Information Commissioner's Office

ICO Hearing 41-00000
Decision

The Governor's Office

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

10 July 2014

Summary:

An Applicant was refused access to documents relating to a complaint made to the Governor, and the Governor's response to the complaint, in relation to Operation Tempura.

The records were withheld in full by the Governor's Office and an Appeal of that decision was made to the Information Commissioner's Office. That Appeal resulted in a Hearing decision (Decision 24-00612) by the Information Commissioner which was appealed by the Governor's Office to the Grand Court by means of a judicial review. The Court returned the matter to the Information Commissioner for reconsideration whether the records are exempt from disclosure by reason of section 20(1)(d) of the *Freedom of Information Law, 2007*.

After receiving a new submission from the Governor's Office, the Acting Information Commissioner decided that – except for a single segment on page 13 of the Complaint - the records were not exempted under section 20(1)(d) of the *Freedom of Information Law, 2007*, and ordered that the records be disclosed.

Statutes[1] Considered:

Cayman Islands Constitution Order 2009 (SI 2009/1379)
Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008
Grand Court Law (2008 Revision)

Contents:

[1] In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to regulations under the *Freedom of Information (General) Regulations, 2008*, unless otherwise specified.

A. INTRODUCTION

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

> *1. A complaint originally filed by Martin Polaine, former legal advisor to Operation Tempura, alleging interference in the investigations conducted by that operation. According to Mr Polaine, "my complaint related to sections of the judiciary, to the Attorney General's Chambers and the FCO (Foreign and Commonwealth Office)." This complaint was taken over by Martin Bridger, former SIO of Operation Tempura, after Mr. Polaine refused to accept the terms under which the investigation into the allegations was* [sic] *to be conducted.*
>
> *2. The Governor's response to the complaint, which I understand was based on the findings of an investigation conducted by Benjamin Aina, QC and was released to Mr. Bridger in March 2011*.

[2] In response, the Governor's Office denied access to Mr. Polaine's complaint and the Governor's response ("the responsive records") on 14 February 2012, relying on section 54(1)(a).

[3] Since HE the Governor had made the initial decision, an internal review was not possible, and an appeal under section 42 was directly made to the Information Commissioner's Office ("ICO") on 16 February 2012.

[4] In the course of the ICO's pre-hearing investigation, the Governor's Office introduced new exemptions, namely sections 17(b)(i) (actionable breach of confidence), 20(1)(d) (prejudice to the effective conduct of public affairs), and 23(1) (personal information).

[5] The investigation was stopped on 22 June 2012, and the matter proceeded to a formal Hearing process before the Information Commissioner (the "Commissioner"). On 22 November 2012 the Commissioner issued Decision 24-00612[2], in which she found that the provision in section 54(1)(a) did not apply to the responsive records, and that the exemptions in sections 17(b)(i), 20(1)(d) and 23(1) did not apply, and ordered the Governor's Office to disclose the responsive records.

[6] The Governor's Office applied for leave for a judicial review in the Grand Court on 7 January 2013. Leave was granted on 8 February 2013. The Governor's Office applied for judicial review on 19 February 2013. The application was heard by Acting Justice Sir Alan Moses ("Moses LJ" or "the Judge") on 30 and 31 October 2013.

[7] In his Judgment and Order in *Governor of the Cayman Islands v Information Commissioner* Cause G0003/2013, dated 23 December 2013, the Judge ruled that the responsive records were not exempted from disclosure under section 54(1), as had been claimed by the Governor's

[2] ICO Decision 24-00612 22 November 2012

Office. The Judge also found that the case for the exemption in section 20(1)(d) had not been properly laid before the Commissioner, and, as a result, the Commissioner had failed to strike the essential balance in considering the exemption and, if applicable, the public interest. Consequently, the Judge ordered that the Commissioner reconsider the exemption claimed under section 20(1)(d).

[8] In the course of the judicial review, the Applicant withdrew, but the proceedings continued given the important nature of the issues at stake, and the Judge rejected the notion that the Commissioner's Decision should be quashed on this basis, saying "The issues are far too important to leave matters without final resolution."[3]

[9] In accordance with the Order, on 4 March 2014 the ICO invited the Governor's Office to make a new submission in writing, "on the sole basis of the application of the exemption in section 20(1)(d) of the FOI Law." The submission was received by the ICO in early April 2014, and after a period of analysis and investigation, the Hearing reconsideration was closed on 12 May 2014, when a date was set for a new Decision to be rendered by the Acting Information Commissioner on 11 June 2014. On 9 June 2014 the ICO extended the decision deadline under section 43(1) and informed the Governor's Office that the decision would be due on 11 July 2014.

B. BACKGROUND

[10] For detailed background information, I refer to the Judgment and Order of Acting Justice Moses in the Judicial Review, as well as to paragraphs 6 through 11 of the Information Commissioner's Decision 24-00612.

[11] I draw particular attention to the following concluding passages from the Judgment:

> *58. … What had to be balanced was the public interest in ensuring that the summary dismissal was reasoned and transparent against the dangers of repetition of dismissed complaints. In my view, the Commissioner failed to strike that essential balance either in her consideration under s.20(1)(d) or under s.26 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. Yet again, I repeat, it was not her fault that she did not do so. The issue was never properly laid before her. Nonetheless I do not regard the paragraphs to which I have referred as an adequate discussion of where the balance lay between those two aspects of public interest, repetition of the complaints and, on the other hand, open and clear explanation of the Governor's dismissal.*
>
> *59. In the light of that conclusion I must consider the appropriate remedy. I say at once that I reject the suggestion that I should myself decide that the Governor satisfied the burden upon her. The decision should, in my view, be taken by the official tasked by the law to make such decision, the Commissioner. She, after all, has the expertise of conditions in the Cayman Islands. Whilst I cannot rule out another appeal, clearly it is better if she strikes the balance than the Court. It was suggested that if, as I have done, I found the decision defective, I should merely quash it in the light of the fact that the original applicant has abandoned his claim to access to the documents. I reject that suggestion. The issues are far too important to leave matters without final resolution. My view is that the Commissioner should reconsider the exemption claimed under*

[3] *Governor of the Cayman Islands v Information Commissioner* Judgment Cause G 0003/2013, 23 December 2013 paras 12 and 59

s.20(1)(d).

60. I hope I have identified the important issues which fall to be decided without indicating where I believe the balance should be struck. If others think I have nudged the Commissioner one way or the other, they are mistaken. I also consider, subject to submissions as to order that I should make, that the Governor should be permitted to put in further written argument should she be so advised to make good her claim. …

61. I shall hear further argument in light of the decision I have reached as to the order I should make. For the reasons I have given I allow the appeal in relation to the order of disclosure and remit the question of disclosure for further consideration of the exemption under s.20(1)(d).

[12] After hearing further arguments on the Order, the Judge ordered the following:

1. *It is declared that the requested documents are not exempted from disclosure by virtue of section 54(1) of the FOI 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 section 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.*
5. *There shall be no order as to costs.*

C. ISSUE UNDER REVIEW IN THIS HEARING

[13] In the third point of his Order of 23 December 2013, Moses LJ explicitly set out the scope of the reconsideration, as follows:

> *3. The Decision is remitted back to the Respondent to reconsider whether the requested records are exempt from disclosure by reason of section 20(1)(d) of the FOI law;*

[14] In accordance with the Order, on 4 March 2014 the ICO Registrar of Hearings invited the Governor's Office to submit its "views in writing on the sole basis of the application of the exemption in section 20(1)(d) of the FOI Law."[4]

[15] In its submission the Governor's Office acknowledges the singular focus of the reconsideration, stating (my emphasis):

> *2. On 23 December 2013, Acting Justice Sir Alan Moses … ordered that [the Commissioner's] decision was unlawful, because the Commissioner had failed to consider adequately the exemption in section 20(1)(d) of the Freedom of Information Law 2007 … . He quashed the Commissioner's decision and remitted the question of*

[4] ICO Hearing 41-00000 *Notice of Hearing* 4 March 2014 p.1

disclosure to the Commissioner for further consideration of the application ***of this exemption****.*

…

16. On 14 February 2012 the Governor's Office informed [the Applicant] that it would not release the records. The Governor relied on the exemptions in sections 54(1)(a), 17(b)(i), 23(1) and 20(1)(d) of the FOI Law. Of those sections, ***only section 20(1)(d) is now relied upon****.*

…

25. ***The Governor now relies on the exemption in section 20(1)(d)*** *of the FOI Law.*

[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) [5], 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).

[20] Section 20 specifies:

20. (1) A record is exempt from disclosure if-

(a) its disclosure would, or would be likely to, prejudice the maintenance of the convention of collective responsibility of Ministers;

(b) its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation;

[5] For clarity, the applicant in that case was Mr. Rob Evans, not Mr. John Evans, the original applicant in this case, as identified by Moses LJ in para 1 of the Judgment in *Governor of the Cayman Islands* op cit.

(c) it is legal advice given by or on behalf of the Attorney-General; or

(d) its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.

(2) The initial decision regarding-

(a) subsection (1) (a) shall be made not by the information manager but by the Minister concerned;

(b) subsection (1) (b), (c) and (d) shall be made not by the information manager but by the Minister or chief officer concerned.

D. CONSIDERATION OF ISSUE UNDER REVIEW

The position of the Governor's Office:

[21] The Governor's Office asserts that Moses LJ approved a number of principles relating to the exemption in section 20(1)(d):

- firstly:

  this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure.[6]

- secondly, the Judge stated there must be a real and significant risk of prejudice, as identified in *McIntyre v Information Commissioner and the Ministry of Defence* EA/2007/0068.[7]

- thirdly, appropriate weight should be attached to the evidence from the Governor as to the prejudice likely to be caused by disclosure of the documents in issue, following the approach in *Cole v Information Commissioner and Ministry of Defence* EA/2013/0042 and 0043.[8] The Governor's Office asserts that this principle was stated by Moses LJ in the review of the Commissioner's decision, but that it ought to apply equally in the present reconsideration by the Acting Commissioner.

[6] *Governor of the Cayman Islands… Judgment* op cit para 37, quoting from: *McIntyre v Information Commissioner and the Ministry of Defence* EA/2007/0068 para 25
[7] *McIntyre* op cit para 40
[8] *Cole v Information Commissioner and Ministry of Defence* EA/2013/0042 and 0043 30 October 2013 para 29

[22] The Governor's Office also points out that, in accordance with *Evans v Information Commissioner and Ministry of Defence* EA/2006/0064, the UK's equivalent exemption to the FOI Law's section 20(1)(d) is engaged when some prejudice, other than that to free and frank expression of advice or views, is concerned.[9]

[23] As well, relying on a New Zealand Act, the Governor's Office asserts that prejudice to the effective conduct of effective public affairs could include circumstances where disclosure would, or would be likely to, result in improper pressure being exerted over, or harassment of, public servants or other persons.[10]

[24] The Governor's Office submits five reasons for concluding that section 20(1)(d) is engaged:

Reason 1:

[25] The Governor's Office states that the effective conduct of public affairs requires trust in serving judges. Any erosion of trust in judges, particularly sitting judges, would, or would be likely to prejudice the effective conduct of public affairs.

Reason 2:

[26] The Governor's Office states that *Sittampalam v Information Commissioner and Ministry of Justice* EA/2011/027 acknowledged that allegations against judges are sensitive, and their publication is therefore capable of undermining trust in the judiciary. The Governor's Office believes that the danger is all the greater in a jurisdiction such as the Cayman Islands where:

1. there are only a small number of serving judges;
2. the small population significantly exacerbates the risk of court users becoming aware of, and forming a view on, the allegations;
3. "the dissemination of allegations through the media in the Cayman Islands is wholly unregulated and uncontrolled";
4. the complex nature of many of the proceedings in Cayman's specialized courts necessitates fostering a judicial environment that is attractive to experienced members of the judiciary; and,
5. continued confidence in the judiciary is essential to maintaining the Cayman Islands' standing as a leading international financial centre.

[27] According to the Governor's Office, the perceived importance of maintaining confidence in the judiciary in a small but significant offshore jurisdiction such as the Cayman Islands "is indicated by the maintenance of the statutory offence of insulting or scandalising the Court", in section 27 of the Grand Court Law (2008 Revision).

[28] The Governor's Office asserts that,

> *the allegations in this case are highly sensitive, will be disseminated widely within the Islands, and will come to the attention of court users. However, given the unregulated nature of the media, there is a substantial risk that the coverage of the allegations will not be properly balanced by the findings contained in the lengthy Report.*

[9] In that case, as well, the applicant was Mr. Rob Evans, not Mr. John Evans.
[10] *Local Government Official Information and Meetings Act* 1987 (New Zealand) No. 174 s.7(f)(ii)

Reason 3:

[29] The Governor's Office claims that the integrity of future investigations into such sensitive allegations must be maintained, because disclosure "would, or would be likely to have a chilling effect on the willingness of judges and others to cooperate with investigations of this nature".

[30] The submission contends that "it is clear that Mr. Aina QC's investigation, which culminated in the Report, involved extensive and candid interviews with those involved in the allegations. The report, which is very detailed, was not intended for wider disclosure". In support of this contention, a brief passage from the Aina Report, itself, is cited, which contains a statement that, "it is consistent with the Governor's primary duty to promote good governance… [and] to provide written reasons **for limited circulation**" (emphasis added by the Governor's Office).

[31] The Governor's Office believes that it can be

> *…presumed that the participants' candid disclosure in the investigation was not made with the expectation that much of their involvement would later be disseminated to the public. In these circumstances, disclosure… would be highly likely to deter persons in similar circumstances in the future from cooperating to the same degree. Similarly, disclosure will likely impact on the Governor's frank and detailed approach to such investigations in future.*

Reason 4:

[32] The submission contends that it is the Governor's considered view that prejudice would, or would be likely to occur, and that

> *Nobody is better placed than the Governor (and the Governor's staff) to make this judgment and the Governor's view must be given appropriate weight in light of that fact.*

[33] This statement is supported by an excerpt from the affidavit of Tom Hines, formerly the Staff Officer and FOI Information Manager in the Governor's Office, written for the judicial review, in which Mr. Hines again raises the point that disclosure would undermine the confidence of the general public in the judiciary, and that this would negatively impact the latter's ability to effectively administer justice in the Cayman Islands. Mr. Hines also states that the Governor has carefully considered the allegations and has summarily dismissed them as being unfounded and unjustified. The Governor is convinced:

> *That the overriding effect of the disclosure of the complaint in* [sic] *the Governor's report and their subsequent treatment in the press would be likely to give public currency to the unmerited allegations they contain rather than to clarify the position or promote greater public understanding of his decision.*

Reason 5:

[34] Finally, the Governor's Office cites the opinion of the judges, themselves. The Governor asked the Chief Justice to give his views, and the submission quotes from a letter received in response, in which the Chief Justice is quoted as saying (in full):

> *The release of the Report would be to publish more than would ever normally be published about a disciplinary complaint that had been found to have no factual foundation. Publicizing the Report would therefore only provide an opportunity for*

unwarranted criticisms of the Report itself and of its findings – criticisms that could not be answered without reopening the issue of whether the Complaint had any merit, inviting everyone to form their own views. Thus, an endless cycle of debate and recrimination potentially harmful to the reputation of the judiciary and precisely of the kind the constitutional process is designed to prevent.

…

From the judges' point of view, the Complaint is defamatory and is intended to be demeaning of the judges. Irrespective of the Governor's reasons for rejecting it, the allegations of the Complaint as reproduced in the Report, if published, are likely to engender concern, including among reasonable members of the public. This would be the kind of concern that the judges themselves would be in no position to answer, being entitled and indeed bound by the Constitution – like the citizenry at large – to accept the Governor's decision.

…

The judges believe that by any objective measure, there is no public interest to be served by the release of the Report. Given the unfounded and defamatory contents of the Complaint which the Report contains, publication of the Report would tend to undermine the public confidence in the judiciary and so would prejudice the effective conduct of public affairs in the sphere of the administration of justice.

[35] The Governor's Office finishes its reasoning by saying that the Judges are "manifestly well placed to assess the consequence of disclosure on their continued discharge of their duties", and that their views should therefore be given substantial weight.

[36] This ends the Governor's Office's reasoning for the exemption of the responsive records by reason of section 20(1)(d). Arguments in consideration of the public interest are submitted separately, which I will discuss further below.

Discussion:

[37] The exemption in section 20(1)(d) is a prejudice-based exemption. It is worded in such a way that, for the exemption to apply, prejudice "would, or would likely" follow from the disclosure. I will first briefly explore the meaning and wording of the exemption and consider related matters.

[38] A prejudice-based exemption, according to the UK's Information Commissioner ("UKICO"), is one where "the authority has to satisfy itself that the prejudice or harm that is specified… either would or would be likely to occur."[11] Since section 43(2) places the burden of proof on the public authority, in this instance, the Governor's Office has to demonstrate that prejudice "would or would be likely" to follow from the disclosure of the responsive records. This involves a three-step test:

- Identify the "applicable interests" within the relevant exemption;
- Identify the "nature of the prejudice". This means:
    - Show that the prejudice claimed is "real, actual or of substance"; and,
    - Show that there is a "causal link" between the disclosure and the prejudice claimed;

[11] Information Commissioner's Office (UK) *The prejudice test. Freedom of Information Act. Version 1.1* 5 March 2013, p. 3; See: *Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 and 0030 17 October 2006 paras 28-36

- Decide on the "likelihood of the occurrence of prejudice".[12]

Applicable interest:

[39] In the present case, the "applicable interest" is the effective conduct of public affairs. The parallel exemption in the UK's Freedom of Information Act 2000[13] ("FOIA"), although differently constituted, contains an identical phrase, and I am satisfied that, on the narrow question of meaning of the wording of this phrase, the guidance from the UKICO is helpful. It states:

> *53. Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.*[14]

[40] The exemption in section 20(1)(d) is very wide, as it may potentially relate to any "effective conduct of public affairs". However, the exact wording of the section - which applies where disclosure would, or would be likely to, **otherwise** prejudice the stated interest (my emphasis) - indicates that it covers only those interests that are not covered by another exemption. The passage from *McIntyre* about the parallel exemption in FOIA, quoted in the Governor's Office's first reason above, confirms this interpretation. It states: (my emphasis):

> *this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information,* ***but which are not covered by another specific exemption****, ….*[15]

This is also confirmed in the UKICO's guidance on the UK exemption, and the conclusions of the UK Information Tribunal in *Evans*.[16]

[41] A public authority must therefore use the exemption that best matches the "applicable interest" it is aiming to protect. Where an "applicable interest" falls within one of the other exemptions provided in the FOI Law, that other exemption must be applied, and not section 20(1)(d). For example, it would not be open to a public authority to claim prejudice to commercial interests under section 20(1)(d) even though a scenario can be thought of whereby Government's interactions with private business might be harmed by the disclosure of commercial information, which ultimately might constitute a prejudice to the effective conduct of public affairs. In that hypothetical scenario, the specific exemption relating to commercial interests (section 21) would have to be used for the purpose of protecting that specific "applicable interest" rather than the wider section 20(1)(d).

[42] The Governor's Office points to one of these specific interests (free and frank exchange of views), quoting *Evans*[17], but under both Cayman Islands and UK Law the same logic applies to all other interests protected in that exemption, and in all other exemptions.

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[12] *The prejudice test* op cit p.5
[13] *Freedom of Information Act* 2000 (2000 c.36)
[14] Information Commissioner's Office (UK) *Prejudice to the effective conduct of public affairs (section 36). Freedom of Information Act 22 Version 2* March 2013 para 53
[15] *McIntyre v Information Commissioner and the Ministry of Defence* EA/2007/0068 para 25, as quoted in: *Governor of the Cayman Islands… Judgment* op cit para 37
[16] *Prejudice to the effective conduct* op cit para 56; *Evans v Information Commissioner* (2006) op cit para 53

The nature of the prejudice:

[43] According to the UK Information Tribunal in *Hogan*[18], demonstrating prejudice involves two steps: the prejudice must be "real, actual or of substance" and there must be a causal link between the disclosure and the prejudice.

[44] For the prejudice to be "real, actual and of substance" the disclosure must at least be capable of harming the interest in some way, i.e. have a damaging or detrimental effect on it. The prejudice must be more than trivial or insignificant, but it does not have to be particularly severe or unavoidable. According to the relevant guidance from the UKICO:

> *There may be a situation where disclosure could cause harm... but the authority can mitigate the effect of the disclosure, perhaps by issuing other communications to put the disclosure in context. In such a case… the exemption may not be engaged, or we may still accept that the exemption is engaged but then consider the effect of these mitigating actions as a factor in the public interest test.*[19]

[45] Secondly, there has to be a "causal link" between the potential disclosure and the prejudice claimed:

> *There must be "more than a mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption".*[20]

[46] Of course, since the disclosure and prejudice (potentially) take place in the future, this involves a certain amount of speculation and extrapolation on the basis of available evidence.[21]

Likelihood of occurrence of the prejudice:

[47] Next, the "likelihood of occurrence of prejudice" has to meet the stated threshold. The exemption in section 20(1)(d) requires that (my emphasis):

> *disclosure* ***would*** *… prejudice, or* ***would be likely to*** *prejudice* [the stated interest]

[48] In *McIntyre* the UK Information Tribunal clarified, in relation to similar wording in the FOIA,

> *There have been a number of Tribunal decisions on the meaning of the two limbs of the prejudice test in qualified exemptions. The words "would prejudice" have been interpreted by the Tribunal to mean that it is "more probable than not" that there will be prejudice to the specific interest set out in the exemption and the words "would be likely to" have been interpreted to mean that there is a "real and significant risk of prejudice" to the interest in the exemption.*[22]

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[17] *Evans v Information Commissioner* (2006) op cit
[18] *Hogan* op cit para 30
[19] *The prejudice test* op cit para 19
[20] *Id* para 21
[21] *England and London Borough of Bexley v Information Commissioner* EA/2006/0060 and 0066 10 May 2007 para 62
[22] *McIntyre* op cit para 40

[49] The meaning of "likely" has been considered on a number of occasions, including by Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin):

> *In my judgment "likely" … connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there "may very well" be prejudice to those interests, even if the risk falls short of being more probable than not.* [23]

This meaning has been relied upon by the UKICO and the UK Information Tribunal under the FOIA, and forms part of the guidance issued by the former.[24]

[50] I consider that this approach is consistent with the formulation of the test by Moses LJ in the Judgment, where he stated that "…the position is, as explained in *McIntyre*, that what [the Commissioner] had to consider was whether there was a real and significant risk of prejudice." [25]

[51] I will now review each of the consecutive arguments raised by the Governor's Office in the light of these considerations.

Reason 1:

[52] I accept the general argument that erosion of trust in the judiciary could constitute prejudice to the effective conduct of public affairs. The judiciary offers an essential public service, the administration of Justice, and this service could be eroded by a lack of trust. However, while the erosion of trust could harm the effective conduct of public affairs, it does not follow that the disclosure of the responsive records would, or would be likely to, cause the erosion of trust in the judiciary.

[53] By virtue of section 43(2) the burden of proof is on the public authority to demonstrate that the exemption has been correctly applied. However, in its first reason the Governor's Office does not address or explain the likelihood of the claimed prejudice, nor establish any causal link between the disclosure of the responsive records and the presumed prejudice. In fact, in its first reason, the Governor's Office does not mention the records at all. Therefore, the Governor's Office clearly fails in this regard in respect of its claimed first reason.

[54] For clarity, I agree that the publication of the Complaint by itself might undermine the general public's trust in certain members of the judiciary, but given the fact that the Report summarily dismisses the allegations in a detailed and considered manner and that it was written by an eminent lawyer and adopted in full by the Governor, I do not believe that its publication, nor the publication of the Complaint with the Report, would, or would be likely to harm the trust in the judiciary.

[55] **Therefore, I find that the exemption in section 20(1)(d) is not engaged by virtue of the first reason provided by the Governor's Office.**

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[23] *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), paras 96-100

[24] See for instance, *Connor v Information Commissioner* EA/2005/0005 para 15; see also: *The prejudice test* op cit paras 30-32

[25] See *Governor of the Cayman Islands… Judgment* op cit para 38, and particularly para 48

Reason 2:

[56] The Governor's Office cites the case of *Sittimpalam*. I note that that case is distinguished on an number of crucial points from the present case, for instance, it did not concern the exemption relating to prejudice to the effective conduct of public affairs, but the FOIA's equivalent of the Cayman Islands section 20(1)(b), which relates to the free and frank exchange of views.

[57] In the words of Moses LJ, the relevance of the *Sittimpalam* case for the present case was as follows:

> *53. … [The UK Information Commissioner] drew attention to the fact that the performance by a judge of his or her role is subject to public scrutiny simply as a result of the public nature of the court processes. This, I interpose, is in contrast to the allegations made against the judges [in the Cayman Islands case] which were not in relation to their behaviour in Court. The [UK] Commissioner, in that case, argued that those factors added to the additional information disclosed in response to the information request, provided substantial assistance to those with an interest in understanding the decision taken by the Lord Chief Justice and the Lord Chancellor, and the handling of the decision by the Office of Judicial complaints.*
>
> *54. The importance of that decision, therefore, is the emphasis placed upon and the recognition of the need for the public to understand the reasons for the decision made in that case. That requirement was, in that case, satisfied.*
>
> *55. The case of Sittampalam is some distance away from the question the Commissioner and this Court has to consider.* [In the Cayman Islands case] *There is no information whatever in the public domain as to why the Governor summarily dismissed the allegations which, in some respects, related to conduct of the judiciary where the primary facts, as referred to in previous decisions of this Court, were known and established. I repeat, Sittimpalam acknowledges the need to understand, at least to some extent, the reasons for the decisions that were taken. It is that aspect of Sittimpalam which seems to me to be of some weight but appears to have had little weight in the consideration of the Governor.*

[58] This assessment of the relevance of *Sittimpalam* is also important for the present reconsideration. As far as the "applicable interests" are concerned, far from acknowledging that allegations against judges are sensitive and that publication would be capable of undermining trust in the judiciary, as claimed by the Governor's Office, in *Sittimpalam* the UK Information Tribunal noted that the UKICO perceived a need to protect certain information about the disciplinary, complaint-handling function exercised by the Lord Chief Justice and the Lord Chancellor, but only after a substantial amount of information had already been disclosed. This has little bearing on protecting trust in the judiciary itself, as claimed by the Governor's Office, or on the present case in which no substantial information has yet been released.

[59] The Governor's Office's submission claims that the dangers of undermining the judiciary are greater because "the dissemination of allegations through the media in the Cayman Islands is wholly unregulated and uncontrolled", and that "there is a substantial risk that the coverage of the allegations will not be properly balanced by the findings contained in the lengthy Report".

[60] In that regard I draw attention to a previous decision where I explained the following, which is also relevant here:

> *Questions of access to a record held by Government cannot be concerned with how that record might be used in the future. This would be a shortcut to censorship, and would contradict the fundamental objectives of the FOI Law. Either a record is exempt under the Law or it is not, but, in either case, any presumed future use of a record can have no bearing on its disclosure. This principle is stated in section 6(3), which states that an applicant is not required to give any reason for requesting access. In the UK it is known as "motive blindness".*[26]

[61] In a democratic society such as the Cayman Islands the Press has every right to express their views freely, including views critical of Government. Freedom of Expression is guaranteed in section 11 of the Constitution,[27] and the FOI Law is itself explicitly intended "to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy".[28] It is within this democratic context that the present reconsidered decision is being made, and it seems futile to wonder how this case would play out if the media were "regulated and controlled". No doubt this would reduce the disclosure of information by Government considerably, and increase the number of articles in the media favourable to Government, but that is not the constitutional and statutory framework within which this reconsideration is taking place, and such observations add nothing to the question at hand.

[62] The Governor's Office also expresses the view that there is an increased risk of a loss of trust in the judiciary, in a smaller jurisdiction: (a) where there are only a small number of serving judges; (b) with a smaller population; (c) in which specialized courts of the Cayman Islands need to be attractive to specialist judges; and (d) in which a loss of trust in the judiciary, if it were to occur, could have negative effects on the standing of the Cayman Islands as a leading financial centre.

[63] I understand the logic behind this argument, but in the circumstances of this case, this argument works both ways. If allegations circulate more easily under the stated circumstances, or have a more significant impact, so will the credible refutation of the allegations presented in the Governor's response. Therefore, this argument does not add to the case the Governor's Office seeks to make in favour of the exemption.

[64] As quoted above, UKICO guidance provides that "the authority can mitigate the effect of the disclosure, …by issuing other communications to put the disclosure in context. In such a case… the exemption may not be engaged".[29] I am convinced that the disclosure of the Governor's considered response would mitigate the presumed negative effects of disclosure of the Complaint. I fail to understand why the disclosure of a report written by an eminent lawyer, which extensively and in a considered manner exonerates all the alleged wrongdoings, and which was wholly adopted by the Governor and incorporated into his response would harm, or be likely to harm, trust in the judiciary. I believe the contrary to be the case.

[65] I consider that there is an instructive parallel in the events surrounding Justice Henderson, who, as is well known, was very publicly accused, arrested, briefly held in police lockup, had his office and home searched and was subsequently released and fully exonerated in court. Nonetheless, I have not heard it said, and no evidence has been presented before me, that Justice Henderson subsequently experienced any negative consequences as a result of these events in the continued execution of his role as Grand Court Judge. This seems a relevant parallel, as

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[26] ICO Hearing Decision 37-02613 28 May 2014 para 143; see: *S v Information Commissioner* EA/2006/0030 9 May 2007 paras 19 and 80

[27] I note that the Bill of Rights had not come into effect when the initial request was made, but it was in effect when the Hearing Decision 24-00612 was issued.

[28] *Freedom of Information Law* 2007 s.4

[29] See footnote 17 above.

there have apparently not been any negative repercussions on Justice Henderson's ability to function in his judicial capacity after the serious allegations to which he was subject were carefully considered and duly rejected.

[66] Notwithstanding my rejection of the application of the exemption to the totality of the two responsive records on the basis of the arguments presented in the Governor's Office's second reason, I concede that the exemption does apply to a short segment on page 13 of the Complaint, to which the Governor's Office has drawn attention in its submission.

[67] In this regard I draw attention to section 12(1):

> *12. (1) Where an application is made to a public authority for access to a record which contains exempt matter, the authority shall grant access to a copy of the record with the exempt matter deleted therefrom.*

[68] The segment in question is the third bullet point on page 13 of the Complaint, after the phrase "…and his room" and before the next paragraph starting with "There is also …".

[69] This segment was discussed at the time of the judicial review, when it was agreed between the parties that this single segment was to be redacted, in the event that the records were ordered disclosed.

[70] In allowing the exemption to apply to this single segment, I am satisfied that the disclosure of the single passage in question would harm the credibility of members of the judiciary, and undermine the administration of justice. Therefore, I agree with the redaction of this segment of the Complaint on the basis that there is a real and significant risk that its disclosure would prejudice the effective conduct of public affairs.

[71] The segment in question stands somewhat separately from the other allegations and was not addressed by Mr. Aina. Therefore there is no corresponding redaction to be made in the Governor's response.

[72] **For the above reasons, the exemption in section 20(1)(d) is not engaged by virtue of the second reason provided by the Governor's Office, except in respect of the single segment on page 13 of the Complaint, identified above.**

Reason 3:

[73] The Governor's Office claims that disclosure would, or would be likely to have a "chilling effect" upon the willingness of judges and others to cooperate with future investigations of the same, sensitive type. It is claimed that those involved in the allegations gave "extensive and candid interviews", and that disclosure of the Report would be "highly likely to deter persons in similar circumstances in the future from cooperating to the same degree", as well as impacting "the Governor's frank and detailed approach to such investigations in the future".

[74] I find this reasoning unconvincing. When the Governor is confronted with serious allegations, it is within her discretion to undertake a preliminary investigation in order to determine whether to send the matter for further investigation by the Judicial and Legal Services Commission (JLSC) under section 96(4) of the Cayman Islands Constitution. The preliminary investigation was the purpose of the investigation by Mr. Aina. The Report does not clarify the methodology employed, but the author clearly enjoyed the full cooperation of those involved. He was acting

on behalf of the Governor when analyzing and investigating the allegations claimed in the Complaint, and the Governor adopted all recommendations and signed the document as his own.

[75] I believe that the likelihood of a member of the judiciary, against whom allegations have been raised, not cooperating fully with a preliminary investigation by the Governor in the context of section 96 of the Constitution, is extremely remote. It does not meet the required threshold of probability that disclosure "would, or would be likely to" cause the claimed harm, and I do not consider the likelihood of the prejudice resulting from disclosure to be "real and significant". Surely it would be an incentive for a member of the judiciary against whom allegations have been raised to cooperate fully with the preliminary process conducted by, or on behalf of, the Governor in her/his discretion under the Constitution, rather than not cooperate and, presumably, increase the likelihood of having the matter referred to the JLSC for a formal investigation.

[76] I also note that many of the allegations have been widely and repeatedly published in the Press,[30] but the Governor's response which summarily refutes all allegations, on the basis of the detailed analysis in the Report written by Mr. Aina, has not. Under these circumstances, I do not see how the disclosure of the refutation would, or would be likely to, deter a member of the judiciary against whom allegations are raised, from cooperating with future, similar investigations of the Governor. Rather than a chilling effect, I would expect that disclosure would have the reverse effect, namely of emphasizing the fair and appropriate nature of the Governor's approach, which can only lead to greater respect and cooperation by all those involved in similar, future investigations.

[77] In the present reconsideration of section 20(1)(d), any claims of prejudice to interests which are covered by another exemption, should have been raised earlier in the process by a claim under that exemption. As I have stated above, such claims do not properly fall within the scope of the present reconsidered decision.

[78] In particular, in its third reason, the Governor's Office raises the expectations of confidentiality of the judges and others on whom Mr. Aina QC relied when compiling his Report, without providing evidence, as well as the confidential nature of the Report itself.

[79] As far as the statement that Mr. Aina QC advised that the report should be circulated on a limited basis, Moses LJ discussed this issue briefly, saying,

> *[The Report] advises that limited disclosure shall be given to the complainant, to Mr. Bridger, the Chief Justice and the Attorney-General. But the report did not, because it was not tasked with it, consider the issues which the Commissioner and this Court has to consider under s.20(1)(d). It was not within the remit of the report.*[31]

[80] It is clearly not the case that a consultant author can fleetingly remark that a document should remain undisclosed and the public authority, who commissioned the document, be bound by such advice without properly considering its disclosure under the FOI Law when tasked to do

[30] Moses LJ noted in the Judgment that details of the allegations against the three judges involved were published in the Financial Times and other newspapers, including local newspapers, and noted "There was a considerable amount of material that shows that the matter was referred to and discussed in the Press up until 2013. In the documents before this Court there was substantially more material taking matters up to 23 April 2013". *Governor of the Cayman Islands… Judgment* op cit, paras 8 and 50.
[31] *Governor of the Cayman Islands… Judgment* op cit para 51

so. This is particularly so, since in the present reconsideration the relevant record is the Governor's response, not Mr. Aina's report, although the two are closely related as already stated.

[81] Although this question is not stated in terms of the tort of breach of confidence or the exemption in section 17(b)(i), the latter exemption has already been extensively dealt with, and rejected, in the Information Commissioner's Decision in Hearing 24-00612 of 22 November 2012. It was not raised by the Governor in the judicial review, and it clearly now falls outside the scope of this reconsidered decision which is solely focused on section 20(1)(d). I will therefore not consider the arguments in relation to confidentiality further.

[82] **For the above reasons, the exemption in section 20(1)(d) is not engaged by virtue of the third reason provided by the Governor's Office.**

Reason 4:

[83] The Governor's Office pointed to the UK's First Tier Tribunal ruling in *Cole*, in which it was confirmed 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.*[32]

[84] I fully support the notion that appropriate weight must be given to the Governor's opinion. The ICO always gives appropriate weight to the evidence provided by a public authority in the context of an appeal, as it is required to do under section 43(1). This is particularly so, since section 43(2) places the burden of proof on the public authority to demonstrate that it acted in accordance with its obligations under the Law. The ICO appreciates that public authorities and their staff understand the context of the records in their custody, as well as the risks disclosure may bring to particular interests.

[85] However, this is some ways removed from the claim that "Nobody is better placed than the Governor (and the Governor's staff) to make this judgment". To the extent that this proposition suggests that the Information Commissioner should defer to the Governor in deciding an appeal, or this reconsidered decision, I strongly disagree with it.

[86] Only in very specific circumstances does the FOI Law give the Governor the final word. For instance, when records are requested that belong to the Government of the United Kingdom the Governor (or the Secretary of State) is authorized to issue a certificate to that effect, and the records are consequently exempted from disclosure. No such certificate is subject to judicial or quasi-judicial proceedings, as per section 3(5)(d). However, no such claim has been made, and no certificate has been issued in the present case, indeed, I do not see how it could have been.

[87] In all other cases the decision of an appeal, and of this reconsidered decision, rests squarely with the (Acting) Information Commissioner, who is by law entrusted to decide whether an exemption applies under the FOI Law, and if so, where the balance of the public interest lies, at least in relation to those exemptions which are listed in section 26 as being subject to a public interest test. This was also confirmed by Moses LJ, who stated (my emphasis):

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[32] *Cole v Information Commissioner and Ministry of Defence* EA/2013/0042 and 0043 30 October 2013 para 29

> *The Court must, however, bear in mind that* ***the Commissioner is an expert on consideration 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 decision should, in my view, be taken by the official tasked by the law to make such decision, the Commissioner. She, after all, has the expertise of conditions in the Cayman Islands****.*[33]

[88] For clarity, the exemption in section 20(1)(d) of the FOI Law differs from the parallel exemption in section 36(2)(c) of the FOIA, in that the latter requires "the reasonable opinion of a qualified person" to engage the exemption. This differs from the FOI Law which, in section 20(2) requires that the initial decision to claim the exemption must be made by the "Minister or chief officer concerned". However, section 20(2) does not support the claim that "Nobody is better placed than the Governor". It does not shift the burden of proof away from the Governor or negate the Governor's Office's duty "to show that it acted in accordance with its obligations under [the FOI Law]", by virtue of section 43(2). These obligations include the general right of access under section 6(1) and the proper application of an exemption where it is considered appropriate.

[89] The Governor's Office's position on this point appears to be undermined by the fact that the Governor has, in fact, sought the advice of the judiciary regarding the application of section 20(1)(d), as further described in the fifth reason.

[90] **Therefore, the point the Governor's Office makes in its fourth reason does not demonstrate that the exemption in section 20(1)(d) is engaged.**

Reason 5:

[91] In its fifth reason, the Governor's Office clarifies that "the judiciary was asked for its view on the question" in the course of this case, and quotes excerpts from a letter received "from the Chief Justice on … behalf [of the judiciary]".

[92] This was a point of some contention in the course of the judicial review, as the input from the judiciary was not clarified until very late in the process. It is public knowledge that the responsive records relate to complaints against the judiciary, and there is no objection in principle to any public authority seeking input from a potentially affected third party, such as the judiciary in this case, as long as this fact is plainly disclosed. For clarity, the FOI Law only mandates consultation with third parties in the context of the disclosure of personal information under section 23 and regulations 11-13. However, this is not the legal context within which the Governor solicited the views of the judiciary.

[93] The Governor's Office emphasizes that,

> *The judges manifestly are well placed to assess the consequence of disclosure on their continued discharge of their duties and so their view should be given substantial weight.*

[33] *Governor of the Cayman Islands… Judgment op cit paras 34 and 59*

[94] This argument seems to be somewhat weakened by the Governor Office's claim in favour of the exemption for the fourth reason, that "Nobody is better placed than the Governor (and the Governor's staff)" to determine whether the exemption in section 20(1)(d) applies.

[95] It could also be argued that the judges whom the Governor consulted, including the Chief Justice, are personally closely involved in the subject matter of the responsive records, and might therefore not be able to give, or might be perceived as not being able to give, an unbiased and objective view on the matter. Moses LJ noted that the allegations "were not in relation to their behaviour in Court",[34] and I do not accept, as perhaps implied, that I should defer to the views of the judiciary as expressed by the Chief Justice and quoted by the Governor's Office.

[96] As commented by Moses LJ, the complaint clearly was based on facts, facts which have already been discussed at length in the Press, and which were the subject of Mr. Aina's report and the Governor's response. I am of course not referring to the allegations themselves, but to the underlying actions and events on which the Complaint and the Report were based, and which clearly did take place.

[97] I disagree with the expressed views that disclosure of the Governor's response would,

> *only provide an opportunity for unwarranted criticisms of the Report itself and of its findings – criticisms that could not be answered without reopening the issue of whether the Complaint had any merit, inviting everyone to form their own views.*

And that,

> *…irrespective of the Governor's reasons for rejecting it, the allegations of the Complaint… are likely to engender concern, including among reasonable members of the public.*

[98] I have explained above that in the process of determining whether an exemption applies, the focus should be on the records, not on any motivations of an applicant, the reasons he/she may have for requesting the records, or the way the records might be used after disclosure.

[99] Section 6(3) provides:

> *(3) An applicant for access to a record shall not be required to give any reason for requesting access to that record*.

[100] In *S v Information Commissioner*, the UK Information Tribunal found that,

> *FOIA is … applicant and motive blind. It is about disclosure to the public, and public interests. It is not about specified individuals or private interests.*

and,

> *In dealing with a Freedom of Information request there is no provision for the public authority to look at from whom the application has come, the merits of the application or the purpose for which it is to be used.*[35]

[34] *Governor of the Cayman Islands… Judgment* op cit, para 53
[35] *S v Information Commissioner* op cit ibid

[101] The reasoning for objecting to disclosure on the basis that a public debate might ensue, in which these issues might be raised again, or that the disclosure would cause concern among members of the public, seems to overlook the fact that the public is already concerned, and that the public debate has in fact been going on ever since the events detailed in the Complaint took place. It is precisely the intent of the FOI Law to facilitate public debate, although the response to the Complaint is clearly the Governor's, and it is not an issue of inviting the public in the decision making process, particularly since this process is within the discretion of the Governor under the Constitution. However, the debate and concern to date has been based on one-sided allegations and rumours, not on the fair and balanced investigation of the facts represented by Mr. Aina's Report and the Governor's response. It would hardly seem appropriate for the rational, considered side of the debate to remain suppressed while the rumour mill churns on.

[102] As to the statement that,

> *an endless cycle of debate and recrimination potentially harmful to the reputation of the judiciary and precisely of the kind the constitutional process is designed to prevent.*

I find this statement unhelpful for the Governor's Office's case. It does nothing to enlighten us on the likelihood of prejudice, or the implied causal relationship between disclosure and harm to the stated interest, i.e. the reputation of the judiciary.

[103] I note that the harm is here claimed to be "potential", which does not appear to explain how the required threshold is met, since the exemption demands that disclosure, "would, or would be likely" to cause the prejudice, which has been found to mean that there is a real and significant risk of it occurring.[36]

[104] In the particular circumstances of this case I would expect the opposite to be true, namely that the judiciary gains in reputation as the detailed and considered reasons for the Governor's refutation of all the allegations become known and the rumours can be laid to rest.

[105] No details are provided in the above statement regarding the reference to the "constitutional process", but I assume this refers to the Governor's powers under section 96 of the Constitution, which pertain to HE's duties and powers in respect of the judiciary. I fail to see how these are designed to prevent debate or recrimination. Section 122 of the Constitution provides for a Freedom of Information Law, and the responsive records in question are properly subject to that Law. They undoubtedly document a process that is provided for in the Constitution, i.e. the Governor's decision under section 96(4), but this does not render the records exempt from disclosure under the FOI Law.

[106] Furthermore, a statement is made that the Complaint is defamatory and is intended to be demeaning of the judges. This issue and its proper consideration under the FOI Law were the subject of a large part of the judicial review proceedings before Moses LJ. The Judge found that section 54 cannot be construed as an exemption from the general right of access. Lord Moses said:

> *A construction [of section 54] which does recognise that disclosure of defamatory material may be required, but in such circumstances provides a defence under [section 54] (2) and (3), limits that defence so that those to whom access is granted may not republish with impunity, does make sense and is coherent…*

[36] See above

[This construction] is unarguably consistent with the objectives of the law and of the constitution. [37]

In other words, whether or not a record is defamatory is not conclusive in terms of disclosure under the FOI Law. In any event, even if it were, the same conclusions I have reached above about the specific focus of this reconsideration on the application of section 20(1)(d), apply in this respect as well.

[107] It is also stated that the judges would be

in no position to answer, being entitled and indeed bound by the Constitution – like the citizenry at large – to accept the Governor's decision.

[108] As I have said above, the issue is not whether the general public should be invited into the Governor's decision making. That is clearly not the case, and the Governor's constitutional discretion is not in question. The question at hand is whether the responsive records, which document the reasons for the Governor's decision, are to be withheld by reason of section 20(1)(d).

[109] The Governor's Office has made the point in its third reason, that Mr. Aina's investigation was completed with the full cooperation of the judges. The investigation resulted in the refutation of all the allegations, and its conclusions were accepted by the Governor in full, who adopted the Report as his own response to the complainant. Under these circumstances, it would not seem that there is anything further for which the judges are answerable.

[110] As already stated above, in my consideration of the other points raised by the Governor's Office, the Governor's response is a thorough and systematic refutation of the allegations raised in the Complaint. It was completed by a respected lawyer on behalf of the Governor, and it summarily refutes and dismisses all the allegations after a considered legal analysis. I believe that the disclosure of this document in conjunction with the Complaint itself (except for the single excerpt noted above) will diminish any potentially negative impact the release of the Complaint by itself might have had.

[111] I also repeat the instructive example of Justice Henderson, whose ability to function in his judicial capacity has apparently not been weakened by his very public ordeal with law enforcement officials.

[112] **For the above reasons I do not agree that the claimed exemption in section 20(1)(d) is engaged by the Governor's Office's fifth reason.**

[113] **Having rejected all five reasons presented by the Governor's Office, I find that the responsive records are not exempted by reason of section 20(1)(d), except for the single, short excerpt of the Complaint, identified above in my discussion of the Governor's second reason.**

<u>The public interest</u>

[114] As I have found that the exemption in section 20(1)(d) applies to a small part of the Complaint, I must now consider whether it would nonetheless be in the public interest to disclose the exempted information.

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[37] *Governor of the Cayman Islands… Judgment* op cit paras 22-23

[115] For the avoidance of doubt, I also wish to conduct the public interest test in relation to the responsive records as a whole.

[116] Section 26 provides:

> *26. (1) Notwithstanding that a matter falls within sections 18, 19 (1) (a), 20 (b), (c) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest.*

[117] Regulation 2 defines the public interest as follows:

> *"public interest" means but is not limited to things that may or tend to-*
>
> > *(a) promote greater public understanding of the processes or decisions of public authorities;*
> >
> > *(b) provide reasons for decisions taken by Government;*
> >
> > *(c) promote the accountability of and within Government;*
> >
> > *(d) promote accountability for public expenditure or the more effective use of public funds;*
> >
> > *(e) facilitate public participation in decision making by the Government;*
> >
> > *(f) improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;*
> >
> > *(h) deter or reveal wrongdoing or maladministration;*
> >
> > *(i) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or*
> >
> > *(j) reveal untrue, incomplete or misleading information or acts of a public authority.*

[118] The public interest is not limited to these factors, and it "can cover a wide range of values and principles relating to the public good, or what is in the best interests of society."[38]

[119] The public interest test "involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining the exemption."[39] The test assumes the form of a balancing exercise between the factors in favour of disclosure and those factors in favour of maintaining the exemption.

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[38] Information Commissioner's Office (UK) *The Public interest test. Freedom of Information Act Version 2* 5 March 2013 pp 5-6

[39] Id p 6

[120] I must also bear in mind that section 6(5) provides:

> (*5) Where the factors in favour of disclosure and those favouring nondisclosure are equal, the doubt shall be resolved in favour of disclosure but subject to the public interest test prescribed under section 26.*

[121] In the Decision in Hearing 19-01911 the Information Commissioner stated that

> *Given the extraordinary attention … topics documented by the responsive records have received and continue to receive in the media, I wish in the first instance to clarify that "public interest" in the context of an FOI application and appeal means "something which serves the interests of the public", and not "something which the public is interested in". Therefore, the media attention for the port expansion is only relevant in so far as it is an indication of the former, not as an indication of the latter.*[40]

The UKICO agrees, saying that "Media coverage of an issue may indicate that there is a public interest at stake, but it is not proof of the fact."[41]

This consideration is relevant in the present case, given the fact that a lot of attention has been, and continues to be given in the media to Operation Tempura in general, and to the responsive records in this case, specifically.

The position of the Governor's Office:

[122] The Governor's Office claims that disclosure of the Complaint and the Governor's response would not be in the public interest. It identifies the following relevant public interest factors, and balances these against disclosure, as follows:

1. There is in general a public interest in promoting greater public understanding of the decisions of public authorities, and in providing reasons for decisions taken by Government

2. There would be a significant negative impact on public confidence in the Cayman judiciary. Publication would reignite public comments of untrue allegations.

3. Disclosure would jeopardize the integrity of future investigations by the Governor. The Governor must feel free to create detailed reports without fear that these will be used to inflame public distrust of the judiciary.

4. The nature of the allegations has already been discussed in the Press. Since the Governor has already stated that they were without merit, this "must greatly diminish any public interest in disclosing them." In this regard, the Governor's Office also refers to *Foreign and Commonwealth Office v Information Commissioner and Friends of the Earth*[42], claiming that "*The public interest in disclosure may be diminished if disclosure of the requested information will add little to what is already in the public domain."*

[40] ICO Decision 19-01911 13 December 2011
[41] Id p 7
[42] *Foreign and Commonwealth Office v Information Commissioner and Friends of the Earth* EA/2006/0065 29 June 2007 para 43

5. The quality of decision making of the Governor has already been given the seal of approval by Moses LJ, when, indicating the importance of giving reasons for public decision, he stated:

> *… the public, it might fairly be said, was entitled to know that the summary dismissal was the result of a conclusion reached after thorough and reasoned consideration.* [43]

The Governor's Office points out that Moses LJ noted that the report "considered the facts and the relevant law in great depth… [it is a] detailed and lengthy consideration"[44], and it claims:

> *Accordingly, the public already has a substantial degree of reassurance in relation to the Governor's decision. .. disclosure… would not satisfy any lingering public interest, but would only serve to fuel the continuing discussion of… Operation Tempura by a few individuals, most of whom no longer reside in the Cayman Islands. The release… will not satisfy the minority and will not serve to bring Operation Tempura, or even the allegations contained in the Complaint, to a close. This is clearly illustrated by the fact that (i) Mr. Bridger has made yet another complaint in relation to the same subject matter to the RCIPS as recently as this year… and (ii) a number of persons involved, including Mr. Evans, continue to speak at conferences about Operation Tempura events. … [T]aking into account the public interest does not require undue consideration to be given to the interests of a marginal few who have a personal interest in the information or to a preoccupation of the local media with an episode which concerned their own sector.*

The Governor's Office concludes by reiterating that, "notwithstanding the Commissioner's sectoral expertise", appropriate weight has to be given to the Governor's views, also in respect of the public interest, and that the Governor is well placed to assess the balance between the public interest in knowing the full reasons for the Governor's decision weighed against "the public interest in not disseminating slurs against the Judiciary,"

6. Finally, the Governor's Office states that,

> *The potential impact of disclosure on those who are now subject to yet another investigation following the most recent complaint made by Mr. Bridger must also be weighed in the balance in this regard.*

Discussion:

[123] In relation to the single segment in the Complaint, which I have found to be exempt by reason of section 20(1)(d), I do not believe that any of the factors in favour of disclosure identified in the Regulations apply, and there are no other relevant factors that would tip the balance in favour of disclosure. On the other hand, in respect of the information in the excerpt, there is a strong public interest in preventing the discrediting of the judiciary, and the undermining of public confidence in the judiciary. The redacted material was not considered in Mr Aina's report.

[43] *Governor of the Cayman Islands… Judgment* op cit para 57
[44] Id para 51

[124] **Therefore, I am satisfied that the public interest factors in favour of withholding the single segment of the Complaint identified above outweigh the factors in favour of disclosure. It would therefore not be in the public interest to disclose that part of the Complaint to which the exemption in section 20(1)(d) applies.**

[125] In regard to the remainder of the Complaint and the totality of the Governor's response, I repeat that I have found that the exemption in section 20(1)(d) does not apply, and therefore there is no requirement to consider whether the responsive records should, nonetheless, be disclosed in the public interest under section 26. However, for the avoidance of doubt, I will now discuss where, in my opinion, the balance of the public interest would lie.

Factors in favour of disclosure:

[126] The following factors are in favour disclosure:

a. I agree with the Governor's Office that the public interest in providing reasons for decisions taken by Government, is relevant.

The Governor's response was provided to the complainant, as demanded by section 19 of the Constitution, as well as by section 27 of the FOI Law, as Moses LJ pointed out:

> *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.*

Furthermore, in the Judgment Moses LJ stated (my emphasis):

> *54.* ***The importance of*** **[the *Sittimpalam*] *decision… is the emphasis placed upon and the recognition of the need for the public to understand the reasons for the decision made*** *…*
> *…*
>
> 56. The importance of giving reasons hardly needs emphasis in the context of judges but may need underlining to those responsible for administration and to the public generally. The giving of reasons provides a framework of discipline for the decision-maker and compels the decision-maker to justify his conclusions. Of particular significance in this case, **the giving of reasons provides satisfaction to the public that the decision-maker has approached his task carefully and conscientiously in proportion to the importance of the issues he is called upon to decide**.
>
> 57. **The allegations in the instant case were not merely of concern to the complainant but to the public in the Cayman Islands… The public… was entitled to know that the summary dismissal was the result of a conclusion reached after thorough and reasoned consideration. …**
>
> 58. … **What had to be balanced was the public interest in ensuring that the summary dismissal was reasoned and transparent against the dangers of repetition of dismissed complaints….**

Public authorities need to be, and need to be seen to be, accountable for the decisions they make, except where the information that would be revealed is itself exempted, which it is not in this case. The matters at stake do not only relate to the personal affairs of the complainant, as the Governor's Office claims, but are of great public concern.

Consequently, I consider the public interest in knowing the reasons for decisions made by public authorities significant, and specifically so in regard to the Governor's response to the allegations against the judiciary.

b. Also relevant is the public interest in promoting Government's accountability for public expenditure. It has been widely reported, following a request under the FOI Law, that significant funds have been expended on the Report, and on the subsequent judicial review of the Information Commissioner's Decision in Hearing 24-00612. The Press has reported that the total costs amount to some CI$700,000, and the public is entitled to know whether these funds have been spent wisely.

   Financial accountability is relevant in a wider sense, as well. There can be no doubt that the disclosure of the responsive records would elevate and inform the public debate about Operation Tempura, which, it has been reported, has involved public expenditure of an even greater magnitude.

c. The publication of the responsive records would support the public's understanding and perception that, in respect to this important part of Operation Tempura, the right actions were taken and the right decisions made. The Governor's Office has – to its credit - recognized this as a relevant public interest factor in favour of disclosure. In my view, this factor is particularly important in the circumstances of this case in which the allegations are widely known and have been discussed in some detail in the Press, but in which the general public has not been given the reasons for the Governor's dismissal of the allegations.

d. Finally, I consider the public trust in the judiciary as an important public interest, however, in direct contradiction to the bulk of the argumentation of the Governor's Office, I am convinced that the publication of the carefully considered analysis and conclusions of an eminent lawyer, such as Mr. Aina QC, taken over by the Governor in full and leading to the summary dismissal of all complaints, would likely reinforce the public trust in the judiciary, rather than harm it.

Factors in favour of non-disclosure:

[127] The Governor's Office lists a number of factors which, they claim, demonstrate the public interest in not disclosing the responsive records. To some degree these have already been discussed in the consideration of the exemption itself, however, they are repeated here for clarity.

a. I have discussed the claimed negative impact of disclosure on public confidence in judges above, and I have reached the conclusion that, in the circumstances of this case, this constitutes a public interest factor in favour of disclosure rather than against it. The allegations have already been widely discussed in the Press but the carefully considered reasons for the Governor's dismissal remain unknown.

b. I have discussed the claimed impact of disclosure on the integrity of future investigations at length in my consideration of the Governor's third reason for the exemption proper. I found that it does not meet the required threshold for the exemption to be engaged. I recognize the public interest in ensuring that future investigations can proceed unimpededly, but, given that I consider the likelihood of prejudice as a result of disclosure of the responsive records as extremely low, I am giving it little weight as a factor in favour of non-disclosure in the circumstances of this case.

c. The Governor's Office claims that the Governor's published statement about the allegations should suffice, and that the fact that the allegations have been discussed in the Press diminishes the public interest in disclosing the detailed reasons in the Governor's full response. In support of this view, the Governor's Office refers to *FCO v Information Commissioner* which, it says, supports the notion that the public interest in disclosure is diminished if the requested information adds little to what is already in the public domain.

   However, the *FCO* case can be sharply distinguished from the present case on at least two crucial points: in the *FCO* case, (1) "there was nothing of substance in the disputed information which would have added in any material way to the public's understanding of the … areas of concern", and (2) "there was an abundance of material in the public domain which addressed each of the … highlighted areas of public concern".[45] This is in sharp contradistinction to the present case in which, as Moses LJ commented, "There is no information whatever in the public domain as to why the Governor summarily dismissed the allegations… ",[46] and the public is entitled to know the reasons for the dismissal of the allegations. This factor, therefore, does not diminish the public interest in disclosing the detailed reasons, as claimed.

d. The Governor's Office does not expand on its last public interest point. It is asking me to consider the impact on "yet another investigation following the most recent complaint made by Mr. Bridger". I do not consider this a public interest factor relevant to the exemption in section 20(1)(d), as it pertains to another exemption, e.g. the exemption in section 16(b)(i) relating to the conduct of investigations. I refer to the discussion above about the specific scope of this reconsidered decision.

Public interest balance:

[128] **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.**

[45] *Foreign and Commonwealth Office…* op cit para 43
[46] *Governor of the Cayman Islands…* op cit para 55

E. FINDINGS AND DECISION

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

Findings:

I find that the single segment on page 13 of the Complaint (consisting of the third bullet point on page 13, after the phrase "…and his room" and before the next paragraph starting with "There is also …") is exempt from disclosure under section 20(1)(d) of the *Freedom of Information Law 2007*. I have considered the public interest pursuant to section 26(1), and I find that it would not be in the public interest to disclose this segment.

I find that the remainder of the Complaint and the entire Response by the Governor are not exempt from disclosure by reason of section 20(1)(d) of the *Freedom of Information Law* 2007.

Decision:

I hereby overturn the decision of the Governor's Office to withhold the requested records by virtue of section 20(1)(d) of the *Freedom of Information Law* 2007, and require the Governor's Office to disclose the records no later than 45 days from the date of this decision, except in regard to the single segment on page 13 of the Complaint, (consisting of the third bullet point on page 13, after the phrase "…and his room" and before the next paragraph starting with "There is also …"), to which the exemption does apply, and which consequently does not have to be disclosed.

Under section 47 of the *Freedom of Information Law,* 2007, the Governor's Office may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.

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

If judicial review has not been sought on or before 25 August 2014, and should the Governor's Office fail to disclose the responsive records in this matter, I may certify in writing to the Grand Court the failure to comply with this Decision and the Court may consider such failure under the rules relating to contempt of court.

Jan Liebaers
Acting Information Commissioner

10 July 2014