive search for parallel provisions in other Freedom of Information legislation around the world, including 33 national and provincial statutes and 2 model statutes put forward by respected international organizations. I have found that only the Jamaican Access to Information Act 2002, has a similar provision.

The results of this search are as follows:

- With the sole exception of in the Jamaican Access to Information Act 2002, there are no parallels in legislation around the world to the provision in section 54(1) which outlaws disclosure of any defamatory matter.
- Some laws specify that disclosure of defamatory matter in good faith under the applicable FOI Law is not actionable against government – this is the case in the Commonwealth Human Rights Initiative (CHRI) model law, Antigua & Barbuda,

[4] "Tax Havens: In a sea of troubles" in: *The Financial Times*, 12 January 2011 and "Cayman Islands: The Met's Caribbean connection" in: *The Independent*, 1 May 2012

Australia, Belize, Jamaica, Trinidad & Tobago, the United Kingdom, Jersey and Scotland . This provision also forms part of the Cayman Islands FOI Law;

- Some laws protect the author or source of defamatory matter against action where disclosure is made in good faith under the applicable FOI Law – this is the case in Australia, Belize, Jamaica and Trinidad & Tobago. This also applies in the Cayman Islands;

- Some laws clarify that further publication by the applicant of any defamatory matter disclosed under FOI is not allowed – this is the case in the CHRI model law, Australia, Belize, Jamaica, New Zealand, South Africa and Trinidad & Tobago. This is also in the Cayman Islands FOI Law;

- Most laws to do not have special provisions relating to defamation at all – including the Article 19 Model Law, Bermuda, Canada and all Canadian Provinces, China, Hong Kong, India, Ireland, Malta, Mexico, the Netherlands, Wales and the United States.

It is clear from this analysis that the imposition of a categorical ban on the disclosure of any defamatory matter, as section 54(1) appears to do, is contrary to international best practice.

b) Contrary to the intent of the drafters of the FOI Bill 2007:

[29] In order to find out why this provision was included in the Cayman Islands FOI Law, I reviewed the available documentation of the Freedom of Information Working Group which was tasked in 2005 and 2006 with advising Cabinet on the drafting of the FOI Bill. To the best of my knowledge the paper presented to Cabinet containing drafting instructions for the FOI Law 2007, which I understand was accepted by Cabinet without changes, contains no reference to defamation.

I assume that section 54(1) of the Cayman Islands FOI Law was copied from the Jamaican Act without appreciation of its potential effect on the workings of the Cayman Islands legislation.

c) In contradiction with other subsections in section 54 of the FOI Law:

[30] The FOI Law provides appropriate safeguards in respect of the disclosure of records containing defamatory matter under the FOI process, by protecting public authorities and public officers, as well as authors or any other person who supplied such a record to a public authority.

Section 54(2) provides:

> *(2) Where access to a record referred to in subsection (1) is granted in the bona fide belief that the grant of such access is required by this Law, no action for defamation, breach of confidence or breach of intellectual property rights shall lie against-*
>
> > *(a) the Government, a public authority, Minister or public officer involved in the grant of such access, by reason of the grant of access or of any re-publication of that record; or*

(b) the author of the record or any other person who supplied the record to the Government or the public authority, in respect of the publication involved in or resulting from the grant of access, by reason of having so supplied the record.

[31] Appropriately, the FOI Law does not protect against further publication of such records by the person to whom access is granted:

Section 54(3) provides:

(3) The grant of access to a record in accordance with this Law shall not be construed as authorization or approval-

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

[32] It is clear that subsections 54(2) and 54(3) anticipate that records containing defamatory matter can be released in the bona fide belief that such disclosure is required under the FOI Law, and provides for protections in relation to such releases. This contradicts the provision in subsection 54(1) which appears to ban such disclosure unconditionally.

d) Fundamentally in contradiction with the stated intent of the FOI Law:

[33] The objects of the FOI Law are succinctly described in section 4 of that Law:

4. The objects of this Law are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely-

(a) governmental accountability;
(b) transparency; and
(c) public participation in national decision-making,

by granting to the public a general right of access to records held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information.

[34] As seen above, if section 54(1) was applied as written, it would have the effect of prohibiting the disclosure by public authorities of any "defamatory matter" under the FOI Law. This would include any materials that could be construed as being critical of government, of decisions of public authorities, or of actions of public officers.

[35] I consider this contrary to the objects of the FOI Law itself, as governmental accountability and transparency, free public discourse and public participation in national decision-making, which are defined as fundamental principles of the system of constitutional democracy in the section above, cannot take place under conditions where the general public does not have the right to express and impart information that is critical of government.

e) Contrary to the fundamental right to freedom of expression in paragraph 11 of the Bill of Rights:

[36] Paragraph 11 of the Bill of Rights provides (my emphasis):

> ***11.***— *(1) No person shall be hindered by government in the enjoyment of his or her freedom of expression, which includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his or her correspondence or other means of communication.*
>
> *(2) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—*
>
> *(a) in the interests of defence, public safety, public order, public morality or public health;*
> *(b) for the purpose of protecting the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telecommunications, posts, broadcasting or other means of communication, or public shows or entertainments; or*
> *(c) for the imposition of restrictions on public officers in the interests of the proper performance of their functions.*

Under paragraph 24 of the Bill of Rights:

> *It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified.*

[37] For the same reasons explained above, I consider that the categorical ban on the disclosure of defamatory matter in subsection 54(1) of the FOI Law is not reasonably justifiable in a democratic society, and I am convinced that it significantly and disproportionately undermines the public's Fundamental Right to Free Expression guaranteed under paragraph 11.

[38] While paragraph 11 of the Bill of Rights provides that the right to free expression is not absolute and may be restricted "to the extent that it is reasonable justifiable in a democratic society… for the purpose of protecting the rights, reputations and freedoms of other persons…", I consider that subsection 54(1) disproportionately restricts the fundamental right to free expression, and that a proper extent of protection of "the rights, reputations and freedoms of other persons" in terms of the disclosure of defamatory matter under the FOI Law is provided by subsections 54(2) and (3). These sections respectively protect government if defamatory matter is disclosed in the bona fide belief that such disclosure is required by the FOI Law, protect the author or source of such material in similar circumstances, and prohibit further publication by the FOI applicant of defamatory matter received in the FOI process.

f) Contrary to the Constitution:

[39] Clause 122 of *The Cayman Islands Constitution Order 2009* states:

> *A law enacted by the legislature shall provide for a right of access to information held by public authorities, for the conditions for the exercise of that right, and for restrictions and exceptions to that right in the interests of the security of the Cayman Islands or the United Kingdom, public safety, public order, public morality or the rights or interests of individuals.*

[40] Clause 5(1) of the Constitution provides:

> ***5.**—(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*

[41] I consider that the right of access conferred by clause 122, as further embodied in the Cayman Islands Freedom of Information Law 2007, is not compatible with a categorical prohibition on disclosure of all defamatory matter, as section 54(1) appears to convey.

[42] Given this obvious, and in my view, insurmountable conflict, further supported by the important arguments above, I find it impossible to apply section 54(1)(a) of the Law in a literal manner.

[43] **Therefore in accordance with clause 5(1) of the Constitution, and the Interpretative Duty imposed in paragraphs 25 and 26 of the Bill of Rights, I intend to interpret the words "defamatory matter" in section 54(1) of the FOI Law, as "matter that it would be defamatory to publish".**

[44] In my view, this approach has a number of important advantages. It is compatible with the requirements of the Constitution, the Bill of Rights and the Freedom of Information Law, as it strikes the right balance between the need to protect the general public's right to access government information, including information that may be critical of public authorities and public officers, while at the same time providing the same level of protection against defamation as applicable in the courts.

[45] There is no definition of "*defamatory matter*" in the FOI Law. The Penal Code (2007 Revision) defines "*defamatory matter*" as "matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation."

[46] In my opinion, to come to a decision as to what is "defamatory matter" a literal interpretation of section 54(1) would impose an inappropriately low threshold as to the sort of information that would be caught, and therefore would not have to be disclosed, under the Law. Taking this approach, it would appear that section 54(1)(a) would not allow me to look to any of the defences for defamation, such as whether the matter is true, or whether it would be to the benefit of the public that it be published. My responsibility would then be only to determine whether or not I find that the responsive records contain defamatory material, which would exclude them from disclosure under the FOI Law. (I should note that it is not my reading of the FOI Law that simply because a document contains some defamatory material, that the entire record can be excluded from disclosure under the Law. It may be possible therefore to redact defamatory material from a record, and release of the remainder of the record.)

[47] It is indeed the case that many records which have been subject to Freedom of Information requests and appeals could be said to fall under this exclusion. A literal interpretation of this section of the Law would have prevented the disclosure of much information that has to date been released under the Law. It could also be argued that as Information Commissioner, it is contingent upon me to examine any record which is the subject of an appeal to determine if it contains defamatory matter, and if it does, the Law would not authorize the disclosure of the record. I consider this to be incompatible with the intent and the effective operation of the FOI Law.

[48] As already stated above, I intend to interpret the words "defamatory matter" in section 54(1) of the FOI Law, as "matter that it would be defamatory to publish". I believe therefore that I should look further to definitions and legal interpretations of "defamation" in considering whether or not a record "contains defamatory matter".

[49] Contact Law, The Definition of Defamation[5] states:

> *Whilst not part of the definition of defamation* per se*, the defences of justification or truth, and fair comment, are important considerations in determining whether a statement is defamatory. Under the defence of justification, if it can be proved that the statement is substantially true, then the statement will not be defamatory. Similarly, under the defence of fair comment, if it can be established that the statement was intended as an expression of a genuinely held opinion, and not as a statement of fact, and that the opinion was made in relation to provable facts, then it may not be defamatory.*

[50] Bullen & Leake & Jacob's Precedents of Pleadings[6] defines defamatory matter as:

> *matter which would "tend to lower the plaintiff in the estimation of right-thinking members of society generally" … The definition extends to matter which tends to make the claimant shunned or avoided by right-thinking members of society, even though it may not be to the claimant's moral discredit. Moreover, if a statement exposes a person to ridicule this too may be capable of being defamatory. … The test of whether a statement is defamatory is objective … .*

[51] The definition of defamation was extensively considered by Tugendhat J in *Thornton v Telegraph Media Group Limited*, who added that it "must include a qualification or threshold of seriousness, so as to exclude trivial claims." [7]

[52] Further consideration should be given to the unanimous ruling of the House of Lords in *Derbyshire County Council v Times Newspapers Ltd* [8] which renders law suits for defamation by public authorities impossible in view of the Fundamental Right to Freedom of Expression. Since restrictions to Freedom of Expression in Article 10 of the ECHR must be "necessary" in a democratic society, and therefore require a pressing social need and should be proportionate to the legitimate aim pursued, as a consequence, "not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but…it is contrary to the public interest that they should have it."

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[5] www.contactlaw.co.uk/the-definition-of-defamation.html

[6] Bullen & Leake & Jacob's Precedents of Pleadings 17 Ed, By William Blair QC, Lord Brennan QC, The Rt Hon. Lord Justice Jacob, Brian Langstaff QC

[7] *Dr. Sarah Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB) para 89

[8] Per Keith LJ in: *Derbyshire County Council v Times Newspapers* Ltd [1992] UKHL 6 at 8-11

[53] The parallel provision in paragraph 11 of the Cayman Islands Bill of Rights provides for a restriction to Freedom of Expression for specific listed purposes only, where it is "reasonably justifiable in a democratic society", which I believe will similarly restrict the bringing of defamation suits by public authorities in the Cayman Islands Government. However, I also note that, as the Law Lords pointed out, to the extent that the defamatory matter concerning a public authority is likely to reflect on the individual public officers involved, these individuals would continue to have the option of bringing proceedings for defamation.

Application of section 54(1) to the responsive records

[54] With respect to the complaint, under the defence of justification, one could argue that the person making the complaint was closely connected to the Tempura investigation, and the statements were intended as an expression of a genuinely held opinion, and not as a statement of fact, and that the opinion was made in relation to provable facts. This is 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.

[55] In the case of the report, it is accepted that the findings were made by an eminently qualified person of high standing, and as a result a reasonable person would expect that the statements contained therein are true, and a fair comment on the situation.

[56] While I understand that there is no public interest test involved in the application of section 54(1), I cannot but note that there is a strong public interest in providing the public with information on the investigation, which cost the public purse millions of dollars, and in particular the findings of the report, which after all, was carried out at a cost to the public of over $300,000.

[57] **I find that section 54(1) does not apply to the responsive records, and the exemptions to disclosure claimed by the Governor's Office are therefore considered below.**

2. Section 17(b)(i)

[58] This section provides:

> *17. An official record is exempt from disclosure if-*
> *(b) the disclosure thereof would-*
> *(i) constitute an actionable breach of confidence;*

The Governor's Office claims this exemption in relation to the report which responded to the complaint.

The position of The Governor's Office

[59] The Governor's Office submits that the report refers to sensitive information provided in confidence by individuals who participated directly in the Operation Tempura investigation, and in subsequent events relating to it. While accepting that there is no contractual agreement to hold the said information on confidence, they contend that "persons would have had a reasonable and well founded expectation that the information provided would be kept in confidence."

[60] They quote the well known case of *Coco v. A. N. Clark* [9] which I have previously discussed in detail in my Decisions 15-00611 and 3-02209[10], and submit that a cause of action for the breach of an equitable duty of confidence would arise where three elements essential to such a cause of action exist:

> *In my judgment three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself … must "have the necessary quality of confidence about it". Second, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it."*

The Position of the Applicant

[61] The Applicant questions whether there are any parties who could actually commence an action for breach of confidence, and states that 'actionable' requires proof that there is scope for litigation, which is not apparent in this case. With respect to the report, they state that "it was a decision by the PA [The Governor's Office] to rule the document confidential and force that decision on Martin Bridger. Again there is no scope for litigation here unless the PA plans to sue themselves".

Discussion

[62] I will consider the arguments of the Governor's Office and the Applicant, where given, as they relate to the three elements required for a case to breach of confidence to succeed, including the common law public interest defence, as previously applied in ICO Decisions 3-02209 and 15-00611.

The meaning of "actionable"

[63] As the UK Information Tribunal found in *Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.*[11] the meaning of "actionable" in the parallel exemption in the UK *Freedom of Information Act 2000* is not unambiguous. Lord Falconer, the sponsor of the Act, in the parliamentary discussions relating to the FOI Bill, clarified that "*the word 'actionable' does not mean arguable…"* and that "[it] *means that one can take action and win."* [12] Guidance from the UK Ministry of Justice[13] supports this view, namely that the exemption may apply "*if a person could bring a legal action and be successful*." There is no comparable discussion on this point in the Cayman Islands Hansard.

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[9] Coco v. A. N. Clark (Engineers) Ltd [1969] RPC 41

[10] ICO Decisions 15-00611 and 3-02209, www.infocomm.ky/appeals

[11] Information Tribunal *The Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.* EA/2009/0036 13 January 2010 http://www.informationtribunal.gov.uk/DBFiles/Decision/i360/Final%20Decision%2013.1.10%20without%20signature.pdf

[12] United Kingdom *Hansard* HL (Series 5) Vol.618, col. 416 and Vol. 619 col 175-6; quoted in Information Tribunal *HEFCE v ICO* op cit para 25 http://www.justice.gov.uk/downloads/guidance/freedom-and-rights/foi-exemption-s41.pdf

[13] Ministry of Justice *Freedom of Information Guidance. Exemptions guidance. Section 41 – Information provided in confidence* 14 May 2008 p. 2

The meaning of "breach of confidence"

[64] In *Coco v. A. N. Clark,* Megarry J established that in order for a case of breach of confidence to succeed, three elements are required:

(i) the document must have the necessary quality of confidence about it;
(ii) the information must have been imparted in circumstances importing an obligation of confidence; and
(iii) there must be an unauthorized use of that information to the detriment of the party communicating it.

[65] It is also important to note, that even if these three criteria are met, a common law public interest defence still exists.

[66] This approach is corroborated by guidance from the UK Information Commissioner on the identically-worded exemption in the UK's *Freedom of Information Act 2000* [14], which also states that:

> *The duty of confidence is not absolute and the courts have recognised three broad circumstances under which confidential information may be disclosed. These are as follows:*
>
> - *Disclosures with consent…*
> - *Disclosures which are required by law…*
> - *Disclosures where there is an overriding public interest… Much will depend on the circumstances of each case, but particular weight should be attached to the privacy rights of individuals. The weight of the wider public interest in confidentiality will also depend to some extent on the context. … Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.*

[67] The correctness of this approach is further confirmed in guidance from the UK Ministry of Justice on the same exemption, which states:

> *The courts have recognised that a person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence. So although the [FOI] Act requires no explicit public interest test, an assessment of the public interest must be still be made.*

Consequently, I hold that the applicability of the exemption in section 17(b)(i) of the Cayman Islands FOI Law will depend on the likelihood that legal action would be successful, and this determination requires a consideration of the common law public interest.

Equitable duty of confidence

(i) Does the information itself have the necessary quality of confidence about it?

[68] Again, according to guidance from the UK Ministry of Justice the term "necessary quality of confidence" means that "it must be information which is worthy of protection – someone must

[14] Information Commissioner's Office (UK) *Freedom of Information Act. Awareness Guidance 2. Information provided in confidence* Version 4 12 September 2008 pp.3-4

have an interest in the information being kept confidential." The information cannot already be in the public domain or be trivial in nature.

[69] The Governor's Office contends that information in the report, if disclosed, would have significant negative repercussions on the reputations of the persons named, and that access to the record has been restricted to a limited number of persons. In addition, the complainant to whom the report was sent was required by way of a confidentiality undertaking to hold the return document in confidence. The Governor's Office also notes that the record is neither trivial nor generally accessible.

[70] The Applicant on the other hand has referred to press releases which indicate that the complaint (but not the report) was seen by at least two British newspapers, which reported widely on its contents.[3]

[71] A large amount of information on Operations Tempura and Cealt is already in the public domain, both as a result of newspaper coverage and in the form of court rulings, official reports and statements. I am not convinced that the report consists of information which is worthy of protection, and it has not been demonstrated to me that the report has the necessary quality of confidence about it. For the avoidance of doubt, I will nonetheless consider the remaining two elements.

(ii) Was the information imparted in circumstances importing an obligation of confidence?

[72] The Governor's Office submits that they owe an equitable duty of confidence to the individuals who provided the information gathered during the Operation Tempura investigation, and to grant access to this information under the FOI Law would be a breach of that duty. They contend that participants in the investigative process who provided information freely disclosed the information on the grounds that the information would be held in confidence. They believe that the release of the report would undermine future investigations as persons would be reluctant to provide information integral to ensuing effective intelligence gathering if they suspected that it might be disclosed following an FOI request.

[73] They again quote from *Coco v. A. N. Clark:*

> *It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this suffices to impose upon him the equitable obligation of confidence.*

[74] The Governor's Office submits that any reasonable man standing in the shoes of the Senior Investigating Officer, the recipient of the information, would have realized that the information was being given to him in confidence, and this is sufficient to impose an equitable obligation of confidence upon the person receiving the information.

[75] The Applicant points out that the people interviewed and who provided information in the investigation are all professional people who would have "understood the need for something more than what is referred to as a 'reasonable and well-founded' expectation of confidentiality" The Applicant contends that "the very clear condition … that 'information must have been imparted in circumstances importing an obligation of confidence' was simply never met".

[76] It is unclear to me from the submissions exactly who is being referred to as the recipient of the information. The report was written for the Governor, and was passed to Mr. Bridger. In passing the report to the latter, the Governor explicitly asked Mr. Bridger to sign a confidentiality statement. The same party, namely the Governor's Office, is now claiming that this constitutes "circumstances importing a duty of confidence".

[77] It appears to me that the author of the report compiled information from various other reports and rulings involving the Tempura and Cealt Investigations. The Governor's Office has not convinced me that the providers of the information would have expected confidence. If indeed there is any sensitive information in the report, such as specific statements from participants in the investigative process, the Governor's Office could have redacted the names of the individuals in question. Neither has the Governor's Office demonstrated that harm would be done, and the nature of such harm, to future investigations should the report be disclosed.

[78] In conclusion, I find that the information was not imparted in circumstances importing a duty of confidence.

(iii) Would disclosure of the responsive record constitute an unauthorized use of the information to the detriment of the party communicating it?

[79] The Governor's Office points out that the *Coco v. A. N. Clark* ruling made it clear that there may be cases where detriment to the party communicating it may not be necessary, and the third element above may therefore exist where there is only unauthorized use of the information. They contend that they have not been authorized to release the information contained in the record, and state that "the disclosure of the record to the applicant would therefore be disclosure to the general public without the consent or authority of the provider of the information".

[80] I accept that case law exists to suggest that detriment is no longer necessary to pass this third leg of the *Coco* test.

[81] However, the Governor's Office has not clarified to me whose authority would be needed to release the information, who was the provider of the information, or indeed who would bring a cause for action against whom, should the information be released.

[82] **I conclude that the Governor's Office has not demonstrated that disclosure of the report would constitute an actionable breach of confidence, and find that section 17(b)(i) does not apply to the report.**

The Public Interest Test in Respect of Section 17(b)(i)

[83] For the avoidance of doubt, I will nonetheless address the public interest test with respect to the release of this record. While section 26(1) of the FOI Law, which requires for some exemptions that access be granted if it is in the public interest to do so, does not apply to section 17(b)(i), the common law public interest test must still be applied, as discussed above. This test differs from the standard public interest test in the FOI Law, as I have set out in paragraphs 91-93 of Decision 15 previously referenced.

[84] I take note of the applicable public interest factors in favour of disclosure in this case, submitted by the Governor's Office:

- Promotion of greater public understanding of the processes or decision of the Governor's Office;
- Promotion of accountability of and within Government; and
- Deterrence or revelation of wrongdoing or maladministration

[85] The Applicant submits that "the continuing secrecy surrounding Operation Tempura/Cealt coupled with evidence that both investigations achieved absolutely nothing is doing immeasurable harm to the reputation of the Cayman Islands and public confidence in the RCIPS and the FCO."

[86] I add the additional factors in favour of disclosure:

- Disclosure would document the reasons for the Governor's decision to dismiss the complaints made by Mr Bridger;
- Disclosure would promote the accountability of Government in relation to the public funds expended in the Tempura/Cealt Investigations, in particular the over $300,000 of public funds reported to have been spent on the report
- Disclosure would help to preserve the reputations of the Judiciary and other Government institutions.

[87] I note, but do not necessarily support, a number of general public interest factors in favour of withholding the report, put forward by the Governor's Office:

- The public interest in preserving confidences;
- Harm to the privacy of individuals named in the documents;
- The possibility that the effectiveness of various government institutions could be adversely affected as their integrity could be questioned by the public;
- The dissemination of unfounded allegations which would discredit and undermine the offices of public officials;
- Exposure of the Government to damages for breach of confidence and defamation.

[88] **Having balanced the public interest arguments in favour of and against disclosure, and having taken into consideration the higher threshold required by the common law public interest test in respect of confidence, I find that it is in the public interest to disclose the report.**

3. Section 23(1)

[89] This section provides the following:

> *23. (1) Subject to the provisions of this section, a public authority shall not grant access to a record if it would involve the unreasonable disclosure of personal information of any person, whether living or dead.*

The Position of the Governor's Office

[90] The Governor's Office contends that the disclosure of the records would constitute an unreasonable disclosure of personal information. They state that the allegations contained in the records relate not only to the names of individuals but include information about individuals whose identities are apparent, or can reasonably be ascertained, from the information. They submit that a redaction of the personal information would destroy the usefulness of the remaining un-redacted information.

The Position of the Applicant

[91] The Applicant has provided me with copies of several press releases which name many of the individuals involved in the investigations in relation to the actions ascribed to them in the responsive records. They also submit that enough information is available in the public domain, even without directly naming the individuals concerned, to enable the identification of those involved.

Discussion

[92] Although they cite the definition of "personal information" in the Regulations, the Governor's Office does not apply the further subsections of Regulation 2 which state that personal information does not include certain types of information:

> *(i) where the individual occupies or has occupied a position in a public authority …*
>
> *(ii) where the individual is or was providing a service for a public authority under a contract for services … ; or*
>
> *(iii) the views or opinions of the individual in relation to a public authority, the staff of a public authority or the business or the performance of the functions of a public authority.*

[93] In my opinion, the majority of the information contained in the responsive records falls into the above categories and therefore does not qualify as personal information for the purposes of the FOI Law. In addition, it is the case that much of the information relating to named individuals is already in the public domain, either through the press, reports or rulings from the court, so it would not be unreasonable to disclose. I refer for example to the Auditor General's Report as cited in the Background section above, and the ruling of Moses LJ of 28 May 2011[15].

[94] While applying a blanket personal information exemption, the Governor's Office has not provided me with specific instances of where the personal information exemption should apply. They have also not demonstrated the unreasonableness of the disclosure of any such information.

[95] As I have not found section 23(1) to apply to the records, it is not necessary to consider the public interest test. However, many of the factors argued above would apply.

[96] **I find therefore that the responsive records are not exempt pursuant to section 23(1).**

[15] Stuart Kernohan v H.E. the Governor, et al Cause No. G 255 of 2009

4. Section 20(1)(d)

[97] This section provides:

> *20. (1) A record is exempt from disclosure if-*
>
> > *(d) its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.*

The Position of the Governor's Office

[98] The Governors Office's seeks to apply the above exemption to both records and cites the ruling of the UK Information Tribunal in *McIntyre v Information Commissioner and Ministry of Defence:*

> *...this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure".* [16]

[99] They again argue that despite the fact that the Governor has dismissed the complaint as being without merit, disclosure of the responsive records would nonetheless damage public confidence in the institutions of Government in a way which would prejudice the effective conduct of public affairs. They contend that disclosure of the records would negatively affect the public's perception of these institutions.

[100] The Governor's Office also contends that there is a real and significant risk that Government could incur significant expenses in the payment of cost and damages in an action for defamation should the records be released, which would have far reaching negative financial implications for the Cayman Islands economy.

[101] Finally, the Governor's Office submits that there is a real and significant risk that the records, if disclosed, would likely prejudice a current trial before the Grand Court as the cause of action effectively arose from the same circumstances. They state that the information contained in the report "touches on and concerns information which may enjoy limited or full protection from disclosure in the court proceedings". It is proposed that release of the record could "lead to the allegations being discussed and determined in the 'court of public opinion' on a matter which is *sub judice",* and it could therefore be considered reckless and improper to disclose the information.

The Position of the Applicant

[102] The Applicant suggests that any claims against Government for defamation or any other costs or damages could already be made based on what has already been published, and the disclosure of these particular records would make no difference. Add to this the fact that "all of the records from the initial Operation Tempura investigation [have] gone missing … including sensitive information including identities of officers involved in the covert phase …".

[16] *Ian Edward McIntyre v Information Commissioner and Ministry of Defence* 4 February 2008 EA/2007/0061 para 25

[103] The Applicant accepts that the on-going claim in the courts in relation to Mr. Kernohan needs to be considered, but suggests that this court case was concluded on 11-12 September 2012 so this current appeal under the FOI Law should be allowed to go ahead unhindered. After it became apparent that judgment in this case would not be handed down until November, the Applicant suggested adjourning this Hearing.

Discussion

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

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

[106] I have given very serious consideration to the matter, and sought further clarification on any current proceedings in the courts, either here or in the UK, that relate to the matters discussed in both the complaint and the report. I have been advised that there are various cases surrounding the main trial[16] in the Grand Court of the Cayman Islands. These cases are very complex and interrelated, and include questions as to the admissibility of documents, the discovery process and the issue of privilege of documents. I understand that judgment is expected to be handed down in Cause 486 of 2011 (Attorney General v. Martin Bridger) in November 2012, and this is expected to pave the way for the main action to continue.

[107] It has not been demonstrated to me that the disclosure of the responsive records would be likely to prejudice the effective conduct of these various court proceedings. It is not sufficient for a public authority to merely mention court proceedings as a good enough reason for a record to be withheld. I invited the Governor's Office to expand upon their arguments to this effect, and for these submissions to be made *in camera* if necessary. While further information was provided with respect to the existence of the court proceedings, no further evidence as to how the release of the response records would prejudice the effective conduct of the court's affairs has been provided.

[108] **For reasons stated above, I find therefore that both responsive records are not exempt records pursuant to section 20(1)(d).**

F. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law, 2007*, I make the following findings and decision:

Findings:

I find that section 54(1)(a) of the Freedom of Information Law, 2007 does not apply to the responsive records.

I find that the responsive records are not exempt from disclosure under sections 17(b)(i), 23(1) or 20(1)(d) of the Freedom of Information Law 2007.

Decision:

Under section 43(3)(a) of the Freedom of Information Law, 2007 I overturn the decision of the Governor's Office to withhold the responsive records in this Hearing and require the Governor's Office to disclose the records.

As per section 47 of the *Freedom of Information Law,* 2007, the complainant, or the relevant public or private body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.

If judicial review is sought, I ask that a copy of the application be sent to my Office immediately upon submission to the Court.

If judicial review has not been sought on or before 6 January 2013, and should the Governor's Office fail to disclose the responsive records in this matter, I may certify in writing to the Grand Court the failure to comply with this Decision and the Court may consider such failure under the rules relating to contempt of court.

Jennifer P Dilbert
Information Commissioner

22 November 2012