The following reference number should be quoted in any reply

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November 10 2011

H.E. The Governor
Government Administration Building
Elgin Avenue, George Town
Grand Cayman KY1-9000
GRAND CAYMAN

Dear Governor

Re: Complaint made by Mr. Martin Bridger concerning Operation Tempura

This is a somewhat delayed response to your letter of 7th March 2011 (with which you conveyed your written reasons for refusing the complaint). In light of your decision to refuse the complaint and the further decision to release your reasons to the complainant, the need for an urgent response was not indicated.

However, having recently found the time to study your reasons, I feel obliged to write, for the sake of the record (at least for the time being), in the following terms. I ask that this letter be made a part of any record to which your reasons for decision relate.

Your reasons for decisions deal at length with my judgments of the 27th February 2008 and 4th April 2008 opining, among other things, that the judgments may be erroneous in concluding that no offences had been shown to have been committed by Messrs. Kernohan and Jones. Specifically as alleged, that no offence was shown under the Penal Code section 277(1) (criminal trespass); section 95 (abuse of office); or section 121 (wilful disobedience of the law).

I wish for it to be recorded that I do not accept the premises of your reasoning in this regard. I am obliged to make the following points for the record now:

(i) The argument – that the above-referenced offences might have been committed by Kernohan and Jones – proceeds in your reasons upon the premise that they both knew that they were acting unlawfully; knowledge that they should have acquired from definitive advice of the Attorney General, to the effect that enlisting the entry into the C.N.N. premises by Messrs Martin and Evans would involve a breach of the law.

This is a pivotal issue going to the states of mind of Kernohan and Jones and therefore to the question of whether they had the necessary criminal intent ("*mens rea")* to commit any offence.
I am obliged to note, however, that my understanding of the advice that Kernohan and Jones had received is different, as will be gleaned from paragraphs 21 and 24 of the judgment of 4th April 2008 (copy enclosed as reported in the CILRs of 2008).

I trust you will recognise that if Kernohan and Jones did not have the benefit of definitive and conclusive advice to the effect that the enlistment of Martin and Evans would constitute a criminal offence, then the basis upon which your reasons rests would be altered fundamentally.

Certainly – and as paragraphs 9 and 10 of the judgment also reflects – on the first application for the warrants, it was not suggested on behalf of Mr. Bridger that Kernohan and Jones were acting other than *bona fide* in the execution of their duties. The suggestion to the contrary – that they had some ulterior motive for enlisting Martin and Evans – emerged only on the re-application and only after statements had been obtained from Mr. Seales and Dep. Supt Ennis. Those statements are treated in your reasons as having patently revealed the implausibleness of the allegations raised by Mr. Lynden Martin – the very allegations which had earlier caused Kernohan and Jones to enlist his entry into the CNN premises. Your reasoning then proceeds on the basis that Kernohan and Jones should therefore have known better than to rely on Martin.

But that kind of *ex post facto* rationalization is fraught with potential unfairness as is shown by a question put to Mr. Bridger upon his application for the search warrants that still remains unanswered: *"what possible reason (or motive) could Kernohan and Jones have had for enlisting Martin and Evans, if they did not believe Martin that the alleged material was to be found in the C.N.N. premises?"*(See in this regard especially paragraphs 82-84 of the judgment).

Your reasons fail completely to address the implications of the absence of an answer to that question. If the obvious answer is that they could have had no other reason or motive, then the whole approach to the question whether they committed an offence changes and then also a proper understanding of the judgment can be attained.

A further misunderstanding of this aspect of the judgment is apparent from your opinion that the judgment would purport to exempt police officers as a class from liability for criminal trespass (your paragraph 179). A proper understanding of the judgment would instead support the very different proposition that police officers, who may be involved in entry into premises without the consent of the owner or occupier and without a warrant but who are acting *bona fide* in the execution of their duties to interdict or prevent serious crime, will not be subject to criminal liability for criminal trespass, because they would lack the *mens rea* of that crime. They will, however, nonetheless be at risk of liability for civil trespass.

The latter proposition holds true in Cayman as it would in England because the offence of criminal trespass under Section 277 of the Penal Code is not prescribed as an offence of strict liability. It therefore requires proof at least of a basic criminal intention to enter unlawfully. The state of mind of the officer as he acts will therefore be of central importance. This appears to be accepted at paragraph 172 of your reasoning yet from paragraph 174-178, a different premise is used – (I would say as derived ~~—~~from choosing the analysis at paragraph 173(b) instead of that at paragraph 173(a)) for arriving at your conclusion.

As I seek to explain above, if the analysis at your paragraph 173(a) were taken coupled with a *bon~~a~~ fide* belief held by Kernohan and Jones that Martin and Evans were assisting in recovering evidence of serious criminality, then no offence of trespass could be found.

(ii) Your reasons proceed upon a further fundamental misunderstanding (and so mischaracterization) of the second basis in law discussed in the judgment for refusal of the warrants.

It is explained beginning at paragraph 81 of the judgment of 4th April 2008 referencing section 26 of the Criminal Procedure Code: *"Before I might issue a search warrant, I must remember that pursuant to the Criminal Procedure Code (2006 Revision) section 26, I must be satisfied, in fact or upon reasonable suspicion, of two things: (i) that an offence has been committed;* and *(ii) that anything upon, by or in respect of which that offence has been committed or anything necessary for the conduct of an investigation into that offence is in the place to be searched."*

I emphasise the second disjunctive phrase of subparagraph (ii). The first phrase is not relevant to this case. The reasoning in the judgment is not, as your reasons suppose (for instance at paragraph 216), merely that *"The Chief Justice's conclusion that the police were embarking on a "fishing expedition", must have been firmly influenced by his view that there was no prima facie case of criminality in respect of Kernohan and Jones. This is because he was prepared to grant a search warrant in respect of Dixon."*

This is flawed reasoning. For, even if an offence had been shown to have been committed by Kernohan and Jones, the requirements of sub-paragraph (ii) also had to be satisfied.

Thus, the application for warrants was refused for this further reason: by the time of the search warrant application, it was already plain that Mr. Bridger and his team knew all they could reasonably expect to know about the enlisting of the entry into CNN. This they had learnt from Kernohan and Jones themselves. Bridger and his team were, from the outset, presented with full witness statements from Kernohan, Jones, Dixon, and Evans of what they had done and written accounts by Martin (addressed to the Governor), of the allegations which he had raised. Indeed, Bridger

and his team had been brought to the Islands to further the very investigation that the enlisted entry into the C.N.N. premises had left unresolved.

Kernohan and Jones had therefore admitted in writing to their enlistment of Martin and Evans to enter without a search warrant. If Kernohan and Jones had, in so doing, committed any offence, the case against them was therefore already "open and shut", by the time Mr. Bridger and his team arrived. The case was however handed over to them by Kernohan, apparently quite confident that he and Jones had done nothing wrong.

So then, what was it, in terms of sub-paragraph (ii) of section 26, that Mr. Bridger and his team had hoped to obtain that would have been necessary to the conduct of an investigation against Kernohan and Jones that they did not already have? An answer to that question also put to Mr. Bridger by me on the application was never forthcoming. Nor, in reality, should a plausible answer have been expected: there simply was no basis for thinking that Kernohan and Jones had enlisted Martin and Evans other than for the reasons stated by Martin and Evans themselves. Indeed, it was that very entry by them enlisted by Kernohan and Jones, that was said to have constituted some kind of criminal offence by Kernohan and Jones.

That lack of any reasonable basis for thinking that something necessary for the investigation into the CNN entry was to be found by the invasive measure of search warrants was, ultimately, the basis for the conclusion in the judgment that the application for them was a "fishing expedition" – a trawling exercise to see whether something otherwise potentially incriminating or embarrassing to the subjects could be found.

Even if nothing could eventually be found, the very issuance of warrants against office holders like Kernohan and Jones would itself have been damaging not only to their reputations but to their ability to remain in office as the investigation against them would have become sanctioned by the Court.

These are reasons why "fishing expeditions" are not permitted by the law and are not a legitimate basis for the issuance of search warrants. The applications had to be and were refused, for this reason as well.

Finally, I must record my concerns here (already expressed in emails) about the legal and constitutional implications of the exercise undertaken in your reasons, of critiquing and criticizing final and conclusive judgments of this Court. This was an exercise undertaken in response to a complaint that (in the case of the Chief Justice) in large part complained about "*deliberate manipulation of the law and partiality or bias on his part in his dealing with the search warrant application"*.

While your decision to reject these complaints was welcomed (and, of course, correct), the question must be asked, what if you had decided otherwise?

I think the question only has to be asked for the obvious troubling answer to present itself: there would then purport to follow an enquiry inevitably such as to undermine these settled judgments of a Superior Court of Record, which have binding effect in law unless and until set aside by way of appeal. These judgments (and for these purposes I include that of Cresswell J.) were never challenged by legal means by way of appeal or otherwise and so have been and still remain in full force and effect. The notion of disciplinary proceedings by the Governor on grounds of misconduct for "*bias*", "*partiality*" or "*manipulation of the law*" in the manner in which such judgments were arrived at and delivered, would have involved potentially nothing less than a transgression of the constitutional bounds and safeguards of the separation of powers and judicial independence.

Moreover, if indeed they are unappealable; the search warrant judgments are not unique in this respect. Take for instance, the position with respect to judgments of this court relating to election petitions. And so, the question whether there was a right of appeal was and remains irrelevant. Indeed, a judgment must be accorded its proper observance and respect even more so when it is treated by the law as being unappealable, final and settled.

There were (and could have been) no separate allegations of ~~criminal~~ misconduct against me in this regard. The criticism of my conduct was and could only have been attempted therefore by seeking a link with my dealing with the search warrant applications. It followed that the complaint was and could have been nothing but a collateral attack upon the judgments themselves. It was patently so from the outset and, for that reason, the complaint should have been dismissed *in limine*, without any kind of "investigation" or "inquiry".

I seek for it to be understood that I remain firmly of this view.

It is also my view that the complaint itself was nothing but an artifice for deflecting attention away from the need for an inquiry into the conduct of Mr. Bridger and company in respect of Operation Tempura. This view is reinforced by the fact that Mr. Bridger did all he possibly could to suppress the affidavit he had filed in the earlier court proceedings containing much the same kinds of allegations as did his complaint against me and Henderson J.; yet his complaint did not emerge until it had become apparent that his efforts to suppress that affidavit would fail. Then too, for the first time, he raised his even more patently specious allegations against Cresswell J. as part of his complaint.

For these reasons I also remain firmly of the view that the conduct of Mr. Bridger in particular, should not have been allowed by your office and by those advising you, to go without reproach.

Yours sincerely

Hon. Anthony Smellie
Chief Justice