

ICO Hearing 48-01115
Decision

Her Majesty's Customs

Jan Liebaers
Acting Information Commissioner for the Cayman Islands

3 November 2015

Summary:

On 15 January 2015 an applicant made a request under the *Freedom of Information Law 2007* to HM Customs Department for fuel cost invoices from fuel/gasoline importers, from 2011 to present. The request was later narrowed to invoices from 2014 to the date of the request.

After seeking representations from the fuel importers the Customs Department withheld access to the invoices on the basis of several exemptions under the Law, namely sections 17(b)(i), relating to actionable breach of confidence; 20(1)(d), relating to effective conduct of public affairs; 21(1)(a)(i), relating to trade secrets; 21(1)(a)(ii), relating to information of a commercial value; and 21(1)(b) relating to commercial interests.

The matter was reviewed by the Chief Officer responsible, and subsequently an appeal was made to the Information Commissioner's Office. The appeal could not be resolved amicably, and the matter proceeded to a formal hearing before the Acting Information Commissioner.

After considering submissions from the Applicant, the Customs Department and the two third-party fuel importers, the Acting Information Commissioner found that disclosure of the requested records would constitute an actionable breach of confidence, and that the exemption in section 17(b)(i) therefore applies to the records.

Statutes¹ Considered:

Customs Law (2012 Revision)

Customs Tariff Law (2015 Revision)

Freedom of Information Law 2007

Freedom of Information (General) Regulations 2008

Contents:

A. INTRODUCTION	2
B. BACKGROUND	3
C. PROCEDURAL ISSUES	3
D. ISSUES UNDER REVIEW IN THIS HEARING	4
E. CONSIDERATION OF ISSUES UNDER REVIEW	4
F. FINDINGS AND DECISION	18

A. INTRODUCTION

- [1] On 15 January 2015 the Applicant made a request under the Freedom of Information Law 2007 (the “FOI Law”), to H.M. Customs Department (the “Department”) for:

... Fuel Cost Invoices from our fuel/gasoline importers – Esso – Sol and Rubis (and any former companies) for the years 2011 to present

- [2] The Department extended the response period by 30 calendar days on 12 February 2015, under section 7(4), because it needed additional time to seek legal advice and consult with the third party oil importing companies.
- [3] On 16 March 2015 the Department informed the Applicant of its decision to withhold the requested records under the exemptions in sections 17(b)(i) – actionable breach of confidence; 20(1)(d) – effective conduct of public affairs; 21(1)(a)(i) – trade secrets; 21(1)(a)(ii) – information of a commercial value; and 21(1)(b) – commercial interests.

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. At the time the request in this case was made the 2015 revision of the FOI Law had not yet been gazetted, and therefore this Decision is made under the 2007 version of the FOI Law.

- [4] On 17 March 2015 the Applicant agreed to narrow the request to invoices from 2014 onwards.
- [5] Subsequently, the Applicant requested an internal review, which the Chief Officer completed on 11 May 2015, confirming the initial decision of the Department to withhold the records.
- [6] The matter was appealed to the Information Commissioner's Office (ICO). All of the ICO's attempts at resolving the dispute amicably failed, and the case was referred to the formal hearing process before me at the end of July 2015.

B. BACKGROUND

- [7] The Department is headed by the Collector of Customs and is responsible for the collection of import duties, package tax and warehouse fees under the Customs Law (2012 Revision) and various Customs Regulations.
- [8] The tariff headings under which duty is charged on importation of goods, and the rates of duty applied are governed by the First Schedule of the Customs Tariff Law (2015 Revision). The rates applicable to fuels can be found on page 57 of that Law.
- [9] There are currently two fuel importers in the Cayman Islands, Rubis and Sol.

C. PROCEDURAL AND OTHER ISSUES

Public statements about fuel prices:

- [10] Several well-publicized statements were recently made by Government which asserted that the wholesale cost of imported fuel was "inaccessible" to Government.² As reported in the Press, these statements also called for greater transparency and better oversight in relation to fuel cost. New regulatory legislation has subsequently been passed.
- [11] These statements are somewhat puzzling, as the two fuel importers have, since 2014, routinely provided fuel invoices that show the cost of imported fuel (and which are the subject of this Hearing) to the Department.

Third party representations and provision of reasons:

- [12] Although the FOI Law does not make explicit provision for consultation with third party commercial businesses, the Department consulted with the two fuel companies, as it was

² See, for instance: Rory J. McDonough "Pressure mounts on fuel distributors" in: *The Cayman Reporter* 14 August 2015, available on: <http://www.caymanreporter.com/2015/08/14/pressure-mounts-fuel-distributors/>; "GIG one step away from fuel prize regulation" Cayman News Service 14 August 2015, available on: <https://caymannewsservice.com/2015/08/cig-one-step-away-from-fuel-price-regulation/>

entitled to do. For the sake of fairness and to give all interested parties in the present Hearing a chance to express their views, I decided to invite the two fuel companies to make representations as well.

[13] Notwithstanding that the information in question originated with two private sector companies, and that each company was given a chance to provide its views, the fuel invoices are undoubtedly held by the Department, and are unequivocally subject to the FOI Law.³ Although each company provided a submission, which I further quote from and discuss below, it is only the Department which has a legal obligation to provide reasons under the FOI Law for withholding the records.

[14] I want to emphasize that the two private companies themselves are not subject to the FOI Law. The Law applies to public authorities only, and has as of yet not been extended to any other bodies or organizations “which provide services of a public nature which are essential to the welfare of the Caymanian society...”, as the Cabinet would be entitled to do by order, pursuant to section 3(2)(b).

D. ISSUES UNDER REVIEW IN THIS HEARING

[15] The issues under review in this Hearing are:

- 1. Whether the responsive records are exempt from disclosure under section 17(b)(i) of the FOI Law; and,**
- 2. Whether the responsive records are exempt from disclosure under sections 20(1)(d), 21(1)(a)(i), 21(1)(a)(ii) and 21(1)(b) of the FOI Law, and, if so, whether access shall nonetheless be granted in the public interest pursuant to section 26 of the FOI Law.**

E. CONSIDERATION OF ISSUES UNDER REVIEW

- 1. Whether the responsive records are exempt from disclosure under section 17(b)(i) of the FOI Law; and,**

[16] Section 6(1) provides:

6. (1) Subject to the provisions of this Law, every person shall have a right to obtain access to a record other than an exempt record.

³ For a discussion of the meaning of “holding” a record, see: Information Commissioner’s Office *Decision Hearing 22-00712 Cabinet Office* 4 August 2012 paras 21-49

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

17. An official record is exempt from disclosure if-

...

(a) the disclosure thereof would-

(i) constitute an actionable breach of confidence;

The position of the Department:

[18] The Department refers in general to the Judgment of the House of Lords in *Attorney General v Guardian Newspapers Ltd.*⁴, stating,

a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others...".

[19] The Department also quotes the three-part test in *Coco v A.N. Clark*⁵, in which Megarry J found that,

...three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself ... must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

[20] In support of the first element of the *Coco* test, the Department points to the nature of the requested records, which are invoices which "contain commercially sensitive information", whose disclosure "could result in substantial financial loss for the parties concerned." The Department does not explain the likelihood of, or reasoning behind this conclusion.

[21] The Department offers no argumentation or evidence in regard to the second element of the *Coco* test, apart from the general quote from *Attorney General v Guardian*, above.

[22] In support of the third element of the *Coco* test, the Department points to what it considers "the strong element of commercial interest and commercial value and the detrimental effect of such release", without, however, explaining the reasons for concluding that disclosure would have a detrimental effect.

[23] The Department correctly expounds the difference between the common law public interest test, which is applicable to breach of confidence, and the general public interest test in section 26(1), which is not applicable.

⁴ *Attorney General v Guardian Newspapers* [1990] 1 AC 109

⁵ *Coco v A.N. Clark (Engineers) Limited* [1968] F.S.R. 415

[24] In regard to the public interest, the Department concludes that “the factors in favour of maintaining the exemption are not outweighed by the public interest factors for disclosure”. However, the Department does not reveal any of the factors it has considered on either side of the argument, but only says that its conclusion is “based on the arguments made [in their submission]”.

[25] The Department also points out that,

...the records in question do not touch or concern the issue of government transparency, accountability or any decision made by government and thus this goes beyond the spirit and intent of the FOI Law.

[26] The same argument is further developed in the Department’s reply submission:

The argument that there is a public interest in releasing the requested information on the grounds of transparency and accountability has limited weight given the fact that the applicant is seeking to go behind the intent of the FOI law by obtaining information through the public authority, which relates to private companies.

[27] The Department adds a further clarification regarding the public interest, reminding me that, while there is undoubtedly a great deal of interest on the part of the public in fuel prices (as demonstrated by the petition signed by several thousand individuals), this does not in itself automatically mean that the disclosure would be in the public interest.

[28] Finally, the Department clarifies that,

...when carrying out the public interest test the public authority should consider the circumstances at the date of the request or the date the request is actually dealt with and not whether the information may be released to the public in the future.

The position of third party fuel importer Rubis:

[29] Fuel importer Rubis agrees with the Department’s reliance on the exemption in section 17(b)(i), asserting that,

...the disclosure of the official records would constitute an actionable breach of confidence in relation to [Rubis] being placed in breach of its supply contracts and also in relation to its own customers. There is a real and significant risk of Rubis being sued for breach of confidence because its contracts specifically prohibit the release of confidential information.

[30] Rubis has not provided me with evidence of the explicit contractual obligation of confidence it relies on, e.g. a copy of a contract with an international supplier and/or local retailer that contains a confidentiality clause.

[31] Rubis points to the UK Information Tribunal's decision in *John Connor v Information Commissioner*,⁶ without indicating how or why this case is relevant to the present case.

[32] Rubis claims that the disclosure of the invoices "would constitute or lead to an actionable breach", and points to the confidential relationship it has with its retail customers:

Apart from its supply contracts Rubis also has contracts with its retail customers ... The sensitive nature of the pricing arrangements will impact directly on the operation of Rubis' customers, as well as on Rubis' own business. Divulging such commercially sensitive information would put Rubis in breach of confidence with its customers and damage its relationship with them.

[33] Finally, Rubis claims that harm would be caused by disclosure, as follows:

If the records in dispute are disclosed it would enable persons, for example competitors of Rubis, to calculate the financial operations of Rubis and also of its customers. It is submitted that this would constitute an impermissible breach of confidence which could lead to law suits for breach of confidence. The information impacts on commercial activity in a competitive environment as a result of which harm would inevitably be caused not only to Rubis but also [to] its customers and possibly to its Suppliers.

The position of third party fuel importer Sol:

[34] Fuel importer Sol provides the following useful background information on the importation process:

The Supplies are subject to import duty based on the volume and type of fuel being imported. Although Sol is required under the Customs Law (2012 Revision) ("Customs Law") to provide Customs with proof of the amount paid for the Supplies, the invoice cost is not used by Customs to calculate the amount of duty owed. Sol prepays duty to Customs on a weekly basis at a fixed rate; Customs then reconcile each imported cargo to determine if any further duty payment is required based on the cargo quantity imported.

[35] Sol adds that it discloses the invoices to the Department,

...only to comply with the Customs Law and the requirement of all importers of any goods to furnish proof of the acquisition costs.

⁶ Information Tribunal *John Connor Press Associates v The Information Commissioner* 25 January 2006 EA/2005/0005

[36] It explains that the invoices contain:

...the total amount charged to Sol for the Supplies, along with the per-unit cost. Therefore, anyone with access to the invoices can calculate the wholesale price Sol pays for the Supplies. Although there are further intermediary costs, a comparison between the wholesale price and advertised pump-price or the price CUC publish in their fuel factor statements will yield a close approximation of Sol's 'mark-up' on the Supplies. The confidentiality of this information is of critical importance to Sol's ability to effectively compete and operate its business in Cayman.

[37] Addressing the three elements of the Coco test, Sol asserts that the invoices have a "clear and necessary confidence about them", and that they have been provided to Customs in a manner "imparting an obligation of confidence". As far as the third leg of the test is concerned, Sol argues that,

As to detriment, Sol has contractual arrangements with its suppliers from whom it purchases fuel at cost. Part of the contractual arrangement is confidentiality of price. International fuel pricing is based on a subscription service which cannot be copied or transmitted to third parties without the subscription service's approval. The refinery suppliers' mark-up or premium is negotiated with each individual customer and is confidential. For the same reasons Sol seek to have confidentiality from competitors, so do Sol's suppliers. Unrestricted exposure of the price Sol pays has the obvious effect of disclosing the price at which Sol's suppliers sell, and in turn puts them at risk in the market.

The consequences to Sol's business are likely to be twofold:

- a. Suppliers may simply refuse to supply Sol, on the basis that trade with Sol is no longer confidential as to price; and/or*
- b. Sol may be sued for breach of confidentiality pursuant to clauses contained within Sol's supplier contracts.*

[38] Sol also asserts that "the same confidentiality issues arise with Sol's retail customers, and could also put Sol at risk of legal action in relation to those agreements." However, it has not provided evidence of the actual contractual confidentiality agreements which it claims are in force.

[39] As far as the public interest test is concerned, Sol states that none of the public interest factors defined in the Regulations directly apply in this case, since they, as well as the FOI Law itself, focuses on "the conduct and transparency of government". The Company asserts that in the present case, in contrast with the stated objects of the FOI Law in section 4,

...the Law is being used as a tool to seek confidential information, through a public authority, that pertains directly to a private company. It is therefore submitted that any public interest in disclosing the invoices for the purposes of the Law must be limited.

[40] For the reasons above, Sol does not believe that the public interest in disclosure overrides the public interest in maintaining the exemption.

[41] Finally, Sol clarifies that in its opinion,

... the notion transparency will necessarily lead to a decrease in prices (which is thereby in the public interest) is flawed. For the reasons [indicated above] disclosure would likely have the opposite effect by harming the competitive nature of the market for petroleum in the Cayman Islands and thereby leading to higher retail pricing, and possibly higher fuel costs and electricity costs in power generation. That is the experience of Sol in comparing the (higher) prices from similarly sized but more regulated (and therefore transparent) markets.

The position of the Applicant:

[42] Without further explanation on this point, the Applicant states that “[t]he records being requested are already in the public domain as they are already being held by a public body/ department.”

[43] He refers to the community group “Cayman Is Fed Up With High Gas Prices” which he represents, and which at the time of the submission had already garnered over 5,000 signatories and another 450 online signatures for the purpose of “seeking such information... cognizant that this singular commodity plays a vital and integral role in their daily lives”.⁷

[44] The Applicant calls fuel the “single vital commodity” which “plays a major role in [the] collective cost of living expenses” in the Cayman Islands. He claims that most people in the Cayman Islands believe that fuel is “vastly over-priced when compared to world commodity market prices” at, what he says, “327% above...publicly accessible market prices”, quoting as his source the Mercantile Exchange Commodity Market/Futures Commodity prices.

[45] In addressing the public interest test, the Applicant does not add any further arguments, except to underline again that the requested information is “vital information of a commodity that no one can do without.”

[46] Finally, the Applicant clarifies that, if the information were disclosed, he and the group he represents would vouch not to use the information “for any malicious purposes”.

⁷ I note that the number of signatories rose to above 14,000 within the next days, see: Cayman News Service “Rain dampens demo but petition exceeds 14,000” 14 October 2015
<https://caymannewsservice.com/2015/10/rain-dampens-demo-but-petition-exceeds-14000>

Discussion:

The meaning of the exemption in section 17(b)(i) has been considered in a number of previous Hearings by the former Information Commissioner and I, most recently in Decision 43-00814. The following general interpretation of the wording of the exemption is based on that Decision.⁸

- The meaning of “would”:

[47] 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*”.⁹

- The meaning of “breach of confidence”

[48] 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;
- (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.¹⁰

- The meaning of “actionable”

[49] As the UK Information Tribunal found in *Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.*¹¹ the meaning of “actionable” in the parallel exemption in the UK FOI Act is not unambiguous. In the parliamentary discussions relating to the UK FOI Bill, Lord Falconer, the sponsor of the UK Act, clarified that “*the word ‘actionable’ does not mean arguable...*”, but that “[it] *means that one can take action and win.*”¹²

⁸ Information Commissioner’s Office *Decision Hearing 43-00814 Portfolio of Legal Affairs* 10 April 2015 paras 66-80; see also Decision 15-00611, 16-00811 and 24-00612.

⁹ *McIntyre v Information Commissioner and the Ministry of Defence* EA/2007/0068 4 February 2008 para 40

¹⁰ *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.

¹¹ *Higher Education Funding Council for England v ICO and Guardian News and Media Ltd.* EA/2009/0036 13 January 2010 para 25

¹² United Kingdom *Hansard* HL (Series 5) Vol.618, col. 416 and Vol. 619 col 175-6; quoted in HEFCE v ICO op cit ibid

[50] 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.”¹³

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

[51] As the Department points out, it is important to note that the public interest test in the context of the common law of confidence is not the same as the statutory public interest test under the FOI Law which does not apply to the exemption in section 17(b)(i).

[52] The Cayman Islands FOI Law contains an explicit bias towards openness. For instance, section 6(5) provides that,

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.

[53] This bias in favour of disclosure in the FOI Law 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).

[54] Contrary to this, the public interest test which forms part of the actionable breach of confidence test under common law and equity – which is applicable here - is neither biased towards disclosure, nor as clearly defined as the public interest in regulation 2. It recognizes, first of all, that there is a strong public interest in maintaining confidences when the duty of confidence arises, since the duty of confidence is not a matter of private but of public interest.¹⁴

[55] In *Attorney General v Guardian* Goff LJ identified three limiting principles relating to the duty of confidence, namely: (1) that the duty is only owed as long as the information has not entered the public domain; (2) that it does not apply to useless or trivial information; and, (3) 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.*¹⁵

¹³ Ministry of Justice *Freedom of Information Guidance. Exemptions guidance. Section 41 – Information provided in confidence* 14 May 2008 p. 2

¹⁴ See: *W v Egdell* [1990] 1 All ER 835

¹⁵ *Attorney General* op cit page 282, also quoted in: Information Tribunal *Derry City Council v Information Commissioner* EA/2006/0014 11 December 2006 para 35(a)

[56] Guidance from the UK Information Commissioner clarifies that,

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...*
- *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.*¹⁶

[57] Additional guidance from the UK Information Commissioner on the similarly worded exemption in the UK's Freedom of Information Act 2000 (section 41 of that Act) instructs that,

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.*¹⁷

[58] This is also confirmed in advice from the UK Ministry of Justice (Department of Constitutional Affairs) which states that,

*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.*¹⁸

[59] The UK Information Commissioner explains the difference between the two types of public interest test as follows:

¹⁶ Information Commissioner's Office (UK) *Awareness Guidance 2. Information provided in confidence Version 4* 12 September 2008 pp.3-4

¹⁷ 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

¹⁸ Ministry of Justice *Section 41* op cit *ibid*

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 must be valid and very strong. A duty of confidence should not be overridden lightly.¹⁹

[60] I will now consider the three-part confidentiality test elucidated in that case, and continue by conducting the appropriate public interest analysis. .

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

[61] 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.”²⁰ The information cannot already be in the public domain or be trivial in nature.²¹ 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.

[62] The records in dispute are the invoices showing the cost of imported fuel received by the Department from two importers, starting in 2014 to the time the request was made. The fuel importers argue that a duty of confidence is owed not only to them, but also to their local retail partners, as well as to the suppliers with whom they negotiate a price on a confidential basis.

[63] The two fuel importers refer to the contractual nature of the confidentiality, both with their international suppliers and local retailers. However, neither they, nor the Department have provided me with any evidence in this regard, for instance copies of the relevant contracts. Therefore, I am not prepared to conclude that the records in dispute are subject to an express contractual obligation of confidentiality.

[64] It is incorrect for the Applicant to say that the records in dispute are “already in the public domain as they are already being held by a public body/ department.” Clearly, there is a distinction between information that is being held by Government and information that is publicly available. If the fuel invoices were already publicly accessible, this Hearing would not have taken place.²²

[65] While the responsive records are “held” by a public authority under the Law, they relate to private business matters, and do not, for instance, involve government decisions or expenditure. They are commercial invoices intended to be kept private, and containing pricing information that is not expected to be divulged to the general public.

¹⁹ *Awareness Guidance op cit ibid*

²⁰ Ministry of Justice *Section 41* op cit p. 6

²¹ *S v Information Commissioner and the General Registry Office* EA/2006/0030 9 May 2007 paras 37 and 42

²² For a full discussion on the meaning of “public domain in the context of the FOI Law”, see: Information Commissioner’s Office *Decision Hearing 37-02613 Planning Department* 28 May 2014 paras 161-172

[66] **Consequently, I am satisfied that the records are implicitly confidential in nature.**

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

[67] Neither the Department nor the third party fuel importers address this question satisfactorily, although Sol clarifies that the invoices are provided “only to comply with the Customs Law and the requirement of all importers of any goods to furnish proof of the acquisition costs”.

[68] Upon my request for clarification, the Department indicated that the information is collected pursuant to sections 9(a) and 43(1) of the Customs Law (2012 Revision), which respectively deal with powers of Customs officers and the value of imported goods.

[69] Since the customs duty on fuels is calculated on the basis of volume, not price, I do not understand the relevance of section 43(1), and I consider that it is arguable that the collection of pricing information under the statutory provisions applicable at the time of the request may have been excessive and unnecessary. However, the Department and its officers clearly had the necessary statutory powers to require that an invoice be provided, under section 9(a)(iii) of the Customs Law.

[70] As already indicated above, no evidence was provided of an express, contractual obligation of confidence attached to the communication of the invoices to the Department.

[71] I am satisfied that there is an implicit obligation of confidence in the manner in which the Department requires and receives invoices in the course of its official business, and that the manner in which the invoices were communicated should reasonably be considered confidential, since the communications are not open to the general public, and are only provided for statutory reasons.

[72] This conclusion meets the “reasonable man” test used by Megarry J in the *Coco* case, in which the Judge said:

...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised, that upon reasonable grounds the information was being given to him in confidence then this should suffice to impose upon him the equitable obligation of confidence.²³

[76] **I am satisfied that the records were imparted to the Department in a manner importing a duty of confidence.**

²³ *Coco* op cit 420-421

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

- [73] While case law on breach of confidence relating to the privacy of individuals has evolved so that detriment to the person whose information is at stake is no longer required for a potential breach of confidence to occur, detriment must still be demonstrated where the confidences are of a commercial nature, as is the case in this Hearing²⁴
- [74] The Department mentions a “strong element of commercial interest and commercial value and the detrimental effect of such release”, but it does not explain the reasons for concluding that disclosure would have a detrimental effect.
- [75] Rubis states that disclosure of “the pricing arrangements” (which presumably include the wholesale prices present in the invoices) would impact directly on the operations of its retail customers (i.e. the gas stations), and damage its relationship with them. The company claims that it would be possible to calculate the “financial operations” of Rubis and the retailers it does business with, and that this would inevitably cause harm to both parties, as well as to Rubis’ suppliers in this competitive commercial environment.
- [76] Sol also argues that disclosure of the records in dispute would allow anyone, including competitors, to calculate their markup which they consider of critical importance “to effectively compete and operate its business in Cayman”. Disclosure would put Sol, as well as its suppliers and retailers “at risk in the market”. It might induce suppliers to refuse doing business with Sol, and would expose the company to litigation for breach of confidence.
- [77] As I already indicated, the fuel importers refer to contractual confidentiality agreements, which if broken would expose them to litigation, without providing me with copies of the contracts. On that basis, I cannot conclude that an express duty of confidence exists.
- [78] However, I do accept that in order for fair competition to exist in the marketplace, it is not beneficial to disclose wholesale prices to the world at large. Doing so would in my view undermine the competitive nature of the fuel market in the Cayman Islands, which would be to the detriment of importers, retailers and the general public alike.
- [79] 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.*²⁵

²⁴ On the first point, see: Information Tribunal (UK) *Pauline Bluck v The Information Commissioner and Epsom & St Helier University NHS trust* 17 September 2007 EA/2006/0090 para 15; on the second point, see: Information Commissioner’s Office (UK) *Information provided in confidence (section 41) Freedom of Information Act Version 1* 22 July 2015 paras 58-60; Information Tribunal (UK) *Higher Education Funding Council for England v The Information Commissioner and Guardian News and Media Ltd* 13 January 2010 EA/2009/0026 paras 43-44

²⁵ Ministry of Justice *Section 41* op cit p 10

[80] It is clear from the respective submissions that: (1) both the recipient of the documents (the Department) and the originators (the third party private companies) have a reasonable expectation of confidentiality in regard to the records in question; and (2) the fuel importers have not given their consent to the disclosure of the information.

[81] The Applicant's promise not to act maliciously if the information is disclosed to his group is undoubtedly will intended, but it misunderstands what happens when records are ordered disclosed under the FOI Law. Except in specific circumstances involving personal information - which is not the case in this Hearing – any records which are ordered disclosed by the Information Commissioner are to be disclosed to the world at large, and not to the Applicant only.

[82] **Consequently, disclosure of the responsive records would constitute an unauthorized use to the detriment of the parties whose confidential information is at stake.**

[83] **Since the answers to the three parts of the Coco test are affirmative, I find that a duty of confidence exists in respect of the fuel invoices held by the Department.**

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

[84] As explained in some detail above, case law and guidance demonstrate that the public interest in maintaining confidences is not absolute and can be outweighed by an overriding public interest in disclosure. I will now conduct a balancing exercise to determine which side of the public interest prevails, in order to determine whether the breach resulting from disclosure would be actionable, as required for the exemption to apply.

- The public interest in maintaining confidentiality:

[85] As discussed above, the courts have recognized that “the grounds for breaching confidentiality must be valid and very strong”. There is a solid public interest inherent in preventing the disclosure of confidences.

[86] Although the present case does not pertain to the privacy rights of an individual – if so, the inherent protection of the confidential information would be even stronger – no evidence has been presented of misconduct, illegality or gross immorality, which are reasons recognized by the courts for overturning confidentiality.

[87] There is a public interest in allowing free competition for companies in the market, tempered by government regulation where appropriate. Fuel pricing was at the relevant time (i.e. the time when the request was received and first dealt with) not subject to government regulation, and so there is no public accountability issue at stake in the request for disclosure of the fuel invoices.

[88] Research shows that the disclosure of wholesale fuel prices to the world at large may actually encourage collusion between wholesalers, and could negatively affect the wholesale and retail

price of fuel and the cost of electricity which are essential commodities in the Islands.²⁶ The representations made by the fuel importers assert that disclosure could also undermine the ability of fuel importers to negotiate terms with suppliers, which ultimately has the potential of destabilizing the fuel supply of the Cayman Islands. These outcomes would be contrary to the public interest.

[89] There is a public interest in preventing breach of confidence and breach of contract litigation between fuel importers and suppliers, and fuel importers and retailers, which is likely to follow if the records were disclosed.

- The public interest in disclosing the records:

[90] Although the FOI Law is concerned with governmental accountability, transparency and public participation in decision making pursuant to section 4, this does not mean that public interest factors that do not directly relate to Government's actions, decisions or expenditure cannot come into play in balancing the public interest. Where issues with a significant impact on the general public are concerned, as is the case in this Hearing, related public interests should be taken into consideration.

[91] There is, understandably, a great deal of frustration amongst many residents of the Cayman Islands about what are perceived to be excessively high retail prices for fuel, as testified by the successful campaign started by the Applicant and reflected in its name, "Cayman Is Fed Up With High Gas Prices". That there is a great deal of interest in this topic is adequately demonstrated by the many Press articles, and the swift actions of the Government, which in recent weeks has, seemingly in record time, significantly altered the manner in which fuel imports are regulated in the Cayman Islands. These circumstances demonstrate that there is a genuine public interest in the fairness of fuel pricing.

[92] Nonetheless, the Applicant stretches the intention of the petition signed by thousands of people, when he claims it is "...seeking such information", i.e. the records in dispute. The text of the petition available online refers to the signatories' "complete dissatisfaction with the price of fuel/gasoline" and demands action to lower fuel prices, but it does not mention the information being sought in this Hearing or refer to transparency in any way.²⁷ In saying this, I assume the online petition is the same as the hardcopy one signed by most signatories.

²⁶ See for instance: Fernando Luco *Mandatory Price Disclosure and Competition* Department of Economics Texas A&M University 8 April 2015, available on: https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2015&paper_id=28

²⁷ See: https://www.change.org/p/government-of-the-cayman-islands-hon-premier-of-the-cayman-islands-hon-kurt-tibbetts-cayman-is-fed-up-with-high-gas-prices?recruiter=375063952&utm_source=share_petition&utm_medium=facebook&utm_campaign=share_for_starters_page&utm_t

- [93] The general public interest factors listed in regulation 2, which are routinely applied in determining the balance of the public interest in applicable FOI cases, are not relevant in the present case since the documents in dispute do not contain a record of any actions, transactions, decisions or expenditures of the Cayman Islands Government. Nonetheless, the Applicant is plainly correct that “this singular commodity plays a vital and integral role in [our] daily lives”, and fair fuel pricing is therefore clearly a matter of public debate and public interest.
- [94] **Given the very strong 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 records in dispute. Consequently, the breach of confidence which would result from the disclosure of the requested information would be actionable as the action would be more likely than not to succeed.**
- [95] **Therefore, the exemption in section 17(b)(i) applies to the records in dispute.**
- [96] **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 20(1)(d), 21(1)(a)(i), 21(1)(a)(ii) and 21(1)(b).**

F. FINDINGS AND DECISION

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

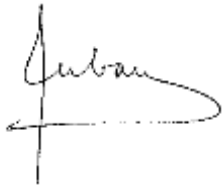
Findings and decision:

For the reasons explained above, I find that the records in dispute are of a confidential nature, that they were imparted in a manner importing confidence, that their disclosure would constitute an unauthorized and detrimental use, and that the common law public interest in disclosure does not override the public interest in maintaining confidentiality. Therefore, the exemption in section 17(b)(i) of the *Freedom of Information Law 2007* applies to the “fuel Cost Invoices from... fuel/gasoline importers” held by HM Customs Department, as requested by the Applicant on 15 January 2015.

Consequently, I uphold the decision of HM Customs Department to withhold the responsive records, on the basis of the exemption in section 17(b)(i) of the *Freedom of Information Law 2007*.

Pursuant to section 47 of the *Freedom of Information Law, 2007*, the Applicant 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 a 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.

A handwritten signature in black ink, appearing to read 'Jan Liebaers', with a long horizontal flourish extending to the right.

Jan Liebaers
Acting Information Commissioner

3 November 2015