

CAYMAN ISLANDS



CIVIL PROCEEDINGS (CLOSED MATERIAL PROCEDURES) BILL, 2023

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A BILL FOR AN ACT TO PROVIDE FOR THE USE OF CLOSED MATERIAL PROCEDURES IN CIVIL PROCEEDINGS; TO PROVIDE FOR THE APPOINTMENT OF SPECIAL ADVOCATES; AND FOR INCIDENTAL AND CONNECTED PURPOSES

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Memorandum of OBJECTS AND REASONS

This Bill seeks to provide for the use of closed material procedures in civil proceedings in the Islands and to provide for the appointment of special advocates. Closed material procedures are utilized in civil proceedings to facilitate the court's consideration of sensitive material or information which, if disclosed publicly, would risk harming national security or other public interests.

Clause 1 provides the short title of the legislation.

Clause 2 provides for the definition of words used in the legislation.

Clause 3 provides for the making of a declaration, pursuant to an application by the Attorney General, any party to the proceedings or by the court's own motion, that the proceedings are such that a closed material application may be made. The court may make such a declaration where two conditions are met. The first condition is either —

- (a) where a party to the proceedings is being required to disclose sensitive material to another person; or
- (b) where a party to the proceedings would be required to make a disclosure were it not for, among other things, the possibility that the evidence may tend to disclose the contents of intercepted communications.

The second condition is that it is in the interests of fair and effective administration of justice to make such a declaration.

Clause 4 provides for the review and revocation of the declaration made by the court. The court may at any time revoke the declaration if it considers that the declaration is no longer in the interests of the fair and effective administration of justice.

Clause 5 provides for the making of the related rules so that the relevant parties are able to make the requisite applications to the court for permission not to disclose material except to the court, the special advocate and in appropriate cases, to the Attorney General.

Clause 6 provides for the appointment of special advocates. The special advocate is a person appointed by the Attorney General to represent the interests of a party in proceedings under section 3 from which the party and the party's legal representative is excluded.

Clauses 7 and 8 provides further for the making of rules under the legislation.

Clause 9 provides for the disclosure of sensitive information in specified situations. A court may not, in the exercise of its residual disclosure jurisdiction, order the disclosure of sensitive information. Sensitive information means, among other things, information obtained from an intelligence service or information specified in a certificate issued by the Governor as information that a specified party should not be ordered to disclose.



Clause 10 provides for the review by a relevant court of a certificate issued by the Governor under section 9.

Clause 11 provides for the persons who may act as special advocates. The Attorney General may publish a list of persons who may act as special advocates and shall ensure that special advocates are provided with adequate administrative support to carry out the role of special advocate.

Clauses 12 provides for the making of regulations.

Clause 13 provides for the powers of the Rules Committee which may be exercised under the legislation.

Clause 14 provides that the special advocate is not liable for acts done or omitted in the discharge of the functions of the special advocate under the legislation unless it is shown that the acts or omissions were in bad faith.

Clause 15 provides for reports on the use of the closed material procedure by the Attorney General to the Parliament.

Clause 16 provides for the review of sections 3 to 8 of the legislation within five years of the legislation coming into force. The reviewer is require to submit the report to the Governor.

Clause 17 provides for transitional arrangements. The legislation applies to matters or proceedings in any court that may be pending or in progress immediately before the legislation comes into force and parties to such matters or proceedings may avail themselves of a special advocate, the closed material procedure and any rights or obligations under the legislation.



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ENACTED by the Legislature of the Cayman Islands.

Short title

1. This Act may be cited as the Civil Proceedings (Closed Material Procedures) Act, 2023.

Interpretation

2. (1) In this Act —

“**relevant civil proceedings**” means any proceedings (other than criminal proceedings) before —

- (a) the Grand Court; or
- (b) the Court of Appeal;

“**relevant person**” has the meaning given by section 3(8) and includes any person treated as a relevant person by any enactment;

“**section 3 proceedings**” has the meaning given by section 3(1) and includes any proceedings treated as section 3 proceedings in any enactment;

“**sensitive material**” means material the disclosure of which would be damaging to the interests of national security or other public interests; and

“**special advocate**” has the meaning given by section 6(1).

- (2) Nothing in sections 3 to 10 and this section (or in any provision made by virtue of them) —
 - (a) restricts the power to make rules of court or the matters to be taken into account when doing so;
 - (b) affects the common law rules as to the withholding, on grounds of public interest immunity, of any material in any proceedings; or
 - (c) is to be read as requiring a court to act in a manner inconsistent with section 7 of the Schedule to the Cayman Islands Constitution Order 2009.
- (3) References to a party’s legal representative do not include a person appointed as a special advocate.

Declaration permitting closed material applications in civil proceedings

3. (1) A court seised of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.
- (2) The court may make a declaration under subsection (1) on the application of —
 - (a) the Attorney General whether or not the Attorney General is a party to the proceedings; or
 - (b) any party to the proceedings,or may make the declaration of its own motion.
- (3) The court may make the declaration under subsection (1) if it considers that the two conditions set out in subsections (4) and (5) are met.
- (4) The first condition referred to in subsection (3) is —
 - (a) that a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings); or
 - (b) that a party to the proceedings would be required to make such a disclosure were it not for one or more of the following —
 - (i) the possibility of a claim for public interest immunity in relation to the material;
 - (ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material;
 - (iii) the evidence may tend to disclose the contents of intercepted communications; or



- (iv) an enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section.
- (5) The second condition referred to in subsection (3) is that it is in the interests of the fair and effective administration of justice to make a declaration.
- (6) The two conditions are met if the court considers that they are met in relation to any material that would be required to be disclosed in the course of the proceedings (and an application under subsection (2)(a) need not be based on all of the material that might meet the conditions or on all of the material that the applicant would be required to disclose).
- (7) The court shall not consider an application by the Attorney General under subsection (2)(a) unless it is satisfied that the Attorney General has, before making the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based.
- (8) A declaration under this section shall identify a party to the proceedings who would be required to disclose the sensitive material (in this Act referred to as “**a relevant person**”).
- (9) Rules of court shall —
- (a) provide for notification to the Attorney General by a party to relevant civil proceedings, or by the court concerned, of proceedings to which a declaration under this section may be relevant;
 - (b) provide for a stay of relevant civil proceedings, whether on an application by a party to the proceedings or by the court concerned of its own motion, where a person is considering whether to apply for a declaration under this section;
 - (c) provide for the Attorney General, if not a party to proceedings in relation to which there is a declaration under this section or proceedings for or about such a declaration, to be joined as a party to the proceedings;
 - (d) require a person making an application under subsection (2), to give notice of the person’s application to every other person entitled to make such an application in relation to the relevant civil proceedings; and
 - (e) require the applicant to inform every other such person of the outcome of the application.
- (10) In this section, “**closed material application**” means an application of the kind mentioned in section 5(1)(a).

Review and revocation of declaration under section 3

4. (1) This section applies where a court seised of relevant civil proceedings has made a declaration under section 3.

- (2) The court shall keep the declaration under review, and may at any time revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.
- (3) The court shall undertake a formal review of the declaration once the pre-trial disclosure exercise in the proceedings has been completed, and shall revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.
- (4) The court may revoke a declaration in accordance with subsection (2) or (3) —
 - (a) on the application of—
 - (i) the Attorney General (whether or not the Attorney General is a party to the proceedings), or
 - (ii) any party to the proceedings, or
 - (b) of its own motion.
- (5) In deciding for the purposes of subsection (2) or (3) whether a declaration continues to be in the interests of the fair and effective administration of justice in the proceedings, the court shall consider all of the material that has been put before it in the course of the proceedings and not just the material on which the decision to make the declaration was based.
- (6) The Rules Committee shall make rules providing for —
 - (a) how a formal review is to be conducted under subsection (3); and
 - (b) when the pre-trial disclosure exercise is to be considered to have been completed for the purposes of subsection (3).

Determination by court of applications in section 3 proceedings

5. (1) The Rules Committee in providing for any relevant civil proceedings in relation to which there is a declaration under section 3, (“section 3 proceedings”) shall ensure that —
 - (a) a relevant person has the opportunity to make an application to the court for permission not to disclose material otherwise than to —
 - (i) the court;
 - (ii) any person appointed as a special advocate; and
 - (iii) where the Attorney General is not the relevant person but is a party to the proceedings, the Attorney General;
 - (b) such an application is always considered in the absence of every other party to the proceedings and every other party's legal representative;
 - (c) the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security;



- (d) if permission is given by the court not to disclose material, it shall consider requiring the relevant person to provide a summary of the material to every other party to the proceedings and every other party's legal representative;
 - (e) the court is required to ensure that the summary under paragraph (d) does not contain material the disclosure of which would be damaging to the interests of national security.
- (2) Rules of court relating to section 3 proceedings shall ensure that provision to the effect mentioned in subsection (3) applies in cases where a relevant person —
- (a) does not receive the permission of the court to withhold material, but elects not to disclose it; or
 - (b) is required to provide another party to the proceedings with a summary of material that is withheld, but elects not to provide the summary.
- (3) The court shall be authorized if it considers that the material, or anything that is required to be summarized, might adversely affect the relevant person's case or support the case of another party to the proceedings, to direct that the relevant person —
- (a) is not to rely on such points in that person's case; or
 - (b) is to make such concessions or take such other steps as the court may specify; or
 - (c) in any other case, ensure that the relevant person does not rely on the material or on that which is required to be summarized.

Special advocate

6. (1) The Attorney General may appoint a person to represent the interests of a party in any section 3 proceedings from which the party, and any legal representative of the party, is excluded.
- (2) A person appointed under subsection (1) is referred to in this section as appointed as a "special advocate".
- (3) A person may be appointed as a special advocate if —
- (a) the person is appointed to the Attorney General's Special Advocate's Panel in the United Kingdom and is nominated by the Attorney General; or
 - (b) the person is admitted to practise in accordance with sections 3 and 4 of the *Legal Practitioners Act (2022 Revision)* and is nominated by the Attorney General.
- (4) For the purposes of this Act, section 15 of the *Legal Practitioners Act (2022 Revision)* applies to persons appointed as special advocates under this section.
- (5) The special advocate's role is to protect the interests of the excluded person in any proceedings referred to under section 3 or 9 when information or other

evidence is heard in the absence of the public and the excluded person and the excluded person's counsel.

- (6) A special advocate may challenge —
 - (a) the relevant person's claim that the disclosure of information or other evidence would be damaging to national security or endanger the safety of any person; and
 - (b) the relevance, reliability and sufficiency of information or other evidence that is provided by the relevant person and is not disclosed to the excluded person or the excluded person's counsel and the weight to be given to it.
- (7) For the purposes of this Act, the special advocate is not a party to the proceedings and the relationship between the special advocate and the excluded person is not that of lawyer and client.
- (8) Notwithstanding subsection (7), communications between the excluded person or the excluded person's counsel and the special advocate that would be subject to lawyer-client privilege if the relationship were one of lawyer and client is deemed to be subject to lawyer-client privilege.
- (9) In respect of communication referred to subsection (8), the special advocate is not a compellable witness in any proceeding.
- (10) In this section, "**excluded person**" means a person or party who is not permitted to see the sensitive material and whose interests in proceedings under sections 3 or 9 are represented by a special advocate appointed under section 6 of this Act.
- (11) A special advocate may —
 - (a) make oral and written submissions with respect to the information and other evidence that is provided by the relevant person and is not disclosed to the excluded person and the excluded person's counsel;
 - (b) participate in, and cross-examine witnesses who testify during any part of the proceedings that is held in the absence of the public and the excluded person and the excluded person's counsel; and
 - (c) exercise, with the court's authorization, any other powers that are necessary to protect the interests of the excluded person.

Saving for disclosure rules

7. Subject to sections 5, 6 and 8, rules of court relating to section 3 proceedings shall ensure that the rules of disclosure otherwise applicable to those proceedings continue to apply in relation to the disclosure of material by a relevant person.



General provision about section 3 proceedings

8. (1) The Rules Committee making rules of court relating to section 3 proceedings shall have regard to the need to ensure that disclosures of information are not made where they would be damaging to the interests of national security.
- (2) Rules of court relating to section 3 proceedings may provide for —
- (a) the mode of proof and about evidence in the proceedings;
 - (b) enabling or requiring the proceedings to be determined without a hearing;
 - (c) legal representation in the proceedings;
 - (d) enabling the proceedings to take place without full particulars of the reasons for decisions in the proceedings being given to a party to the proceedings or to any legal representative of that party;
 - (e) enabling the court concerned to conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party);
 - (f) the functions of a person appointed as a special advocate; and
 - (g) enabling the court to give a party to the proceedings a summary of evidence taken in the party's absence.
- (3) In subsection (2), references to a party to the proceedings do not include the relevant person concerned and (if the Attorney General is not the relevant person but is a party to the proceedings) the Attorney General.
- (4) The following proceedings are to be treated as section 3 proceedings for the purposes of sections 5 to 7, this section and sections 9, 15 and 16 —
- (a) proceedings on, or in relation to, an application for a declaration under section 3;
 - (b) proceedings on, or in relation to, a decision of the court to make a declaration under that section of its own motion;
 - (c) proceedings on, or in relation to, an application for a revocation under section 4; and
 - (d) proceedings on, or in relation to, a decision of the court to make a revocation under that section of its own motion.
- (5) In proceedings treated as section 3 proceedings by virtue of subsection (4), a “**relevant person**”, for the purposes of sections 5 to 7, this section and sections 9, 15 and 16, is a person who would be required to disclose sensitive material in the course of the proceedings.

Disclosure proceedings: “Norwich Pharmacal” and similar jurisdictions

9. (1) This section applies where, by way of civil proceedings, a person (“A”) seeks the disclosure of information by another person (“B”) on the grounds that —

- (a) wrongdoing by another person (“C”) has, or may have, occurred;
 - (b) B was involved with the carrying out of the wrongdoing (whether innocently or not); and
 - (c) the disclosure is reasonably necessary to enable redress to be obtained or a defence to be relied on in connection with the wrongdoing.
- (2) A court may not, in exercise of its residual disclosure jurisdiction, order the disclosure of information sought (whether that disclosure would be to A or to another person) if the information is sensitive information.
- (3) For the purposes of this section, “**sensitive information**” means information —
- (a) held by an intelligence service;
 - (b) obtained from, or held on behalf of, an intelligence service;
 - (c) derived in whole or part from information obtained from, or held on behalf of, an intelligence service;
 - (d) relating to an intelligence service; or
 - (e) specified or described in a certificate issued by the Governor, in relation to the proceedings, as information which B should not be ordered to disclose.
- (4) The Governor may issue a certificate under subsection (3)(e) only if the Governor considers that it would be contrary to the public interest for B to disclose —
- (a) the information;
 - (b) whether the information exists; or
 - (c) whether B has the information.
- (5) For the purposes of subsection (4), a disclosure is contrary to the public interest if it would cause damage to the interests of national security, international relations or other public interests.
- (6) In this section —
- “**information**” includes —
- (a) information contained in any form of document or stored in any other way; and
 - (b) alleged information;
- “**intelligence service**” means —
- (a) the National Security Council;
 - (b) the Financial Reporting Authority;
 - (c) the Royal Cayman Islands Police Service;
 - (d) the Coast Guard; or
 - (e) the Customs and Border Control Service.



“**obtained**” means obtained directly or indirectly; and

“**residual disclosure jurisdiction**” means any jurisdiction to order the disclosure of information which is not specifically conferred as such a jurisdiction by or under an enactment.

- (7) This section —
- (a) enables the Governor to issue a certificate under subsection (3)(e) where the Governor is B as it enables the Governor to issue such a certificate where another person is B; and
 - (b) does not restrict any other right or privilege that the Governor can claim in order to resist or challenge an application for the disclosure of information.
- (8) The Cabinet may, by order, amend the definition of “**intelligence service**”.

Review of certification

- 10.** (1) Where the Governor has issued a certificate under section 9(3)(e) in relation to proceedings, any party to the proceedings may apply to the relevant court to set aside the decision on the ground in subsection (2).
- (2) The ground referred to in subsection (1) is that the Governor ought not to have determined, in relation to the information specified or described in the certificate, that a disclosure by B as mentioned in section 9(4) would be contrary to the public interest.
- (3) In determining whether the decision to issue the certificate should be set aside on the ground in subsection (2), the relevant court shall apply the principles which would be applied in judicial review proceedings.
- (4) Proceedings arising by virtue of this section are to be treated as section 3 proceedings for the purposes of sections 5, 6, 7, 8, 15 and 16.
- (5) Sections 5, 6, 7, 8, 15 and 16 apply in relation to proceedings treated as section 3 proceedings by subsection (4) as if —
- (a) the Governor were the relevant person; and
 - (b) the references to the interests of national security in sections 5, 8 and 15 are references to the interests of national security of the Islands.
- (6) In this section “**relevant court**” means the court seised of those proceedings.

Persons who may act as special advocates

- 11.** (1) The Attorney General may establish a list of persons who are nominated to act as special advocates and shall publish the list in such manner that the Attorney General considers appropriate to facilitate public access to it.
- (2) The Attorney General shall ensure that special advocates are provided with adequate administrative support and resources to carry out the role of special advocate.

Regulations

- 12.** (1) The Cabinet may make regulations —
- (a) prescribing anything that is required by this Act to be prescribed; or
 - (b) providing for such matters as may be necessary or convenient for carrying out or giving effect to this Act and its administration.
- (2) The Cabinet may by regulations make such transitional or saving provisions as the Cabinet considers appropriate in connection with the coming into force of any provision of this Act.

Rules Committee

- 13.** The Rules Committee referred to in section 19 of the *Grand Court Act (2015 Revision)* shall exercise the powers set out in that section for the making of rules for the purposes of this Act.

Immunity

- 14.** A special advocate is not liable for acts done or omitted in the discharge or purported discharge of the special advocate's respective functions under this Act unless it is shown that the act or omission was in bad faith.

Reports on the use of closed material procedure

- 15.** (1) The Attorney General shall —
- (a) prepare a report on the matters mentioned in subsection (2) for —
 - (i) the period of twelve months beginning with the day on which section 3 comes into force; and
 - (ii) every subsequent twelve month period; and
 - (b) lay a copy of each such report before the Parliament.
- (2) The matters referred to in subsection (1)(a) are —
- (a) the number of applications made during the reporting period —
 - (i) by the Attorney General under section 3(2)(a) or 4(4)(a)(i); and
 - (ii) by persons other than the Attorney General under section 3(2)(b) or 4(4)(a)(ii);
 - (b) the number of declarations made by the court under section 3(1), and the number of revocations made by the court under section 4(2) or (3), during the reporting period —
 - (i) in response to applications made by the Attorney General during the reporting period;
 - (ii) in response to applications made by the Attorney General during previous reporting periods;



- (iii) in response to applications made by persons other than the Attorney General during the reporting period;
 - (iv) in response to applications made by persons other than the Attorney General during previous reporting periods; and
 - (v) of the court's own motion;
 - (c) the number of final judgments given in section 3 proceedings during the reporting period which are closed judgments; and
 - (d) the number of such judgments which are not closed judgments.
- (3) The report may also include such other matters as the Attorney General considers appropriate.
- (4) The duty under subsection (1) in relation to the preparation and laying of a report shall be carried out as soon as reasonably practicable after the end of the twelve month period to which the report relates.
- (5) In this section —
- “**closed judgment**” means a judgment that is not made available, or fully available, to the public; and
- “**final judgment**”, in relation to section 3 proceedings, means a final judgment to determine the proceedings.

Review of sections 3 to 8

- 16.** (1) The Governor shall appoint a person to review the operation of sections 3 to 8, referred to in this section as the “reviewer”.
- (2) The reviewer shall carry out a review of the operation of sections 3 to 8 in respect of the period of five years beginning with the day on which section 3 comes into force.
- (3) The review shall be completed as soon as reasonably practicable after the end of the period to which the review relates.
- (4) As soon as reasonably practicable after completing a review under this section, the reviewer shall send to the Governor a report on its outcome.
- (5) Subject to subsection (6), upon review of the report the Governor shall send a copy of it to the Attorney General who shall lay it in the Parliament.
- (6) Before the copy of the report is laid before the Parliament by the Attorney General, the Governor may, after consulting the reviewer, exclude from the copy any part of the report that would, in the opinion of the Governor, be damaging to the interests of national security or endanger the safety of any person if it were included in the copy laid before the Parliament.
- (7) The Governor may compensate the reviewer —

