



Attorney-General's Chambers

BY HAND & EMAIL (ben.adamson@conyersdill.com)

26 September 2016

Conyers Dill & Pearman Ltd
Clarendon House
2 Church Street
Hamilton HM 11

Attention: Mr. Ben Adamson

Dear Mr. Adamson,

Re: Commission of Inquiry – LF Wade Airport Re-development

This will acknowledge receipt of a copy of your correspondence to Liberty Law dated 20 September 2016, along with copies of summonses to witnesses Mr. Anthony Manders and Mr. Curtis Stovell. Those individuals are, respectively, the Financial Secretary of the Government of Bermuda and the Accountant General. They are required to provide documentation and information relating to the LF Wade Airport Re Development Project (“the Project”).

In accordance with Rule 4 of the Commission’s Rules, the Attorney General objects, on the following grounds, to the disclosure and use of any documentation or information relating to the Project that is not already in the public domain:

1. The Project is not within the Commission’s Terms of Reference.

The inquiry into the Project is apparently made in reliance on paragraphs 7 and 9 of the Terms of Reference: “7. Consider the adequacy of current safeguards and the system of financial accountability for the Government of Bermuda;” “9. Consider any other matter which the Commission considers relevant to any of the foregoing.”

In *BECL v. Commissioners and AG* [2016] SC (Bda) 82 Civ (7 September 2016) at paragraph 37, the Chief Justice was of the view that:

“This mandate is primarily anchored to the Financial Years 2010, 2011 and 2012 and the matters addressed in Section 3 of the Auditor-General’s Report. This finding may (not must) have implications for the range of documents falling outside this time period which can properly be sought.”

A footnote to that sentence states that this finding may have implications for the Commission’s ‘evinced intention’ of inquiring into the Project. We say, respectfully, that the Project is outside the remit of the Commission. Section 3 of the Auditor’s Report identifies certain systemic failures of accountability, but only in relation to the years of the Auditor’s Report. Insofar as the Commission



seeks to inquire into the Project, it is constrained by the limits of the Terms of Reference and to documents that are in the public domain.

Paragraph 9 of the Terms of Reference is also limited in its scope. The language in that paragraph, “any other matter ... relevant to ... the foregoing,” cannot be interpreted to expand the inquiry beyond the Auditor’s Report. Any request relating to the Project or question put to a witness that relates to the Project need not be answered by a witness because such questions or requests are not relevant. As the Chief Justice noted in the BECL decision:

“A basic rule of evidence is that witnesses are required to answer only relevant questions. It must be possible to easily determine what is or is not relevant by reference to well-defined terms of reference” (at para. 16).

In addition to our objection to the Commission’s receipt and use of any Project documents, we object to the disclosure of the Project documents by witnesses who may be in a position to provide them. Such witnesses may feel they are not in a position to object to the disclosure themselves because there may be penal consequences attached to a failure to comply with a Summons or request. As employer and interested party, Government makes the objection to the disclosure.

2. The documents relating to the Project are protected by public interest immunity.

Public Interest Immunity or “PII” may be claimed where the disclosure of confidential information would cause real or substantial harm to the public interest. In this particular case, the public interest would be engaged by the premature disclosure of information which would harm the Government of Bermuda’s commercial position in relation to entities with which it is engaged in active negotiations. PII arises under the common law, and has been expressly preserved in the context of judicial proceedings involving the Crown by section 19 of the Crown Proceedings Act 1966 and by the Rule 24/15 of the Rules of the Supreme Court of Bermuda 1985 (“RSC”). Witnesses before the Commission have the same rights and privileges they would have when appearing before the courts in legal proceedings. In particular, the right includes immunity against the release of any information which would be injurious to the public benefit.

Section 19 of the Crown Proceedings Act 1966 addresses the rules of discovery of evidence in proceedings in which the Crown is a party. The proviso to subsection (1) thereof makes very clear this provision does not authorise or require the disclosure of any document or to answer any question if the disclosure of such document or the answering of such question would be against the public interest.

Rule 24/15, RSC similarly states that rules governing disclosure in court proceedings are without prejudice to any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest.

In addition to any prejudice to Government’s interests caused by disclosure, Government has a contractual obligation not to disclose proprietary information that it has received in the course of negotiations. The disclosure would be injurious to the commercial interest of third parties. The non-



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disclosure would cease to be effective at Financial close, but would continue in effect should Government decide not to proceed with the Project.

We request that the Commission keep confidential any documents and information about the Project it may receive that are not already in the public domain. If the Commission is unable to accede to this request for confidentiality, we ask that the Commission grant a stay of any proposed public disclosure by it to allow the Attorney General an opportunity to petition the Supreme Court on the issue.

Should you have any questions or concerns, please do not hesitate to contact me at 295-5151 ext 4427.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "G. Howard", with a long horizontal flourish extending to the right.

Gregory Howard
Crown Counsel
for the Attorney-General