



## OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

ANY REPLY OR SUBSEQUENT REFERENCE TO THIS COMMUNICATION SHOULD BE ADDRESSED TO THE DIRECTOR OF PUBLIC PROSECUTIONS AND **NOT TO ANY OFFICER BY NAME** AND THE FOLLOWING REFERENCE QUOTED:-

P.O. BOX 633,

KINGSTON,

TELEPHONE: 922-6321-5

12<sup>th</sup> March 2013

### **MEDIA RELEASE**

The Office of the Director of Public Prosecutions (ODPP) received a formal referral from the **Office of the Contractor General (OCG)** dated the 2<sup>nd</sup> January, 2013 **pertaining to Collective Failure of the Cabinet of Jamaica to Comply with Requisitions of the Contractor General.**

The ODPP's Office reviewed the Report and its attached documents and has made the following findings:

### **BACKGROUND**

### **SUMMARY OF REPORT FROM THE OCG**

On the 25<sup>th</sup> of April 2012, Mr. Craig Beresford, on behalf of the Contractor General wrote to the Cabinet Secretary, Ambassador the Honourable Douglas Saunders requesting all the Cabinet Submissions and Decisions pertaining to the following:

- a) The approval for the continuation of the North South Link of Highway 2000;
- b) The approval of the Gordon Cay Container Transshipment Hub; and
- c) The Approval for the establishment of an Oversight Panel to oversee the award of Government contracts.<sup>1</sup>

Mr. Beresford in his correspondence explained that given certain information within the public domain concerning these approvals, he sought the perusal of these documents 'to clarify certain assertions which have alluded to, inter alia, the existence, consideration and granting of Cabinet Submissions, Decisions and Recommendations.'<sup>2</sup>

On the 2<sup>nd</sup> of July 2012, Mr. Craig Beresford acting on behalf of the Contractor General, wrote to the Cabinet Secretary requesting a copy of Cabinet Submissions and Decisions with respect to the extension of the Operating Agreement with Blue Diamond Hotels and Resorts Inc.- Braco

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<sup>1</sup> Exhibit 1 of the OCG's Referral to the Office of the DPP ( ODPP)

<sup>2</sup> Ibid

Resorts Hotel, Trelawny.<sup>3</sup> In a letter dated July 11, 2012, OCG stated that it was particularly concerned with having the disclosure of Cabinet Submissions and Decisions that touched and concerned the consummation of a Lease Agreement between the Government of Jamaica or its subject and Blue Diamond Hotel and Resorts.<sup>4</sup>

On the 26<sup>th</sup> of July 2012, The OCG requested a copy of Cabinet Submissions and Decisions regarding the Liquefied Natural Gas (LNG) Project – Floating, Storage, and Regasification Terminal and the Supply of LNG.<sup>5</sup>

In each request made, Mr. Beresford grounded his authority to require the information under section 4 of the **Contractor-General Act**.

With respect to each of the projects, the Office of the Cabinet, through its Cabinet Secretary, requested several extensions of the initial deadline it was given. The Cabinet Secretary indicated on each occasion that the Cabinet was awaiting the advice of the Attorney General which was not yet to hand. The Cabinet Secretary further indicated in some of its correspondence to the OCG that the release of Cabinet documents requires the approval of Cabinet, and this approval had not yet been granted, as the Cabinet was still awaiting the legal advice of the Attorney General on the matter.

By way of correspondence dated the 31<sup>st</sup> of August 2012, the Cabinet Secretary indicated that the Attorney General's Chambers advised that:

*“... The Supreme Court was asked to interpret certain parts of the statute governing the Office of the Contractor in “Minister of Works vs The Contractor General” and that the Courts ruling in that matter will impact the advice to the Cabinet concerning the OCG’s requisitions for Cabinet Documents.*

*In the circumstances, the advice awaited by the Cabinet will not be forthcoming until after the Court has delivered its ruling in the aforementioned case.”<sup>6</sup>*

The OCG thereafter sought the legal opinion of Mrs. Jacqueline Samuels Brown Q.C in respect of its legal powers to require answers in respect of requisitions directed to the Cabinet Office. On the 16<sup>th</sup> of November 2012, The Learned Queen's Counsel expressed the view that:

*“... The Minister, Cabinet Secretary, and all public bodies are by law obligated to respond to the requisitions of the Contractor General...”<sup>7</sup>*

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<sup>3</sup> Exhibit 15 of the OCG's referral to the ODPP

<sup>4</sup> Exhibit 17 of the OCG's referral to the ODPP

<sup>5</sup> Exhibit 19 of the OCG's referral to the ODPP

<sup>6</sup> Exhibit 23 of the OCG's referral to the ODPP

A copy of this opinion was forwarded to The Cabinet Secretary, the Most Honourable Prime Minister, Portia Simpson Miller and several other government officials on the 19<sup>th</sup> of November 2012.

On the 20<sup>th</sup> of November 2012, the Attorney General wrote to the OCG stating as follows:

*“ ...I have advised the Cabinet, The Minister of Transport Works and Housing and the Ministry of Science, Technology, Energy and Mining that compliance with the request of the OCG should await the Supreme Court’s decision in the matter of Ministry of Transport, Works and Housing v The Contractor General Claim No. 2012 HCV 03501. In these circumstances I am requesting that your office should also await the court’s decision before making any further demands on the offices in question. ”*<sup>8</sup>

On the 26<sup>th</sup> of November 2012, Office of the Cabinet wrote to the Contractor General reiterating the following position:

*“... only the Cabinet can authorize the release of its documents. The Cabinet Office is therefore not in a position to release such documents without the express approval of the Cabinet. It is expected that the matter will be considered by the Cabinet on the 3<sup>rd</sup> of December 2012.*

*Accordingly, request is hereby made for an extension to the timeline indicated in your letter under reference, to 10<sup>th</sup> December 2012.”*<sup>9</sup>

On the 10<sup>th</sup> of December 2012, the Cabinet Secretary wrote to the OCG indicating that the Cabinet has requested the further advice of the Attorney General on the matter.

The OCG referred the matter of the failure of the Cabinet to respond to its Requisitions to this Office on the 2<sup>nd</sup> of January 2013.

It is to be noted that the Court’s decision in the matter of **Ministry of Transport, Works and Housing v The Contractor General Claim No. 2012 HCV 03501** was delivered on February 1, 2013 by Mr. Justice Lennox Campbell. This judgment was favourable to the OCG.

The Office of the Cabinet has still not responded to the requisitions of the OCG. Neither has it advised the OCG how the Court’s judgment has influenced its position concerning the OCG’s requisitions for Cabinet Documents.

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<sup>7</sup> Exhibit 41 – of the OCG’s referral to the ODPP

<sup>8</sup> Exhibit 43 – of the OCG’s referral to the ODPP

<sup>9</sup> Exhibit 49 – of the OCG’s referral to the ODPP

## **ISSUES FOR DETERMINATION**

The Contractor- General in its referral of the matter to this Office indicated as follows:

*“...the Cabinet of Jamaica has failed thus far to comply with the instructions which were stated in the Requisitions/Questionnaires of the OCG. In this regard, the Cabinet of Jamaica, in refusing to comply, has without lawful justification or excuse, obstructed, hindered, or resisted a Contractor-General in the execution of his functions under the Contractor-General Act.”*

Given the foregoing two issues for determination have been identified:

- 1. Is the Cabinet’s refusal to comply with the instructions of the OCG as stated in its requisitions in breach of any applicable laws?**
- 2. Is there sufficient material in this report and its attachments to form the basis for the prosecution of anyone for breach of any applicable laws?**

## **THE LAW**

### **The Constitution of Jamaica**

The Cabinet derives its authority from section 69 of the Constitution. Each member of the Cabinet before assuming office must swear to the oath of allegiance as stated in the First Schedule of the Constitution. The relevant sections are outlined below.

#### **Section 69**

*1) There shall be in and for Jamaica a Cabinet which shall consist of the Prime Minister and such number of other Ministers (not being less than eleven) selected from among Ministers appointed in accordance with the provisions of section 70 of this Constitution as the Prime Minister may from time to time consider appropriate.*

*(2) The Cabinet shall be the principal instrument of policy and shall be charged with the general direction and control of the Government of Jamaica and shall be collectively responsible therefore to Parliament.*

#### **Section 74**

*The Prime Minister and every other Minister shall, before entering upon the duties of his office, make before the Governor-General the oath of allegiance and the appropriate oath for the due execution of his office in the forms set out in the First Schedule to this Constitution.*

## First Schedule

### Oaths

*Oath for the due execution of the office of Prime Minister or other Minister or Parliamentary Secretary.*

*I \_\_\_\_\_, being appointed Prime Minister/Minister/Parliamentary Secretary, do swear that I will to the best of my judgment, at all times when so required, freely give my counsel and advice to the Governor-General (or any other person for the time being lawfully performing the functions of that office) for the good management of the public affairs of Jamaica, and I do further swear that I will not on any account, at any time whatsoever, disclose the counsel, advice, opinion or vote of any particular Minister or Parliamentary Secretary and that I will not, except with the authority of the Cabinet and to such extent as may be required for the good management of the affairs of Jamaica, directly or indirectly reveal the business or proceedings of the Cabinet or the nature or contents of any documents communicated to me as a Minister/Parliamentary Secretary or any matter coming to my knowledge in my capacity as such and that in all things I will be a true and faithful Prime Minister/Minister/Parliamentary Secretary. (emphasis ours)*

## **The Contractor-General Act**

### Section 4

*4. (1) Subject to the provisions of this Act, it shall be the function of a Contractor-General, on behalf of Parliament-*

*(a) to monitor the award and the implementation of government contracts with a view to ensuring that (i) such contracts are awarded impartially and*

*on merit; (ii) the circumstances in which each contract is awarded or, as the case may be, terminated, do not involve impropriety or irregularity;*

*(b) to monitor the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof.*

*(2) For the purpose of the discharge of his functions under this Act a Contractor-General shall be entitled -*

*(a) to be advised of the award and, where applicable, the variation of any government contract by the public body responsible for such contract;*

*(b) subject to section 19, to have access to all books, records, documents, stores or other property belonging to government, whether in the possession of any officer of a public body or a contractor or any other person;*

*(d) to have access to all books, records, documents or other property used in connection with the grant, issue, suspension or revocation of any prescribed licence whether in the possession of any public officer or any other person;*

### Section 18

*18.(1) Subject to the provisions of subsection (5) and section 19 (l), a Contractor-General may at any time require any officer or member of a public body or any other person who, in his opinion, is able to give any assistance in relation to the investigation of any matter pursuant*

*to this Act, to furnish such information and produce any document or thing in connection with such matter as may be in the possession or under the control of that officer, member or other person.*

*(4) Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person by or under the Official Secrets Act, 1911 to 1939 of the United Kingdom (or any Act of the Parliament of Jamaica*

*replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any other law (including a rule of law) shall not apply in relation to the disclosure of*

*information or the production of any document or thing by that person to a Contractor-General for the purpose of an investigation; and accordingly, no person shall be liable to prosecution by reason only of his compliance with a requirement of the Contractor-General under this section.*

*(5) No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.*

### Section 19

***19.-(1) Where the Secretary to the Cabinet at the direction of Cabinet***

***(a) gives notice that the disclosure by a Contractor-General of any document or information specified in the notice, or any class of document or information so specified, would-***

***(i) involve the disclosure of the deliberations or proceedings of the Cabinet, or any committee thereof, relating to matters of a secret or confidential nature and is likely to be injurious to the public interest; or***

***(ii) prejudice the relations of Jamaica with the government of any other country or with***

*any international organization; or*

*(iii) prejudice the detection of offences, a Contractor-General or any member of his staff*

*shall not communicate to any person for any purpose any document or information specified in the notice or any document or information of a class so specified;*

*(b) certifies that the giving of any information or the answering of any question or production of any document or thing would prejudice the security or defence of Jamaica, a Contractor-General shall not further require such information or answer to be given or such document or thing to be produced.*

*(2) Except as provided in subsection (1), no law which authorizes or requires the refusal to answer any question or the withholding of any information or document or thing on the ground that the answering of the question or the disclosure of the information, document or thing would*

*be injurious to the public interest, shall apply in respect of any investigation by or proceedings before a Contractor-General.*

## Section 29

*29 - (b). Every person who without lawful justification or excuse-*

*(i) obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under this Act; or*

*(ii) fails to comply with any lawful requirement of a Contractor-General or any other person under this Act;*

*....*

*shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.*

## Access to Information Act

### Section 6

*6.—(1) Subject to the provisions of this Act, every person shall have a right to obtain access to an official document, other than an exempt document.*

*15.—(1) An official document is exempt from disclosure if it is a Cabinet document, that is to say—*

*(a) it is a Cabinet Submission, Cabinet Note or other document created for the purpose of submission to the Cabinet for its consideration and it has been or is intended to be submitted;*  
*(b) it is a Cabinet Decision, or other official record of any deliberation of the Cabinet.*

*(2) Subsection (1) does not apply, to—*

*(a) any document appended to a Cabinet document that contains material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature; or*  
*(b) a document by which a decision of the Cabinet has been officially published.*

## Section 19

*19.—(1) Subject to subsection (3), an official document is exempt from disclosure if it contains—*

*(a) opinions, advice or recommendations prepared for;*  
*(b) a record of consultations or deliberations arising in the course of, proceedings of the Cabinet or of a committee thereof.*

...

*(3) A public authority shall grant access to a document referred to in subsection (1) if it is satisfied, having regard to all the circumstances, that the disclosure thereof would, on balance, be in the public interest.*

## Definition of Public Authority in the Access to Information Act

A public authority is defined in the interpretation section of the Act as follows:

*"public authority" means—*

*(a) a Ministry, department, Executive Agency or other agency of Government;*  
*(b) a statutory body or authority;*  
*(c) a Parish Council;*  
*(d) the Council of the Kingston and St. Andrew Corporation;*  
*(e) any government company which—*  
*(i) is wholly owned by the Government or an agency of the Government, or*  
*in which the Government holds more than 50% shares; or*  
*(ii) is specified in an order under section 5 (3);*  
*(f) any other body or organization specified in an order under section 5 (3);*



### Section 5(3)

*(3) The Minister may, by order subject to affirmative resolution, declare that this Act shall apply to—*

*(a) such government companies, other than those specified in paragraph (e) (i) of the definition of "public authority", as may be specified in the order;*

*(b) any other body or organization which provides services of a public nature which are essential*

*to the welfare of the Jamaican society,*

*or to such aspects of their operations as may be specified in the order.*

## **DISCUSSION AND ANALYSIS**

### **Issue One**

***Is the Cabinet's refusal to comply with the instructions of the OCG as stated in its requisitions in breach of any applicable laws?***

Although not expressly stated by the Cabinet Secretary, it appears that the Cabinet justifies its delay in complying with the OCG's requisitions on the oath of allegiance sworn to by its members.<sup>10</sup> This oath is referred to in section 74 of the Constitution. The content of the oath is found in Schedule 1 of the Constitution and states clearly:

*"..that I will not, except with the authority of the Cabinet and to such extent as may be required for the good management of the affairs of Jamaica, directly or indirectly reveal the business or proceedings of the Cabinet or the nature or contents of any documents communicated to me as a Minister/Parliamentary Secretary or any matter coming to my knowledge in my capacity.."*

The provisions of the **Contractor-General Act**,<sup>11</sup> in clear and unambiguous language contemplate Cabinet documents being made available to the Contractor General (please see page 6 and 7 for the relevant details of the section). The only exception provided for, is where on request of the documents the Secretary of the Cabinet, at the direction of the Cabinet, gives notice to the Contractor General, that disclosure of the documents would prejudice the security or defence of Jamaica.<sup>12</sup> From the material provided from the OCG to this office no such notice by the Cabinet was given in this case.

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<sup>10</sup> Correspondence from the Cabinet Secretary to the OCG dated November 26, 2012 stated *that 'only the Cabinet can authorize the release of its documents.'* This language is found in Schedule 1 to the Constitution.

<sup>11</sup> Section 18(4); Section 19 (1) and (2)

<sup>12</sup> Section 19 (2).

Equally, the **Access to Information Act** explicitly provides that a public authority can grant access to Cabinet documents where if it is satisfied, having regard to all the circumstances, the disclosure would, on balance, be in the public interest.<sup>13</sup>

It is trite law that the **Constitution** of a country is the supreme law by which all other laws are measured. If any other law is inconsistent with its entrenched provisions, the Constitution will prevail and the other law shall to the extent of the inconsistency be void.<sup>14</sup>

It follows therefore that guidance on this issue must first be sought from the provisions of the Constitution.<sup>15</sup> The oath of allegiance in Schedule One of the Constitution implies that two conditions are to be met before Cabinet documents can be disclosed by members of the Cabinet to the public:

1. The authority of the Cabinet must be obtained;
2. The material sought must be required for the good management of the affairs of Jamaica.

*Are the Members of the Cabinet in breach of Section 29 of the Contractor General's Act?*

In light of the supremacy of the Constitution in our legal system, the Contractor General's Act must be interpreted, as far as is possible, in a manner that is consistent with it. The Office of the DPP would posit that since the Cabinet did not grant the authority for the documents to be disclosed, then without more, no member of the Cabinet could have lawfully disclosed them<sup>16</sup>. **The individual members of the Cabinet cannot therefore be held to be in breach of Section 29 of the Contractor General's Act.**

*Is the Cabinet Secretary in breach of Section 29 of the Contractor General's Act?*

The Cabinet Secretary, though not a member of the Cabinet is bound by section 92 of the Constitution to convey decisions of the Cabinet to persons on the instructions of the Prime Minister.<sup>17</sup> **The important question here, is whether the Cabinet Secretary has the lawful**

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<sup>13</sup> Section 19 (1) and (3);

<sup>14</sup> The Jamaican Constitution unlike other Caribbean jurisdictions, does not contain a preamble to this effect. However, this is the common law position. Reference to this position can be found in the Trinidadian case of *Collymore v A-G* (1967) 12 WIR 5.

<sup>15</sup> It is a moot point whether the oath taken by the members of the Cabinet carries the weight of the substantive parts of the Constitution. It is submitted that the members of the Cabinet must have regard to their oath of allegiance given the critical role it plays in their duty of accountability to the people of Jamaica.

<sup>16</sup> **A generous interpretation of the provisions of the Access to Information Act suggest that where the authority of the Cabinet is not obtained for the disclosure of documents, the Court can make an order for disclosure, pursuant to an application under the Access to Information Act.**

<sup>17</sup> Section 92 of the **Constitution** establishes the position of Cabinet Secretary. It states:

(1) *There shall be a Secretary to the Cabinet who shall be appointed by the Governor-General, acting on the recommendation of the Prime Minister, from a list of public officers submitted by the Public Service Commission.*

**authority to disclose documents to the OCG without the prior approval of the Cabinet.** A common sense approach to this question would suggest that this is not so for the following reasons:

1. The Cabinet Secretary is instructed in the execution of his duties by the Prime Minister, who is a member of the Cabinet. It follows that non-compliance with an instruction of the Prime Minister would be in breach of section 92 of the **Constitution**.
2. It is the Cabinet who must ultimately decide which documents can be disclosed without prejudice to the national interest. Section 19 of the **Contractor-General's Act** suggests that Secretary of the Cabinet could not on his own accord determine this. The opening words of this section are:

*'Where the Secretary to the Cabinet at the direction of Cabinet ...'*

The Cabinet Secretary is therefore the medium through which requests are made to and responses received from Cabinet. The Cabinet Secretary who is duty bound to act on the instructions of the Prime Minister by virtue of the Constitution would therefore not be held to be in breach of Section 29 of the Contractor General's Act.

*Is the Cabinet at Liberty not to Grant Authority for the Disclosure of its Documents?*

It is to be noted that the oath of allegiance provides that where the business or proceedings of the Cabinet or the nature or contents of any documents utilised by the Cabinet is required for the good management of the affairs of Jamaica, the Cabinet or any of its members can make disclosure. However, the prior approval of the Cabinet is needed.

**Does the Cabinet have the unfettered power to choose not to grant approval for disclosure without providing a reason, particularly in instances where public bodies such as the OCG require the information for the good management of the affairs of Jamaica?**

A consideration of this question must have necessity touch and concern the following factors including the recent decision of the Court in the *Minister of Transport and Works and The Contractor General Claim No. 2012 HCV 0351*.

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*(2) The Secretary to the Cabinet shall have charge of the Cabinet Office and shall be responsible, in accordance with such instructions as may be given to him by the Prime Minister, for arranging the business for, and keeping the minutes of the meetings of the Cabinet and for conveying the decisions of the Cabinet to the appropriate person or authority, and shall have such other functions as the Prime Minister may from time to time direct.*

1. **The Effect of the decision of *Minister of Transport and Works and The Contractor General Claim No. 2012 HCV 0351*.**

The Cabinet has not disputed the authority of the OCG under section 4 of the Contractor General's Act to monitor and investigate matters surrounding the three projects for which requisitions have been made. Indeed it cannot seriously dispute the powers of the OCG to do so, having regard to the recent decision of the Court in the case of *Minister of Transport and Works and The Contractor General Claim No. 2012 HCV 0351*. The judgment which was handed down on February 1, 2013, has settled the issue of whether the Contractor General has the power under the **Contractor-General Act** to monitor and investigate pre-contractual activities. It has also settled the issue of whether the **Contractor-General Act** empowers the Contractor General to investigate the activities of the Independent Oversight Panel (IOP), a voluntary advisory body to the government. Justice Campbell, who delivered the judgment of the Court ruled that The Contractor General was empowered under the Act to monitor and investigate pre-contractual activities. He further ruled that the IOP was a public body for the purposes of the **Contractor-General Act** and therefore amenable to the powers prescribed by that Act in relation to such bodies.<sup>18</sup> Please note that this decision is declaratory of the present state of the law on the issue. As presently advised no appeal has as yet been heard and concluded.

2. **The Non-Compliance of the Cabinet with the Requisitions of the OCG since the Decision of the Court.**

Correspondence from Cabinet Office had indicated that the Attorney General's Chambers was awaiting the aforementioned decision of the Court to assist in determining whether disclosure in accordance with the OCG's requisitions would be authorised by Cabinet.

Although the decision was handed down from the 1<sup>st</sup> of February 2013, the Cabinet Office has still not complied with the requisitions of the OCG.

3. **The Fact that the Cabinet has not Asserted Prejudice to the Security or Defence of Jamaica as a Reason for its Non-Compliance.**

The Contractor General's Act provides clear directions for the procedure to be followed where Cabinet considers that information prejudicial to the security or defence of Jamaica has been requested by the OCG. It states:

***19.-(1) Where the Secretary to the Cabinet at the direction of Cabinet:***

***(b) certifies that the giving of any information or the answering of any question or***

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<sup>18</sup> Para. 37

*production of any document or thing would prejudice the security or defence of Jamaica, a Contractor General shall not further require such information or answer to be given or such document or thing to be produced.*

*There is no material in this referral which evidences any such certification from the Secretary to the Cabinet at the direction of the Cabinet to the OCG, to ground the refusal of the request of the information. The requested information, prima facie does not appear to touch and concern the security or defence of Jamaica. It touches and concerns:*

- a) The approval for the continuation of the North South Link of Highway 2000;*
- b) The approval of the Gordon Cay Container Transshipment Hub;*
- c) The Approval for the establishment of an Oversight Panel to oversee the award of Government contracts;*
- d) The extension of the Operating Agreement with Blue Diamond Hotels and Resorts Inc. – Braco Resorts Hotel (formerly Breezes Rio Bueno), Trelawny and*
- e) The Liquefied Natural Gas (LNG) Project – Floating, Storage and Regasification Terminal and the Supply of LNG.*

*It would appear therefore that the OCG is indeed within its right to continue to request the information and also consider themselves entitled to receive that information from Cabinet.*

*Further, since the OCG has on previous occasions requested and received Cabinet documents,<sup>19</sup> without any useful explanation on the part of the Cabinet Office, the stance of the Cabinet on this occasion does appear very unusual, and begs the question whether the Cabinet can lawfully interpret and utilise the provisions of the Constitution to obtain absolute secrecy in cases where they are unwilling to comply with requisitions of the OCG.*

#### **4. An Examination of the Trends in Current Case Law Suggest a Lack of Support for Absolute Secrecy of the Cabinet.**

The Courts have always recognized the need for non-disclosure of some Cabinet documents in order to effect good governance. Over time a constitutional convention developed that favoured the nondisclosure of State documents. However, a substantial body of case law now exists that demonstrate that the Courts will not allow Cabinet documents to be held confidential as of right, but will employ a balancing exercise in determining whether these documents ought to be disclosed.

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<sup>19</sup> Page 4 – Special Report of the OCG to Parliament

In the case of *Sankey v Whitlam* the High Court of Australia considered the question of whether certain official documents are protected from disclosure in judicial proceedings. In that case, The Honourable E. G. Whitlam, who had recently ceased to be the Prime Minister of Australia was charged for a breach of the Crime Act and for a Conspiracy at Common Law to deceive the then Governor- General. It was argued on his behalf that certain official documents should not be disclosed or admitted into evidence.

In delivering the judgment of the Court, Gibbs A.C.J. opined as follows:

**“it is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public”.**

He noted, however, that the object of such protection from disclosure:

**“is to ensure the proper working of government, and not to protect Ministers and other servants of the Crown from criticism, however intemperate or unfairly based”** (pg. 40).

He stated:

**“It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld”** (pg. 38).

He further observed:

**“It is impossible to accept that the public interest requires that all state papers should be kept secret forever, or until they are only of historical interest. In some cases the legitimate need for secrecy will have ceased to exist after a short time has elapsed.** (pg. 41-2)

**The fact that members of the Executive Council are required to take a binding oath of secrecy does not assist the argument that the production of State papers cannot be compelled...state papers are not protected from disclosure because they are confidential or because the Minister has taken an oath not to reveal them. The question is whether the disclosure of the documents would be contrary to the public interest.** (pg. 42)

**I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure forever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public**

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<sup>20</sup> 1978 142 CLR 1

**interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice.” (pg. 43)**

It must be emphasized, that this approach of balancing the injury to the national interest with the need for Cabinet’s accountability for the proper management of the affairs of the country is not foreign to our own jurisprudence as it is alluded to in the oath of allegiance under Schedule one of the Constitution, Section 19 of the Access to Information Act, and Section 18 and 19 of the **Contractor-General Act**.

**Rk Jain v Union of India<sup>21</sup>**

In the case of **Rk Jain v Union of India**, the proper interpretation of a Constitution similar in part to ours was considered by the Supreme Court of India. The Court ruled that where the Cabinet relied on its oath of secrecy in the Constitution as a basis for nondisclosure of State documents it had a duty to state in an affidavit the basis on which it claimed state immunity.

In this case, the qualifications of the person who was appointed to the position of President of the Customs, Excise and Gold Control Appellate Tribunal (CEGAT) did not find favour with the petitioner, the Editor of Excise Law Times. On behalf of the Union of India it was contended that a Cabinet Subcommittee approved the appointment of the Respondent as President of CEGAT and by operation of Article 77(3) and 74(1), the appointment was made by the President. It was argued that the material utilized by this subcommittee constituted Cabinet documents that contained the nature of the advice that was relied on in making that decision. The documents were immune from disclosure as the disclosure would cause public injury preventing candid and frank discussion and expression of views by the bureaucrats at higher level and by the Minister/Cabinet Sub-Committee causing serious injury to public servants. In dismissing this argument, Ramaswamy J. held:

**“When a claim for public interest immunity has been laid for nondisclosure of the State documents, it is the Minister's due discharge of duty to state on oath in his affidavit the grounds on which and the reasons for which he has been persuaded to claim public interest immunity from disclosure of the State papers and produce them. He takes grave risk on insistence of oath of secrecy to avoid filing an affidavit or production of State documents and the Court may be constrained to draw such inferences as are available at law. Accordingly the oath of office of secrecy adumbrated in Article 75(4) and Schedule III of the Constitution does not absolve the Minister either to state the reasons in support of the public interest immunity to produce the State documents or as to how the matter was dealt with or for their production when discovery order nisi or rule nisi was issued.”**

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<sup>21</sup> 1993 AIR 1769, 1993 SCR (3) 802

### *Eagan v Chadwick*<sup>22</sup>

In the Eagan and Chadwick case, the Court of Appeal was asked to decide whether or not the power of the Legislative Council to call for documents from the Executive arm extended to documents for which claims of legal professional privilege or of public interest immunity, could be made at common law.

The facts are that on 24 September 1998 the Legislative Council passed a resolution directing the Government to produce by 29 September all documents relating to the contamination of Sydney's water supply. On 29 September the Clerk of the Council received a letter from the Director General of the Cabinet Office, Roger Wilkins, stating that, further to advice sought from the Crown Solicitor, the Government would not table some documents on the grounds of legal professional privilege and public interest immunity. The continued refusal of the Government to comply with the directives of the Legislative Council resulted in the Treasurer and Leader of the Government in the Upper House, the Hon Michael Egan MLC being suspended for five sitting days.

All three members of the Court of Appeal agreed that the Council's power to call for documents did extend to privileged documents, on the basis that such a power may be reasonably necessary for the exercise of its legislative function and its role in scrutinising the Executive.

Priestley JA opined:

**“notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.”**<sup>23</sup>

This case is instructive, as the Office of the Contractor General in the execution of its monitoring and investigative mandate acts on behalf of Parliament to whom the Cabinet is collectively responsible by virtue of section 69 (2) of the Constitution.<sup>24</sup> Whilst the Constitution speaks to the need for the authority of the Cabinet to be obtained before Cabinet documents can be disclosed, it is silent on whether Parliament is fettered or unfettered in exercising this power of granting authority. This issue does not appear to have been ventilated or determined by our Constitutional Court or any other relevant tribunal. The ODPP is open however to being corrected. It would be helpful if at some point in the future the issue is ultimately determined by our Courts, that is, whether the powers of Parliament extend to directing the Executive to produce Cabinet documents to the OCG or whether Parliament is fettered or unfettered in the exercise of this power given to it under the Constitution.

It is submitted that the cases discussed in this opinion are persuasive authority in our jurisdiction and provide a useful guide as to the possible approach the Courts may consider should the issue of non-disclosure of Cabinet documents to the OCG fall to be considered by them.

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<sup>22</sup> 1999 46 NSWLR 563

<sup>23</sup> Para. 143

<sup>24</sup> See section 4 of the Contractor- General's Act



## **ISSUE TWO**

*Is there sufficient material in this report and its attachments to form the basis for the prosecution of anyone for breach of any applicable laws?*

The Office of the Contractor - General alleges in this referral that the Cabinet has without lawful justification, obstructed, hindered or resisted a Contractor- General in the execution of his functions under the **Contractor-General Act**<sup>25</sup>, and has therefore breached section 29 (b) of the **Contractor-General Act**.

### **Obstructed, Hindered, Resisted**

By way of correspondence to the Cabinet Secretary dated September 6, 2012<sup>26</sup>, with regard to the requisitions of the OCG regarding Cabinet Submissions and decisions, the OCG pointed out:

*“In the instant matter, the referenced case and certainly the germane issue which is now in contention, and before the Court, concerns, inter alia, the OCG’s jurisdiction to request information, prior to the award of a Government of Jamaica (GOJ) Contract – Pre Contract Stage, pursuant to its Section 4 mandate.*

*The OCG is now therefore gravely concerned that the GOJ has proceeded to, in at least one instance , sign a Concession Agreement for the North South Link of Highway 2000, even before a ruling has been handed down by the Court, and even as the GOJ is asking the OCG to await said ruling. Further, the GOJ has already signed an Operating Agreement with Blue Diamond Hotels and Resorts Inc, with respect to the extension of the Management Agreement for the Operation of Braco Resort Hotels ( Formerly Breezes Rio Bueno. ) Therefore, both Agreements have already been duly consummated and, consequently, outside of the ambit of the matter that is currently before the Supreme Court.”* (Emphasis ours)

In response to this letter, the Office of the Cabinet indicated that it would seek the advice of the Attorney General’s Department. It further reiterated that:

*“...in any event, only the Cabinet can authorize the release of its documents.”<sup>27</sup>*

This OCG correspondence if supported by concrete material, indicates the following:

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<sup>25</sup> Page 2 of cover letter

<sup>26</sup> Exhibit 24 of OCG’s referral

<sup>27</sup> Exhibit 25 of OCG’s referral

1. The OCG was hindered in monitoring the pre-contract stages of the North South Link of Highway 2000 project, as since the requisition of the OCG, the contract was signed;
2. Extensions requested in previous correspondence by the Cabinet in relation to the Blue Diamond Hotels and Resorts Inc, Braco Resort Hotels (Formerly Breezes Rio Bueno), may have been for reasons other than the need for the decision of the Court, as the issues before the Court did not touch and concern this project.

It appears therefore that there is concrete material from which it can be readily inferred that the Contractor General has been obstructed and hindered in the monitoring and investigative mandate with regard to these two projects, the subject of this referral.

### **Without Lawful Justification**

As stated earlier, the **Contractor- General Act** provides that the Cabinet is entitled, on the request for documents by the OCG, to indicate that the disclosure would prejudice the security or defence of Jamaica. This reason provides the Cabinet with a lawful justification under this Act.

However as extensively, discussed earlier, the Cabinet has not provided any reason for its non-compliance, and has instead raised a ‘constitutional justification’ for its inaction. It is yet to be determined whether this ‘justification’ is lawful.

Given the supremacy of the Constitution, this issue of whether the Cabinet can be the judge in its own cause and thereby refuse to grant authorization for the release of its documents to the OCG is now a moot legal point to be decided by the appropriate authority. It has not escaped our notice that if the Constitution can be properly interpreted in this way, then if the Cabinet proceeds on this path they may unwittingly and unfortunately frustrate the mandate of the Contractor General, whenever its documents (that is the Cabinet’s documents) are required as provided by sections 18 and 19 of the **Contractor- General’s Act**.

## CONCLUSION

Having closely examined, the documentary material ( including the Special Report to Parliament dated the 13<sup>th</sup> December 2012) referred along with the fifty-one (51) exhibits attached thereto from the OCG, the relevant legislation as well as case law and having carefully considered the constitutional position of the Cabinet our findings are as follows:

1. Schedule 1 of the Constitution speaks to the need for the approval of the Cabinet before the documents pertaining to the Cabinet can be disclosed;
2. Sections 18 and 19 of the Contractor- General Act contemplate the disclosure of Cabinet documents to the OCG pursuant to his mandate to monitor and investigate the award of government contracts. It further provides for the procedure that the Cabinet Secretary should adhere to if the documents are deemed to be privileged. From the material available it does not appear that this procedure was complied with;
3. The Office of the Cabinet has not complied with the requisitions of the OCG and further has not cited prejudice to the security or defence of Jamaica as its reason for not doing so;
4. Given the constitutional requirement of the approval of the Cabinet for its documents to be released as stated in Schedule 1 of the Constitution, further direction and guidance is needed from the Court (Civil Jurisdiction) as to the procedure to be adopted by the OCG when the Cabinet does not authorize the release of its documents to the OCG, and further, provides no reasons for its non-compliance with the OCG's requisitions;
5. Case law from other jurisdictions suggests that Cabinet ought not be allowed by the Courts to withhold Cabinet documents from inspection without good reason. These authorities are persuasive only and are yet to be tested in our jurisdiction;
6. The present state of affairs raises the following critical question: **Does the Cabinet of Jamaica have the unfettered power to choose not to grant approval for disclosure of its documents without providing a reason, particularly in instances where the OCG requires the information for the good management of the affairs of Jamaica?;**
7. The answer to that question is outside the remit of the Office of The Director of Public Prosecutions as outlined under section 94 of the Constitution;

8. If there continues to be non-compliance by the Secretary of the Cabinet and the Cabinet as stated in item 3 in conjunction with non-disclosure of the requested material then its only after a Court has made the decision in the favour of the OCG of the question posed in item 6, will a re-assessment of the possibility of culpability of the Cabinet and its Secretary could be properly made by the ODPP; and
9. Given the foregoing I would not be able to properly initiate criminal prosecution of any of the members of the Cabinet or the Cabinet Secretary at this time.

### **RECOMMENDATIONS**

The ODPP will always give due regard and respect to the named entities and their mandates which is derived either from the Constitution or their enabling legislation. These entities are therefore always at liberty if deemed helpful, to consider and to take such action as their particular remit prescribe. The ODPP in the discharge of its public duty under the Constitution has in good faith brought to bear in its preparation of this legal opinion our usual objective professional methodology which pays the very greatest respect to the material provided by the referring entity and the law.

The following recommendations are herein after made:

1. That the Office of the Cabinet, through its Secretary, comply with the requisitions of the OCG or state its reasons for non-compliance in accordance with Section 19 of the **Contractor- General's Act** and
2. That the Attorney General's Department, the Cabinet or the OCG use the appropriate channels to have the legal question posed in item 6 answered by the Court.