IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No: G 0188/2014

IN THE MATTER OF THE FREEDOM OF INFORMATION LAW 2007

AND IN THE MATTER OF AN APPEAL AGAINST THE DECISION TO DISCLOSE RECORDS HELD BY A PUBLIC AUTHORITY

AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO O.53 OF THE GRAND COURT RULES 1995

BETWEEN:

THE GOVERNOR OF THE CAYMAN ISLANDS

APPLICANT

AND:

THE INFORMATION COMMISSIONER

RESPONDENT

Appearances: **Mr. Ian Paget-Brown Q.C. instructed by Ms. Anne-Marie Rambarran and Ms. Dawn Lewis of the Attorney General's Chambers for the Applicant**

Ms. Monica Carss-Frisk Q.C. instructed by Mr. Kyle Broadhurst of Broadhurst LLC for the Respondent

Before: **The Hon Justice Timothy Owen (Actg.)**

Heard: **10th and 11th February 2015**

JUDGMENT

INTRODUCTION

1. In September 2007, the Governor of the Cayman Islands, Mr. Stuart Jack, accepted a recommendation from Larry Covington, the Law Enforcement Advisor in the Foreign and Commonwealth Office, and 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. A few weeks later, on 19th October 2007, the Governor gave his assent to the enactment of the Freedom of Information Law 2007 (Law 10 of 2007) ("the Law") which provided for a new framework of law governing the duty on public authorities to publish certain information and to ensure that all decisions by public authorities and the reasons for those decisions are made public (save where such information would be exempt) as well as conferring on each citizen a right to apply for access to records held by public bodies (see s.7 of the Law).

2. This appeal arises from the impact of the 2007 Law on one product of the special investigation approved by the Governor (which came to be known as Operation Tempura). It is the second occasion on which the Grand Court has been asked to resolve what is a fundamental difference of view between the Governor and the Information Commissioner concerning the proper approach to a request for access to two documents, namely, a complaint relating to a section of the Cayman Islands judiciary and the Governor's response to that complaint ("the records").

The complaint consists of a 16 page document lodged in June 2010 by Martin Polaine, a former legal advisor to the Cayman Islands Government, and later adopted by Martin Bridger, the former senior investigating officer ("SIO") to Operation Tempura. The Governor's response to that complaint is dated 7th March 2011, runs to some 185 pages and bears the signature of former Governor Duncan Taylor. I have read both documents although, for obvious reasons, I shall not cite any passages from them within my Judgment in view of the nature of the dispute between the parties as to whether the Law requires that disclosure of their contents should occur either forthwith (as the Commissioner submits), never at all (as the Governor submits) or, potentially, at some future point when no relevant exemption based on potential prejudice to an active criminal investigation can be maintained (as is the possible result of one of the Governor's objections to disclosure).

3. The first appeal pursuant to s.47(1) of the Law was heard by Acting Judge Sir Alan Moses in October 2013 and resulted in a judgment handed down on 23rd December 2013. In order fully to understand the sequence of events that has led to this second appeal it is necessary to read the whole of Moses Ag. J's judgment[1]. But for present purposes it is possible to summarise the essential background facts as follows.

[1] ([2013] (2) CILR 421)

4. The original request for disclosure of the records was made by a Mr. John Evans on 8th February 2012 and was refused by the Governor's office on 14th February 2012 on the grounds that they contained defamatory material and were thereby exempt from disclosure pursuant to s.54 (1) (a) of the Law. On 22nd November 2012, the Information Commissioner ("the Commissioner"), Ms. Jennifer Dilbert MBE, JP, overturned the Governor's decision pursuant to s.43 (3) (b) of the Law and ordered that the records be disclosed. The Governor appealed by way of judicial review the Commissioner's decision pursuant to s.47 (1) of the Law. Leave was granted to apply for judicial review on 8th February 2013. By letter dated 1st March 2013 Mr. Evans wrote to the Governor's Office stating that he withdrew both his information request and his appeal against the Governor's decision not to disclose the records. Notwithstanding Mr. Evans's withdrawal, by Order dated 11th June 2013 Moses Ag. J. directed that the proceedings should continue on the basis that Mr. Evans had ceased to be a directly affected party. The Governor raised no objection to this direction and made no submission to the effect that Mr. Evans' withdrawal deprived the Court of jurisdiction to adjudicate on what was, by this stage, a dispute solely between the Governor and the Commissioner albeit one triggered by Mr. Evans' original request pursuant to s.7 of the Law. In a letter to Walkers (who were then acting for the Governor's office in the litigation) dated 12th March 2013, Mr. Kyle Broadhurst on behalf of the Commissioner set out in some detail why the Commissioner's view was that Mr. Evans' withdrawal from the appeal process did not impact on the judicial review. He pointed out that on 22nd November 2012 the Information Commissioner had decided that the Governor had not acted in accordance with his obligations under the Law and overturned the Governor's decision not to disclose the records.

"As such" Mr Broadhurst opined "the appeal of Mr Evans to the Information Commissioner has been determined, that decision stands and it cannot be undermined or negated by a change of stance by him at this stage". The letter then went on to make the following point:

> "*The decision made by the Information Commissioner has far wider public interest significance than simply answering the request of one individual, albeit that it was that request which started the appeal process in this case. This is clearly reflected at section 46 of the Law which allows the Commissioner to conduct an investigation and reach a decision on her own initiative. Even if Mr. Evans had withdrawn his appeal before it had been determined, the Information Commissioner could have continued the process of her own volition.*"

5. The main ground originally relied upon by the Governor in the first appeal was that he was entitled to withhold the records from disclosure on the basis of s.54 (1) of the Law which deals with protection from liability in relation to defamation and breach of confidence arising from the grant of access to records pursuant to the Law. As Moses Ag.J. held, this reliance was misconceived as nothing in s.54 provides any basis for an exemption against disclosure by reference to the defamatory nature of the records in issue and, accordingly, it was not open to the Governor to rely on the fact that the material was defamatory (as Moses Ag J. found it was).

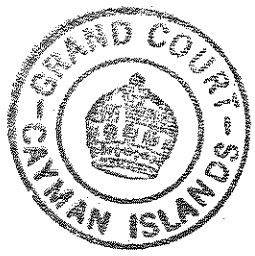
Having rejected the Governor's principal ground of appeal, Moses Ag. J considered the alternative arguments advanced by the Governor to the effect that disclosure of the records would prejudice, or would be likely to prejudice, the effective conduct of public affairs so that they were exempt from disclosure pursuant to s.20 (1) (d) and s.26 of the Law. While acquitting the Commissioner of any blame for her failure fully to address the issues that arose under this ground in view of the way the Governor had originally advanced his case before the Commissioner, Moses Ag. J. held that the Commissioner had failed to strike the right balance in her consideration of the issues under both s.20 (1) (d and s.26 of the Law because even if she decided that there would be prejudice to the effective conduct of public affairs she was still required to consider where the public interest finally lay (see para 58, judgment of 23/12/13).

6. Accordingly, the issue of the application of s.20 (1) (d) was remitted for further consideration by the Commissioner on the basis that, as things stood, that was the only tenable basis for arguing that the records were exempt from disclosure. The terms of the Order made by Moses Ag. J. were as follows:

> "1. *It is declared the requested documents are not exempted from disclosure by virtue of s.54 (1) of the Law.*
>
> 2. *The order of certiorari to quash the decision is granted.*
>
> 3. *The decision is remitted back to the Respondent to reconsider whether the requested records are exempt from disclosure by reason of s.20 (1) (d) of the FOI Law.*
>
> 4. *It is declared that on remission the Respondent is to use such investigative powers pursuant to the FOI law as she considers necessary and for the purpose of her reconsideration is to receive such written or oral submissions as the FOI law permits and, consistent with that law, she considers necessary.*"

It is to be noted that in the course of argument, the Governor had submitted that if, as he eventually did, Moses Ag.J. found the Commissioner's decision to be defective he should merely quash it in light of the fact that the original applicant had abandoned his claim to access to the documents. But this submission was firmly rejected by Sir Alan who observed that "the issues are far too important to leave matters without final resolution. My view is that the Commissioner should reconsider the exemption claimed under s.20 (1)(d)" (para 59).

7. If the Governor was of the view that Mr Evans' withdrawal of his complaint back in March 2013 had indeed deprived the Court of jurisdiction to continue to adjudicate upon the issue of disclosure of the records, the Governor could and should have appealed the Order made by Moses Ag.J. (as well, of course, as making a submission to that effect at the outset of the hearing before Sir Alan). But no such appeal was pursued and accordingly the process of reconsidering the issue of disclosure of the records was commenced by a new Commissioner, Acting Information Commissioner Jan Liebaers, who had taken up his post following the retirement of Ms. Dilbert. It is the product of this reconsideration which has generated this second appeal to the Grand Court.



THE GOVERNOR'S SUBMISSIONS TO THE INFORMATION COMMISSIONER ON HIS RECONSIDERATION OF THE DISCLOSURE DECISION

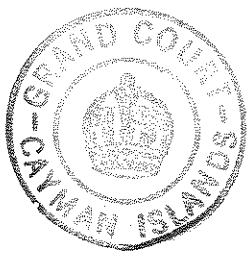
8. It is important to understand precisely how the Governor's case was presented to the Commissioner following the Notice of Hearing dated 4th March 2014 in which the Commissioner, pursuant to s.43 (1) of the Law, invited the Governor to make written submissions "on the sole basis of the application of the exemption in section 20 (1) (d) of the FOI Law". In a 20-page written submission in response lodged on 7th April 2014, the Governor's office asserted in unqualified terms that the only basis for exemption relied upon was s.20 (1) (d)[2] and proceeded to identify five reasons why that section was engaged. Having set out the Governor's case under s.20 (1) (d), the submission then proceeded to assert that although the relevant date for assessing whether a public authority was under an obligation to disclose is the time when the request was first dealt with, i.e. 14th February 2012 (see ***Evans v. Information Commissioner***[3]), the Commissioner nonetheless had a discretion to allow a public authority to rely on an exemption even if it did not rely on that exemption when initially refusing to disclose (see ***APPGER v. Information Commissioner and Ministry of Defence***[4]). Having asserted the existence of this discretion, the Governor then proceeded to submit that it "appeared" that circumstances now existed which meant that the records would be exempt from disclosure under two fresh headings of exemption, namely sections 16 and 17 of the Law.

[2] "of [sections 17 (b) (i), 23(1) and 20(1) (d)], only section 20 (1) (d) is now relied upon", see para 16 Governor's Submissions, 7th April 2014.
[3] [2012] UKUT 313 (AAC
[4] [2011] UKUT 153 (AAC)

9. The basis for the s.16 exemption was said to arise from the fact that the Governor had learned that allegations of criminal conduct were made on 19th January 2014 by Mr. Martin Bridger against Larry Covington, the Attorney General and former Governor Stuart Jack which were connected to the subject matter of the records in issue. Section 16 of the Law provides that:

> *"Records relating to law enforcement are exempt from disclosure if their disclosure would, or could reasonably be expected to –*
>
> ...
>
> *(b) affect-*
>
> *(i) the conduct of an investigation or prosecution of a breach or possible breach of the law; or*
>
> *(ii) the trial of any person or the adjudication of a particular case."*

10. The Governor explained that the records relate to law enforcement because they concern the conduct of judges, the Operation Tempura investigation and the conduct of Larry Covington who was at the relevant time the Law Enforcement Advisor for the Caribbean for the FCO. "Plainly" it was submitted "disclosure [of the records] would or could reasonably be expected to affect the conduct of an investigation pursuant to the allegations which have now been made" and reference was made to a short statement appended to the Governor's submissions from the Commissioner of Police for the RCIPS, Mr. David Baines, setting out his view of the likely impact of release of the requested records on what was said to be the "current" RCIPS investigation.



11. Mr. Baines' statement made clear that in addition to criminal allegations made against the Governor, Mr. Covington and the Attorney General, he had received counter allegations of criminal conduct on the part of Mr. Bridger who, it was alleged, had made false allegations of criminal conduct, had wasted police time and was guilty of misconduct in public office while undertaking his duties as the SIO in the Tempura investigation. It was in the context of allegation and counter allegation that Mr. Baines explained that he had reviewed what he described as the Aina report. This was a reference to a document prepared by a London Silk, Mr. Benjamin Aina QC, at the request of the Governor to assist him in the discharge of his Constitutional duty to determine whether a complaint of misbehavior against a member of the judiciary should be referred to the Judicial and Legal Services Commission. As I was told by Mr. Paget-Brown QC on behalf of the Governor in the course of the hearing, the Governor's report at the heart of this appeal is in all essential respects identical to the Aina report. In short, apart from one or two minor changes and the insertion of the Governor's name by way of substitution for that of Mr. Aina QC, the Aina report and the Governor's report are identical, the Governor having simply adopted Mr Aina's reasoning and conclusions as his own without any apparent qualification. I will address the implication of this fact later in this judgment when I consider the Governor's claim that former Governor Taylor's response to the complaint is covered by legal professional privilege and thus exempt from disclosure pursuant to s.17 of the Law. But for present purposes the significance of Mr. Baines having read the Aina report is that he had, in practice, read the very document which lies at the heart of this appeal. Having read it, he made the following observations:

"It is too early for me to determine if a criminal investigation is warranted or not due to the further analysis required, however I can state that the publication of the Aina report would interfere with any investigation that were launched, not least as its contents cover some of the issues [which are the] subject of controversy; in addition to being contradictory in their position to the earlier legal decisions pronounced by the DPP, Chief Justice and others.

The release would I consider be contrary to the rule of natural justice as it would enable one version of events relating to the subject matter and deny those subject of and named in the report an opportunity to counter the version of events and defend themselves. It should be noted that some named persons have been privy to the contents of the report, the majority of individuals subject to comment have not been canvassed or made aware of the contents.

....I trust this position assists in determining the response to the FOI request. I am willing to meet with the Information Commissioner to provide a verbal briefing and provide sight of the complaints received and other documentation that would assist in making a decision based on all the factual matters and context of the FOI matter in light of the interconnectivity to previous legal actions, current legal actions in train and potential future criminal investigations."

12. As for the Governor's suggestion that exemption from disclosure might arise pursuant to s. 17(b)(ii) of the Law, reference was made to an Order made by Justice Williams in the Grand Court in Cause 486 of 2011 which had recently been brought to the Governor's attention. It was explained that the Order restrained Martin Bridger from permitting various identified persons to inspect or copy a list of specified documents and the Governor explained that she was "advised that a number of the documents listed in the document schedule are referred to and/or have excerpts set out in the [Aina] Report because the documents were provided by Mr. Bridger to Mr. Aina QC during the investigation into the complaint". The Governor said that she did not have access to the document schedule and thus could not verify the extent of any overlap but said that "if and to the extent that documents contained in the document schedule are set out in the Report, disclosure of the Report in such circumstances could constitute contempt of the [Williams J.] Court order." Having cited the relevant terms of s.17 (b) (ii) of the Law[5], the Governor submitted that:

> "*It therefore appears that the Report may be subject to an absolute exemption under s.17 (b) (ii) of the FOI Law and the Governor requests that the Commissioner takes this exemption into account when exercising his discretion as to whether or not disclosure should not be ordered under section 44 (2).*"

[5] s.17 *An official record is exempt from disclosure if –*
...
(b) the disclosure thereof would –
..
(ii) be in contempt of court."

13. The final section of the Governor's submission focused on why, if a qualified exemption applied, the public interest in disclosure did not require access to be given to the information, i.e. that s.26 of the Law did not compel disclosure even if the provisions of s.20(1)(d) were engaged by the nature of the material under review. Four reasons were advanced under this heading. First, that prejudice caused by the disclosure would have a significant negative impact on public confidence in the Cayman judiciary. Secondly, that disclosure would jeopardise the integrity of future investigations into alleged judicial misbehavior. Thirdly, that some of the relevant facts concerning the complaints were already in the public domain. And, fourthly, that the quality of the decision making in the Governor's report had already been given the seal of approval by the Grand Court so that the public already had a substantial degree of reassurance in relation to the Governor's decision summarily to dismiss all the complaints against the judges. In the event however Mr. Paget-Brown QC made clear in the course of the hearing before me that he did not seek to advance as a freestanding ground of appeal that the Commissioner had, on the basis of the material he had taken into account pursuant to his s.20(1)(d) reconsideration, erred in law in his decision to require disclosure of the disputed records[6]. Accordingly, it will not be necessary to spend time in this judgment considering the issue of whether there was any basis in law for interfering with the Commissioner's decision as to whether a s.20(1)(d) exemption had been made out by the Governor and his assessment of whether, if s.20(1)(d) did apply, access to the records should still be granted by reference to the public interest.

[6] Mr. Paget-Brown QC also made clear in the course of the hearing that he did not seek to advance the submission, briefly covered in paragraph 61 of his Skeleton Argument, that the Commissioner's decision was flawed on what were described as "human rights" grounds by reference to the provisions of Article 10 of the European Convention on Human Rights. Ms Carss-Frisk QC described this submission as "hopeless" and I agree with that description.

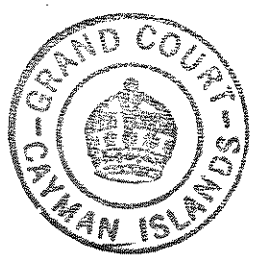
THE COMMISSIONER'S FRESH DECISION

14. The Commissioner's fresh decision was ultimately handed down on 10th July 2014 and runs to 28 pages of detailed reasoning as to why (save in relation to a single identified segment on page 13 of the complaint document) he had decided to overturn the decision of the Governor's office to withhold the requested records by virtue of s.20 (1) (d) of the Law. Before summarising the basis for his decision, it is important to refer to a passage in the First Affidavit of the Commissioner dated 8th December 2014 in which he explains why he declined the invitation from the Governor's office to meet with Police Commissioner Baines for a briefing on the matters raised in Mr Baines's statement which were said to be relevant to a new ground of exemption pursuant to s.16 of the Law. The Commissioner's explanation is as follows:

> *"18. The final paragraph of Mr Baines's report offers a meeting with him "to provide a verbal briefing and provide sight of the complaints received and any other documentation that would assist in making a decision based on all the factual matters and context of the FOI matter in light of the interconnectivity to previous legal actions, current legal actions in train and potential future criminal investigations". I also received an email on the 29th April 2014 from the Governor's office asking whether I would like to extend the deadline for my Decision so that I could "receive Commissioner Baines's briefing". This invitation was also reiterated through Commissioner Baines' personal assistant. A private meeting with one party to a dispute would, in my view, be contrary to the ethos of a fair and impartial FOI process. The*

procedure requires that submissions be made in writing and this had already been done by the Governor's Office. The Registrar of Hearings responded the same day explaining that it would be highly unusual for the Commissioner to meet with a party, particularly after written submissions had been presented and requesting that future correspondence be sent via the Registrar."

15. Of course by the time the Commissioner was conducting his reconsideration, the original applicant, John Evans, had abandoned his application and withdrawn from the process. It follows that the only "parties" to the process flowing from the order of Moses Ag J. were the Information Commissioner and the Governor. In these circumstances I take the view that the Commissioner's reason for refusing to meet with Commissioner Baines was mistaken. In circumstances where there was no longer an individual applicant seeking disclosure and where the Order of Moses Ag J. had specifically referred to the Commissioner using "such investigative powers pursuant to the FOI Law as she considers necessary and for the purpose of her reconsideration is to receive such written *or oral* submissions as the FOI Law permits" I consider that not only would it have been permissible for the Commissioner to accede to the request for an oral briefing but it would have been a sensible, indeed highly desirable, step to take in view of the points raised in Police Commissioner Baines's written statement. I will address the implications of the Commissioner's refusal to entertain the offer of a meeting with Mr Baines when I turn to the issues that arise for my consideration in this appeal.

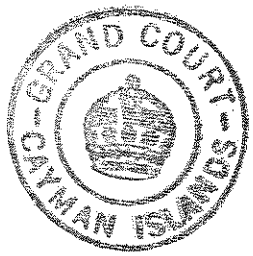


16. Under the heading "Issue under review in this hearing" the Commissioner explains why he intended to confine his reconsideration solely and strictly to the issue of whether s.20 (1) (d) of the Law was engaged by the nature of the information contained in the records in issue and that he would not consider any other potential exemption raised by the Governor. Having cited from the Order of Moses Ag J. and quoted from the Governor's written submission where she appeared to accept that she was relying only on the exemption in s.20 (1) (d) of the Law, the Commissioner stated as follows:

> *"16. Yet despite the explicit, singular focus of the current reconsideration the Governor's Office also asks me to consider additional exemptions which it claims are relevant, namely the exemptions in sections 16(b)(i), 16(b)(ii) and 17((b)(ii). In support, the Governor's Office states that the Commissioner has discretion to allow a public authority to rely on any exemption even if it did not rely on that exemption when initially refusing to disclose, following APPGER v Information Commissioner and Ministry of Defence [2011] UKUT 153 (AAC).*
>
> *17. I will not consider the new exemptions raised, for the following reasons. Firstly, this reconsideration stems directly from the Judge's unambiguous Order which is very clear to the effect that my reconsideration should only be concerned with the application of section 20(1)(d).*

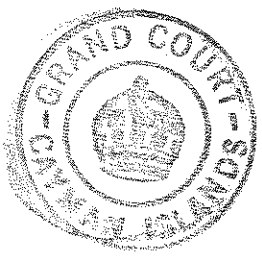
18. *Secondly, as the Governor's Office points out, the relevant date for assessing whether the public authority is under an obligation to disclose a requested record is "the time when the request was first dealt with", as confirmed by the UK's Upper Tribunal in Evans v Information Commissioner [2012] UKUT 313 (AAC), which, it says, in this case, was 14 February 2012. I agree that the relevant date in this regard is the time when the request was received and initially dealt with by the Governor's Office in February 2012. The circumstances briefly described by the Governor's Office in support of the additional exemptions in sections 16(b)(i), 16(b)(ii) and 17((b)(ii), now being claimed, had at that time not yet materialized.*

19. *Consequently, I will not consider the new exemptions raised by the Governor's Office, and the sole issue to be determined in this Decision is whether the two responsive records, i.e. the complaint originally filed by Mr. Martin Polaine, subsequently taken over by Mr. Martin Bridger, and the Governor's response to the complaint, are exempt from disclosure by reason of section 20(1)(d).*"



17. The bulk of the Commissioner's decision then proceeds to address point by point the five arguments raised by the Governor in relation to the s.20 (1) (d) issue and decides in each case that the exemption is not engaged by any one of them save for the single short passage on p.13 of the Complaint document. Although not strictly necessary (save in relation to the single short passage in the Complaint) the Commissioner then proceeds to consider whether the overall balance of the public interest means that, in the event that s.20 (1) (d) *was* (contrary to his primary finding) engaged in relation to the records as a whole, access should be granted on the basis that it would "nevertheless be in the public interest" pursuant to s.26 of the Law. Having identified what he describes as factors in favour of disclosure and factors in favour of non-disclosure, he concludes as follows in para 128 of his Decision:

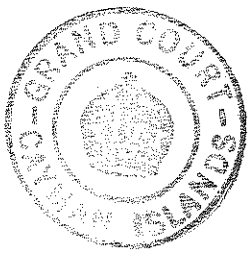
> "*Although I am not required to conduct a public interest test in relation to those parts of the responsive records which are not exempted under section 20(1)(d), for the avoidance of doubt I have nonetheless done so. I have balanced the public interest factors, and I find that the factors in favour of disclosing outweigh the factors in favour of withholding. I therefore find that, even had the exemption applied, access should nonetheless have been granted in the public interest.*"



THE APPLICATION FOR LEAVE

18. By Notice of Application lodged on 25th August 2014, the Governor sought leave to apply for judicial review of the Commissioner's decision of 10th July 2014 whereby (a) he refused to consider whether he should decline to order the disclosure of the requested records in light of the fact that, if requested today, they would now be exempt from disclosure under ss.16(b) and 17(b)(ii) of the 2007 Law, (b) he held that the requested records are not exempt under s.20(1)(d) of the Law and (c) ordered the Governor's office to disclose the requested records. The grounds on which relief was sought included the assertion that in refusing to consider any factual matters mitigating against disclosure which arose after the date of the request (and after the order of Moses Ag J.) the Commissioner erred in law. Specific reliance was placed on the issues of potential prejudice to a "live" criminal investigation together with the issue of potential contempt in relation to the order of Williams J. Also relied upon was an alleged error of law in applying the balancing test inherent in s.20(1)(d) of the Law. Finally, a wholly new basis for declining to order disclosure was relied upon, namely that the Governor's report into the original complaint "mirrors the content of legal advice" so that the report attracts legal professional privilege under s.17(a) of the Law. An add-on ground of *Wednesbury* unreasonableness was also identified although not developed in detail within the Grounds.

19. By letter dated 29th August 2014, Messrs Broadhurst on behalf of the Commissioner wrote a letter to the Court raising a number of issues, including a concern that the Governor had not fully discharged her duty of disclosure to the Court in lodging what was, at that stage, an *ex parte* application for leave. In light of that letter I directed that there be an oral directions hearing before me on 4th September 2014 and, having heard from the parties and considered the history of this matter, I directed that the case be listed for a "rolled up" hearing with the substantive hearing to follow in the event that leave were to be granted. I did so in view of the inevitability of a renewed oral application if leave were to be refused on the papers and the obvious importance of achieving an early resolution to the Governor's challenge to the legality of the Commissioner's decision. In the event, having heard argument from both parties over the two days of the hearing on 10-11th February 2015 I indicated that I would grant leave while reserving Judgment on the substantive issues for determination.



THE ISSUES

20. By the date of the rolled up hearing, it was clear from the Skeleton Arguments, the amended Grounds and the evidence lodged that the following issues fell to be resolved:

a. Is leave in fact required for an appeal pursuant to s.47 (1) of the Law and, if so, what is the source for this requirement?

b. Is it permissible now for the Governor to raise a jurisdictional objection to the Commissioner's 10 July 2014 decision on the basis that the FOI Law does not apply once an application for access to records and a consequent appeal has been withdrawn?

c. Did the Commissioner act lawfully in limiting his consideration of the disclosure request to the s.20 (1) (d) dispute, thereby refusing to consider any matters that arose after the date of the original request?

d. Is there any merit in the "fresh" grounds for not disclosing the records, namely the issues of contempt, legal professional privilege and potential prejudice to a live criminal investigation and, if so, what consequences flow from this?

21. As indicated above, it was made clear by Mr. Paget-Brown QC in the course of argument that he did not seek to rely on what I will describe as the straightforward challenge to the Commissioner's exercise of his s.20 (1) (d) assessment and his consideration of the public interest balancing test in s.26. I confess I found this somewhat surprising as it seemed to me that there was merit in some of the arguments potentially open to the Governor on this ground and in light of the fact that the jurisdiction of the Court on a s.47 appeal is not confined to conventional judicial review grounds (see the Judgment of Moses Ag J. at paras 25-33). But it is not the job of the Court to persuade one party to maintain a ground that s/he has distinctly abandoned after what was, I must assume, thorough consideration and in any event I heard no argument on this issue from Ms. Carss-Frisk Q.C. Accordingly, I will say no more on this matter save to observe that absent any current alternative basis for exemption, the Commissioner's 10th July 2014 decision on the application of s.20 (1) (d) and the public interest assessment under s.26 of the Law would lead to the release of the records to the public at large.

IS LEAVE REQUIRED FOR AN APPEAL PURSUANT TO S.47 OF THE FOI LAW?

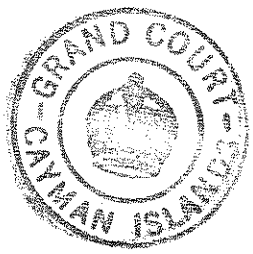
22. This was an issue which I myself raised with the parties at the outset of the "rolled up" hearing, it not having been disputed in the proceedings before Moses Ag J. that the normal judicial review procedure set out in Order 53 of the Grand Court Rules 1995 applied to any appeal pursuant to s.47 of the Law. Section 47 states as follows:

> *"47 (1) The complainant or the relevant public or private body may, within 45 days, appeal to the Grand Court by way of judicial review of a decision of the Commissioner pursuant to s.43 or 44 or an order pursuant to section 45 (1).*
>
> *47 (2) In any appeal from a decision pursuant to section 43, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under the law."*

23. My reason for raising whether in fact the requirement to obtain leave in O.53, r.3 applied to the statutory appeal process in s.47 of the Law arose from the observations of Moses Ag J. in paragraphs 25-26 of his Judgment in which he said as follows:

> "25. *It is necessary to decide what is meant by "an appeal....by way of judicial review of a decision". Plainly as Mr. Bourne submitted on behalf of the Governor, it is more than merely judicial review since if the only means of challenge for a disappointed applicant or public authority were judicial review then there already exists a system of judicial within the Cayman islands. Moreover the existence of s.47 (2), referring as it does to an appeal from a decision pursuant to s.43 into which category the decision in the instant case falls, is a powerful indication that the right conferred by s.47(1) is a right to appeal and not merely to judicial review of the decision of the Commissioner.*
>
> *26. I conclude that the court is concerned to determine an appeal and is not merely considering judicial review. This is, as Ms Carss-Frisk on behalf of the Commissioner pointed out, somewhat startling in the light of the form in which this appeal was launched which was redolent of traditional judicial review, but I cannot overlook the reference to an appeal by way of judicial review which is, in my view, of importance? (emphasis added)"*

24. Sir Alan's reference to s.47(1) as conferring a "right to appeal and not merely to judicial review" is on one view inconsistent with there being any requirement for an aggrieved appellant to obtain leave at all. Moreover Order 53, r.3(1) states that "no *application* for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule" (emphasis added), and it can fairly be argued that this is inapt to cover what is, as Sir Alan held, a right to *appeal* rather than a mere right to pursue an application for judicial review. The parties disagreed on the true construction of s.47 and the procedural consequences that flowed, with the Governor submitting that Sir Alan's analysis was incompatible with a requirement to obtain leave and the Information Commissioner submitting that the legislature could have provided for a discrete appellate process but instead chose to indicate that the statutory right to appeal would be subject to the procedural requirements of judicial review as already provided for by O53 of the Grand Court Rules. In my view, Ms Carss-Frisk was right to emphasise the legislative options available when enacting the 2007 Law and I find that the specific reference to a s.47(1) appeal being brought "by way of judicial review" was intended to engage the procedural requirements of O.53, including the requirement in O.53, r.3 to obtain leave from the Grand Court as a precondition of pursuing any appeal. The fact that O.53 imposes a disciplined timetable on potential applicants for leave and enables hopeless cases to be weeded out at an early stage is obviously beneficial to good administration and it cannot be said that to require leave defeats the legislative intent when crafting the 2007 Law.



DID THE COMMISSIONER LACK JURISDICTION TO ISSUE HIS 10TH JULY 2014 DECISION IN VIEW OF THE DECISION OF THE ORIGINAL COMPLAINANT TO WITHDRAW HIS APPLICATION FOR ACCESS TO THE RECORDS?

25. Mr. Paget Brown QC made clear both in his Skeleton Argument and in oral submissions that his principal ground in favour of quashing the Commissioner's decision is that the decision of the original applicant, Mr. John Evans, to withdraw his application for access and his appeal against the Governor's refusal meant that the Commissioner lacked any statutory authority to order the Governor to provide access to the records. I am however quite clear that to permit the Governor to raise this jurisdictional challenge at this stage would be an abuse of the process of the Court and that, in any event, it is an argument wholly lacking in merit. My reasons are as follows.

26. The submission that Mr. Evans' withdrawal of his application for access and his appeal deprived the Commissioner and the Court of any power to adjudicate on the issues raised by the original request for access was never advanced by the Governor in the original proceedings that culminated in the hearing before Moses Ag J. in 2013. Indeed, as I pointed out in paragraph 4 above, after Mr. Evans gave notice of withdrawal of his appeal, Moses Ag. J. directed that the proceedings should continue on the basis that Mr. Evans had ceased to be a directly affected party. No objection to this direction was raised by the Governor and indeed the only reliance later placed by the Governor on the fact of Mr. Evans's withdrawal was in the context of the consequence of any finding that the Commissioner's decision fell to be quashed.

The Governor submitted that if Moses Ag J. held that the decision was unlawful – as of course he ultimately did – he should merely quash it in the light of the fact that the original applicant had abandoned his claim to access to the documents. In other words, it was suggested that the withdrawal of Mr. Evans was relevant to the Court's discretion to withhold relief. As stated above, Moses Ag J. firmly rejected this submission because he concluded that the issues raised by the case were far too important to be left without final resolution. No doubt in concluding as he did, the learned Judge was in agreement with what Mr. Broadhurst had asserted in his 12th March 2013 letter to Walkers as to the wider public interest significance attaching to the Information Commissioner's decision and the fact that s.46 of the Law empowered the Commissioner to conduct an investigation and reach a decision on her own initiative.

27. No appeal was pursued by the Governor against Moses Ag J.'s decision to direct a reconsideration by the Commissioner of the exemption claimed under s.20(1)(d) of the Law although if the Commissioner lacked power to decide this issue (as is now boldly submitted by Mr. Paget-Brown QC) then the Governor was duty bound both to advance this submission before Moses Ag J. and to appeal his decision to remit the matter for further reconsideration. Yet, remarkably, not only was no appeal pursued against Moses Ag J.'s order, the jurisdiction argument did not even feature in the original Notice of Application filed by the Governor in August 2014 (and drafted by Mr. Paget-Brown). It first raised its head in the Notice of Originating Motion dated 31st October 2014 which (in addition to adding what were described as "human rights" arguments to the Governor's assault on the 10th July 2014 decision) asserted the following new ground:

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

28. It is to be noted that the way the argument was framed in the Governor's 31st October 2014 pleading was not in the form of a hard edged jurisdictional challenge to the Commissioner's power to make an order of disclosure. Rather it was said that the Commissioner had power to consider the issue of disclosure but that in view of Mr Evans' disappearance from the stage, he should decline to order disclosure. The first occasion on which the full blooded jurisdictional challenge was formulated was in Mr. Paget-Brown's Skeleton Argument dated 6th January 2015 in which he developed a detailed submission to the effect that the repeated reference within the 2007 Law to an "applicant" and an "application" in the context of the right of access to public records meant that, absent any "applicant" or continuing "application" the Information Commissioner simply lacks power to order access to documents. He relied on s.10 of the Law (which deals with the different forms in which access may be afforded to an applicant) and the Australian case of ***Marke v. Victoria Police***[7] as supporting his submission that where there is no individual applicant for access to a record, it would be absurd to uphold an order providing disclosure to the whole world.

[7] [2007] VSC 522

Reliance was placed on two US authorities in which, under rather different freedom of information legislative schemes, American Courts had concluded that absent a "contested case" or a "real dispute" the relevant information commissioners had no power to issue final decisions[8]. By analogy, it was submitted that Mr. Evans' abandonment of his appeal rendered any dispute moot and deprived both the Commissioner and the Grand Court of jurisdiction to make any order requiring disclosure of the records in issue.

29. In my view, the Information Commissioner was right to submit that the final version of the jurisdiction argument advanced by the Governor is both misconceived in law and an abuse of process given its timing. It is misconceived as a matter of law because there can be no argument but that the Commissioner had jurisdiction under s.43 of the Law to make the original decision that was the result of Mr Evans's original appeal pursuant to s.42. There is equally no doubt that the Grand Court had jurisdiction to entertain an appeal pursuant to s.47 (1) of the Law as commenced by the Governor on 7th January 2013 with leave being granted on 8th February 2013 (i.e. a few weeks before Mr. Evans withdrew his access request). The outcome of the Governor's appeal was that the Court ordered a reconsideration of the original decision. In these circumstances, it follows that the Commissioner's reconsideration as required by Moses Ag J. was part and parcel of the appeal process, clothing both the Commissioner and the Court with necessary power to adjudicate on the issues arising for consideration under the 2007 Law.

[8] *Dept of Pub Safety v. Freedom of Info Comm'n* 103 Conn.App, 571, 930 A.2d 739. *Unified Sch Dist No 259, Sedgwick Cnty, Kan v. Disability Rights Ctr of Kansas*, 491 F.3d 1143, 1147 (10th Circuit, 2007).

30. Moreover, as Ms. Carss-Frisk QC pointed out in her submissions to me, the Commissioner's powers under the Law are not confined to determining appeals under s.43. Part VII of the Law, entitled Enforcement by Commissioner, identifies additional powers which may provide the Commissioner with the necessary power to ensure compliance by a public authority with the Law. Section 44(1) confers a broad power on the Commissioner to decide that a public authority has failed to comply with an obligation under the Freedom of Information Law quite separate from an appeal under s.42 brought by an aggrieved individual. Pursuant to s.44 (2) the Commissioner may require the public authority "to take such steps as may be necessary or expedient to bring it into compliance with its obligations under the Law" and this includes a power to order the publishing of certain information or categories of information. I accept the Commissioner's submission that if he concludes that a public authority has failed to comply with its obligations under the FOI Law by wrongly invoking an exemption, he has the power to rectify matters by ordering disclosure. As to what obligations are generated by the Law, the provisions of s.27 are in my view plainly relevant:

> "s.27 *Public authorities shall make their best efforts to ensure that decisions and the reasons for those decisions are made public unless the information that would be disclosed thereby is exempt under this Law.*"

This is a very broad duty and one which applied to the Governor's Report of 7th March 2011 whereby he decided summarily to dismiss all the allegations of misconduct laid against identified members of the judiciary.

31. Section 27 of the Law establishes that disclosure of information should be the default setting for government – in other words, information should be kept private only when there is a good reason and it is permitted by the Law. In short, when the Governor issued his report, he ought to have been aware that absent being able to establish a relevant exemption his report was liable to be disclosed to the people of the Cayman Islands in the event that an access request were to be lodged and no exemption applied to maintain the confidentiality of the requested records. It was no doubt for precisely this reason that Moses Ag J. refused merely to quash the Commissioner's decision on the last occasion this matter was before the Court ("the issues are far too important to leave matters without resolution", para 59) and directed a reconsideration of the exemption claimed under s.20 (1) (d). Moses Ag J. was plainly aware that there was no longer any individual applicant pursuing access to the records and that the outcome of a future decision to the effect that they were not exempt under the Law would result in disclosure in effect to the whole world. Section 10 of the Law and the decision in ***Marke v. Victoria Police*** relied on by Mr. Paget-Brown do not establish that in an appropriate case the Commissioner may never, pursuant to s.43 of the Law, direct disclosure of records "to the whole world". Indeed such a submission is flatly in conflict with the fundamental principle of openness which informs s.27 of the Law.

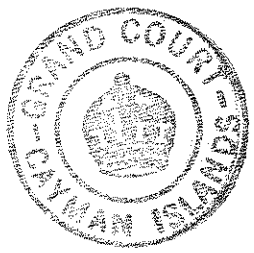
32. In addition to the power under s.44, the Commissioner also has a broad power pursuant to s.46 on his own initiative to conduct an investigation "into any matter and where he does so, the matter shall be treated as an appeal to the extent practicable". I accept that this provision provides further support for the Commissioner's submission that the scheme of the 2007 Law is to provide the Commissioner with wide powers to ensure public access to information which is not an exempt record. To argue in these circumstances that the fact of the withdrawal by Mr Evans of his original access request deprived the Commissioner of jurisdiction to order disclosure of the records is quite impossible in my view. As for the two USA authorities relied on by the Governor, neither is of relevance to the issue I have had to decide, not least because the legislative schemes are different. Unlike the US schemes under consideration, there is no provision in Cayman law that confines the Commissioner's powers to "contested cases" and accordingly there can be no jurisdictional objection to the Commissioner's decision-making power in the appeal before me.

33. Regardless of the lack of merit in the Governor's so-called jurisdictional submission I consider it is an argument that is simply not open to the Governor to advance at this stage. If it had any merit, it could and should have been advanced in the course of the appeal before Moses Ag J. and for the Governor now to seek to deliver this "knock out" punch offends against the principle enunciated as long ago as 1843 in ***Henderson v. Henderson***[9] in which the rule was stated as follows:

[9] (1843) 3 Hare 100, 67 ER 313

> *"...a claimant is barred form litigating a claim that has already been adjudicated upon or which could and should have been brought before the Court in earlier proceedings arising out of the same facts. Parties are expected to bring their whole case to the court and will in general not be permitted to re-open the same litigation in respect of a matter which they might have brought forward but did not, whether from negligence, inadvertence or even accident."*

34. In light of my view of the merits of the Governor's jurisdiction argument it is not necessary for me to embark on lengthy citation from the various authorities relied on by the Commissioner concerning the distinction between a tribunal's constitutive and adjudicative jurisdiction and the principle that parties "cannot by agreement or conduct confer upon a tribunal a jurisdiction which it does not otherwise have" (per Lord Hoffman, para 30 in ***Watt (formerly Carter) v. Ahsan***[10]. I am entirely satisfied that in circumstances where the Governor acceded to the jurisdiction of the Grand Court to determine this appeal pursuant to s.47 (1) of the Law, considerations of fairness, justice and effective case management mean that it is not an issue that can properly be raised within the instant appeal proceedings.



[10] [2007] UKHL 51 [2008] 1 AC 696. See *R (Hill) v. Institute of Chartered Accountants in England and Wales* [2013] EWCA Civ 555; *R (Nirula) v. First Tier Tribunal (Asylum and Immigration Chamber) and anr* [2012] EWCA Civ 1436); *Anwar and Adjo v. Sec of State for the Home Department* [2010] EWCA Civ 1275.

DID THE COMMISSIONER ACT LAWFULLY IN LIMITING HIS CONSIDERATION OF THE DISCLOSURE REQUEST TO THE S.20 (1) (D) DISPUTE, THEREBY REFUSING TO CONSIDER ANY MATTERS THAT AROSE AFTER THE DATE OF THE ORIGINAL REQUEST?

35. In paragraph 14 above I have cited the relevant passage from the Commissioner's 10th July 2014 decision in which he explained why he declined to consider the additional exemptions relied upon by the Governor in her 7th April 2014 submissions to the Commissioner. In argument before me, Ms Carss-Frisk QC sought to support the Commissioner's stance by reference to a passage from the judgment of Moses Ag J. in which he compared and contrasted the powers of the Grand Court on an appeal under s.47 of the Law with those exercisable by the First-Tier Tribunal under the UK Freedom of Information Act 2000 s.58. Having summarised the relevant provision of UK law, Sir Alan stated as follows:

> "*31. In the Cayman Islands Law, s.47(2) requires the Court not just to consider the decision of the Commissioner but also to decide whether the public authority has satisfied the burden of proof that it acted in accordance with its obligations under the Law; in other words, has refused to grant access to documents which were not exempt. But s.47 (2) is not a licence to the public authority to start all over again as if there had been no consideration by the Commissioner. The appeal is against her decision. The decision of this Court on appeal must be based on the evidence and material before the Commissioner. It is not, I repeat, an appeal de novo. Fresh evidence is only legitimate on ordinary Ladd and Marshall principles, and failure to advance that evidence earlier must be explained. New arguments based on that evidence would, however, be permitted provided it is based on evidence and material before the Commissioner at the time of her decision.*
>
> *32. The provision in s.47(2) as to the burden of proof serves to echo and underline provisions earlier in the Law making clear that, throughout consideration of disclosure, it is for the public authority to justify a refusal of access (see s.6(5) and s.43(2) of the Law).*

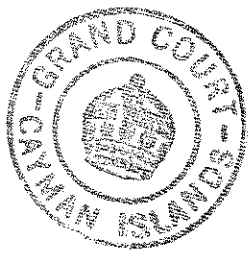
33. *The essential question, both for the Commissioner and for the Court on appeal by way of review, is to consider whether the Governor complied with her obligations. Unless she shows that she had, then there must be disclosure. In the instant case that means she must show that the material, i.e. the documents were exempt and, even if prejudice to the effective conduct of public affairs is established, access would nevertheless not be in the public interest (see s.26).*

34. *This Court must, therefore, consider whether the Commissioner was right in concluding that the complaint and response were not exempt from disclosure. It is open to this Court to disagree, provided it is satisfied that the decision was wrong. This Court is not confined to consideration as to whether the Commissioner was entitled to reach her conclusion. In short, it is not confined to a traditional judicial review approach. The Court must, however, bear in mind that the Commissioner is an expert on considerations of where the balance is to be struck between rival aspects of the public interest, but the Court must also bear in mind that appropriate weight must be attached to evidence from the Governor as to the prejudice likely to be caused by disclosure of the documents in issue. The approach is identified in the First-Tier Tribunal decision in the United Kingdom* ***Cole v. Information Commissioner and the Ministry of Defence****, EA/2013/0042 & 0043, (30 October 2013) in which a number of authorities, well known as they are, were cited for the proposition at paragraph 29 that appropriate weight needs to be attached to evidence from the executive branch of the Government about the prejudice likely to be caused by disclosure of particular information. I also add that the reference in the law to judicial review indicates the appropriate procedure for launching an appeal and the remedies available to the Court. Rather than merely allowing or dismissing the appeal it is open to this Court to quash the decision with or without order for reconsideration."*

36. On the basis of Sir Alan's analysis and the fact that under UK law the First-Tier Tribunal is empowered to receive and consider fresh evidence not before the Information Commissioner, Ms. Carss-Frisk argued that although Mr. Evans original request for access was made as long ago as February 2012, the sole and exclusive focus of the Commissioner's reconsideration of the original decision to disclose was strictly confined to the narrow parameters of s.20(1)(d) of the Law, i.e. exemption from disclosure on the grounds that to disclose "would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs".

She further submitted that the flexibility under UK law whereby a public authority is entitled to rely as of right on exemptions that were not previously raised in a refusal notice or internal review before the Information Commissioner and the First Tier Tribunal has no bite under Cayman law in view of the different legislative structure (see ***DEFRA v. Information Commissioner and Simon Birkett***[11] and ***Information Commissioner v. Home Office***[12]; ***Birkett v. Department for the Environment, Food and Rural Affairs***[13]). The implication of Ms. Carss-Frisk's submission is that even where the evidential basis for a new exemption arises after the original decision in favour of disclosure has been made and before the conclusion of the s.47(1) appeal process, the Commissioner enjoys no discretion to take into account the new material even though it is clear that a requested document is plainly exempt from disclosure.

37. I do not accept that either the terms of Moses Ag J.'s order dated 23rd December 2013 or the nature of the appellate process under Cayman freedom of information law requires such a rigid approach to the Commissioner's powers to consider whether any relevant exemption applies to requested records. The issue of whether a public authority may rely on a new exemption on appeal where no mention of it had been made to the Commissioner prior to the decision to order disclosure was not strictly before Moses Ag J. because, as I read his judgment, all the Governor's objections to disclosure before Moses Ag J. had been raised in one form or another prior to the Commissioner's original decision (see para 35, Judgment of Moses Ag J.).



[11] [2011] UKUT 39
[12] [2011] UKUT 17
[13] [2011] EWCA Civ 1606

Moses Ag J. heard no argument on whether Cayman law prevented a public authority from relying on a new exemption the basis for which had arisen since the original decision and in my view there is nothing in the Cayman legislative scheme or the Judgment of Moses Ag J. that establishes such a rigid, inflexible approach.

38. But in any event, the sequence of events in the instant case is, to say the least, unusual and does not present a conventional factual matrix against which to test the flexibility of the 2007 Law against UK FOI law. In my view the real question is whether, in quashing the Commissioner's original decision (thereby nullifying it as invalid) and ordering remittal to reconsider whether the requested records are exempt from disclosure by reason of section 20(1)(d) of the FOI Law, Moses Ag J. was to be taken to be excluding in all circumstances the possibility of the Governor relying on any new basis for exemption that had arisen since the original decision in February 2012, including one which had arisen after his Judgment was handed down in December 2013. Nothing in his Judgment suggests such an intention and indeed in paragraph 60 Sir Alan stated:

> "*...subject to submissions as to orders that I should make...the Governor should be permitted to put in further written argument should she be so advised to make good her claim*".

I consider that in light of the fact that the original request for access had been made in February 2012, it would be surprising if Sir Alan intended to confine the Governor's ability to rely only on the exemption(s) available as long ago as 2012 when the appeal process against the reconsideration decision would stretch into 2015 and where new objections to disclosure might arise in light of the continuing saga of Operation Tempura and its fallout.

This would be especially surprising bearing in mind the fact of Mr. Evans' withdrawal of his request in March 2013 and the Commissioner's own reliance on his broad powers under s.44 and 46 of the Law as justifying his continuing "roving" remit to review the legality of the Governor's refusal to disclose the requested records. In order for such a rigid outcome to be sanctioned, I would require clear and compelling language in Moses Ag J's Judgment and final Order and I find none such. The fact that the Order of 23rd December 2013 only referred to reconsideration of exemption under s.20(1)(d) was no doubt because that was, at the time, the only exemption which it was envisaged could apply to the requested records. To read the Order as imposing a straitjacket on both the Governor and Commissioner would be contrary to good public administration and common sense.

39. As for Sir Alan's analysis of the nature of an appeal under s.47(1) of the Law, I do not accept that by permitting the Governor to rely on a new exemption which had arisen since the original decision (and indeed since the handing down of Sir Alan's Judgment in the case of the concern as to prejudice to a criminal investigation) this amounts to watering down the principles identified by Sir Alan in paragraph 31 of his Judgment concerning the nature of the appellate process under s.47(1). Subject to normal principles of fairness and case management, I therefore conclude that the Governor was entitled to raise new bases for exemption of the records from disclosure as part of the reconsideration process flowing from the quashing of the original order. In my view the Commissioner erred in law in deciding that he could not lawfully consider any new exemption, confined as he was by Moses Ag J.'s Order strictly to the circumstances as they stood in February 2012 and the single ground for exemption in s.20(1)(d) of the Law.

IS THERE ANY MERIT IN THE "FRESH" GROUNDS FOR NOT DISCLOSING THE RECORDS, NAMELY THE ISSUES OF CONTEMPT, LEGAL PROFESSIONAL PRIVILEGE AND POTENTIAL PREJUDICE TO A CRIMINAL INVESTIGATION AND, IF SO, WHAT CONSEQUENCES FLOW FROM THIS?

40. In oral argument before me, Mr. Paget-Brown QC sought to rely on three fresh bases for exemption, one of which (the claim to legal professional privilege) had never featured in the Governor's submissions to the Commissioner in the context of the reconsideration process in 2014. Two of the three objections to disclosure are, in my view, utterly misconceived but the third alleged exemption has merit and requires lengthier consideration.

The contempt exemption

41. The basis for this claimed exemption pursuant to s.17(b)(ii) of the Law was somewhat tentatively set out in the Governor's April 2014 submissions to the Commissioner (see paragraph 10 above). The witness statement of the former Assistant Solicitor General, Douglas Schofield, dated 19th December 2014 set the matter out in greater detail. In short, it was submitted on behalf of the Governor that disclosure of the requested records would "breach an order of the Grand Court restraining Martin Bridger from permitting anyone to inspect or copy certain documents, some of which are thought to be referred to and/or quoted in the Governor's decision on the complaint" (see para 57 (ii), Appellant's Skeleton Argument).

By reference to an order made by Williams J. in separate civil proceedings brought by the Attorney General of the Cayman Islands against Martin Bridger (whereby Mr. Bridger was prohibited from allowing any party to that litigation and their attorneys from inspecting or taking copies of a number of documents listed in three discrete Tables of materials) it was the Governor's submission that the simple fact of this injunction directly engaged the s.17 exemption. The basis for the injunction issued by Williams J. against Mr. Bridger was that legal professional privilege attached to a number of documents that Mr. Bridger proposed to disclose within the civil action against him (on the basis that they were relevant to his defence to the claim in misfeasance in public office brought by Stuart Kernohan) and that this privilege was not Mr Bridger's to waive. Mr. Schofield's witness statement asserts that the documents identified in the Tables referred to by Williams J. in his 8th November 2013 Judgment and 12th December 2013 Order run into many hundreds. Neither the Aina Report itself nor the Governor's report of 7th March 2011 is apparently included in any of the Tables but what is said is that because many paragraphs in the Governor's report contain references to or summaries of documents that *are* listed within the Tables, it would be contrary to – indeed somehow a breach of – the order of Williams J. to permit disclosure of the requested records within these appeal proceedings.

42. In my view the Governor's submission is fundamentally misconceived. If it is proper under the 2007 Law to order disclosure of the requested records, it is quite impossible for any such order to amount to a breach of the Order of Williams J. which is directed solely and exclusively at Martin Bridger and arises from a discrete finding that the Attorney General had established a proper claim to privilege in relation to a list of identified documents in circumstances where Mr. Bridger had failed in his attempt to go behind that privilege (see para 151, Judgment of Williams J., 8th November 2013). The sole basis for objecting to the disclosure of the records in the instant case is that they are exempt from disclosure under Cayman freedom of information law. If they are exempt, then they cannot lawfully be disclosed. If they are not, the fact of the Order made by Williams J. in November 2013 cannot otherwise prohibit their disclosure. In my view the fact of the Order against Mr Bridger is irrelevant to the issues I have to decide.

The privilege exemption

43. For the first time in his Skeleton Argument, Mr. Paget-Brown QC sought to raise a completely new basis for exemption from disclosure, never raised before Moses Ag J. in the first appeal process despite the fact that, if it was a good point, it was a complete answer to the disclosure issue. Nor did it feature in grounds for judicial review originally lodged in August 2014 in the instant appeal or in the Notice of Originating Motion lodged on 31st October 2014. Indeed it was not even raised in the December 2014 witness statement of Mr. Schofield as a discrete basis for exemption.

I refer to the submission at paragraph 59 of Mr. Paget-Brown QC's Skeleton Argument that the whole report of the Governor dated 7th March 2011 is exempt from disclosure pursuant to s.17(a) of the Law, i.e. "it would be privileged from production in legal proceedings on the ground of legal professional privilege".

44. Anyone who has ever been an advocate has probably had the experience of thinking up their best argument as they walk to Court on the first day of the hearing and sometimes such last minute thoughts are indeed the devastating nuggets of gold that carry the day. But where an advocate decides to take a point that could and should have been taken at the outset of proceedings that began some two years earlier and is one which, if correct, was staring everyone in the face, it is always sensible to reflect on whether in truth the point is a good one. The Court is also entitled to expect that such a last minute point of fundamental principle would be developed with care and after proper legal research. Yet Mr. Paget-Brown's submission in relation to the belated claim to privilege was limited in his Skeleton Argument to the following bare statement:

> "***Further or in the alternative the Respondent should not have ordered disclosure of the Report, because the report was privileged.*** *The report precisely mirrors the contents of legal advice. The report therefore attracts legal professional privilege under s.17 (a) of the FOI Law.*"

No authority was cited in support of this submission and in oral argument before me Mr. Paget-Brown did not expand upon it.

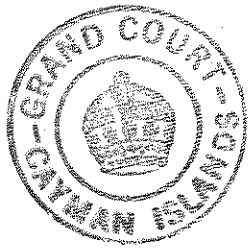
In short, his submission was that because Mr. Schofield asserts in his witness statement that "the Aina Report was plainly intended to be legal advice provided to the Office of the Governor....and cannot be released without the Cayman Island Government's consent" and the Governor's 7th March 2011 report adopted the Aina report *verbatim*, the Commissioner and the Court are bound to accept that the Governor's report is exempt from disclosure under s.17(a) of the Law.

45. I reject the claim to legal privilege attaching to the Governor's report. Even accepting that the circumstances in which the Governor sought the assistance of Mr. Aina QC in the discharge of his constitutional duty to determine whether a complaint of misbehavior against a member of the judiciary should be referred to the Judicial and Legal Services Commission were such as to attract legal professional privilege (as to which see the judgment of Moore-Bick J. in ***Goodridge v. Chief Constable of Hampshire Constabulary***[14]) the simple fact is that the issue of disclosure in the instant appeal is focused upon the Governor's report and not Mr. Aina's advice. The fact that the Governor decided (perhaps unwisely it might be said) simply to adopt in full Mr Aina's report, merely substituting his own name for that of Mr. Aina QC, does not mean in my view that the Governor's report is exempt from disclosure on the ground of legal professional privilege exemption pursuant to s.17 (a) of the Law. Ms. Carss-Frisk QC relied on the following passage in the current edition of ***Passmore on Privilege*** (3rd ed, para 2-181) in support of her submission that the Governor's response to the complaint cannot itself attract privilege:

[14] [1999] 1 All ER 896 at 902D-903H

> ***"The result of a lawyer's work product: "fruits of advice":*** *privilege does not operate "to put beyond the reach of the law documentary or other material which has an existence apart from the process of giving or receiving legal advice or the conduct of litigation"*[15]*. Accordingly privilege does not protect documents that are the means of carrying out, or are evidence of, transactions which are not themselves the giving or receiving of advice or the conduct of litigation. Such documents may be outwith the privilege because instructions to do a particular thing, such as prepare a legal document, do not necessarily amount to a request for advice. But even where advice has been given, the end product – or the "fruits" – of the legal advice given by the lawyer will usually not be privileged.*"

46. In my view this principle is directly relevant to the situation here where the Governor's report represents the product of such legal advice as was sought from Mr. Aina QC. By adopting the views of Mr. Aina for inclusion in his formal report by way of response to the complaints made by Martin Polaine, the Governor was not and is not able to rely on the protection of privilege attaching to the original Aina report so as to render his report exempt from disclosure under s.17 (a) of the Law. Although apparently identical in content, the Governor's response dated 7th March 2011 is *not* the Aina report and it cannot claim to be protected from disclosure on the basis that it is a privileged document.

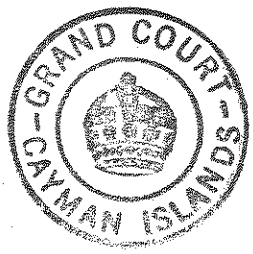


[15] *Per* Dawson J in *Baker v. Campbell* (1983) 153 C.L.R. 52 at 122-123.

The "records relating to law enforcement" exemption

47. I have already set out in paragraphs 9-10 above the factual basis for Governor's claim that the records are exempt from disclosure pursuant to s.16 (b) of the Law. And in paragraphs 14-15 I have expressed the view that the Information Commissioner's reasons for refusing to meet with Commissioner Baines to receive a verbal briefing as to why publication of the records would potentially engage the s.16 (b) exemption revealed a mistaken understanding of the legitimate scope of his investigative powers following the quashing of the original decision concerning disclosure of the records. Before explaining why I consider this to be the case it is necessary to say more about the context in which this new exemption was being raised as a reason for non-disclosure.

48. Whatever criticism may be laid against the Governor's office for the way in which her case has been advanced both before Moses Ag J. and before me in terms of the constantly shifting positions adopted in relation to potential exemptions from disclosure, no blame attaches in relation to the contention that the records are *at the moment* exempt from disclosure pursuant to s.16 (b) on the basis that the Governor's 7th March 2011 response is a "record relating to law enforcement"[16] whose disclosure "...could reasonably be expected to affect the conduct of an investigation or prosecution of a breach or possible breach of the law or the trial of any person or the adjudication of a particular case".



[16] There is no definition in the 2007 Law of the meaning of a" record relating to law enforcement" and the Commissioner did not seek to contend that the records were incapable in law of being such records.

This is because it was not until January 2014 that allegations of criminal conduct were made by Martin Bridger against Mr. Covington, the Attorney General, Sam Bulgin, and former Governor Stuart Jack relating to the subject matter of the original complaint and the Governor's report. By the time the Governor's submissions were lodged with the Information Commissioner on 7th April 2014 (as Commissioner Baines explained in his statement exhibited to the Governor's submissions) counter allegations of criminal conduct on the part of Mr. Bridger had been received. These all related to his discharge of his duties while acting as the SIO in Operation Tempura. In these circumstances, it could not have been foreseen at the time Moses Ag J. handed down his Judgment in December 2013 that a potentially new basis for exemption might arise for consideration.

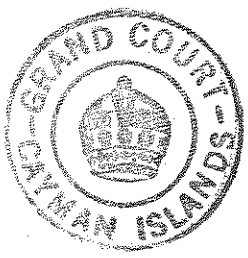
49. In his Affidavit sworn in these proceedings and dated 8th December 2014, the Information Commissioner repeated the explanation contained in his 10th July 2014 decision as to why he took the view that the claimed s.16 (b) exemption was not something he was required or indeed lawfully able to take into account, stating that the Order made by Moses Ag J. was very clear in confining his reconsideration solely to s.20(1)(d) and that, in effect, he had no discretion to consider any developments that may have occurred since the original request made by Mr. Evans in February 2012 (see paragraph 14). I have already explained why, in my view, this was an error of law on the part of the Commissioner.

50. The Commissioner then proceeds to explain that although he did not consider that he should address the new exemptions invoked by the Governor, he did give thought to whether there was any merit in the Governor's substantive arguments based on these exemptions. He concluded that the Governor had failed to discharge the burden of proof resting on her to prove that the requested documents are exempt under s.16 (b), citing three reasons. First, it is said that the Governor's submissions in relation to the applicability of s.16 are "ambiguous and unparticularised" and that the Governor had failed to address the asserted connection between the allegations made by Mr. Bridger and the subject matter of the requested records. Secondly, it is said that Mr. Baines's statement had itself explained that it was too early to determine whether a criminal investigation was warranted, let alone a prosecution and that the allegations and counter allegations of criminal conduct were non-specific. Thirdly, it was pointed out that Mr. Baines had referred to the potential damage caused by publication of the Aina Report but that "this was not the subject of the FOI request' and in any event the mere assertion of an overlap between the issues covered in the requested documents and a potential investigation "is insufficient to engage the exemption" (see paragraph 17 of Mr. Liebaers' Affidavit).

51. In relation to Mr. Baines' offer to meet with the Information Commissioner to provide a verbal briefing and to give sight of the complaints received and any other documentation that would assist in making a decision, the Commissioner explained that in his view "a private meeting with one party to a dispute would....be contrary to the ethos of a fair and impartial FOI process".

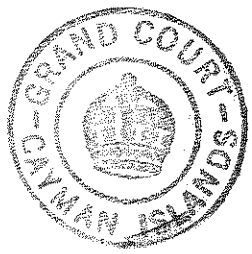
The Information Commissioner points out that after his decision was made on 10th July 2014, the Royal Cayman Islands police released a statement on 1st August 2014 stating that the allegations made by Mr Bridger had been fully investigated, found to be baseless and that no further action would be taken on them. However the statement also made clear that "counter allegations made against Mr Bridger remain the subject of continued inquiry, although no further information is given about these counter allegations". In other words, while Mr. Bridger's original allegations of misconduct leveled against others had been dismissed, Mr. Bridger himself remained very much "in the frame" for potential criminal misconduct.

52. In my view the Information Commissioner was wrong to reject the offer of a meeting with Commissioner Baines whereby he might be provided with further and better particulars of the criminal inquiry then underway into the allegations and counter allegations flowing between Mr. Bridger and those against whom he had complained. As I have explained, the Order of Moses Ag J. had specifically referred to the Commissioner's investigative powers and the possibility of receiving both written and oral submissions. The Commissioner's reference to it being inappropriate to meet one party to the dispute overlooked the fact that there was only one party to the dispute, namely the Governor.



As Mr. Liebaers pointed out in paragraph 9 of his Affidavit, there was no FOI applicant in the proceedings following Mr. Evans's withdrawal from the process and, in these circumstances, I can see no prejudice or unfairness in the Commissioner agreeing to meet with M. Baines in order fully to understand the basis for the perceived s.16 (b) exemption. Indeed, if the meeting had taken place, one of the things that I presume would have become clear to the Commissioner is that the Aina report and the Governor's report are all but identical so that the Commissioner's dismissal of the relevance of Commissioner Baines having read the Aina report was mistaken. As for the suggestion that the Governor, through Mr Baines, had failed to discharge the burden of showing why the requested documents were exempt under s.16 (b), this point overlooks the very real possibility that by meeting with Mr Baines, the Commissioner might have gained a much clearer understanding of the strength of the claimed s.16 (b) exemption in light of contents of the requested records.

53. The Affidavit of Mr. Schofield seeks to update the Court as to the current state of play concerning the investigation into Mr. Bridger's potential criminal conduct arising from his role as SIO of Operation Tempura. At paragraph 16 of his 19th December 2014 Affidavit, Mr. Schofield states as follows:



> *"16.....the Court should be aware that Martin Bridger is currently under criminal investigation as a result of his conduct and actions during Operation Tempura. At 09.45 today, 19th December 2014, I spoke with David Baines, Commissioner of the RCIPS. Mr Baines has read the entire Aina report and he advises me that there is material in the report that supports and will be relied upon in the criminal investigation currently on foot. Mr Baines has authorised me to advise the Court that Bridger is currently being investigated for the following offences: (1) misconduct in public office, contrary to common law (2) providing false information to a public officer contrary to s.120 of the Penal Code (3) willfully misleading a police officer contrary to s.123 (g) of the Police Law (4) making a false report to a police officer contrary to s.124 of the Police Law. In addition and in connection with the UK High Court civil action referenced at paragraph 15 (c) above, Bridger is under investigation for potential criminal charges in either the Cayman Islands or the UK relating to (5) theft of police property (6) handling and/r possession of stolen property; and (7) breaches of the UK's Data Protection Act 1998. I personally assisted the Commissioner of Police in the preparation of a file for preliminary review by DPP Cheryl Richards and I was present at the DPP's office on 28 November 2014 when the Commissioner delivered that file directly into her hands."*

Having summarized the current position, Mr. Schofield proceeds to give his opinion that "release of operation Tempura evidence and correspondence contained, exhibited or referred to in the Aina Report is likely to affect the conduct of a criminal investigation and any eventual trial arising from that investigation."

54. Ms. Carss-Frisk QC was scathing in her criticism of what she implied was a desperate, barrel-scraping effort by the Governor to block the release of the requested records by reference to vague allegations of prejudice to a potential criminal investigation. However when I asked her whether she was suggesting that no weight could or should be attached to the evidence from Commissioner Baines and Mr. Schofield because their evidence was incapable of belief or advanced in bad faith, she made clear that that was not her position.

In my view, it is quite impossible for me to dismiss as baseless the concern that publication of the Governor's report, identical in content to the Aina report as it is, has the potential to interfere with what is plainly an active criminal investigation into Mr. Bridger's alleged commission of a wide range of criminal offences. It is equally impossible to dismiss the possibility that, were Mr. Bridger to be charged, the wide publicity that would inevitably be given to the Governor's response to the complaints pursued by him and Mr. Polaine has the potential to prejudice a fair trial. Having read the records myself, it is clear that insofar as the Governor's response summarily dismisses the allegations pursued by Messrs. Polaine and Bridger against identified members of the judiciary, the former Attorney General and Mr. Covington - and does so in great detail by reference to a complex series of events that can fairly be assumed to overlap with at least some of the issues that will be addressed in the current criminal investigation into Mr. Bridger's conduct – a credible basis for the engagement of s.16(b) of the Law is made out on the evidence. In my judgment, one of the issues that might usefully have been considered by the Information Commissioner in light of the concerns expressed by Commissioner Baines was whether a redacted version of the Governor's 7th March 2011 report might be capable of being published with a view to avoiding prejudice to the current criminal investigation while upholding basic principles of FOI law. However the Information Commissioner's blanket refusal to contemplate a meeting with Commissioner Baines, combined with his view that he could not lawfully consider the claim to a s.16(b) exemption, prevented any such consideration and in my view that is a further reason why I consider that the 10th July 2014 decision was unlawful and falls to be quashed.

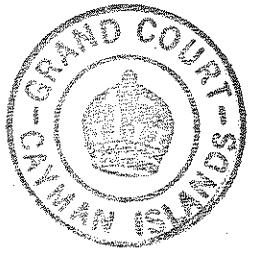
CONCLUSION

55. The Information Commissioner's view that the Order of Moses Ag J. dated 23rd December 2013 prevented him from taking into account any new exemptions claimed by the Governor, including the newly asserted s.16 (b) exemption that had arisen only after Sir Alan handed down his decision, was wrong in law. I also consider that the Information Commissioner was wrong to reject the invitation from Commissioner Baines for an oral briefing on the precise basis for the claimed s.16 (b) exemption prior to issuing his 10th July 2014 decision. The Governor's submissions to me in this appeal (based on s.16(b) of the Law) do not seek to raise issues that were not raised in the original submissions lodged in April 2014 albeit that there is fresh evidence from Mr. Schofield that relates back to the s.16(b) submission originally advanced in relatively skeletal form in April 2014 on behalf of the Governor. And I can find no prejudice to any individual or the overall conduct of public administration flowing from a legal obligation on the Commissioner to take into the account the content of Commissioner Baines's statement and concerns. Accordingly, I see no basis for arguing that it is contrary either to the spirit or letter of paragraph 31 of Moses Ag J.'s judgment to allow the Governor to rely on s.16(b) in the context of the appeal before me.

56. In these circumstances, I have concluded that the Governor's argument on the single s.16 (b) exemption is made out with the consequence that the Information Commissioner's decision of 10th July 2014 must be quashed.

I will hear further submissions on the terms of the Order that properly flows from my conclusion. My provisional view is that, in light of Mr. Paget-Brown's abandonment of what I will describe as the broad s.20(1)(d) challenge to the Commissioner's 10th July 2014 decision (as developed in paragraph 58 of his Skeleton Argument), it is not open to the Governor now to challenge or require reconsideration of the Commissioner's decision pursuant to the requirements of s.20 (1) (d) and s.26 of the Law. Subject to any genuinely new exemption arising for consideration (by which I mean an exemption that is based on new factual developments rather than a revised view of what legal submission might be advanced on "old" facts), the only tenable basis for exempting the requested records from disclosure under the 2007 Law is that the current active criminal investigation into Mr. Bridger's conduct *prima facie* engages the s.16 (b) exemption. Whether ultimately it prevents publication of the whole of the Governor's report (or merely identified parts of it) or whether future events wholly undermine the basis for the s.16(b) exemption are all matters for the Information Commissioner to reconsider in light of all relevant considerations and in light of the full exercise of his investigative powers. The appeal is allowed to this extent.

Dated this the 16th day of March 2015



Honourable Mr. Justice Timothy Owen Q.C. (Actg.)
Acting Judge of the Grand Court