



ICO Hearing 26 – 00312  
**Decision**

Office of the Auditor General

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

26 November 2012

**Summary:**

The Office of the Auditor General partially withheld records relating to the Auditor General's report on Operation Tempura.

The decision of the Office of the Auditor General to redact information from responsive records on the grounds of sections 20(1)(b), 20(1)(c) and/or 20(1)(d) was upheld by the Information Commissioner. She overturned the decision of the OAG to redact information contained in one responsive record pursuant to section 17(a), but found this information to be exempt under sections 20(1)(b) and 20(1)(d).

**Statutes<sup>1</sup> Considered:**

*Freedom of Information Law, 2007*  
*Freedom of Information (General) Regulations, 2008*  
*Public Management Finance Law (2010 Revision)*

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<sup>1</sup> In this decision all references to sections are to sections under *the Freedom of Information Law, 2007* unless otherwise specified.

## A. INTRODUCTION

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- [1] On 12 November 2011, the Applicant made a request to the Governor's Office for "copies of all items of correspondence or any other written records (emails, minutes of meetings, etc.) relating to the production of the Auditor General's report into Operation Tempura from any official who was involved or attempted to be involved, in the format and contents of the final report."
- [2] On 23 November 2011, the Governor's Office transferred the request in part to the Office of the Auditor General (OAG). On 29 December the OAG's Information Manager (IM) responded to the Applicant providing access to 31 documents. Some information was redacted from a number of the provided records pursuant to sections 17(a), 20(1)(b) and (d) and 23(1) of the FOI Law, (relating to legal professional privilege, inhibition of free and frank exchange of views for the purpose of deliberation, prejudice of the effective conduct of public affairs and the unreasonable disclosure of personal information).
- [3] The applicant requested an Internal Review, and on 6 February 2012 the Auditor General upheld the majority of the IM's decisions, making limited changes to two of the redacted documents and releasing a third in full. On 7 February 2012, the Applicant appealed to the Information Commissioner's Office (ICO) for a review of the decision by the OAG to deny full access to the requested records.
- [4] During the course of the investigation of the appeal by the ICO, the OAG provided their reasoning for the use of each exemption and introduced reliance on section 20(1)(c) of the FOI Law. The OAG also accepted some of the recommendations made in the ICO's pre-hearing Investigative Report with reference to section 23(1) of the FOI Law 2007, revised their redactions accordingly and released further records. The Applicant indicated that they disagreed with the remaining redactions and the matter moved to a formal Hearing before the Information Commissioner.
- [5] After the commencement of the Hearing, the Applicant accepted the remaining redactions made pursuant to section 23(1). The redactions to records in dispute in this Hearing and exemptions claimed are therefore as follows:
1. **Document 2** – Audit of Expenditures for Operations Tempura and Cealt - Andre - 14 Aug 2009, 20(1)(d)
  2. **Document 5** – Audit of Expenditures for Operations Tempura and Cealt - Martin Bridger - 14 Aug 2009, 20(1)(b) and (d)
  3. **Document 9** – Bridger Response to AG - 27 May 2009, 20(1)(b) and (d)
  4. **Document 13** – Email to Alan and response back - not dated, 20(1)(b) and (d)
  5. **Document 30** – Revised draft of the Report on Operations Tempura and Cealt - McCarthy - 6 & 11 Aug 2009, 17(a), 20(1)(b) and (d)
  6. **Document 31** – Solicitor General's comments to AG - 4 June 2009, 17(a), 20(1)(c)

## B. BACKGROUND

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### The Office of the Auditor General

- [6] The Office of the Auditor General's<sup>2</sup> role is to scrutinize public spending on behalf of the Legislative Assembly and ultimately the people of the Cayman Islands. The OAG reports its audits to the Public Accounts Committee and the Legislative Assembly which holds the Government to account for its use of public money, thus helping to safeguard the interests of citizens. In addition, the OAG's work aims to help public service managers improve performance and service delivery.

### Review of Expenditures for Operations Tempura and Cealt

- [7] In September 2007, His Excellency the Governor commenced a special investigation into police corruption and engaged the services of the London Metropolitan Police Force to conduct the investigation, known as Operation Tempura. In March 2008, another investigation, Operation Cealt which at that time had been operating covertly for approximately nine months, was announced. During the ensuing months, concerns were raised about the lack of information on related expenditure being made public by the Government. In January 2009 the Auditor General commenced a value-for-money review of the costs of Operation Tempura and Cealt to provide information to the Legislative Assembly and the public. The Auditor General's Report<sup>3</sup> was published in October 2009.
- [8] As a routine part of the audit process, a draft report was sent to a number of individuals for their comments and verification of facts contained in the report. The present request for records pertains to correspondence resulting from this process.

## C. PROCEDURAL MATTERS

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- [9] I note that reliance on sections 20(1)(b) and (d) was communicated to the Applicant by the Information Manager. I would remind public authorities that the initial decision regarding the application of these exemptions should be made by the Minister or chief officer concerned. Section 20(2)(b) states:

*The initial decision regarding-*

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

## D. ISSUES UNDER REVIEW IN THIS HEARING

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- [10] The issues to be decided in this Hearing are:
1. **Section 17 (a)** – Is the information redacted from records contained in Documents 30 and 31 exempt from disclosure because it would be privileged from production in legal proceedings on the ground of legal professional privilege?

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<sup>2</sup> OAG website [www.auditorgeneral.gov.ky](http://www.auditorgeneral.gov.ky)

<sup>3</sup> Special Report of the Auditor General on the Review of Expenditures of Operations Tempura and Cealt dated October 2009, [www.auditorgeneral.gov.ky/powerpanel/modules/reports/html/uploads/pdfs/Special-Reports-TEMPURACEALTREPORTFINAL.PDF](http://www.auditorgeneral.gov.ky/powerpanel/modules/reports/html/uploads/pdfs/Special-Reports-TEMPURACEALTREPORTFINAL.PDF)

2. **Section 20(1)(b)** – Is the information redacted from records contained in Documents 5, 9, 13 and 30 exempt from disclosure because its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purpose of deliberation?
3. **Section 20(1)(c)** – Is the information redacted from records contained in Document 31 exempt from disclosure because it is legal advice given by or on behalf of the Attorney General?
4. **Section 20(1)(d)** – Is the information redacted from records contained in Documents 2, 5, 9, 13 and 30 exempt from disclosure because its disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs?

In accordance with section 26(1), the last three exemptions above are subject to a public interest test.

## **E. CONSIDERATION OF ISSUES UNDER REVIEW**

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

### **Section 17 (a) and Section 20(1)(c)**

- [12] These sections provide:

17. *An official record is exempt from disclosure if-
 
  - (a) it would be privileged from production in legal proceedings on the ground of legal professional privilege;*
20. (1) *A record is exempt from disclosure if-
 
  - (b) it is legal advice given by or on behalf of the Attorney General.*

### **Document 30**

- [13] The OAG applied the exemption found in 17(a) to the contents of an email in Document 30 dated 6 August 2009 from Mr. George McCarthy, in his capacity of Chief Secretary, to the Attorney General. They state that Mr. McCarthy was writing the Attorney General for assistance and considering taking legal advice, and that even though the email was copied to several individuals, they were high ranking Government personnel familiar with the consideration under review.
- [14] The Applicant submits that as Mr. McCarthy went public with distancing himself from Operation Tempura, the issue is already in the public domain<sup>4</sup>.

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<sup>4</sup> Cayman27 news story, "TOP STORY: No One Responsible for Costly SPIT Investigations?", dated Tuesday, 13 October 2009 [www.cayman27.com.ky/2009/10/13/top-story-no-one-responsible-for-costly-spit-investigations](http://www.cayman27.com.ky/2009/10/13/top-story-no-one-responsible-for-costly-spit-investigations)

- [15] I have, in previous Decisions, in particular Decision 2 – 01109<sup>5</sup>, set out in some detail the application of the exemption relating to legal professional privilege. With respect to legal advice privilege, I accept that there is a written communication which is of a confidential character, and its distribution was limited to those directly connected with the matter at hand. However, given the content of the email, I do not find that it was between a client (or his agent) and a legal advisor, nor was it directly related to the seeking, formulating, or giving of legal advice.
- [16] It has also not been demonstrated to me that litigation privilege attaches to the records. I am not convinced that they were created for the dominant purpose of preparing for, advising on, or conducting litigation that is either underway, or was a reasonable prospect at the time the records were created.
- [17] With respect to the Applicant's claim that the subject matter is in the public domain, while the matter was generally discussed in the press, specific details or the emails themselves are not publicly available.

**I find that section 17(a) does not apply to records in Document 30.**

**Document 31**

- [18] The Office of the Auditor General has applied exemptions 17(a) and 20(1)(c) to parts of a Memorandum from the Solicitor General to the Auditor General dated 4 June 2009. They claim that 17(a) applies because the Solicitor General “indicated in the Memo that it was confidential and privileged”.
- [19] They add that the redacted information was legal advice given on behalf of the Attorney General and section 20(1)(c) therefore applies.
- [20] The Applicant counters that the fact that a document is headed ‘Confidential and Privileged’ can be challenged by an appropriate authority.
- [21] I agree with the Applicant that simply marking a document ‘Confidential and Privileged’ does not mean that legal professional privilege automatically attaches to it. Indeed in this case, some of the record has been disclosed. However, while the first part of the Memo, which has been disclosed, deals with the response of the Solicitor General to the Draft Report, it is clear that the latter part of the memo offers legal advice and legal professional privilege attaches. It also constitutes legal advice given on or behalf of the Attorney General.

**I find that both sections 17(a) and 20(1)(c) apply to the records in Document 31.**

**Section 21(1)(b) and Section 20(1)(d)**

- [22] These sections provide:

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

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

*and*

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<sup>5</sup> ICO Decision 2-01109 at [www.infocomm.ky/appeals](http://www.infocomm.ky/appeals)

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

## **Document 2**

- [23] The exemption in 20(1)(d) has been applied to one paragraph in a set of minutes pertaining to the Tempura Investigation reviewed by the Auditor General in preparing his Report. These minutes are attached to letters requesting verification of information of several participants, all of which themselves have been disclosed to the Applicant.
- [24] The Office of the Auditor General submits that the release of this information could “jeopardize/prejudice future operations of this nature by releasing sensitive information about their operations”. The Applicant states that this argument is not valid as Operations Tempura and Cealt are now closed.
- [25] The Applicant is seeking insight into changes made to the various drafts of the Auditor General’s Report, and what discussions led to these changes. A July 2012 draft is publicly available, as well as the final report. Also in the public domain are a number of email exchanges leading to amendments being made to the draft. More similar correspondence has been released to the Applicant in the course of this request and appeal, some in full, and some with redactions as are being considered in this Hearing.
- [26] In my opinion, with respect to specific documents relating to the Tempura Investigation, it cannot be the intent of the FOI Law to allow access to records via the Auditor General that may be lawfully withheld by the originating public authority. I believe that the disclosure of such records in this case may do just that and I am convinced that any access in this way would prejudice the effective conduct of public affairs of the Office of the Auditor General.
- [27] I find that the release of the redacted information would prejudice the effective conduct of the Auditor General’s affairs, as full disclosure of sensitive information by public authorities may be adversely affected. Public authorities need to be assured that records enjoy the same level of protection, where warranted, regardless of which public authority holds copies of them. Applying the public interest test, as expanded upon below, I also do not find that it is in the public interest to disclose the redacted sections of this record.

**I find that section 20(1)(d) applies to the record in Document 2.**

## **Documents 5, 9, 13 and 30**

- [28] The Office of the Auditor General has applied Sections 20(1)(b) and 20(1)(d) to redact information in these four documents, and I find that the type of information redacted is similar enough for me to consider these records and the exemptions applied altogether.
- [29] The general argument of the Office of the Auditor General is that free and frank discussions between the auditor and the auditee in regards to gathering audit evidence and determining factual accuracy is essential. They contend that individuals will not communicate with their Office in an open manner, if they believe the information communicated will become public information. This therefore would impede the effectiveness and timeliness of their audits.
- [30] They point to FOI Laws in other jurisdictions that provide an audit exemption, as well as a proposed exemption to the Cayman FOI Law that is supported by the ICO which is as follows:

*A record is exempt from disclosure if its disclosure would, or would be likely to,*

*prejudice the exercise of the Auditor General's functions in relation to:*

- (a) the financial audit of another public authority;*
- (b) the performance audit of another public authority regarding management of its resources; or*
- (c) the reporting of other significant matters to the Legislative Assembly.*

[31] While I support this exemption, it has not yet been agreed by the Legislature and the Law has not been amended accordingly. I must therefore consider the Law as it stands now, and not as it could be after a possible amendment.

[32] The Applicant repeats their assertion that many of the records relating to the Auditor General's Report are already in the public domain, and points to the then Auditor General's comments concerning attempts by various officials to influence the official Report, but does not actually speak to the application of the exemptions.

[33] The Auditor General's argument with respect to free and frank discussions needed in the process of gathering audit evidence and determining factual accuracy are noted. I also note that The Public Management and Finance Law sets out requirements for public officers with respect to complying with audits as follows:

*64.(1) For the purposes of carrying out an audit or an investigation other than under section 60(e), the Auditor General or any person authorised by him for that purpose has-*

- (a) the right of access to all information held by any public officer or employee of a statutory authority or government company;*
- (b) the right to take copies of any information referred to in paragraph (a);*
- (c) the right to require explanations from officers or employees of entities subject to audit or investigation; and*
- (d) the right of access to all premises occupied by any ministry, portfolio, the Office of the Complaints Commissioner, the Office of the Information Commissioner or any statutory authority or government company.*

*(2) The Auditor General may direct in writing a public officer or an employee of a statutory authority or government company subject to audit or to an investigation other than under section 60(e), to -*

- (a) provide information to the Auditor General within the time and in the manner specified in the direction;*
- (b) attend before the Auditor General at a specified time and place and answer questions; and*
- (c) grant access to the Auditor General or to any person authorised by the Auditor General, to any premises occupied by the entity.*

[34] It is contingent therefore upon public servants to comply to the best of their ability with the requirements of the Auditor General. The FOI Law must in turn protect the Auditor General's ability to conduct investigations and obtain the free and frank testimony of relevant public servants, even where this may deny the general public access to the ensuing records via the Office of the Auditor General.

**I find that sections 20(1)(b) and/or 20(1)(d) are applicable to the redactions to records in Documents 5, 9, 13 and 30.**

## The Public Interest Test

- [35] Section 26(1) provides that the exemptions in section 20(1)(b),(c), and (d) are subject to the public interest test. This means that even if the exemptions are found to apply, the records should still be released if the public interest factors in favour of disclosure outweigh those in favour of withholding the records.
- [36] I am not obliged to apply the public interest test to the records contained in Document 31 as exemption 17(a) – legal professional privilege – also attaches to this record, which is not subject to the public interest.
- [37] Again, the records withheld in the remaining documents, and the reasons for applying the exemptions, are similar enough for me to consider them together in balancing the public interest. Although the Office of the Auditor General has not addressed the public interest in the release of the records, it is contingent upon me to do so. It is the case that many records responsive to this request are already in the public domain, and the Applicant has been provided with many more. This Hearing addresses the redaction of certain sensitive information from some of the documents already provided. The process by which the Auditor General conducted his investigation is already demonstrated, and in the public domain are an early draft, comments of major participants on that draft, and changes made resulting in the final document.
- [38] Pursuant to the definition of “public interest” in regulation 2, I do not find that the disclosure of the redacted information would (as listed in the FOI (General) Regulations 2008) :
- (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) *[sic] 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.*
- [39] Given the role of the Auditor General, as set out in the Background Section above, it would not be in the public interest to disclose records that would, or would be likely to, prejudice the effective conduct of the affairs of his Office. In my view, in this case the public interest in allowing the Auditor General to conduct his affairs unhindered outweighs any public interest in the disclosure of the redacted information.

**I find therefore that it is not in the public interest to disclose the information redacted from records contained in Documents 2, 5, 9, 13 and 30.**



## **F. FINDINGS AND DECISION**

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

### **Findings:**

The information redacted from the responsive records found in Document 2 is exempt from disclosure pursuant to sections (20(1)(d).

The information redacted from the responsive records found in Documents 5, 9 and 13 is exempt from disclosure pursuant to section 20(1)(b) and 20(1)(d).

The information redacted from the responsive records found in Document 30 is not exempt from disclosure pursuant to sections 17(a). However, it is exempt under sections 20(1)(b) and (d).

The information redacted from the responsive records found in Document 31 is exempt from disclosure pursuant to section 17(a) and 20(1)(c).

### **Decision:**

Under section 43(3)(b) of the FOI Law I uphold the decision of the Office of the Auditor General to redact information in the responsive records and do not require the OAG to disclose the redacted information .

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

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



Jennifer P Dilbert  
Information Commissioner

26 November 2012