



Cayman confidential

Bernadette Carey explains the Cayman Islands' new legislation on the disclosure of confidential information

Given the global push for cross-border information-sharing and transparency, the recent repeal of the Cayman Islands' *Confidential Relationships (Preservation) Law (2015 Revision)* (the Law) and the introduction, in July 2016, of its replacement – the *Confidential Information Disclosure Law, 2016* (the CIDL) – have been the subject of much international interest.

The Law, which operated to protect the confidentiality of information pertaining to certain commercial activities and business dealings taking place in the Cayman Islands, had, for many years, been referred to colloquially, and perhaps somewhat unfairly, as 'Cayman's secrecy law'. Its repeal has, in some quarters at least, been heralded as the beginning of the end for the protection of confidential information in offshore financial centres, and a gateway to the wholesale sharing of any and all information between the Cayman Islands and other jurisdictions.

However, this is not the case. The CIDL in fact reflects a concerted effort by local lawmakers to cooperate with global transparency initiatives in respect of certain categories of confidential information, while still allowing for the important protections given to that information in the Cayman Islands, both by statute and common law.

THE LAW

A product of the mid-1970s, the Law operated to protect a number of different categories of confidential information located in the Cayman Islands, regardless of the origin of the information. 'Confidential information' was defined as 'information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorised by the principal to divulge'.

Section 3 of the Law stated that it applied to all confidential information

KEY POINTS

WHAT IS THE ISSUE?

With the global push towards cross-border sharing of data, it is important to stay up to date with the implementation of legislation governing the protection and disclosure of confidential information.

WHAT DOES IT MEAN FOR ME?

The Cayman Islands' *Confidential Information Disclosure Law, 2016* clarifies the law regarding disclosure of such information located there, and offers both guidance and solutions concerning the appropriateness of such disclosure.

WHAT CAN I TAKE AWAY?

The law reflects a modern approach to the disclosure of confidential information in offshore jurisdictions, and is a helpful tool for professionals dealing with requests for such disclosure.

'with respect to business of a professional nature which arises in or is brought into the Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or thereout'.

Section 5 prohibited holders of such confidential information from attempting, offering or threatening to divulge it; wilfully obtaining or attempting to obtain it; and making use of it for the benefit of any person, either clandestinely or without the consent of the person who imparted it. Exceptions to these prohibitions allowed for the disclosure of confidential information by specified groups of people, including a professional person acting in the normal course of business with the consent of the person who imparted the confidential information; a police officer investigating an offence; the Financial Secretary of the Cayman Islands; and the Cayman Islands Monetary Authority.

Perhaps most importantly, and controversially, the Law contained

criminal sanctions. Any person who was found to have divulged, threatened to divulge, wilfully obtained or attempted to disclose any confidential information in breach of the Law's provisions would be liable, on conviction, to imprisonment for a maximum of two years, and a fine of no more than KYD5,000 (USD6,100). However, not a single prosecution was pursued in the 40 years that the Law was in force, suggesting that these particular provisions were somewhat hollow.

ASSISTANCE OF THE GRAND COURT

Where questions as to the appropriateness or necessity of disclosure of confidential information arose in the context of litigation, the Law provided a unique avenue of relief. Section 4 provided that, where no exception in s3(2) applied, confidential information could be disclosed in connection with legal proceedings, provided that the person intending to make the disclosure first obtained the permission of the Grand Court. The Grand Court has construed the 'proceedings' captured by s4 very narrowly, so as to include ordinary litigation in the Cayman Islands courts, civil litigation in progress in another country, and investigations occurring under the authority and supervision of a court in a foreign country. In the course of considering a s4 application, the Grand Court was empowered to do one of a number of things specified by the Law: it could direct that the evidence comprising the confidential information was to be given; not to be given; or to be given subject to conditions designed to safeguard, as far as possible, the confidentiality of the information.

THE NEED FOR CHANGE

Despite being a generally helpful tool for the preservation and controlled disclosure of sensitive and confidential information in the Cayman Islands, the Law was a contentious statute for the jurisdiction in

its original form. The existence of the criminal sanctions was particularly troublesome, and so frequently highlighted by detractors of the Law (despite the fact that, as noted above, no such sanctions were ever imposed) that they appeared to serve merely as ammunition against the jurisdiction. The lack of clarity around the actual scope of the Law and its true intentions meant it was ripe for refreshment and modernisation.

THE CIDL

On 22 July 2016, the CIDL was enacted to provide a more modern approach to the protection and disclosure of confidential information, and it is now in effect. In place of the Law, the CIDL provides for disclosure of confidential information in a wider range of specific circumstances, both without the sanction of the Grand Court and without the threat of criminal sanctions. However, in doing so, the CIDL does not entirely disregard its origins; many of the Law's provisions have been subsumed into the CIDL and remain in use.

Under the CIDL, 'confidential information' is now defined to include 'information, arising in or brought into the Islands, concerning any property of a principal, to whom a duty of confidence is owed by the recipient of the information', and the Law otherwise makes it clear that the prohibitions on disclosure in the CIDL will now apply only where a person actually owes a duty of confidence, pursuant to common law, as opposed to operating as a blanket ban as they did under the Law.

Perhaps the biggest change is that it is no longer a criminal offence to disclose confidential information. The removal of the criminal sanctions has the effect of providing for liability for breach of confidence to be determined (as is the case in most other common-law jurisdictions) not as a criminal matter, but according to common law and the rule of equity. The ban on disseminating confidential information has therefore shifted from

one of criminal liability to one of a civil duty of confidentiality, and it will be up to individuals and companies to take a breach of the duty of confidence into their own hands, by instituting proceedings in the civil courts for breach of common law and equitable rights (a cause of action often pursued before the Grand Court already), and the common law will continue to evolve in this regard.

The circumstances in which disclosure can be made have also been expanded. Section 3(1) CIDL offers a more clearly articulated list of the circumstances in which disclosure is authorised, and the authorities to whom confidential information can be disclosed without the risk of any civil or criminal liability. These include local tax, law-enforcement and financial regulatory authorities, pursuant to a right or duty created by any other law or regulation of the Cayman Islands, such as the *Proceeds of Crime Law (2014 Revision)* and the *Criminal Justice (International Cooperation) Law (2015 Revision)*.

Section 3(2) CIDL is new and introduces a further exemption permitting the disclosure of confidential information relating to the commission of a criminal offence; a failure to comply with a legal obligation; a miscarriage of justice; or corruption, dishonesty or serious maladministration. It also allows for disclosure of confidential information pertaining to a serious threat to the life, health or safety of a person, or in relation to a serious threat to the environment. However, in all such cases, the person making the disclosure must have acted 'in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing'. The CIDL, therefore, effectively introduces a 'whistle-blowing' defence for disclosures of confidential information made in good faith, and is broadly consistent with the common-law defence of a disclosure being made in the public interest.

Helpfully, s4 of the Law has been reproduced, largely intact, in the CIDL, with some minor changes to clarify the

intended effect of the section and the role of the Grand Court. As with the Law, the CIDL contains provisions to seek the Court's direction where a person intends, or is required, to give evidence in or in connection with any proceeding. The preservation and clarification of these particular provisions is of great assistance not only to trustees, but also to all whose actions or information may fall within the ambit of the CIDL.

A WELCOME NEW LAW

The repeal of the Law has not in fact removed the protections available to confidential information in the Cayman Islands. Instead, the Law has been retired to make way for the more modern and practical CIDL, which will continue to guard against the unwarranted disclosure of confidential information, without imposing the heavy-handed sanctions so frequently highlighted under the previous regime. Its enactment is a positive development for the jurisdiction, consistent with the steps taken in other areas of Cayman law to shore up global cooperation in the investigation of criminal activity, and recognise the need for both confidentiality in certain circumstances and disclosure in others.



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