Information Commissioner's Office

ICO Hearing 43-00814
Decision

Portfolio of Legal Affairs

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

10 April 2015

Summary:

An Applicant made a request under the *Freedom of Information Law 2007* for the amounts of the settlement payments made to Messrs. Rudolph Dixon, Stuart Kernohan and Burmon Scott by the Government. The Portfolio of Legal Affairs refused access to the information on Mr. Kernohan on the basis of section 3(5)(a) which places records resulting from judicial functions outside the scope of the FOI Law, and withheld all three agreements pursuant to the exemptions in sections 17(b)(i) (actionable breach of confidence), 17(b)(ii) (contempt of court), 23(1) (personal information) and 20(1)(d) (effective conduct of public affairs).

In this Decision, the Acting Information Commissioner rejected the application of section 3(5)(a) to the Kernohan agreement since that agreement is separate from the Court Order itself, but upheld the decision of the Portfolio of Legal Affairs to exempt all three agreements on the basis of the exemption in section 17(b)(i) as it would be an actionable breach of confidence to disclose them.

Since he found that the exemption in section 17(b)(i) applied, the Acting Information Commissioner did not consider the other exemptions.

Statutes[1] Considered:

Cayman Islands Constitution Order 2009 (2009 No. 1379)
Freedom of Information Law 2007
Freedom of Information (General) Regulations 2008
Freedom of Information Act (UK) 2000 (2000 c.36)

[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 the *Freedom of Information (General) Regulations 2008*, unless otherwise specified. Where several laws are being discussed in the same passages, all relevant legislation has been indicated.

Contents:

A. INTRODUCTION

[1] On 1 April 2014 the Applicant made a request under the Freedom of Information Law, 2007 (the "FOI Law") to the Portfolio of Legal Affairs (the "Portfolio") for:

> *the settlement amounts paid to the following individuals with regard to relevant civil matters related to the Operation Tempura investigation: Rudolph Dixon, Stuart Kernohan, Burmon Scott. Please state separately whether the settlement amounts included attorneys [sic] fees and list those fees separately. This request applies only [to] the amount of each individuals [sic] settlement and does not seek any further details of the settlement arrangement.*

[2] On 1 May 2014 the Portfolio wrote to the Applicant explaining that it needed to extend the normal period allowed for a response, as provided under section 7(4).

[3] On 14 May 2014 the Portfolio informed the Applicant of its decision to refuse access to the responsive records, quoting the exclusion in section 3(5)(a), as well as the exemptions in sections 17(b)(i) and 23(1). The initial decision also mentioned contempt of court, without reference to the related exemption in section 17(b)(ii).

[4] Since the initial decision was signed by the Solicitor General, the Portfolio's Chief Officer, an internal review was not possible, and on 15 May the Applicant made an appeal directly to the Information Commissioner.

[5] On 15 July 2014 the Portfolio expressed its preference for a formal hearing before the Acting Information Commissioner.

[6] On 18 July 2014 the Applicant amended his request, limiting it to a single figure for the three settlements. After consulting with the third parties, the Portfolio responded to the amended request, maintaining its refusal to provide a single, combined figure. The original request was then referred for a formal hearing before me.

[7] Unlike Information Managers, the Information Commissioner is not obligated by law to consult with third parties regarding the disclosure of their personal information.

Regulations 11 and 12 prescribe procedures to be applied by Information Managers when they intend to give access to a record that contains personal information. These provisions do not, however, apply to the Information Commissioner. Nonetheless, in the interest of fairness, out of an abundance of caution, and without prejudice to the question whether the requested information is indeed the personal information of these individuals, in the course of the Hearing I invited all three of the individuals concerned (i.e. the three parties who reached a settlement with the Government) to make representations on the disclosure of the requested information. Of the three individuals, only Mr. Kernohan gave me his views.

B. BACKGROUND

[8] The Portfolio of Legal Affairs advises the Government and its affiliated bodies, statutory boards and corporations on all legal matters and is responsible for legislative drafting, law revision, law reform and local legal education through the Cayman Islands Law School.

[9] The Portfolio of Legal Affairs is headed by the Honourable Attorney General and comprises the Attorney General's Chambers, the Office of the Solicitor General, the Law Reform Commission, the Law Revision Department, the Legislative Drafting Department, the Cayman Islands Law School, and the Financial Reporting Authority.

C. PROCEDURAL ISSUES

Raising exemptions late:

[10] The Portfolio has repeated arguments in regard to the late submission of exemptions, which have already been addressed on numerous occasions by the former Information Commissioner and myself. Since this issue comes up repeatedly in hearings, and the considerations have been further interpreted by the courts, I want to give the following guidance on this topic.

[11] The Portfolio raises the following general arguments:

(a) when hearing an appeal, the Information Commissioner may by virtue of section 42(2) "make any decision which could have been made on the original application";

(b) therefore, the Commissioner is not restricted to the grounds relied on by the public authority and may apply new exemptions; and, moreover,

(c) the Commissioner is under "a statutory obligation to consider all other relevant exemptions even when not raised by the respondent".

[12] The Portfolio claims that the authority of the UK Commissioner is more circumscribed than that of the Cayman Islands Commissioner, since the former does not have the equivalent of section 42(2) to assist him. This demonstrates, according to the Portfolio, that the

Cayman Islands Commissioner must therefore certainly be in a position to consider new exemptions, even more so than the UK Commissioner.

[13] In support of point (b) above, the Portfolio quotes from *Sugar v Information Commissioner and BBC* in which the Information Tribunal found that a public authority was permitted to raise new exemptions to the Tribunal, i.e. after a decision had already been made by the Information Commissioner. The Portfolio quotes the following from paragraph 5 of that Tribunal Decision:

> *Despite ss 10 and 17 FOIA providing time limits and a process for dealing with request [sic] a public authority is not necessarily precluded from seeking to rely, in proceedings before the Tribunal, on exemptions that were not relied upon within the time limits; whether new exemptions may be claimed for the first time in Tribunal proceedings should be decided on a case by case basis taking into account all the circumstances of the particular case ...* [2]

[14] The Portfolio omits the last sentence of the quoted passage. In it, the Tribunal qualifies its preceding statement as follows:

> *… public authorities, however, must have reasonable justification for the late claim.*

[15] In *Sugar* the Information Tribunal had before it a specific set of circumstances, including the fact that the request had been made when the UK FOI Act had only just come into effect and the UK Commissioner had neglected to clarify that the public authority had to rely on an exemption as an alternative to its primary case which relied on a derogation. In paragraph 8 of its decision the Tribunal clarified that late exemptions are not automatically allowed:

> *We would observe that if the circumstances of this case arose now we would be unlikely to come to the same conclusion because the BBC has much more experience of the Act. Furthermore the practice of the Commissioner has evolved since then…*[3]

[16] There is no direct parallel between the quoted case and the circumstances in the current Hearing, nor between the UK FOI regime in this respect and the Cayman Islands FOI Law. Any review of the Cayman Islands Information Commissioner's decision is undertaken by means of a judicial review in the Grand Court, not by a *de novo* appeal[4], and not by a Tribunal.

[17] In regard to the Portfolio's point (a) above, I agree that section 42(2) provides:

> *(4) On the consideration of an appeal, the Commissioner-*
>
> > *(a) may, subject to paragraph (b), make any decision which could have been made on the original application;*

[2] Information Tribunal *Sugar v Information Commissioner and British Broadcasting Corporation* EA/2005/0032 14 May 2009 para 5
[3] *Sugar* op cit para 8
[4] *The Governor of the Cayman Islands v The Information Commissioner (1)* Cause G 0003/2013 23 December 2013 para 31

…

[18] In regard to the Portfolio's point (b) above, I agree that it is within the discretion of the Information Commissioner to accept an exemption late in the hearing process, although the former Information Commissioner and I have pointed out the potentially inappropriate nature of such an approach on several occasions, as follows:

> *I do not encourage or condone the application of exemptions so late in the appeals process, since doing so would undermine the timeliness, credibility and fairness of the process, and would risk delaying the applicant's fundamental right to access as established by the FOI Law. This is consistent with the practice in the UK, where the Information Tribunal has found that: "it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations… This is a public policy issue which goes to the underlying purpose of FOIA."*[5]

[19] In response to the Portfolio's point (c) above, I categorically reject that it is up to the Commissioner to proactively consider each and every possible exemption that might apply in any given case. Accepting this point would undermine the FOI process which has been carefully crafted with fairness and expediency in mind, and would be highly likely to invite a cavalier attitude on the part of many public authorities in regard to their duty to provide reasons for decisions under the FOI Law. Furthermore, placing the burden on the Information Commissioner, as put forward by the Portfolio, contradicts section 43(2) which clearly places the burden of proof on the public authority:

> *(2) In any appeal under section 42, the burden of proof shall be on the public or private body to show that it acted in accordance with its obligations under this Law.*

[20] In addition, in *The Governor of the Cayman Islands v The Information Commissioner*, Acting Justice Timothy Owen has recently ruled that late exemptions may be justified, if there are relevant new factual developments that occur after the initial decision has been reached.[6]

[21] Consequently, it is not up to the Information Commissioner to raise and consider every possible exemption that might apply in a given case since the burden of proof is squarely on the public authority, but I accept that it is within the discretion of the Information Commissioner to take into consideration an exemption on his own initiative or one that is raised late. The appropriateness of considering an exemption that is raised late will depend on the circumstances, including whether any new factual developments have occurred since the earlier decision by the public authority was made.

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[5] Information Commissioner's Office *Decision Hearing 9-02210* 24 March 2011 para 23, quoting from: Information Tribunal *Department for Business, Enterprise and Regulatory Reform (DBERR) v Information Commissioner and Friends of the Earth* EA/2007/0072 29 April 2007 para 42

[6] *The Governor of the Cayman Islands v The Information Commissioner (2)* Cause G 0188/2014 16 March 2015.

D. ISSUES UNDER REVIEW IN THIS HEARING

[22] The following issues under review are listed in the Fact Report:

1. **Whether the FOI Law applies to the requested records pursuant to section 3(5)(a) of the FOI Law.**

2. **Whether the records are exempt under section 17(b)(i) of the FOI Law.**

3. **Whether the Public Authority is required to exempt the records under section 23(1) of the FOI Law and if so, whether pursuant to s.26(1) access is nonetheless required to be granted in the public interest.**

[23] The responsive records consist of three settlement agreements, namely:

- The settlement agreement between the Attorney General of the Cayman Islands and Mr. Stuart Kernohan, dated 27 March 2014;
- The settlement agreement between the Government of the Cayman Islands and Mr. Rudolph Dixon, dated 31 August 2011; and,
- The settlement agreement between the Government of the Cayman Islands and Mr. Burmon R. Scott, dated 21 January 2013.

[24] I have also been provided with a Court Order. Attached to the Order is a version of the first settlement agreement which does not contain the settlement amount paid to Mr. Kernohan.

[25] The Portfolio is asking me to consider two additional exemptions, sections 17(b)(ii) relating to contempt of court, and 20(1)(d) relating to the effective conduct of public affairs, which were not mentioned in the Fact Report agreed to by both parties.

[26] Given that the issue of contempt of court was, in fact, raised in the initial decision of 14 May 2014, albeit without reference to the related exemption in the FOI Law, I accept that the exemption in section 17(b)(ii) is properly before me in this Hearing, although I note that it should have been raised earlier and should have been included in the Fact Report so as to allow the Applicant a right of reply.

[27] I also note that this exemption could only apply to the Kernohan settlement agreement, and not to the other two agreements, since that is the only agreement which, according to the Portfolio, forms part of a court order.

[28] Consequently, the following issue is also under review in this Hearing:

4. **Whether the exemption in section 17(b)(ii), relating to contempt of court, applies to the settlement amount in the Kernohan settlement agreement.**

[29] In relation to the exemption in section 20(1)(d), the Portfolio claims to have informed the Applicant that it was relying on this exemption in relation to Mr. Kernohan's information in December 2014. That communication has not been provided to me, nor have I been provided with an explanation why the exemption was not included in the Fact Report – which both the Portfolio and the Applicant agreed to before the Hearing commenced.

[30] The Portfolio does not specify which of the three agreements is claimed to be subject to the exemption in section 20(1)(d). Since the exemption was apparently raised in the course of the (failed) mediation of this appeal in December in relation to the Kernohan settlement agreement only, I accept the following new issue under review, but only in relation to that agreement:

> ***5.*** **Whether disclosure of the settlement amount in the Kernohan settlement agreement would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs under section 20(1)(d)**.

E. CONSIDERATION OF ISSUES UNDER REVIEW

1. Whether the FOI Law applies to the requested records pursuant to section 3(5)(a) of the FOI Law.

[31] Section 3(5)(a) provides:

> *(5) This Law does not apply to-*
>
> *(a) the judicial functions of-*
>
> *(i) a court;*
> *(ii) the holder of a judicial office or other office connected with a court;*

[32] The records submitted to me by the Portfolio include a Tomlin Order issued by the Grand Court in relation to the agreement reached between the Government and Mr. Kernohan on 27 March 2014. There is no indication that this Order applies to the agreements with Messrs. Dixon and Scott.

[33] The Portfolio's intention to apply section 3(5)(a) only to the Kernohan settlement agreement is not confirmed in its hearing submission, but is confirmed in the Fact Report, where section 3(5)(a) is listed in respect of the first agreement only. This intent was also stated in the initial decision of 14 May 2014 in which the Solicitor General references section 3(5)(a) in relation to the Kernohan agreement only.

[34] Consequently, I will proceed on the assumption that the Portfolio's claim of the exclusion in section 3(5)(a) is intended to be raised, and indeed can viably only be raised, in relation to the Kernohan agreement and not to the other two agreements.

The position of the Portfolio:

[35] The Portfolio addresses the engagement of section 3(5)(a) by stating that the Court has issued the Order "of which the settlement agreement [with Mr. Kernohan] forms a part." The Portfolio points to the confidentiality provisions in the agreement which prohibit the disclosure of the terms of the settlement which it says are enforceable by the court.

[36] The Portfolio states the following:

As the Tomlin Order was made by the court in the exercise of its judicial function, the respondent submits that it falls outside the scope of review under the FOI Law and is not amenable to an order of disclosure by the Information Commissioner.

The position of the third parties:

[37] Of the three third party individuals contacted by the ICO, Mr. Kernohan is the only one who responded to my invitation to make written representations. However, his feedback did not address the applicability of section 3(5)(a).

The position of the Applicant:

[38] The Applicant did not make an initial or reply submission in this hearing.

Discussion:

[39] There is no dispute that the Court Order itself, as a record representing the judicial functions of a court, is subject to section 3(5)(a) and is therefore not subject to the provisions of the FOI Law. However, the Order is not a responsive record in this case, and the question at hand is whether the agreement between the Government and Mr. Kernohan is subject to section 3(5)(a).

[40] LexisPSL's online *Guidance for Lawyers* defines a Tomlin Order as follows (emphasis added):

> *A Tomlin order is made up of two parts:*
>
> > *• a court order—which is a consent order between the parties that stays proceedings on agreed terms with liberty for a party to go back to the court to enforce the agreement in the event that one of the parties does not comply with it. This will be approved by the court. This is enforceable as a court order. In practice the order is kept short*
> >
> > *• a schedule—the terms agreed by the parties are not set out in the court order but in a schedule attached to the order. The schedule is a contract between the parties as to what they have agreed to do. As a consequence the terms are not enforceable by the court as a judgment, rather contractual considerations would apply. The schedule is generally much longer than the order and frequently the terms of the agreement are detailed and may contain matters which go beyond the scope of the original dispute in the proceedings.*[7]

[41] *Atkin's Court Forms*, as quoted by Sir Maurice Casey in the Privy Council in *Horizon Technologies International Ltd v Wealth Consultants Ltd* [1992] 1 HKLR 106, defines the nature and scope of a Tomlin order as follows (emphasis added):

> *A form of consent order commonly found in the Chancery Division where the parties are sui generis is the Tomlin order, in which the terms agreed between the parties are set out in a schedule and all further proceedings in the action are stayed except for the purpose of giving effect to the terms, for which purpose*

[7] http://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393750

> *liberty to apply is given. The terms are not part of the order, and if a term is not observed by a party, application under the liberty to apply will usually be necessary to give effect to it. If by a term a party is to pay a sum of money to another party and does not carry it out, application must be made for an order for payment to enable judgment to be entered and execution to issue. It should be particularly noted that if by one of the terms a party gives an undertaking to do, or to refrain from doing, something, the undertaking is not an undertaking given to the court: it is merely an agreement between the parties. Terms scheduled to a Tomlin order represent an arrangement between the parties, and the court is not concerned with approving them although it may properly offer suggestions upon them if it appears to the court that they may cause some difficulty.*
>
> *The terms need not be within the ambit of the original dispute but the Court will refuse to enforce terms which are too vague or insufficiently precise.* [8]

[42] As well, in the Court of Appeal case of *Watson v Sadiq*, Lord Justice McCombe expressed the following (emphasis added):

> *For my part, I agree with the analysis of Ramsey J in Community Care North East v Durham CC [2010] EWHC 959 (QB) that the CPR have no application to the schedule to a Tomlin order, which indeed is not an order of the Court at all. A different principle applies to the curial part of the order.*[9]

[43] As I have noted above, two different versions of the Kernohan agreement were supplied to me, one with and one without the settlement amount. The version that is in the schedule to the Tomlin Order does not, in fact, contain the actual settlement amount paid to Mr. Kernohan, and is therefore not a responsive record in this appeal. The version of the agreement which contains the settlement amount is not attached to the Order, although it is otherwise identical to the document in the schedule.

[44] I asked the Portfolio to provide an explanation for the existence of two different versions of the same agreement, both signed by the same people on the same day, and I received the following answer (emphasis added):

> *the Tomlin Order and its Schedule lie on the Court file and could, theoretically, be searched by a member of the public upon payment of the required fee… the parties agreed (as did the Judge when we appeared before him) that the Schedule appended to the Court Order would not include the settlement amount. This is not unreasonable because, again in law, no Court can order a party to accept a certain sum of money in settlement. The amount of any voluntary settlement is exclusively a matter for the parties.*
>
> *The other document, which recites the specific settlement amount, is a confidential Deed of Settlement between the parties—neither of whom consent to it being made public. It was required for the protection of (1) Mr Kernohan, who was entitled to insist that the Gov't agree in writing to pay the agreed settlement*

[8] *Horizon Technologies International Ltd v Wealth Consultants Ltd* [1992] 1 HKLR 106, quoted in: *Magwall Jamaica Ltd v Glenn Clydedale and Victoria Clydedale* [2013] JMCA Civ 4 para 15
[9] *Julian Watson v Tariq Mahmood Sadiq and Khalid Mahmood Sadiq* [2013] EWCA Civ 822 para 50

amount, and (2) of the Gov't, so that, once that sum was paid, no further amount could ever be claimed by Mr Kernohan.

[45] I note that the Portfolio, at the end of the first paragraph above, agrees that the "settlement is exclusively a matter for the parties", and that the Court has not ordered the settlement.

[46] The above authorities and considerations lead me to conclude that the responsive record, i.e. the agreement between the Government and Mr. Kernohan does not form part of the court order, and therefore does not represent the judicial functions of a court or of the holder of a judicial office, as required for the exclusion in section 3(5) to be engaged. Instead, the settlement agreement constitutes a contract between the two parties and is in that capacity enforceable, but not directly as a judgment of the court.

[47] **For these reasons, I reject the Portfolio's claim that the Kernohan settlement agreement is subject to the exclusion in section 3(5)(a), and I confirm that the FOI Law applies to it.**

[48] For clarity, as already explained above, I also reject any claim that the other two settlement agreements in this Hearing are subject to section 3(5)(a), and the FOI Law therefore also applies to them.

2. Whether the records are exempt under section 17(b)(i) of the FOI Law.

[49] There is a risk that public authorities may be tempted to use contractual agreements containing confidentiality clauses in order to remove controversial or embarrassing information from public scrutiny. However, agreements are governed by the laws of the Cayman Islands, including the FOI Law which applies to all records that are (a) held by a public authority, and (b) not excluded from its application.

[50] The marking of a document as "confidential" by a public authority, or the addition of a confidentiality clause in a contractual agreement, does not place it outside the reach of the FOI Law.[10] The strong public policy interest in openness, transparency and accountability expressed by the Legislative Assembly when the FOI Law was unanimously passed in 2007 cannot be set aside by simply "contracting out of FOI". [11]

[51] Therefore, public authorities should carefully consider whether confidentiality is necessary and appropriate before agreeing to sign an agreement containing a confidentiality clause, and should not use such clauses unless absolutely necessary, such as may be the case in the course of litigation. Before agreeing to confidentiality public authorities should make it clear to the other parties to an agreement that disclosure may nonetheless be required under the FOI Law.

[52] In the words of the UK Commissioner in the *Stoke-on-Trent* case:

[10] Information Commissioner's Office (UK) *Freedom of Information Act. Awareness Guidance 2. Information provided in confidence* Version 4 12 September 2008 p. 5
[11] Information Commissioner's Office (UK) *Freedom of Information Act. Awareness Guidance 5 – Annexe. Public Sector Contracts.* Version 3.0 6 March 2008 p.1

… the Commissioner's view is that if the [public authority] were found to be … using mediation in a non-litigation context to ascribe spurious confidentiality to a process which would not otherwise be confidential, that would be a valid argument in favour of disclosure in the public interest, in those particular circumstances.... [12]

[53] The UK's Secretary of State for Constitutional Affairs has expressed these concerns in the Code of Practice under section 45 of the UK FOI Act, as follows:

> *31. Public authorities should bear clearly in mind their obligations under the Freedom of Information Act when preparing to enter into contracts which may contain terms relating to the disclosure of information by them.*
>
> *32. When entering into contracts with non-public authority contractors, public authorities may be asked to accept confidentiality clauses, for example to the effect that information relating to the terms of the contract, its value and performance will not be disclosed. Public authorities should carefully consider the compatibility of such terms with their obligations under the [FOI] Act. It is important that both the public authority and the contractor are aware of the limits placed by the [FOI] Act on the enforceability of such confidentiality clauses.*
>
> *33. The Act does, however, recognise that there will be circumstances and respects in which the preservation of confidentiality between public authority and contractor is appropriate, and must be maintained, in the public interest.*
>
> *34. Where there is good reason, as recognised by the terms of the exemption provisions of the Act, to include non-disclosure provisions in a contract, public authorities should consider the desirability where possible of making express provision in the contract identifying the information which should not be disclosed and the reasons for confidentiality. Consideration may also be given to including provision in contracts as to when consultation with third parties will be necessary or appropriate before the information is disclosed.* [13]

[54] I share these concerns and recommend that public authorities in the Cayman Islands Public Sector adopt a similar general approach. This is quite separate from the circumstances of this case, which I will now consider further.

The position of the Portfolio:

[55] The Portfolio claims that the disclosure of the settlement amounts,

> *…would constitute an actionable breach of confidence as the settlement amount is the subject of a confidentiality clause which forms part of a court order.*

[12] Information Commissioner's Office (UK) *Stoke-on-Trent City Council* FS50426113 19 September 2012 paras 25-26

[13] Ministry of Justice *Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000* November 2004 paras 31-32, 34

[56] The Portfolio bases its argument on the confidentiality clauses included in the settlement agreements. It raises a slight distinction (without fully explaining its meaning) between the confidentiality clause in the Kernohan agreement, which it says forms part of the Tomlin Order issued by the court, and the confidentiality clauses in the agreements with Messrs. Scott and Dixon, which are not claimed to be part of a court order. Specifically, it states that:

> *…the disclosure of the settlement amount in respect of Mr. Kernohan would constitute an actionable breach of confidence as the settlement amount is the subject of a confidentiality clause which forms part of a court order.*

And,

> *In respect of Mr. Scott and Mr. Dixon, there is an express prohibition against the disclosure of information contained in the settlement agreements which includes the settlement amounts. The disclosure of such information would therefore constitute an actionable breach of confidence as the confidentiality clause binds all parties and the respondent is not at liberty to unilaterally waive the terms of the agreement.*

[57] The Portfolio also points out that it has consulted with the third parties regarding disclosure and they are said to have unanimously objected to the disclosure. I have not been told when those communications took place, or been provided with any responses that were given.

[58] The Portfolio explains that, by the very nature of its function in government, it handles many confidential matters, and in the event that it would not "honour its confidentiality obligations, it would be exposed to civil liability for breach of the terms of the agreement."

[59] The Portfolio points to the standard three-part test relating to breach of confidence in the *Coco* ruling, further explained below, and claims that all three of the required conditions in that test have been met, without, however, providing further reasons as to why this is said to be so.

[60] Finally, the Portfolio points out that the public interest test in section 26(1) does not apply to the exemption in section 17(b)(i).

The position of the Applicant:

[61] The Applicant has not made a submission or reply submission.

The position of the Third parties:

[62] In the course of this Hearing the ICO has itself queried the views of the third parties, and Mr. Kernohan's response confirms his opposition to disclosure. Messrs. Scott and Dixon did not provide their views to the ICO.

[63] In his response, Mr. Kernohan raises the following points regarding the confidentiality of the requested information. He asserts that:

a. *Neither the precise settlement figure, nor a global figure should be released;*

b. The settlement agreement contains a confidentiality clause which states:

> *Both Parties to the Deed of Settlement and Release have agreed that they shall maintain the following matters in confidence:*
>
> *1) The terms of this Deed of Settlement and Release;*
>
> *2) All oral and written communications, representations and information of any nature made by the Parties and/or their advisors pursuant to the conclusion of their agreements herein.*

c. In light of the above, release of the requested information would be a contempt of court and would constitute an actionable breach of confidence.

[64] Although I did not see the responses which the Portfolio says it received from the three individuals, or receive a response to my own query from Messrs. Scott and Dixon, I am satisfied on a *prima facie* basis that all three individuals object to the disclosure, as they have signed their respective agreement which includes a confidentiality clause.

Discussion:

[65] Section 17(b)(i) provides:

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

[66] This exemption has been considered in a number of previous hearing decisions by the former Information Commissioner and myself. The following is in part based on those prior decisions.[14]

The meaning of "would":

[67] In the *McIntyre* case the UK Information Tribunal clarified, in relation to similar wording used in the UK FOI Act, that "would" is to be interpreted as *"more probable than not".*[15]

The meaning of "breach of confidence"

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

> (i) the document must have the necessary quality of confidence about it;

[14] Information Commissioner's Office *Decision Hearing 15-00611* 2 September 2011 paras 28-33; see also Decisions 16-00811 and 24-00612.
[15] *McIntyre v Information Commissioner and the Ministry of Defence* EA/2007/0068 para 40

(ii) the information must have been imparted in circumstances importing an obligation of confidence; and

(iii) there must be an unauthorized use of that information to the detriment of the party communicating it .[16]

The meaning of "actionable"

[69] As the UK Information Tribunal found in *Higher Education Funding Council for England v ICO and Guardian News and Media Ltd*. [17] the meaning of "actionable" in the parallel exemption in the UK FOI Act is not entirely unambiguous. Lord Falconer, the sponsor of the UK Act, in the parliamentary discussions relating to the UK FOI Bill, clarified that "*the word 'actionable' does not mean arguable…",* but that "[it] *means that one can take action and win*."[18]

Guidance from the UK Ministry of Justice supports this view, namely that the exemption may apply "if a person could bring a legal action and be successful."[19]

The nature of the public interest test in the context of the common law of confidence

[70] The Portfolio's correctly points out that the public interest test under section 26(1) does not apply to the exemption in section 17(b)(i). However, it neglects to explain that a breach of confidence would only be actionable if there is no countervailing common law public interest defence.

[71] In *Attorney General v Guardian Newspapers (No 2)[1990] 1 AC 109* Lord Goff stated that,

> *... although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure.*[20]

[72] Guidance from the UK Information Commissioner on the parallel exemption in the UK FOI Act explains that (emphasis added):

> *The duty of confidence is not absolute and the courts have recognised three broad circumstances under which confidential information may be disclosed. These are as follows:*
>
> - *Disclosures with consent…*
> - *Disclosures which are required by law…*

[16] *Coco v A.N. Clark (Engineers) Limited* [1968] F.S.R. 415 at 419. I note that Megarry J could *"conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him*" at 420-421.
[17] *Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.* EA/2009/0036 13 January 2010 para 25
[18] United Kingdom *Hansard* HL (Series 5) Vol.618, col. 416 and Vol. 619 col 175-6; quoted in HEFCE v ICO op cit ibid
[19] Ministry of Justice *Freedom of Information Guidance. Exemptions guidance. Section 41 – Information provided in confidence* 14 May 2008 p. 2
[20] Quoted in: Information Tribunal *Derry City Council v Information Commissioner* EA/2006/0014 11 December 2006 para 35(a)

- *Disclosures where there is an overriding public interest… Much will depend on the circumstances of each case, but particular weight should be attached to the privacy rights of individuals. The weight of the wider public interest in confidentiality will also depend to some extent on the context. … Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.*[21]

[73] This approach is further confirmed in guidance from the UK Ministry of Justice (Department of Constitutional Affairs), which states:

> *The courts have recognised that a person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence. So although the* [FOI] *Act requires no explicit public interest test, an assessment of the public interest must be still be made.*[22]

[74] Consequently, the applicability of the exemption in section 17(b)(i) depends on the legal action being more likely than not successful, and this determination requires a consideration of the public interest.

[75] In this regard, it is important to note that the common law public interest test in the context of the law of confidence is not the same as the public interest test under the FOI Law, for the following reasons.

[76] The Cayman Islands FOI Law contains a built-in bias towards openness. Section 6(5) provides that (emphasis added),

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

[77] This bias is further enhanced by the construction of regulation 2 which lists a number of general public interest factors that are to be taken into consideration in regard to those exemptions that are subject to section 26(1).

[78] On the other hand, the public interest defence which forms part of an action for breach of confidence under common law and equity is not as clearly defined as the public interest in regulation 2, and recognizes that there is a strong public interest in maintaining confidentiality, when the duty of confidence arises, since "the duty of confidence... [is] not a matter of private but of public interest."[23]

[79] Guidance from the UK Information Commissioner confirms the difference between the two types of public interest test as follows (emphasis added),

> *It is important to note that this is not the public interest test required in the qualified exemptions of the FOIA; it is a consideration required by the development of the common law. There are no hard and fast rules, but the important thing to note is that the courts have taken the view that the grounds for breaching confidentiality*

[21] Information Commissioner's Office (UK) *Awareness Guidance 2* op cit pp.3-4
[22] Ministry of Justice *Section 41* op cit ibid
[23] *W v Egdell* [1990] 1 All ER 835

must be valid and very strong. A duty of confidence should not be overridden lightly.[24]

[80] Additional guidance from the UK Information Commissioner instructs (emphasis added):

> *The inherent public interest test in the duty of confidence is the reverse of that normally applied under the FOIA. This is because the FOIA public interest test for qualified exemptions assumes that information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.*
>
> *However, the public interest test within the duty of confidence assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.*[25]

[81] I will now apply the three-part *Coco* test of breach of confidence to the responsive records in order to establish whether a duty of confidence exists, and– if so – conduct the common law public interest test.

- **Does the information itself have the necessary quality of confidence about it?**

[82] Guidance from the UK Ministry of Justice indicates that the term "necessary quality of confidence" means that "it must be information which is worthy of protection – someone must have an interest in the information being kept confidential."[26] The information cannot already be in the public domain or be trivial in nature.[27] The courts will hold that information is subject to a duty of confidence where there is an express agreement to keep it confidential, or where there is an implied duty of confidence.

[83] The information in dispute in the current appeal is the amounts of the settlements, which forms part of the terms of the agreements that are subject to an express duty of confidence. It is neither publicly available, nor trivial, and I am satisfied that both the Government and the three individuals have an expectation of confidentiality in its regard.

[84] Accordingly, I consider that the requested information itself is of a confidential nature.

- **Was the information imparted in circumstances importing an obligation of confidence?**

[85] Having read the responsive records, I confirm that all three settlement agreements contain a confidentiality clause. The Kernohan and Scott agreements include similar language, except for a slight, insignificant variation in the final sentence:

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[24] Information Commissioner's Office (UK) *Awareness Guidance 2 ibid*
[25] Information Commissioner's Office (UK) *The Freedom of Information Act The Duty of confidence and the public interest* Version 1 17 November 2008 p.2
[26] Ministry of Justice *Freedom of Information Guidance. Exemptions guidance. Section 41 – Information provided in confidence* 14 May 2008 p. 6
[27] *S v Information Commissioner and the General Registry Office* EA/2006/0030 9 May 2007 paras 37 and 42

Both Parties to the Deed of Settlement and Release have agreed that they shall maintain the following matters in confidence:

1) The terms of this Deed of Settlement and Release;

2) All oral and written communications, representations and information of any nature made by the Parties and/or their advisors pursuant to the conclusion of their agreements herein.

[86] The Dixon agreement includes the following clause:

Neither party and or his agents or servants shall disclose to any third party details of this agreement without the prior consent of the other or Order of the Court.

[87] These clauses and the other terms of the agreements resulted from the confidential negotiations between the Government and the three individuals, and I am satisfied that the information was in that process "imparted in circumstances importing an obligation of confidence" and has not been published by either party.

- **Would disclosure of the responsive record constitute an unauthorized use?**

[88] Guidance from the UK Ministry of Justice indicates that,

Unauthorised disclosure could take place where disclosure runs contrary to the express wishes of the person to whom the duty is owed or where a department does not have the consent of the person concerned.[28]

[89] Both of these conditions apply in the present appeal, namely: (1) the three individuals who signed a settlement with Government and to whom the duty of confidence is owed do not wish the responsive information disclosed; and, (2) the Portfolio does not have the consent of these individuals to disclose the settlement amount.

[90] Consequently, disclosure of the settlement amounts would constitute an unauthorized use.

[91] **Since the answer to the three questions above is affirmative, I find that a duty of confidence exists in respect of the settlement amounts in the agreements signed between the Government and Messrs. Kernohan, Scott and Dixon.**

- **Is there an overriding public interest in disclosure?**

[92] For the reasons explained above, I must now consider whether the applicable public interest in favour of disclosure overrides the public interest inherent in maintaining the confidentiality of the terms of the settlement agreements, in order to determine whether the breach would be actionable, as required for the exemption to apply.

[28] Ministry of Justice *Section 41* op cit p 10

[93] As indicated above, the Applicant has not contributed to answering this question, and the Portfolio has simply stated that the public interest in section 26(1) is not to be taken into consideration at all in regard to the exemption in section 17(b)(i).

[94] I consider that the following public interest factors weigh in favour of disclosure:

(a) Disclosure would promote the accountability of Government, specifically the accountability of Government expenditure in the context of the publicly funded, and very costly Operation Tempura; and,

(b) Disclosure would promote greater public understanding of the processes and decisions of public authorities, in this case the Portfolio of Legal Affairs.

[95] Countervailing these factors are public interest factors in support of maintaining the confidentiality of the terms of the agreements, including the settlement amounts. Some of these factors were raised by the Portfolio in the context of other exemptions they are claiming in this Hearing, but they are applicable here as well:

(c) As already stated above, the courts have confirmed the public interest inherent in maintaining confidences is "very strong". This consideration applies to all three settlement agreements.

(d) The Portfolio raises the public interest in preventing unwarranted interference and prejudice to the rights, freedoms and legitimate interest of the individuals concerned, as disclosure would unduly invade the right to private and family life of the individuals, embodied in section 9 of the Bill of Rights, Freedoms and Responsibilities in the *Cayman Islands Constitution*. The Portfolio has inexplicably raised this public interest factor only in respect of Mr. Dixon, but I believe it applies to all three agreements.

In this regard, I acknowledge that the UK Information Commissioner and Tribunal have confirmed that settlement agreements with individuals are to be withheld since the terms of the settlement constitute personal information and disclosure would breach the privacy rights of the individuals, as for instance in the Tribunal decision in *Beckles v Information Commissioner*.[29] I note that a case where the settlement is paid to a company or organization may be distinguishable, however this is not relevant in the present hearing.[30]

This point is supported by guidance from the UK Commissioner, already quoted above, which states that "particular weight should be attached to the privacy rights of individuals".[31] I also note that there is no suggestion that the requested information in the present case concerns "misconduct, illegality or gross immorality".

(e) The Portfolio states the public interest in allowing Government an unfettered ability to negotiate settlement agreements at present and in future in the context of

[29] For instance: *Bruce Beckles v Information Commissioner* EA/2011/0073 & 0074 7 September 2011; as well as: *Stoke-on-Trent* op cit;
[30] see for instance the UK Information Commissioner's Decision Notice in *Three Rivers District Council* FS50493492 9 October 2013
[31] Information Commissioner's Office (UK) *Awareness Guidance* 2 op cit p 4

litigation, which they claim would be severely hampered if confidentiality is not upheld in this case.

(f) Closely connected to his argument is the public interest in the Government avoiding "unnecessary and expensive" litigation, which the Portfolio says would surely follow if the settlement amounts were disclosed, or would be more likely to ensue in future cases if the Government was unable to maintain confidentiality in such agreements. This seems particularly relevant in the present cases, where the litigation has already been successfully settled.

[96] **Given the heavy weight attached to the maintenance of confidences by the courts, I find that the public interest in disclosure does not override the public interest in maintaining the confidentiality of the terms of all three agreements including the requested settlement amounts, and that, consequently, the breach of confidence which would result from the disclosure of the requested information would be actionable as the action would very likely succeed.**

[97] **Consequently, the exemption in section 17(b)(i) applies to the responsive records and any parts thereof.**

[98] **Since I have found that the exemption in section 17(b)(i) applies to the responsive records, there is no need for me to consider the application of the other exemptions claimed by the Portfolio, namely sections 23(1), 17(b)(ii) or 20(1)(d).**

F. FINDINGS AND DECISION

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

Findings and decision:

For the reasons explained, I find that neither of the three settlement agreements, including the agreement between the Attorney General and Mr. Stuart Kernohan, is subject to the exclusion in section 3(5)(a), and that the *Freedom of Information Law 2007* consequently applies to it.

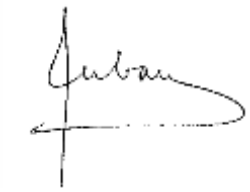
I find that the exemption in section 17(b)(i) of the *Freedom of Information Law 2007* applies to all three of the settlement agreements or parts thereof, which are responsive to the request made on 1 April 2014, namely the settlement agreements between the Attorney General of the Cayman Islands and Mr. Stuart Kernohan of 27 March 2014; the settlement agreement between the Government of the Cayman Islands and Mr. Rudolph Dixon of 31 August 2011; and the settlement agreement between the Government of the Cayman Islands and Mr. Burmon R. Scott of 21 January 2013.

Therefore, I uphold the decision of the Portfolio of Legal Affairs to withhold the responsive records, or part thereof, on the basis of the exemption in section 17(b)(i) of the *Freedom of Information Law 2007*. I do not require the Portfolio of Legal Affairs to take any further steps to bring itself in compliance with the requirements of the Law.

Furthermore, given the potential for conflict with the public policy intentions of the *Freedom of Information Law, 2007*, I recommend that the Government adopt an policy to confidentiality clauses similar to the approach prescribed for UK public authorities by the Lord Chancellor in his "Code of Practice on the discharge of public authorities' functions" dated November 2004, as quoted above.

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

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



Jan Liebaers
Acting Information Commissioner

10 April 2015