TURKS AND CAICOS ISLANDS

# CHAPTER 1.08

# COMPLAINTS COMMISSIONER (OMBUDSMAN) ORDINANCE

**Revised Edition**
showing the law as at 31 March 2018

This is a revised edition of the law, prepared by the Law Revision Commissioner under the authority of the Revised Edition of the Laws Ordinance.

This edition contains a consolidation of the following laws—


Page

**COMPLAINTS COMMISSIONER (OMBUDSMAN) ORDINANCE** 3

Ordinance 12 of 2015 .. in force 1 August 2015 (L.N. 47/2015)

Amended by Ordinance 10 of 2017 .. in force 15 September 2017 (L.N. 32/2017)


No Subsidiary Legislation has been made under this Ordinance


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# CHAPTER 1.08

# COMPLAINTS COMMISSIONER (OMBUDSMAN) ORDINANCE

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# CHAPTER 1.08

# COMPLAINTS COMMISSIONER (OMBUDSMAN) ORDINANCE

*(Ordinances 12 of 2015 and 10 of 2017)*

AN ORDINANCE TO PROVIDE FOR THE OFFICE OF THE COMPLAINTS COMMISSIONER; TO MAKE PROVISION FOR THE APPOINTMENT, FUNCTIONS AND JURISDICTION OF THE COMPLAINTS COMMISSIONER; FOR THE INVESTIGATION OF ADMINISTRATIVE ACTION TAKEN ON BEHALF OF THE GOVERNMENT AND CERTAIN BODIES; AND FOR CONNECTED PURPOSES.

## Commencement

*[1 August 2015]*

## PART I

### PRELIMINARY

## Short title

**1**. This Ordinance may be cited as the Complaints Commissioner (Ombudsman) Ordinance.

## Interpretation

**2**. (1) In this Ordinance—

"administrative action" means any action taken by or on behalf of an authority in the exercise of its administrative functions and includes—

*(a)* a decision or an act;

*(b)* a failure to make a decision or do an act, including a failure to provide reasons for a decision;

*(c)* a recommendation;

*(d)* any action taken because of a recommendation; or

*(e)* a failure to make a recommendation;

"authority' means a government department or other body to which this Ordinance applies;

"Commission" means the office of the Complaints Commissioner, including the Complaints Commissioner and the staff;

"Commissioner" means the Complaints Commissioner whose appointment is referred to in section 4;

"complaint" means a complaint made under this Ordinance;

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"complainant" means a person aggrieved by maladministration or a person who makes a complaint under this Ordinance;

"Court" means the Magistrate's Court;

"investigation" means an investigation under this Ordinance;

"maladministration" means inefficient, bad or improper administration, and includes—

*(a)* unreasonable delay in dealing with the subject matter of an investigation;

*(b)* abuse of any power (including any discretionary power); or

*(c)* administrative action that was—

(i) contrary to law;

(ii) unfair, oppressive or improperly discriminatory or based on procedures that are unfair, oppressive or improperly discriminatory;

(iii) based wholly or partly on a mistake of law or fact or irrelevant grounds;

(iv) related to the application of arbitrary or unreasonable procedures; or

(v) negligent;

"officer" includes an employee.

(2) Reference to a government department, authority or body of persons includes a reference to Ministers, members or officers of that department, authority or body of persons.

(3) Nothing in this Ordinance authorises or requires the Commissioner to question the merits of a decision taken without maladministration by an authority in the exercise of a decision vested in that authority.

## Application

**3**. (1) This Ordinance applies to—

*(a)* government departments;

*(b)* government boards;

*(c)* statutory bodies; and

*(d)* any other corporation or body—

(i) established by an Ordinance; or

(ii) whose revenues are appropriated by the House of Assembly, or whose fees or charges of any other description are authorised by the House of Assembly.

(2) This Ordinance does not apply to the persons and bodies listed in Schedule 1.

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PART II

OFFICE OF COMMISSIONER, FUNCTIONS AND JURISDICTION

## Office of Complaints Commissioner

**4**. (1) The Complaints Commissioner is appointed in terms of section 99 of the Constitution.

(2) The Commissioner may appoint such officers as are required for the proper performance of the functions of the Commission.

(3) The Commissioner may in addition, engage from time to time, technical or professional advisors as he considers necessary to assist in the discharge of his functions.

(4) A function of the Commissioner under this Ordinance may be performed by an officer of the Commission authorised for that purpose by the Commissioner.

## Oath of secrecy

**5.** The Commissioner and an officer of the Commission shall, before assuming the functions of his office, make and subscribe to the oath of secrecy in the Form set out in Schedule 2.

## Funds, accounts and audit

**6.** (1) The funds of the Commission shall consist of funds provided to the Commission by or under any appropriation law.

(2) The Commission shall keep proper accounts of all its transactions to the satisfaction of the Permanent Secretary, Finance and in a form that conforms to internationally recognised standards.

(3) The Commission shall have regard to and comply with its obligation to prepare and submit its annual budget and its financial statements for auditing within the timeframe required under the Public Finance Management Ordinance and National Audit Ordinance.

(4) Section 44 of the Public Finance Management Ordinance shall apply in relation to the unexpended balance of moneys appropriated to the Commission for any financial year. *(Inserted by Ord. 10 of 2017)*

## Functions and jurisdiction

**7**. (1) The functions of the Commissioner are—

*(a)* to investigate an administrative action of an authority for the purpose of deciding whether there is evidence of maladministration on the part of the authority;

*(b)* following an investigation, to make recommendations to the authority concerning an administrative action that formed the subject of the investigation and, generally, to recommend ways of

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improving the authority's administrative practices and procedures; and

*(c)* to perform such other powers as may be conferred on him under this Ordinance or any other Ordinance.

(2) Subject to this Ordinance, the Commissioner may investigate any administrative action taken by or on behalf of an authority—

*(a)* where a complaint is made by a person who claims to have been treated unjustly as a result of maladministration arising from or in connection with the administrative action taken by the authority; or

*(b)* on his own motion, where he—

(i) considers that he ought to investigate any matter on the ground that a person or body of persons has or may have sustained an injustice as a result of maladministration; or

(ii) is satisfied that there are reasonable grounds to carry out an investigation in the public interest.

(3) Subject to this Ordinance, in determining whether to initiate, continue or discontinue an investigation, the Commissioner shall act in his own discretion and any question whether a complaint is duly made under this Ordinance shall be determined by the Commissioner.

### Restrictions on matters for investigation

**8**. (1) The Commissioner shall not conduct an investigation on any matter—

*(a)* where the complainant has or had a right of appeal, reference or review to or before a tribunal constituted by or under any Ordinance;

*(b)* where the complainant has had or had a remedy by way of proceedings in any court; or

*(c)* set out in Schedule 3.

(2) Notwithstanding subsection (1), the Commissioner may investigate a matter although the complainant has or had a right or remedy before a tribunal or by way of proceedings in any court, if the Commissioner is satisfied that in the particular circumstances it is not reasonable to expect the complainant to take or to have taken such proceedings.

(3) The Commissioner shall not investigate—

*(a)* a matter which relates to corruption and falls within the powers of the Integrity Commission; or

*(b)* a matter which falls within the powers of the Human Rights Commission.

(4) The Commissioner shall—

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*(a)* on receipt of a complaint which it is evident falls within the powers referred to under subsection (3), refer the complainant to the relevant authority; or

*(b)* in the course of the investigation, where it becomes apparent that the complaint falls within the powers referred to under subsection (3), transfer the matter to the relevant authority.

## PART III

### COMPLAINTS AND INVESTIGATION PROCESS

### Making a complaint

**9**. (1) A complaint to the Commissioner about an administrative action of an authority shall be made—

*(a)* by an aggrieved individual, but may be made on behalf of that individual by a member of his family or other suitable person if the individual by whom the complaint is to be made is dead or unable to act for himself; or

*(b)* by a body of persons whether incorporated or not, not being—

(i) a body constituted for purposes of the public service or of Government, or for the purposes of carrying on any industry or undertaking or part of an industry or undertaking under national ownership; or

(ii) any other authority or body whose members are appointed by the Government or a government department, or whose revenues consist wholly or mainly of moneys provided by Government.

(2) A complaint—

*(a)* may be made orally, electronically or in writing; and

*(b)* shall be made within one year from the day the complainant first had notice of the matters alleged in the complaint.

(3) A complaint made orally shall be reduced in writing by the officer taking the complaint, and shall be read to the complainant who shall attest his signature to the complaint.

(4) Notwithstanding subsection (2)*(b),* the Commissioner may conduct an investigation not made within the period specified in that subsection if he considers that there are special circumstances which make it proper to do so.

(5) Where a complaint is made to the Commissioner, he shall record—

*(a)* the complainant's name, address and telephone number;

*(b)* the subject matter of the complaint; and

*(c)* the date when the complaint was made.

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(6) A person who is detained in custody or otherwise confined in an institution may make a complaint by informing the person in charge or another person performing the duties in connection with his detention or confinement, that he wishes to make a complaint to the Commissioner.

(7) A person informed of the intention to make a complaint under subsection (6) shall—

*(a)* take all necessary steps to facilitate the making of the complaint and shall provide an unsealed envelope to the person in custody or otherwise confined; and

*(b)* without delay, after receiving the envelope from the person in custody or otherwise confined, seal the envelope and send it sealed to the Commissioner.

(8) A communication from the Commissioner to a person in custody or otherwise confined shall be forwarded to that person in a sealed envelope.

(9) The Commissioner shall write to a complainant acknowledging receipt of the complaint.

## Preliminary inquiries

**10**. For the purposes of determining whether to undertake an investigation, the Commissioner may conduct preliminary inquiries as he considers appropriate.

## When not to investigate

**11**. (1) A complaint shall not be investigated unless the complaint relates to an action—

*(a)* taken in relation to a person while he was present in the Islands, on a ship or aircraft registered in the Islands; or

*(b)* in relation to rights or obligations which accrued or arose in the Islands or on such ship or aircraft.

(2) The Commissioner may decide not to investigate a complaint if he is satisfied that—

*(a)* the complainant knew of the administrative action complained against more than one year before the date when the Commissioner received the complaint;

*(b)* the law or existing administrative procedure provides a remedy adequate in the circumstances for the complainant and, if the complainant has not availed himself of the remedy, there is no reasonable justification for the failure to do so;

*(c)* where the complaint is made on behalf of a body corporate, the body corporate has not authorised the making of the complaint;

*(d)* the subject matter of the complaint is trivial; or

*(e)* the complaint is frivolous, vexatious or not made in good faith.

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(3) The Commissioner may decide not to continue to investigate a complaint if—

*(a)* the complainant has abandoned the complaint—

(i) by failing to advise the Commissioner of a current address or a telephone number at which the Commissioner can contact him; or

(ii) by failing to respond after a reasonable number of attempts by the Commissioner to contact him;

*(b)* the complainant withdraws the complaint; or

*(c)* the complaint is settled or is successfully dealt with by mediation.

(4) Where the Commissioner decides not to investigate or continue to investigate a complaint, he shall notify the complainant and a senior officer of the authority of his decision in writing, and give reasons for the decision.

(5) The Commissioner may indicate in the notice under subsection (4) any other recourse that may be available to the complainant.

## Mediation

**12**. (1) The Commissioner may decide to deal with a complaint by mediation if he is of the opinion, having regard to all the circumstances of the case, that mediation is suitable in such circumstances.

(2) The Commissioner may appoint a person as a mediator for purposes of this Ordinance.

(3) The Commissioner shall not participate in a mediation.

(4) Participation in a mediation by the authority that is the subject of the investigation and the complainant is voluntary, and any party may withdraw at any time.

(5) The mediator may decide to terminate a mediation at any time and, when he does, he shall give reasons for his decision.

(6) If an attempt to deal with a complaint by mediation under this section is unsuccessful—

*(a)* the complaint is to be treated as if the mediation had not taken place; and

*(b)* the mediator is excluded from participating as an investigating officer in any subsequent investigation of the complaint.

(7) Anything said or admitted during a mediation and any document prepared for the purposes of such mediation—

*(a)* shall not be admissible in evidence in any subsequent investigation of the complaint that is the subject of the investigation unless the person who said or admitted the thing, or to whom the document related, consents to its admission; and

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*(b)* shall not be admissible in evidence against a person in any court or at any inquiry or in any other proceedings,

and no evidence in respect of the mediation may be given against any person.

(8) The costs of mediation shall be borne by the Commission.

### Notice of intention to investigate

**13**. (1) If the Commissioner decides to conduct an investigation he shall, before commencing an investigation, give a senior officer of the authority that is the subject of a complaint, and the complainant, notice in writing of the decision.

(2) The notice under subsection (1) shall—

*(a)* inform the senior officer and the complainant of the Commissioner's intention to conduct the investigation;

*(b)* specify the administrative action that is the subject of the investigation;

*(c)* in general terms, inform the senior officer and the complainant of the powers of the Commissioner regarding the investigation; and

*(d)* give the senior officer an opportunity to comment on any allegations contained in the administrative action within fourteen days of receipt of the notice.

### Conduct of investigation

**14**. (1) Subject to this Ordinance, the Commissioner may regulate investigations and proceedings in the manner that he sees fit.

(2) Every investigation shall be conducted in private, except in circumstances where the Commissioner may determine another procedure as he considers appropriate in any particular case.

(3) When conducting an investigation, the Commissioner may—

*(a)* obtain information from any person, and in the manner, he considers appropriate;

*(b)* make such inquiries as he considers appropriate;

*(c)* determine whether a person may be represented by his attorney or otherwise; and

*(d)* on giving reasonable notice to a senior officer in the authority subject to the investigation, and at a reasonable time—

(i) enter the premises occupied by the authority for inspection; and

(ii) subject to sections 15 and 16, carry out in those premises, any investigation which is within his jurisdiction.

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(4) The Commissioner may, if he thinks fit, pay to the complainant or to any other person who attends or furnishes information for purposes of an investigation—

*(a)* sums in respect of expenses properly incurred by them; or

*(b)* compensation for the loss of their time,

in such amounts and subject to such conditions as may be determined by the Government.

(5) If, during the course of an investigation or after an investigation, the Commissioner is of the opinion that there is evidence of a breach of duty or misconduct, or of an offence on the part of an officer of an authority, the Commissioner shall refer the matter to an appropriate authority for further consideration.

(6) Where the Commissioner makes reference to an appropriate authority under subsection (5), proceedings under this Ordinance in respect to any investigation are stayed pending consideration of the matter by the appropriate authority.

(7) The conduct of an investigation under this Ordinance shall not affect any action taken by the appropriate authority, or any power or duty of that authority to take further action concerning any matters subject to investigation.

(8) Where a complainant has been removed from the Islands under the Immigration Ordinance or another enactment, he shall, if the Commissioner directs, be permitted to re-enter and remain in the Islands for the purposes of the investigation, subject to such conditions as the Governor may direct.

## Evidence

**15**. (1) For purposes of an investigation, the Commissioner—

*(a)* may require a Minister, officer or member of the authority subject to investigation, complainant or any other person who in the Commissioner's opinion is able to provide information or produce documents relevant to the investigation, to provide such information or produce such documents;

*(b)* may summon before him and examine on oath or affirmation a person referred to in paragraph *(a)*; and

*(c)* shall have the same powers as the Court in so far as those powers relate to the attendance and examination of witnesses and in respect of the production of documents.

(2) The Commissioner shall not require—

*(a)* a person to provide information or answer any question relating to proceedings or deliberations of Cabinet or any committee of Cabinet;

*(b)* a person to produce any document as relates to proceedings in paragraph *(a)* or that might prejudice the matters mentioned in such proceedings; or

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*(c)* a member of Cabinet to provide information or answer any question.

(3) For purposes of subsection (2), a certificate issued by the Governor and certifying that any information, question or part of a document relates to the proceedings shall be conclusive.

(4) Subsection (2)*(c)* shall not apply where a member of Cabinet is the person being investigated and—

*(a)* the action in respect of which the complaint is made was taken in pursuance of a decision of Cabinet; and

*(b)* the document or information in question is required by the member of Cabinet to establish the true facts.

(5) Subject to subsection (2), a person shall not be compelled to give evidence or produce any document which he could not be compelled to give or produce in civil proceedings before the Court.

## Protection and privileges of witnesses

**16.** (1) Every person shall have the same privileges in relation to—

*(a)* the giving of information to the Commissioner; and

*(b)* the production of documents and things to the Commissioner,

as witnesses have in the Court.

(2) Compliance with any requirement of the Commissioner under section 15—

*(a)* is not a breach of any relevant obligation of secrecy or non-disclosure, or of the enactment or provision by which that obligation is imposed; and

*(b)* shall not make a person liable to prosecution for an offence against any enactment by reason only of that person's compliance with any requirement of the Commissioner under that section.

(3) Except in proceedings for an offence under section 19(2), 22 or 23—

*(a)* no statement made or answer given by any person in the course of any investigation by or proceedings before the Commissioner shall be admissible in evidence against that person or any other person in any court or in any inquiry or other proceeding; and

*(b)* no evidence in respect of proceedings before the Commissioner shall be given against any person.

## Procedure after investigation

**17.** (1) If, at the conclusion of an investigation, the Commissioner determines that there is no evidence of maladministration on the part of the authority that is the subject of the investigation, the Commissioner shall record his decision and the reasons in writing and, as soon as is reasonable, notify the complainant and the senior officer of an authority of the decision.

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(2) The Commissioner may indicate in the notice under subsection (1) any other recourse that may be available to the complainant.

(3) If, at the conclusion of an investigation, the Commissioner decides that there is evidence of maladministration on the part of the authority, the Commissioner shall report his decision to the senior officer of the authority and the complainant and make such recommendation to the authority as he sees fit.

(4) Without limiting subsection (3), the Commissioner may recommend that—

*(a)* a matter should be referred to an appropriate authority for further consideration;

*(b)* an omission or a delay should be rectified;

*(c)* a decision or recommendation should be cancelled or altered;

*(d)* reasons should be given;

*(e)* a practice, procedure or course of conduct should be altered; or

*(f)* an enactment should be reviewed.

(5) For the purposes of the law of defamation, a publication listed below shall be absolutely privileged—

*(a)* the publication of any matter by the Commissioner in making a report to the Governor, Cabinet or House of Assembly for the purposes of this Ordinance;

*(b)* the publication of any matter by the Governor or a Member in communicating with the Commissioner or his officers in communicating with the Governor or such Member for those purposes;

*(c)* the publication by the Governor or such Member to the person by whom a complaint was made under this Ordinance of a report or statement sent to the Member in respect of the complaint in pursuance of subsection (1);

*(d)* the publication by the Commissioner to the person mentioned in subsection (3), of a report to that person in pursuance of that subsection.

(6) For the purposes of this section "Member" means a member of the House of Assembly.

### Authority to notify Commissioner of steps taken

**18**. (1) Where the Commissioner makes a recommendation to an authority under section 17(4)—

*(a)* the authority shall within twenty business days of receipt of the recommendation, notify the Commissioner, in writing, of the action that has been taken or is proposed to give effect to the recommendation; or

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*(b)* where the authority has taken no action within twenty business days of receipt of the recommendation or does not propose to take any action, the authority shall give reasons, in writing, for failure to implement the recommendation.

(2) The Commissioner may, if he thinks fit in the circumstances of a particular investigation, in writing, extend the period specified in subsection (1).

(3) If within the period specified in subsection (1) or (2), the authority—

*(a)* fails to notify the Commissioner of the action that has been taken or is proposed; or

*(b)* has taken no action, or has taken action that in the Commissioner's opinion is inadequate or inappropriate,

the Commissioner, after considering any reasons given by the authority, may submit a special report under section 21(2).

## PART IV

### MISCELLANEOUS PROVISIONS

### Duty as to secrecy

**19.** (1) The Commissioner and every officer of the Commission and every person performing a function in the service of the Commission shall treat all records, and information relating to any complaint, as secret and confidential and shall not disclose or communicate the text of any record, or information or, complaint to an unauthorised person or allow an unauthorised person to have access to any records, information or declarations.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine of $20,000 or to imprisonment for a term of three years, or to both.

### Immunity

**20.** (1) No action, suit, prosecution or proceeding shall be instituted against the Commissioner or an officer of the Commission, for any act done or omitted to be done in good faith in the exercise or discharge of any duty or function of the Commissioner.

(2) The Commissioner or an officer of the Commission shall not be called to give evidence in court or in any proceedings of a judicial nature, in respect of anything coming to their knowledge in the exercise of their functions under this Ordinance.

(3) Anything said or any information given or any document or thing produced by a person in the course of an investigation conducted by, or proceedings before the Commissioner under this Ordinance shall be privileged in the same manner as if the investigation or proceedings were proceedings in the Court.

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## Annual and special reports

**21.** (1) The Commissioner shall, as soon as practicable, and in any case within six months after the end of each year, prepare a report on the performance of his functions under this Ordinance during that year.

(2) Where—

*(a)* an administrative action that is under investigation is in the opinion of the Commissioner, of public interest; or

*(b)* the Commissioner has made a recommendation under section 17(4) and within the period specified no action, or in his opinion no adequate action has been taken by the authority to remedy the administrative action complained against,

the Commissioner may prepare a special report on the investigation.

(3) The Commissioner shall submit to Cabinet, the special report prepared under subsection (2).

(4) The Commissioner shall annually submit to the House of Assembly a general report on the performance of his functions under this Ordinance, and may from time to time submit to the House of Assembly, such other reports with respect to his functions.

(5) Where any part of a report deals with any matter concerning an authority for which a Minister is charged with responsibility, the Commissioner shall also send copies of that part of the report to that Minister for his information.

## Obstruction and contempt

**22.** (1) If a person without lawful excuse obstructs the Commissioner or an officer of the Commission in the performance of his functions under this Ordinance, or is guilty of an act or omission in relation to any investigation under this Ordinance which, if that investigation were a proceeding in the Court, would constitute contempt of court, the Commissioner may certify the offence to the Court.

(2) Where an offence is certified under this section, the Court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, deal with him in any manner in which the Court could deal with him if he had committed a similar offence in relation to the Court.

(3) Nothing in this section shall be construed as applying to the taking of an action mentioned in section 14(7).

## Offences

**23**. (1) A person commits an offence if he intentionally makes a false statement to, misleads or attempts to mislead the Commissioner or another person in the exercise of any function or power conferred by this Ordinance.

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(2) A person who commits an offence contrary to subsection (1) is liable on summary conviction to a fine of $5,000.

## Amendment of Schedules

**24.** The Governor may by Order published in the *Gazette*, amend a Schedule.

## Regulations

**25.** The Governor may make regulations prescribing anything under this Ordinance which is to be prescribed or which is necessary or convenient to be prescribed for the better carrying out of the objects and purposes of this Ordnance, or to give force and effect to its provisions.

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## SCHEDULE 1

*(Section 3(2))*

PERSONS AND BODIES NOT SUBJECT TO INVESTIGATION

1. Governor
2. Cabinet
3. House of Assembly
4. Chief Justice and any Judge of the Supreme Court or Court of Appeal
5. Magistrate
6. Police
7. National Audit Office and Staff

_____

## SCHEDULE 2

*(Section 5)*

OATH OF SECRECY

I,..... being appointed Complaints Commissioner/officer of the Complaints Commission do swear that I will not on any account or at any time disclose any opinion, advice or privileged information of the Complaints Commission and that I will not, except with the authority of the [Supreme Court or the Complaints Commissioner], and to such extent as may be required for the good management of the affairs of the Commission, directly or indirectly reveal the business or the proceedings of the Complaints Commission or the nature or any contents of any document.

*If the Oath is taken by an officer, the provision for revealing or disclosing the business or proceedings of the Commission will be on the authority of either the Supreme Court or the Complaints Commissioner; if the Oath is taken by the Complaints Commissioner it will be on authority of the Supreme Court.

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## SCHEDULE 3

*(Section 8(1)(c))*

MATTERS NOT SUBJECT TO INVESTIGATION

1. Action taken in matters certified by the Governor to affect relations or dealings between the Government of the Turks and Caicos Islands and any other Government or international organisation of States or Governments.

2. Action taken under any law relating to extradition or fugitive offenders.

3. Action taken by or with authority of the Attorney General, Director of Public Prosecutions, Commissioner of Police, Director of Immigration or the Collector of Customs for the purposes of investigating crime or of protecting the security of the Islands, including action taken with respect to passports.

4. The commencement or conduct of civil or criminal proceedings before any court of law in the Islands, or of proceedings before an international court or tribunal.

5. Action taken in respect of appointments or removals, pay, discipline, or other personal matters other than superannuation, in relation to—

   *(a)* service in any office or employment under the Government; or

   *(b)* service in any office or employment, or under any contract for services, in respect of which power to take action, or to determine or approve the action to be taken, in such matters is vested in the Government.

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