

# HOW THE CAYMAN ISLANDS UPDATED ITS CONFIDENTIALITY LAW

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Not so long ago, it used to be considered a good thing if a person's private affairs were kept confidential. The right to privacy was enshrined in conventions and bills of rights in civilised countries.

It still is, of course, but in recent years it has increasingly been overridden and the focus has been on transparency, openness and access to information. To the point where in the Cayman Islands the existence of a law from the 1970s aimed at preserving confidentiality had become a stick for offshore-bashers and an awkward anachronism, no longer consistent with Cayman's position at the forefront of the global move towards transparency, cooperation, mutual assistance and information-sharing with other countries.

The Confidential Relationships (Preservation) Law, originally enacted in 1976, did not intend to widen the ambit of duties of confidentiality (though it arguably did so through imprecise drafting), but sought to reinforce them by imposing criminal penalties for the disclosure of confidential information.

Despite the fact that no one in the 40 years of the law's existence was ever prosecuted, it did have a certain deterrent effect, and had been reported far and wide as Cayman's "banking secrecy law."

Although the only one of its provisions that was ever regularly used was in fact a section authorising disclosure, it was regularly cited by those pursuing a political agenda hostile to international financial centers, as evidence that Cayman was a "secrecy jurisdiction" and a tax haven.

It had to go. So in July 2016, the Confidential Information Disclosure Law, 2016, came into force to repeal and replace the old law — a change widely welcomed by Cayman's legal and financial services community.

But what exactly has changed between the two legislative regimes? The key distinction between the old law and the new is that it is no longer a criminal offense to disclose confidential information.

Under the old law, a person was guilty of an offense and liable to a fine of five thousand dollars and to imprisonment for two years for divulging confidential information. It was also an offense wilfully to obtain or attempt to obtain confidential information. The penalty was doubled for anyone acting for financial gain, who would also be liable to a further fine equal to the reward received and to forfeiture of the reward.

The removal of these criminal offenses does not mean that confidential information can now be freely disclosed. The new law simply returns the whole area of liability for breach of confidence to the realm of the common law and rules of equity, which is where it resides in other jurisdictions, such as England and Wales.

Anyone affected by another person's breach of a duty of confidence will have to institute civil proceedings for damages or other remedies, as indeed they always could, rather than hoping (in vain, as it turned out) that the Cayman prosecuting authorities would pursue criminal sanctions.

The definition of "confidential information" under the new law has been simplified, but it continues to refer to information concerning property, in respect of which a duty of confidence is owed by the recipient of the information to the "principal" or owner of the information.

It would arguably have been better to leave the concept undefined (and therefore to be given its ordinary or natural meaning) given that there is a body of case law on the common law duty of confidence. By defining it, the legislature has, for example, excluded information concerning a person's intentions.

The question of whether a duty of confidence is owed will depend on the particular circumstances. A duty may arise, for example, under an express or implied term of a contract, or may be imposed by the rules of equity as a result of the circumstances in which the information was received.

Again, the extensive case law on the area will be relevant. Where a duty is established, there are several exceptions set out in the new law which specifically permit disclosure of confidential information.

A person will not be in breach of any duty of confidence if they disclose confidential information in the following circumstances:

1. In compliance with the directions of a court pursuant to section 4;
2. In the normal course of business or with the consent, express or implied, of the principal;
3. In compliance with an order or request of a Cayman authority pursuant to various laws enacted to provide assistance or evidence to international jurisdictions;
4. Pursuant to requests by Cayman authorities including the police, the Director of Public Prosecutions, CIMA, the Financial Reporting Authority and the Anti-Corruption Commission; and
5. In accordance with, or pursuant to, a right or duty created by any other law or regulation (which encompasses disclosure permitted under the Tax Information Authority Law pursuant to international tax information exchange agreements with participating countries).

These exceptions remain relatively unchanged from the old law and are, for the most part, cases where known common law defenses to disclosure would apply. Obviously the consent of the person to whom the duty is owed would always be a defense, and most of the other situations would be covered by the well-established "compulsion of law" defense.

One significant new feature, however, is a "whistleblower" defense. Specific whistleblower legislation is currently under consideration in the Cayman Islands, but is not yet in force. In the meantime section 3(2) of

the new law provides protection for those disclosing confidential information in certain circumstances considered to be in the public interest.

Anyone who discloses confidential information on wrongdoing (which would be widely defined), or in relation to a serious threat to the life, health or safety of a person or the environment has a defense under the new law to an action for breach of the duty of confidence, as long as the person acted in good faith and in the reasonable belief that the information is substantially true and disclosed evidence of such wrongdoing or threat.

Importantly, the new law retains the requirement (under section 4) for seeking court approval for disclosure of confidential information as evidence in any proceeding (whether inside or outside of the Cayman Islands). This appears to be a distinct feature of Cayman Islands law that does not exist in most other common law jurisdictions.

Under that section, a person who intends or is required to disclose confidential information in proceedings (whether in Cayman or elsewhere) is required to apply for directions from the Grand Court before doing so, unless the person has been provided with the express consent of the principal.

This was the most commonly used provision in the old law and that is expected to remain the case in the new law. It is likely to be particularly useful where the intended disclosure is not a matter of obligation, or where the obligation to disclose arises under foreign law, rather than Cayman law, as in those cases the common law "compulsion of law" may not be available.

The new law brings Cayman into line with other jurisdictions in this area, and whilst legitimate confidentiality will continue to be protected by contractual and other obligations, it removes the stigma of secrecy. It is one of a series of steps taken by the Cayman Islands to demonstrate cooperation with international organisations.

Cayman has also signed 36 tax information exchange agreements with various countries, 29 of which have already come into force, and a further 15 are in the process of being negotiated. Further, it has made commitments to introduce a new data protection law, which will be developed in line with international best practices, and to the development of a new global standard for the exchange of beneficial ownership information on companies and other business organisations.

The implementation of these laws or standards may result in further amendments to the law on confidentiality in due course, so continued movement in this direction is expected.

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