

INFORMATION COMMISSIONER'S OFFICE CAYMAN ISLANDS



Decision 2 - 01109
Royal Cayman Islands Police Service ("RCIPS")

Jennifer Dilbert, MBE, JP
Information Commissioner for the Cayman Islands
12 February 2010

Summary: A media Applicant was refused access to a report filed with former Police Commissioner James Smith by Martin Bridger relating to Mr. Justice Alexander Henderson.

The Information Commissioner upheld the Public Authority's decision to refuse access to the responsive record and found that the record requested by the Applicant is exempt from disclosure under the Freedom of Information Law, 2007 ("FOI Law") as it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Statutes Considered:

Freedom of Information Law, 2007, sections 16(b)(ii), 17(a), 17(b)(i) and 20(1)(d).
Freedom of Information (General) Regulations, 2008 section 2.

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A. INTRODUCTION

On 23 April 2009 the Applicant requested the following record from the Royal Cayman Islands Police Service ("RCIPS"):

A report filed by SIO Martin Bridger, title unknown, that was "submitted by the Senior Investigating Officer Martin Bridger in his quest to provide the country with clarity on this issue" relating to the Operation Tempura investigation and its arrest of Mr. Justice Alexander Henderson.

On 1 May 2009, the RCIPS wrote to the Applicant acknowledging the existence of the requested record but refused access under sections 16(b)(i) and 16(c) of the FOI Law. Section 16(b)(i) states that records relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to affect the conduct of an investigation or prosecution of a breach or possible breach of the Law. Section 16(c) states that records relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, in relation to law enforcement.

The Applicant filed an appeal of this decision to the Information Commissioner on 4 May 2009, stating his belief was that the report requested does not pertain to an on-going investigation and can no longer be withheld under Section 16(b)(i) of the FOI Law. With respect to Section 16(c), he stated that he was not seeking to reveal confidential sources of information and that any references to these could be redacted in the report presented.

As is the policy of the Information Commissioner's Office ("ICO"), the matter was diverted to mediation to determine whether it could be informally resolved. While the mediation process resulted in identifying the specific documents in dispute, the matter could not be resolved through mediation, and a Notice of Hearing was issued on 2 November 2009.

B. PROCEDURAL MATTERS

During the mediation process, the Public Authority put forward sections of the FOI Law on which it was relying to deny access to the record requested as set out above. However, in its submission for this Hearing the RCIPS abandons reliance on some of the sections originally cited and submits that the record requested by the Applicant is exempt from disclosure by virtue of sections 16(b)(ii), 17(a), 17(b)(i) or in the alternative section 20(1)(d) of the FOI Law.

From the Fact Report submitted to me as well as in the Notice of Hearing, to which there was no objection by either party, it has been accepted by both the Public Authority and the Applicant that the record in dispute is "a report written by Martin Bridger on 14 April 2009 related to the Operation Tempura investigation and the arrest of Grand Court Justice Alexander Henderson". This is different from the wording of the original request as set out above.

C. ISSUES UNDER REVIEW IN THIS HEARING

The issues to be decided in this hearing are:

1. Is the record requested exempt from disclosure under section 17(a) of the FOI Law?
2. Is the record requested exempt from disclosure under section 17(b)(i) of the FOI Law?
3. Is the record requested exempt from disclosure under section 16(b)(ii) of the FOI Law?
4. Is the record requested exempt from disclosure under section 20(1)(d) of the FOI Law?

D. FREEDOM OF INFORMATION – A FUNDAMENTAL CULTURE SHIFT

As this is only the second decision I have issued under the Cayman Islands' FOI Law, a repeat of the brief discussion presented in my first decision about the purpose and processes under the Law is warranted. The FOI Law came into force in January 2009. Section 4 sets out the objects of the Law:

...to reinforce and give further effect to certain fundamental principles underlying constitutional democracy, namely-

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

The FOI Law does so by replacing the discretion of Government to decide when, what and to whom it will disclose information with a uniform set of rules that all public authorities must respect and abide by when making disclosure decisions. The rules in the FOI Law allow public authorities to balance the public's general right of access against the need, in limited and necessary circumstances, to keep information confidential in the public interest.

The FOI Law represents a fundamental shift in the operations of Government to an environment where routine disclosure of information is commonplace, and the public's right to information is denied only when there are objective reasons and legal authority for doing so. Under the FOI Law, the onus for justifying a refusal to provide access rests solely with the public authority that withheld the requested information.

E. OPERATION TEMPURA

Operation Tempura is the name given to the investigation into various allegations concerning the RCIPS, which commenced in 2007. The investigation has been complex and far reaching and of great interest to the public in general, generating much press coverage and discussion.

F. CONSIDERATION OF ISSUES UNDER REVIEW

1. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 17(a) OF THE FOI LAW?

The RCIPS has relied firstly on section 17(a) of the FOI Law to withhold the requested document. That section states that an official record is exempt from disclosure if it would be privileged from production in legal proceedings on the grounds of legal professional privilege. It should be noted that any exemption falling within section 17 of the FOI Law is not subject to the public interest test, and the Information Commissioner cannot order that records subject to this exemption be released in the public interest.

1(a) The position of the RCIPS

In its submission, RCIPS argues that the report prepared by the then Senior Investigator Martin Bridger was in response to Crown Counsel's request for further instructions, and that the report represents confidential communication between a client and his lawyer, to which legal professional privilege is attached.

They further purport that the record requested was a response to counsel's memorandum for further instructions on a matter in which litigation was being contemplated, and is also a request for legal advice. The RCIPS submits that legal professional privilege is attached both within the context of litigation privilege and legal advice privilege.

The RCIPS also contends that the sole purpose (and not just the dominant purpose) of the preparation of the report was to enable counsel as legal advisor to the RCIPS to conduct or provide advice regarding contemplated litigation. It states that the entire report was made confidentially for the purpose of seeking legal advice.

The RCIPS goes on to argue that although the report was forwarded to third parties by the Senior Investigator, the client's right to claim legal professional privilege has not been waived, because the Senior Investigator lacks the authority to waive the client's (RCIPS) privilege. It is also contended that the third parties to whom the report was copied were senior public officers who were indirectly connected to Operation Tempura, and shared a common interest with the client. In addition, the report was labelled confidential and was forwarded to third parties with the expectation that it would remain confidential.

The RCIPS therefore submits that the appeal filed by the Applicant should be set aside as the report is protected by legal professional privilege and is exempt from disclosure by virtue of section 17(a) of the FOI Law.

1(b) The Applicant's position

The Applicant has not argued, nor is it necessary for him to do so, the "legal niceties" of legal professional privilege. However the Applicant asserts that legal professional privilege may have been waived. He states that the RCIPS's statement that "the

expectation that (the report) would remain confidential and was done for the limited purpose of keeping informed other parties who had a common interest in the subject matter” is incorrect.

According to the Applicant, the existence of the report was made known to newspapers in Cayman via a letter from an individual in Jamaica, who discussed generally the content of the report. He contends that this individual could only have obtained information about the report through Mr. Bridger or the other individuals who had access to the report. He further claims that the creator of the report should not be able to discuss it directly or indirectly with the press, and then claim legal professional privilege.

The Applicant also questions RCIPS’s claim that “the report requested was prepared by a Senior Investigator to Operation Tempura but belongs to the client, the RCIPS”. He argues that Mr. Bridger was a special constable of the RCIPS at the time, and over the course of the investigation released a good deal of information regarding it. To claim that he did not have “instructions from the head of the RCIPS” to release information is nonsense as Mr Bridger was the RCIPS’s representative in charge of Operation Tempura.

The Applicant therefore requests the Commissioner to disregard all arguments regarding legal professional privilege.

1(c) Discussion and finding - Is the record requested exempt from disclosure under section 17(a) of the FOI Law?

Legal professional privilege is divided into two streams: legal advice privilege and litigation privilege.

- Legal advice privilege

Legal advice privilege “serves to promote full and frank communications between solicitor and client, thereby facilitating effective legal advice, personal autonomy (the individual’s ability to control access to personal information and retain confidences), access to justice and the efficacy of the adversarial system”.¹

In common law², in order for legal advice privilege to attach to all or part of a document, four things must exist:

- (i) *there must be a communication, whether oral or written;*
- (ii) *the communication must be of a confidential character;*
- (iii) *the communication must be between a client (or his agent) and a legal advisor; and*
- (iv) *the communication must be directly related to the seeking, formulating, or giving of legal advice.*

In this case, condition (i) is met as the responsive record has been identified.

¹ College of Physicians and Surgeons v BC Information Commissioner 2002 BCCA 665 at paras. 22-4

² B. v. Canada, [1995] 5 W.W.R. 374 (B.C.S.C.)

With respect to (ii), having seen the report in its entirety, I am confident that the document was meant to be confidential not only because each page of the body of the report was marked – “confidential”, but it was also copied to a limited number of people who had a vested interest in the maintenance of its confidentiality. The investigative and procedural nature of its contents, also indicate to me that it was not intended to be a public document.

In this case it is clear that the RCIPS sought advice of a legal nature from the Cayman Islands Government Legal Department who advise and represent the public authorities of the country. This is evident in the memorandum from the Legal Department in which further details on Operation Tempura were requested so that it could better advise the RCIPS on how to proceed. Based on this evidence of a client-solicitor relationship, I am satisfied that the report was a communication between a client and its legal advisor which satisfies point (iii) of the solicitor-client privilege test set out above.

With respect to (iv), I am in receipt of a memorandum to the Acting Commissioner of Police James Smith from the Legal Department requesting further information to enable the Legal Department to prepare for litigation. This memorandum references previous correspondence which I have not seen, but I am confident that this previous correspondence represented the seeking of legal advice by the RCIPS. I therefore find that condition (iv) also applies to the document.

From the documents received from the RCIPS I am satisfied that the record requested was prepared to enable legal advice to be given, and as such represents confidential communication between the RCIPS and their legal representative. Legal advice privilege can therefore be claimed.

- Litigation Privilege

The second branch of legal professional privilege is litigation privilege, which arises when litigation is a reasonable prospect or in progress. For this privilege to apply, the records must have been created for the dominant purpose of preparing for, advising on, or conducting litigation that is either underway, or is a reasonable prospect at the time the records were created. Litigation privilege is geared towards ensuring counsel a “zone of confidentiality” and protecting the lawyer’s brief from being “poached” by the adversary.

It is worth noting that “unlike legal professional privilege, litigation privilege does not last indefinitely. It ends with the litigation for which the reports or other communications were prepared subject to any undertaking of confidentiality”³.

While I have not been provided with concrete evidence that matters discussed in the report were before the court at the time of the request for the document, this fact is referred to both by the RCIPS and the Applicant in their submissions, and I believe that it is also in the public domain. I will therefore accept that such litigation is in progress.

³ Sopinka, Lederman and Bryan, *The Law of Evidence in Canada*, Toronto, Butterworths, 1992 p. 660.

I find that litigation privilege also applies and has not come to an end, as the dominant purpose for which the document was created was to prepare for litigation being contemplated, and this litigation is still in progress.

With respect to whether or not legal professional privilege has been waived, I note that privilege can be waived in the following circumstances:

- **Express waiver** - the client must have the clear intention of waiving privilege and does so
- **Implied waiver** - an objective consideration of the client's conduct demonstrates an intention to waive

A public authority may have disclosed the substance of the legal advice, for example, to the press, and may have waived privilege in doing so. Similarly, if a public authority has disclosed privileged advice to a person adverse to their interests, privilege would likely be waived.

In this case, there is no substantial evidence to support either an express or implied waiver of privilege. At the same time, I do not support the RCIPS' argument that the Senior Investigator lacked the authority to waive the client's privilege. I find no evidence that privilege had been waived in this case.

I uphold the decision of the RCIPS and find that the record is exempt from disclosure under section 17(a) of the Freedom of Information Law, 2007.

Despite the above ruling, it is helpful to outline the arguments and my findings in respect to the other exemptions under the FOI Law submitted by the RCIPS as grounds to withhold the requested record and the Applicant's responses to those grounds.

2. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 17(b)(i) OF THE FOI LAW?

Section 17(b)(i) states that an official record is exempt from disclosure if the disclosure thereof would constitute an actionable breach of confidence.

2(a) The position of the RCIPS

The RCIPS contends that the report prepared by the Senior Investigator in response to counsel's request was confidential in nature, being one prepared within the context of an attorney-client relationship. They further contend that the report was communicated in circumstances importing an obligation of confidence, as the report was labelled "confidential" and given to the parties in circumstances where litigation was being contemplated. Finally, they submit that detriment to the RCIPS would arise if the document is disclosed, in that such disclosure would adversely affect its ability to effectively carry out its functions.

The RCIPS therefore submits that the report should be exempt from disclosure as its disclosure would constitute an actionable breach of confidence.

2(b) The position of the Applicant

The Applicant does not argue, nor is it necessary for him to do so, the finer points of law as set out by the RCIPS. This in no way weakens his case, as it must be borne in mind that the FOI Law states under section 43(2) that in any appeal, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under the Law. In addition, along with the mediation procedure put in place, and the manner in which Hearings are conducted, the Information Commissioner's Office is determined to make the appeals process as "user friendly" and accessible to all parties as possible.

The Applicant argues that the RCIPS discussed the existence and contents of the report with third parties, and that some of that information ended up in the hands of the press. He thus questions the confidential nature of the report. He asserts that "the people who created the report cannot blab about it to the press, directly or indirectly, and then turn around and claim legal professional privilege and the like". He also refers to a newspaper article in which the author states that he is "aware of the report that has recently been submitted by the Senior Investigating Officer Martin Bridger in his quest to provide the country with clarity on this issue".

Finally, the Applicant feels that disclosure of information, would not be to the detriment of the RCIPS, but would instead serve to restore crucial confidence in the RCIPS.

2(c) Discussion – Is the record requested exempt from disclosure under section 17(b)(i) of the FOI Law?

In order for a case of breach of confidence to succeed (in the event of no contract), three elements are normally required⁴:

- (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.*

However, even if these three criteria are met, there is still a public interest defence to the disclosure of the document.

First, I have already discussed the quality of confidence of the report. Secondly, although the report was copied to a limited number of parties, I am satisfied that the necessary obligation of confidence existed. Thirdly, it is the case that the document commented on many aspects of the Operation Tempura investigation, and was not focussed on just one particular area. The report, although prepared in response to one issue, was far reaching in nature and scope, in order to give the recipients further insight into what is a very complex matter involving many individuals and issues.

⁴ *Coco v. A. N. Clark (Engineers) Ltd* [1969] RPC 41

I find that the release of some of the content of the report would not be of detriment to the RCIPS' ability to effectively carry out its functions. I cannot agree therefore that the entire document could be withheld under section 17(b)(ii).

With respect to the public interest defence, it could be argued that a part or parts of the document could be released, with a view to providing the public with information as to whether justice is being served in this important investigation.

Therefore, had the RCIPS been relying solely on the grounds that disclosure of the document would constitute an actionable breach of confidence, I would have ordered that a part or parts of the document were not exempt and must be released.

3. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION (16)(b)(ii) OF THE FOI LAW?

Records relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to affect the trial of any person or the adjudication of a particular case.

3(a) The position of the RCIPS

The RCIPS argues that the adjudication of a case is still pending before the court, and that the content of the report, if disclosed, would or could reasonably be expected to affect the adjudication of the matter. They suggest that they do not have to prove that disclosure will necessarily affect the trial, but only that its disclosure would or could reasonably be expected to affect it. The RCIPS also argues that section 16(b)(ii) applies whether the trial would be negatively or positively affected.

3(b) The position of the Applicant

The Applicant contends that Operation Tempura is no longer an on-going criminal investigation, and all of the matters brought to trial following its investigations have been disposed of. The Applicant states that "the principal subject of Mr Bridger's report, Grand Court Judge Justice Alexander Henderson, has already had his matter adjudicated". The Applicant believes that references to any other matter could be redacted from the document and the remainder of the information released.

3(c) Discussion - Is the record requested exempt from disclosure under section 16(b)(ii) of the FOI Law?

The threshold in this section is low, calling for the release of information to "affect" the trial or adjudication. The question is, how would disclosure affect a trial or adjudication? If the records relate to the person on trial and would have a positive effect on that person's defence, is that somehow "affecting" the ability of the crown to garner a conviction? The key question is whose interests are "affected" by the disclosure, and how? The new Cayman Islands Constitution (Section 7 of the Bill of Rights – Freedoms and Responsibilities) sets out the rights that everyone has with respect to receiving a fair and public hearing by an independent and impartial court within a reasonable time. The

standards include the right to be presumed innocent, be informed of the nature and cause of an accusation and to examine witnesses. Would disclosure infringe on any of these rights?

I do not agree with the RCIPS's statement that section 16(b)(ii) applies whether the case would be negatively or positively affected by disclosure. I believe the intent of this section is to preserve the impartiality and fairness of judicial and quasi-judicial processes, rather than to tip the scales in favour of one side or the other.

I would therefore argue that the entire document would not be exempt under section 16(b)(ii). Again, had I not found that the document was protected by privilege, I would have ordered that a part or parts of it be released.

4. IS THE RECORD REQUESTED EXEMPT FROM DISCLOSURE UNDER SECTION 20(1)(d) OF THE FOI LAW?

This section states that a record is exempt from disclosure if its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs. This exemption is subject to the public interest test.

4(a) The position of the RCIPS

Against the background of this exemption being considered if no other exemptions were seen to apply, the RCIPS accepts that there would need to be a "real and significant risk of prejudice" to the effective conduct of its business should the document be released. They submit that in this case, this risk does exist.

They also contend that disclosure of the document would erode the public's confidence in the RCIPS.

Finally the RCIPS submit that disclosure of this report would "limit the openness with which advice would be sought and given. It would prejudice the flow of free and frank advice not just between officers and counsel but also as between officers. Members of the RCIPS may become timid, overly cautious, guarded and reserved in seeking advice regarding investigations and subsequent prosecution of criminal conduct if documents connected to the investigation and prosecution of such conducts are disclosed under the FOI Law ... [and] would prejudice the ability of the RCIPS to offer an effective service".

Given that any exemption under Section 20(1)(d) is subject to the public interest test, the RCIPS goes on to argue that factors in favour of maintaining this exemption are not outweighed by the public interest factors in favour of disclosure.

4(b) The Applicant's Position

The Applicant refutes the position that disclosure would erode the public's confidence in the RCIPS. He states that "...an explanation might, in fact, go a long way toward restoring crucial public confidence in the police. Failure to disclose such information

would more likely, in our view, needlessly add to the perception of a veil of secrecy which in the past and even today continues to erode public confidence in police operations”.

With respect to police being timid or overly cautious as submitted, the Applicant states that “members of the RCIPS were neither timid, nor overly cautious when speaking about the existence and contents of this report to a ‘third-party’ representative; information that partially ended up in the hands of the press”.

He contends that all of the reasons the respondents have stated for disclosure not being in the public interest under Section 20(1)(d) of the FOI Law are not applicable, since they appear to be making reference to criminal investigations that no longer exist and “confidential” reports that have already been discussed in the public forum.

Finally, the Applicant submits that if this exemption is allowed to prevent the release of any government document, the entire FOI process should be abandoned and the Law stricken from the books. Any media report about virtually any topic could be argued to “prejudice the conduct of public affairs”.

4(c) Discussion - Is the record requested exempt from disclosure under section 20(1)(d) of the FOI Law?

The harms-based test in this section - “prejudice” - is steep. In order for this section to apply to the record, its disclosure must injure or damage a public authority’s ability to conduct its business. This section should not be confused with section 20(1)(b) which relates to free and frank discussion and where the harms test is much lower – i.e. “inhibit” - the free and frank exchange of views.

The report being withheld in this instance is a detailed, comprehensive and complex one. It encompasses many facets of the Operation Tempura investigation and contains information concerning matters outside the scope of this particular FOI request.

I find that in this case, disclosure of the responsive record in its entirety would prejudice, or would be likely to prejudice, the effective conduct of public affairs. If the RCIPS and its legal advisers had to be concerned at every step of their proceedings or investigations, that the information they hold would be disclosed under the FOI Law, then this would injure or damage its ability to conduct its business. However, it is also the case that the FOI Law provides adequate exemptions to protect the necessary and specific documents. In this instance, the document in question has also been protected by other sections of the Law, and I agree generally with the Applicant that if exemption under section 20(1)(d) is applied too widely, it could undermine the purposes of the FOI Law.

However, this exemption is subject to the public interest test. While the RCIPS weighs the factors for and against disclosure in the public interest, it must be noted that the Freedom of Information (General) Regulations, 2008 in the Cayman Islands clearly defines public interest and it is not a weight-based test.

In this case, if and when possible, disclosure of parts of this report would be in the public interest, especially as the Operation Tempura investigation relates to allegations of significant public misconduct.

G. GENERAL DISCUSSION

The Applicant refers to the possibility of the document being redacted so that information pertaining to matters other than those concerning Mr Justice Henderson is not released. In my opinion redaction of the record to the extent that it disclosed only material relevant to this request would need to be so extensive as to render the redacted document unreadable.

In this particular case, I have found that both legal advice privilege and litigation privilege can be claimed. As noted earlier, litigation privilege does not last indefinitely. I would therefore encourage the RCIPS to waive the privilege attached to this and any other related documents in due course so that the public may receive whatever information possible to enlighten it on Operation Tempura. This investigation was publicly funded and therefore the public should be ultimately informed as to its outcome, in the spirit of transparency, accountability and good governance which form the basis of the Freedom of Information Legislation in the Cayman Islands.

H. FINDINGS AND DECISION

Under section 43(1) of the FOI Law, I make the following findings and decision:

Findings:

The report written by Martin Bridger on 14 April 2009 related to the Operation Tempura investigation and the arrest of Grand Court Judge Alexander Henderson is exempt from disclosure under Section 17(a) of the FOI Law.

Decision:

As per section 43(3) of the FOI Law I reject the appeal of the Applicant.



Jennifer Dilbert
Information Commissioner
12 February 2010