SPEECH OF THE ATTORNEY GENERAL

YBHG TAN SRI DATO' SRI HAJI MOHAMED APANDI BIN HAJI ALI

ON THE OCASSION OF THE OPENING OF THE LEGAL YEAR 2016

(8 JANUARY 2016)

CONFIDENTIALITY VS TRANSPARENCY:
WHERE DO YOU DRAW THE LINE?

Dengan izin,

YAA Tun Arifin bin Zakaria, Ketua Hakim Negara

Yang Amat Berbahagia Tun Dato' Seri Zaki bin Tun Azmi, Mantan Ketua Hakim Negara

Mr. Nurak Marpraneet, Presiden Mahkamah Perlembagaan Thailand

YB Senator Tan Sri Abu Zahar bin Ujang, Speaker Dewan Negara

YB Puan Hajah Nancy binti Haji Shukri, Menteri di Jabatan Perdana Menteri

Tuan-Tuan Yang Terutama Duta-Duta dan Pesuruhjaya Tinggi

YAA Tan Sri Dato' Seri Md. Raus bin Sharif, Presiden Mahkamah Rayuan Malaysia

YAA Tan Sri Dato' Seri Zulkifli bin Ahmad Makinudin, Hakim Besar Malaya

YAA Tan Sri Datuk Seri Panglima Richard Malanjum, Hakim Besar Mahkamah Sabah Sarawak

YA Hakim-Hakim Mahkamah Persekutuan, Mahkamah Rayuan, Mahkamah Tinggi dan Pesuruhjaya-Pesuruhjaya Kehakiman

Peguam Besar Negeri Sabah dan Peguam Besar Negeri Sarawak

Rakan-rakan daripada perkhidmatan kehakiman dan perundangan, tuan-tuan dan puan-puan yang dihormati sekalian.

YAA, pohon izin demi mengekalkan tradisi untuk berucap seterusnya dalam Bahasa Inggeris.

My Lords, My Ladies, ladies and gentlemen,

It is an honour and privilege for me to address this traditional commencement of the Legal Year for the Bench and Bar for the first time as Attorney General. The start of my tenure as Attorney General has been challenging. But I have passed through the “one hundred days trial period”, as they call it, wiser to the challenges of this Office.

Allow me to focus my address this morning on one particular challenge that has occupied my mind in the last few months. This is the perennial challenge that confronts those in public office – where do you draw the line between confidentiality and transparency.

INTRODUCTION

The Attorney General’s Chambers (AGC) prides itself on going about its constitutional and statutory functions out of the public eye. This is its long-held tradition. It does not seek credit or publicity – and this rule applies whether a case is won or lost. Storms and public brick-bats are borne stoically, not from personal choice but because this is the requirement of

law and public service discipline. Lest anyone forget, the Attorney General's Chambers, as a part of the apolitical Malaysian civil service, is bound by the legal constraints of the Official Secrets Act 1972, the Public Officers (Conduct and Discipline) Regulations 1993, internal directives as well as the specific secrecy and confidentiality provisions as contained in the laws enacted by Parliament.

Regardless of this in-built reticence in engaging with the media and the public directly, Chambers and I have found ourselves compelled to do so in dealing with several high profile and public interest cases. As Mahatma Gandhi said, "*I am used to misrepresentation all my life. It is the lot of every public worker. He has to have a tough hide … It is a rule of life with me never to explain misrepresentations except when the cause required correction*."

My Lords, My Ladies, ladies and gentlemen,

It is trite that public trust and confidence in the justice system depends on trust that justice is being served fairly. This in turn depends on a certain degree of transparency and openness in the prosecution of cases and the legal advisory work undertaken by the AGC. This has led Chambers on occasion to explain the law and its position to the public, to ensure that news reports on cases and issues handled by the AGC are accurate and balanced.

To this end, the AGC does explain certain decisions that the AGC has made in media statements and through other fora. For example in relation to sensitive and relatively complex cases that may not have even been brought to court, why it was decided not to institute proceedings against the offenders. For example, in the sedition complaints lodged against certain individuals. It is stressed each time that such decisions are based on the evidence produced from investigations.

In addition, the AGC has organized public-engagement sessions to clarify both the law and the AGC's position in complex areas of law such as during the public debate over section 114A of the Evidence Act 1950 and in the watershed repeal of the Emergency laws and in the introduction of the new security-related legislation, including the Security Offences (Special Measures) Act 2012. Perhaps more crucially, Chambers finds public interventions necessary to rebut and/or correct misinformation or misconstructions or misinterpretations of the law.

However there must be a balance between this desire for accountability and transparency against the need for the retention of confidentiality of sensitive official information from the public eye to avoid misuse, particularly in high-profile, sensitive and complex cases and issues.

It is also recognized that although the professional confidentiality rule does not distinguish between government and private lawyers, there are differences in the confidentiality duties between them. In addition to ethics

rules, government lawyer's confidentiality duties are also subject to the complex regime for control of government information. The government lawyer and the authorizing official of the government agency are bound to respect the legal regime controlling government information. If that legal regime prohibits the information from being disclosed, then the institutional client is deemed to have withheld consent to disclosure. No discretion is exercisable by the government lawyer.

CONFIDENTIALTY VS TRANSPARENCEY – WHERE DO YOU DRAW THE LINE?

To better understand this age-old tension between obligations of government confidentiality or secrecy against the commitment to openness which underpins democracies, Chambers undertook a review of the development of these two competing concepts in various jurisdictions including the United Kingdom and the United States of America.

Time does not permit an in-depth discourse of the findings. Perhaps there will be another occasion to explore this issue further. Suffice to say that it is recognized that official secrecy is a reality in each country, regardless of its commitment to open government. Even the advocates for open government acknowledge that there would be some legitimate exceptions to such openness such as national security, crime prevention and personal privacy. However as stated in *Bennett* v *President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334, [98]-[99], "*Official secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not*."

The policies and laws adopted in the jurisdictions reviewed demonstrate that a balance can be achieved between confidentiality and transparency if the different reasons for confidentiality can be distinguished and general categories of information that should be considered confidential can be identified. In this way, proportionate treatment of confidential official/ government information can be prescribed and be implemented in a standardized manner.

It is noted that the Freedom of Information legislation of almost all countries, from Sweden (18th century) to the United States of America (1966) to the United Kingdom (2000) generally establish a legal right of access to government information but they all create certain (almost standard) exemptions. Inherent in their approach to freedom of information is recognition that transparency is not a constitutional right but is merely policy embodied in freedom of information laws. Therefore transparency is not regarded as a value necessarily to be maximized at the expense of other interests.

The exemption areas from public disclosure under freedom of information laws (i.e. areas where confidentiality is retained) are commonly defence, national security, foreign affairs, and law enforcement and legal proceedings.

In balancing the competing demands of confidentiality and transparency, the overriding determinant has to be how to best serve the public interest. That is to say, the question to be weighed in each case by

the decision-maker is, "*Will it be more harmful to maintain the confidentiality of the information or to disclose the information concerned*?"

As every judge knows, this means that application of the relevant principles of the public interest test will vary from case-to-case. In this regard it is noted that typically the concept of “public interest” is not defined in Freedom of Information Acts. This is intentional so that determinations must be made with regard to the specifics of each instance/ request for access.

It is also noted that “national interest” is not defined under Freedom of Information laws but is given a broad interpretation. For example, the United Kingdom Information Commissioner’s Office guide note on section 24 of the Freedom of Information Act 2000 states that national security includes more than the security of the United Kingdom, its military defence and its systems of government, it also involves co-operation with other States in combating international terrorism and guarding against actions targeted at other States which may impact on the UK and its people.

In considering requests under that Act, the Information Commissioner is also guided by the House of Lords observations in *Secretary of State for the Home Department* v *Rehman* [2001] UKHL 47, that “national security” means the security of the United Kingdom and its people and the protection of democracy and the legal and constitutional systems of the State are part of national security as well as military defence.

My Lords, My Ladies, ladies and gentlemen,

Returning to the Attorney General's dilemma, it is humbly submitted that the solution is not as simple as determining which way public interest is weighted, especially when national interest is involved. This is because the Attorney General is still bound by the Official Secrets Act 1972, in particular section 8 which prohibits wrongful communication, *etc*. of official secrets.

Section 8 of the Official Secrets Act 1972 re-enacted the provision from the Official Secrets Ordinance 1950 of the States of Malaya, which in turn appears to have been modeled on section 2 of the United Kingdom's Official Secrets Act 1911. The Franks Departmental Committee on section 2 of the Official Secrets Act 1911 in its Report issued in September 1972 calculated that over 2000 differently worded charges could be brought under section 2.

By correlation, the same effect applies to our section 8 to the risk of the public officer. As the Franks Committee noted, section 2 was clearly intended to operate as a general check against civil servants of all kinds. Or as Geoffrey Robertson QC put it – "*in legal theory, it was a crime to reveal even the number of cups of tea consumed each day in the MI5 canteen*".

In view of the breadth of section 8 of the Official Secrets Act 1972, it is only workable today if read with the Doctrine of Implied Authorisation, the unwritten convention practiced by the civil service and recognized in the aforementioned Franks Report. The doctrine essentially recognizes that senior civil servants can self-authorise the disclosure of certain official information within the parameters of the legal constraints of official secrets laws. But this also means that the Attorney General then must exercise his judgement whether disclosure of official information is appropriate in a given case or request from the media or the public.

Some guidance may be obtained from the court decisions and other guidance notes of the relevant jurisdictions. In *Commonwealth* v *Fairfax* (1980) 147 CLR 39, the leading case on disclosure of confidential government information, the High Court held that the disclosure of confidential government information would only be restrained if disclosure would be 'inimical to the public interest because national security, relations with foreign countries or the ordinary course of business of government will be prejudiced'. Hence considerations of national interest, etc. would usually outweigh public interest disclosure.

The courts have recognized that regardless of the confidentiality of information, the government's interest in confidentiality diminishes over time.

In *Attorney General* v *Jonathan Cape Ltd* (1975) 3 All E.R. 484 (Q.B.) 492, the court acknowledged that different types of information require different lengths of confidentiality, but noted the difficulty in determining exactly when that would occur. In the national security field, in the USA there is a presumption that confidential national security-related information can be released 10 years after its creation, unless the sensitivity of the information requires that automatic declassification occur in 25 years. With respect to the secrecy of criminal investigations, the courts have noted that the need for secrecy may end when the investigation ends.

My Lords, My Ladies, ladies and gentlemen,

As the former head of the UK Home Civil Service stated in his testimony to the Franks Committee, when it comes to exercising self-authorisation and disclosures of official information, it is difficult to define the line but it is never difficult in practice to know when one is approaching it. In other words, there is no “one size fits all” and each request for disclosure or transparency will require a judgement call on a case-by-case basis. Perhaps ultimately the public officer is best served recalling the proposition advanced by Kay Redfield Jameson that, “*Confidentiality is an ancient and well-warranted social value*”.

My Lords, My Ladies, ladies and gentlemen,

Allow me to conclude with the traditional pledge. On behalf of the officers of the Attorney General's Chambers, we renew our pledge to the Chief Justice of our commitment to the fair and efficient administration of justice in Malaysia. We also extend our good wishes to Your Lordships, the Honourable Chief Justice and brethren, the State Attorneys General and members of their Chambers, and members of the legal fraternity. May we be able to look forward to a more peaceful and harmonious year ahead.

Thank you.