

1st Annual Report of the
Complaints Commissioner for the
Virgin Islands
For the year ended 31 December 2009

Elton Georges CMG, OBE



The Complaints Commission

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Ref. No.: A1/12

18th June, 2010

His Excellency the Governor
Mr. David Pearey
Governor's Office
Road Town, Tortola VG1110
British Virgin Islands

Dear Governor:

In accordance with section 24 of the Complaints Commissioner Act, 2003, I have the honour to furnish you with the first annual report of the Office of the Complaints Commissioner, plus a copy of the statement of accounts and the Auditor General's comments, with the request that you cause them to be laid before the House of Assembly within three months.

This report is for the financial year ending 31 December, 2009.

Yours sincerely,

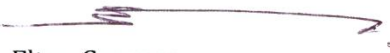

Elton Georges
Complaints Commissioner

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FOREWORD

To have been appointed the first Ombudsman (or “Complaints Commissioner”, as the British drafters of the Constitution preferred to call it) was an almost incredible honour and gift, but a humbling one. It followed a career of public service at the senior levels of government



administration that was both a help and a drawback. It was a help, in that I came to the Commission with a thorough knowledge of government operations and of many of the personalities; an easy familiarity with the laws of the Territory, including the Constitution; and many years of sorting out complaints against the bureaucracy. It was a drawback, in that I had to be on guard against making too many easy allowances for the officials complained against, out of intimate knowledge of how the pressures of day to day administration can derail even the best of intentions. It was humbling in that the work brought me face to face with the realization that I had in the past been also, in some cases, guilty of maladministration and that any of us can slip

into it without constant due care and attention.

I was very conscious of the long road to the establishment of the office and the appointment of the first Commissioner. I knew, also, how very important for its future credibility it was that the office should begin to make a positive impact within the first year or two. Added to that was the fact that this office happened to be opened in a year that was being celebrated around the world as the 200th anniversary of the noble institution of the Ombudsman, widely accepted as having been inaugurated with the first such appointment in Sweden in 1809. So it was with a sense of history and of mission, as well, that I entered upon this assignment.

It has been an interesting year. My long public service notwithstanding, I could still be surprised at some of the things that complainants experienced and the administrative gaps that investigations turned up. In spite of ten years, more or less, of public service reform (sometime called ‘development’), and notwithstanding the existence of many model public servants, the prevailing public service culture is one in which the tendency to shabby treatment of people appears to be still too much ingrained. This is a major challenge. This attitude or conduct derives from various causes: carelessness, ignorance, laziness or prejudice being a few. Some of it derives from senior officers who mean well greatly underestimating the work and determination involved in achieving and maintaining high standards of administration – in keeping, in other words, to the laudable undertakings published in their service charters. To be fair, overburdened public officers also sometimes, perhaps not always consciously, choose the priority of dealing with other pressing matters and letting the quality of service delivery slip. A general strong aversion to accountability, openness and transparency, from the level of the political directorate down, adds to this challenge.

And yet, we encounter sterling public officers regularly. There are so many who, as Dr. Karl Dawson, President of the Community College, said in an address two years ago, “... try to give the best possible service both to external and internal customers because they deeply feel that it is the right thing to do... They cannot bear to see someone standing at a counter unattended, to hear a telephone ringing unanswered, to know that a query or request has not been attended to or to know that an inefficient or ineffective process is continued in their area.” In many cases such officers are let down by organizational deficiencies over which they have little control, by outdated

legislation and processes, by crushing work overload. But there are also some very well run departments. We are considering ways of identifying and publishing, in future reports, the names of those exceptional agencies in which good service – courteous, considerate, helpful, informative and the like – is the norm.

While I stressed at the outset, and have continued to stress, that I see the Complaints Commissioner's role as assisting in raising standards in public administration – quality assurance, as one perceptive officer put it - it isn't always clear how one measures that impact. The main measure of success must still be how well persons who seek help with their matters feel that they have been served; how those who might be the subject of investigations view the fairness and professionalism of the office; and the extent to which recommendations are acted upon. A partial first year in which the office was staffed only from mid-August is not a firm basis on which to embark on impact assessment. That will be left for future years and is best undertaken by third parties. I just hope that the Complaints Commission has made a credible start as one of the constitutional agencies - the Auditor General being another - that carry out the essential function of shoring up the accountability structure of good governance.

A discouraging aspect of the year that is dealt with in the report is the negative response or, in some cases, entire lack of response to the recommendations made. Time will tell whether this is a function of the newness of the office or of determined resistance on the part of several elements of the executive. I hope that it is the former and we will be able to say in the not too distant future, as the Ombudsman of Ontario could state in his most recent annual report, that "...even in the most contentious cases government has not only accepted our recommendations but have gone on to praise and to champion them." We do not expect agreement with every conclusion and recommendation, but when agencies do not even see the need to respond or argue their positions it is a symptom of a serious problem.

On the whole, though, it was a rather satisfying opening year. Thanks to the persons who came in for help, to my hardworking staff and temporary assistants, to those in public service who responded well and the many persons who gave encouraging words. We look forward to a productive second year with a website up and running, a complaints tracking system in place, and a little more confidence in how we execute our functions along with a better understanding of the role of the office on the part of all concerned.



Elton Georges, CMG, OBE

I. INTRODUCTION

ESTABLISHMENT AND ACTIVATION OF THE OFFICE

The Constitutional Commissioners 1993, in their report presented in 1994, began Chapter 9 with accounts of the strength of public support for a “Bill of Rights” and a public Register of Interests and recommendations for their inclusion in the Constitution. Then it went on in paragraph 9.4 to state:

*“We found similar widespread support for the establishment in the Constitution of the office of Ombudsman (or Complaints Commissioner as he is sometimes known). It was considered by many of our witnesses that some machinery was needed to enable a person who felt himself aggrieved by maladministration on the part of a government department or official or some other public body and who had no redress at law or otherwise to have his complaint examined by an impartial and independent investigator who, if he found the complaint to be substantiated, could bring it to the notice of the competent authority and recommend specific redress. We agree with this conventional view of an Ombudsman and his duties **but consider it necessary to go further and to recommend that if the Ombudsman’s decision is not complied with, the complainant should be able to seek an injunction in the High Court to enforce compliance.** In such an action it should be possible for the complainant to appear without legal representation.*

We are not of course able to judge how many cases an Ombudsman may have to deal with but in order to keep costs to a minimum, we suggest that the post might suitably be filled by a retired person, e.g., a judge, preferably from outside the territory and paid on a fee basis.”
[Emphasis added]

The Summary of Recommendations went on to list as Number (xix) “For action by her Majesty’s Government” the following: **“Provision should be made for an Ombudsman and for enforcing his decisions.”**

2. In the event, the office of Complaints Commissioner was written into the Constitution by way of the Virgin Islands (Constitution) (Amendment) Order, 2000 and inserted as new sections 66A and 66B, retained as sections 110 and 111 in the Virgin Islands Constitution Order, 2007. The provisions were brought into force on 12th June, 2000. Section 66B (now 111) stated that the Commissioner would have “such functions and jurisdiction as may be prescribed by law” and also stipulated its independence of action thus:

(2) In the exercise of his or her functions, the Complaints Commissioner shall not be subject to the direction or control of any other person or authority.

The Legislative Council passed the Complaints Commissioner Act, 2003 (No. 6 of 2003) (“the Act”) on 17th April of that year. The Act was, by oversight, not brought into force until 23rd February, 2009 by proclamation of the Governor, Mr. David Pearey, in Statutory Instrument No. 7 of 2009 (gazetted on 26th February, 2009). Neither the Constitution nor the Act included any reference to enforcement of decisions.

3. The position was first advertised in mid 2003. It was again advertised in 2006 and in 2008, but no appointment was offered. Finally, the Governor issued a statutory notice of appointment dated 2nd February, 2009 to appoint Elton Georges to be Complaints Commissioner, acting after consultation with the Premier and the Leader of the Opposition as the Constitution required. With the Premier, the Governor held a press conference the same day to announce the appointment and introduce the first Commissioner.

4. The office opened its doors without fanfare on 3rd March, 2009 at Upstairs 80 Main Street, right beside the Old Administration Building offices of the Post Office. The location is central and easy to find, accommodation is spacious. (There is one major drawback that has mandated that we seek other quarters. It is an elderly great-grandmother who came with a complaint and before she got to her matter stated bluntly that if she had known that she had to come up a flight of stairs she would have stayed home! That indirect complaint about the premises alerted us to the fact that we had to seek another location accessible to the disabled and elderly.) Even during the week before the office opened a member of the public had been referred to me and I conducted a preliminary interview at my home. That person followed up and on 4th March became the first official complainant. The Complaints Commissioner's Office was at last in business, fifteen years after the publication of the recommendation cited above, eight years after the constitutional mandate and nearly six years after passage of the requisite legislation. With a borrowed assistant for some of the time and the logistical support of the Deputy Governor's Office, I proceeded on a campaign to make the office known throughout the public service and to as many residents of the Territory as possible. This included addresses to Rotary Clubs; appearances on "Public Eye" and "Spotlight" television programmes; and presentations to the Cabinet, heads of department, permanent secretaries, and chairmen and chief officers of statutory corporations.

SCOPE OF THE ACT

5. The Act authorizes the investigation of "any action taken by a department of Government or a public authority in the exercise of its administrative functions". The investigation could be triggered by a complaint made in writing by any person alleging that he or she has suffered injustice as a result of **maladministration** (see description below); by a written request from a Member of the House requesting the investigation on behalf of someone in similar circumstances; and by the Commissioner's own decision that an action or series of actions should be investigated on the ground that someone has, or may have, sustained an injustice. Lists of known Government departments and public authorities are appended to the report. They are not exhaustive, as *ad hoc* bodies also come within the scope of the Act.

Jurisdiction

6. Section 5 (4) of the Act sets limits on what the Commissioner may investigate. It states:

4) The Commissioner shall not investigate

(a) any matter in respect of which the complainant has or had

- (i) a remedy by way of proceedings in a court, other than by way of judicial review; or**
- (ii) a right of appeal, objection, reference or review to or before any person, tribunal, board or other authority appointed or constituted by or under an enactment;**

(b) any such action, or action taken with respect to any matter, as is described in the Schedule.

The Schedule lists action taken under any law relating to extradition or fugitive offenders; action taken for the purpose of investigating crime or protecting the security of the Territory; the commencement of civil or criminal proceedings before any court or international tribunal; and action in respect of appointments, removals, pay, discipline, pension or other personnel matters in relation to service or employment in any department of Government or public authority. None of these actions is subject to investigation.

Furthermore, section 3 of the Act puts the following outside the application of the Act: judges; magistrates; the functions of any court; the Attorney General, the Director of Public Prosecutions and

Auditor General, in the exercise of their constitutional powers; and the deliberations and proceedings of the Cabinet and House of Assembly or any committee thereof.

STAFFING

7. The Act specifies that the Commissioner be “*provided with such staff as the Governor, after consultation with the Commissioner, considers necessary for the efficient administration of the Act.*” It further provides that “*the Governor...may appoint the staff of the Commission either in accordance with the Public Service Commission Regulations, 1969 or on contract.*” As this was the first year, it was decided to go with just two members of staff, the senior one titled “Assistant Complaints Commissioner” and the other “Senior Administrative Assistant/Investigator”. There was considerable interest in the two positions as advertised in May/June. After many interviews, an appointment was issued to Mrs. Monique Hodge-Bell who took up the position of Assistant Commissioner in mid-August for two years on contract. Later, Mrs. Louann Hodge-Smith, who was on leave of absence from the Department of Inland Revenue, was also appointed on contract. She commenced work at the office in mid-September, but her service was much interrupted as she was on jury duty for the Criminal Assizes at the High Court, which ended in early December. She brought and contributed valuable experience with the government’s operating systems especially in finance and accounts. Neither had had any experience working in a complaints office before, of course.

The indefatigable Assistant Commissioner brought to the job a level of enthusiasm and energy that was infectious and used her organizing skills to good effect, significantly contributing to our achievements for the year. As the person most responsible for setting up the systems that the office needed in order to function effectively, Mrs. Hodge-Bell attacked her responsibilities with determination and verve within the existing budgetary constraints. We obtained for her an attachment for a week in October at the Office of the Ombudsman of Bermuda. In this very packed week she got an intensive introduction to the systems and routines of such an office as well as to other complaints handling bodies in Bermuda. This proved invaluable in helping her to advance the process of setting up the office here for efficient execution of its mission.

II. ACTIVITIES

I. VOLUME

8. The Office dealt with a fair number of contacts during the nine months it was in existence. Not all of these approaches were recorded in the early months owing to starting up issues and lack of staff. In the last two months of the year the practice of recording each approach was fully adopted, so that we could capture those contacts made just for information and advice, those complaints that were outside of jurisdiction, those that were referred to other agencies for whatever reason, those that were declined and those that were in fact investigated and reported on. At year's end we had recorded eighteen (18) complaints that were the subject of investigation or preliminary inquiries. Of these, in five (5) cases the investigations were complete and the reports had been sent; a further eight (8) were still under investigation and four (4) had been referred to other agencies¹. Twenty (20) complaints had been **declined** on jurisdictional or other grounds, and 5 **withdrawn** by the complainant before investigations had gone very far². Tables of statistics are appended to this report.

II. REPORTS

9. The Act requires the Commissioner on completing an investigation to provide the relevant agency with "a report containing his findings of fact, his opinion and the reason for his opinion." During the year the Commissioner wrote five (5) such **reports** to the Heads of the following agencies: Immigration, Vehicle Licensing, Ministry of Communications and Works, BVI Electricity Corporation³, Inland Revenue and the Public Works Department. **In accordance with the Act, all such reports were copied to the Governor and every member of the Cabinet.**

10. Where the Commissioner finds that any person has suffered an injustice on account of maladministration he shall include in his report "such recommendations as he thinks fit" and a request that the department or agency notify him, within a specified time, of the steps, if any, that it proposes to take to give effect to the recommendations. The five reports noted above contained a total of **24 recommendations**, only 8 of which, however, were aimed directly at redress for the injustice sustained. The remaining 16 were of a systemic nature aimed at reducing the chances for repetition of the maladministration.

11. "**Maladministration**" is defined as 'bad administration' including a variety of poor conduct and practices in the delivery of public services. It **includes** failures in responding, unreasonable behaviour and decisions, improper discrimination and abuse of office. The act makes clear that the Commissioner has a wide discretion in determining what counts as maladministration. In the cases in which the investigations were complete the types of maladministration encountered were, for the most part, *discourtesy, lack of response or undue delay in responding and failure to provide information reasonably due to applicants*. In more than one case the failure to keep records properly was a factor in the failures identified. Recommendations to address this were included.

¹ Referrals were mainly to Ministries in an attempt to have the matters resolved at a lower level and in keeping with departmental service charters.

² Under the Act, the Commissioner may continue to investigate a matter even if the complainant withdraws the complaint; but this option was not exercised in any of the 5 cases recorded.

³ The same report was addressed to the Ministry and the Corporation.

III. SPECIAL REPORTS

12. The Act in section 14 requires that the Commissioner “lay a special report on [a] matter before the House of Assembly”⁴ where, in his opinion, no adequate or appropriate action has been taken on the recommendations that he made in the matter within a reasonable time after issue of the report. Before doing so, he must consider “the comments, if any, made by or on behalf of the relevant department or authority”. By 11th December we had completed the first such report and sent it to the Premier to be laid. It concerned a recommendation rejected by the Ministry of Communications and Works in respect of making good to a citizen the loss of an electricity connection subsidy amounting to more than \$4,000 through the Ministry’s failure to follow up communication opened by the citizen. At year’s end the report had not yet been laid, but it was expected that it would be early in 2010. On 27th November notice was served on the Acting Director of Public Works that a special report would be laid in respect of the report of an investigation into a complaint of unreasonable delay in paying on a contract, to which there had been no response at all, let alone response that was adequate or appropriate. The special report was in preparation to be completed in 2010.

IV. SAMPLE COMPLAINTS AND THEIR DISPOSITION

DISCOURTESY / UNRESPONSIVE

13.1 If you arrive at a Government office before the stated closing time you expect to get in. At least, you expect someone to acknowledge your presence and disclose, apologetically, the unforeseen reason why you cannot be allowed in. This was not the experience of Ms. L and another citizen.

Ms. L had gone to the Vehicle Licensing Department at about 2:10 p.m. to process a ‘transfer of ownership’ form pertaining to a vehicle; and had taken a queue number, 89. Because the highest number then being dealt with was 49, she spoke to an employee about returning and was told that provided she returned before 3:30 p.m., at which hour the door would be locked, they would process the form. (3:30 was the time stated as closing hour on large signs inside the entrance to the office.) Returning before 3:25 to complete her transaction, Ms. L found the door locked. Members of staff ignored her persistent knocking on the door, even though they could see her through the glass portion. Along with her was another person, who said she had arrived at 3:15 p.m., and who was also being ignored by the staff. Both finally left in frustration and disgust.

The CC found that the Department’s action in this instance was indefensible. The Department explained that workers had locked the door early on account of “an overflow of customers that still had to be processed”. The officer in charge accepted, however, that they were at fault in not acknowledging Ms. L’s presence, apologised to her in writing, and enclosed a copy of the department’s charter. She further undertook to instruct frontline staff on proper conduct in such situations and to introduce appropriate changes to the information they put out.

UNRESPONSIVE / UNREASONABLE DELAY

13.2 How long do you have to wait for a reply to an application for tax exemption, how many letters must you write, how often must you telephone?

For a company had applied in November, 2008 to the Commissioner of Inland Revenue (the “CIR”) for a declaration of tax exemption for her company in respect of payments on the health insurance plan for the company’s employees, it turned out to take nine months, numerous calls and the intervention of the Complaints Commission. The company’s manager had applied on advice from a member of the Department’s staff who told her that she would receive a reply within two weeks. Three weeks later when she called to inquire they told her that they would check into it and return her call. No call came. She called every month until May, 2009 when she was asked to re-submit the application,

⁴ The Standing Orders of the House, however, permit “papers” to be “presented” to the House only by a Minister (Standing Order 14). The Premier graciously consented to lay the reports on the Commissioner’s behalf.

.....UNRESPONSIVE / UNREASONABLE DELAY CNT'D

which she did, in person, to a very helpful officer who assured her that they would respond within two weeks. She filed the complaint at the end of July, not having up to then received a response in spite of calling regularly to check.

The CIR immediately accepted the Department's culpability in the matter and moved to approve the application and undertake a refund of taxes paid on the amount in question from the date of the application. The CC also recommended a letter of apology to the company. The CC had to intervene further to ensure that these undertakings were met but received confirmation just before Christmas of the receipt of the refund and apology.

UNREASONABLE DELAY

13.3 A small company entered into a one year contract with the Ministry of Education to provide specified services, namely, weekend and vacation aquatic sports training to young people from the age of 6. The contract was for an agreed sum and payments were to be made in equal quarterly installments. Unusually, payments were to be made from three sources: the Ministry, the Department of Education and the Department of Youth Affairs and Sports ("DYaS") with the last named department contributing nearly 60% of the amount. The company claimed payments in accordance with the terms of the contract and encountered long delays in getting payment as agreed from the DYaS even though the Ministry agreed that the payments were due and had paid its portion. By the time they contacted the Commission in very late September they were experiencing financial distress as they had not received due payments in full for the second quarter, neither had they been given an official reason for the failure. After brief preliminary inquiry and intervention by the Commission with the Permanent Secretary and Acting Director of Youth Affairs the situation was relieved by payment of the outstanding amount for the April-June quarter on 1 October. No further action was taken especially as the contract itself spelled out procedures for dispute resolution.

EXTREME DELAY IN PROCESSING APPLICATIONS FOR RESIDENCE AND WORK PERMIT EXEMPTION

13.4 It would seem that an immigrant, a property owner, who has been allowed to reside continuously for 25 years and not convicted of any crime should not expect to be facing non-renewal of his entry permit on account of systematic delays, stretching over several years, in processing applications.

A 25 year resident, Mr. A, complained in late June that he had applied for a certificate of residence in 1987 but had not received a reply. He had also applied for a work permit exemption (WPE) in late 2006 and was still awaiting a decision (even though the subject Minister had told him in person in August 2008 that he had 'approved' it). Meanwhile, the Immigration authorities were on grounds of his unsettled Labour status threatening him with non-renewal of his entry permit, which would require him to leave the Virgin Islands and apply from abroad for permission to re-enter. The Ministry of Labour admitted the delay in processing the WPE, which they said was partly due to the review of WPE policies and procedures during 2007 and 2008, but confirmed that Mr. A's name was on a list recommended to Cabinet and the Ministry had no control over how long the Cabinet process would take. (They also said that a temporary work permit had been issued for Mr. A during 2008 to 'legalise' his status during the delay but he neglected to pick it up, so it had lapsed. Mr. A said he was not aware of the permit.) Under the procedures in place when Mr. A submitted his application the Minister approved the exemptions in his discretion and the process was much quicker.

As the Commission could not demand Cabinet papers or look into Cabinet proceedings, further investigation into the delay of the WPE was stalled. Finally, in December the exemption was published in the Gazette as approved. Mr. A elected to withdraw his complaint regarding the certificate of residence.

V. ACTION ON DECLINED COMPLAINTS

14. Nearly all of the 20 complaints declined were so treated on jurisdictional grounds, the vast majority being employment or ‘personnel’ matters. Two were declined on grounds that they could be construed as being connected with the functions of the Magistrates Court. In many such cases the Commission still, if the complainant wished, undertook to engage with the agencies concerned to assist in resolving the grievance. In the statistics, this assistance is described as “*value added*” following the Bermuda Ombudsman practice. As a result of our intervention in these cases:

- Two retired, non-established workers who had been denied retirement benefits had their claims re-assessed and were granted benefits by the Governor on recommendation of the Human Resources Department.
- The medical board system for processing the claims of persons injured on the job in the public service, which had broken down, resulting in a backlog of unresolved claims of several years standing, had by December been substantially repaired after meetings between the Director of Human Resources and the Chief Executive Officer, BVI Health Services Authority and their teams. They developed a strategy and comprehensive programme for dealing with the backlog. It was anticipated that the outstanding cases would be settled early in 2010.
- Court documents in appeal cases were supplied to the High Court Registry after long delays.

In other cases the Commission advised complainants as to the other avenues (for example, the Labour Department) available for having their matters dealt with. In fact, some of these persons were among the most appreciative of the efforts of the Commission.

VI. COMPLIANCE

15. While the Commissioner has wide discretion to make recommendations both to make up for wrongdoing to complainants and to address administrative deficiencies or defective procedures, acceptance of and compliance with the recommendations rest completely with the executive. As noted above, of the 24 recommendations made in 2009 eight (8) were specifically aimed at redress of wrongdoing. The agencies concerned acted on four (4) of these, accepted two (2), rejected one (1) and did not at all respond to two others. This is a 50% compliance rate as far as actual implementation was concerned. Of the remaining eighteen (18) general recommendations the compliance rate by year’s end was low. Ten (10) were accepted in principle by the agencies but no evidence of action completed or even commenced to put them into practice could be produced. There was no response to five (5) of the general recommendations (PWD). **The overall ‘paper’ acceptance rate was 66.7%, while the overall compliance rate, with compliance defined as recommendations accepted and acted on, was a mere 20.8% at best. If this does not improve in future years it must call into question the commitment of the highest Government authorities to good administration, excellent service delivery and the principles upon which the office of Complaints Commissioner was established. It would also signal the disappointment of the hopes of the large number of persons who in 1993 asked for such an office.**

16. The Commissioner and his staff need information when conducting investigations. Compliance with requests for documents and for interviews with employees or heads of agencies was fairly high, but in a few cases officials did not respond with the required urgency. It was not, however, necessary during the year to resort to the special investigatory powers.

VII. GENERAL RECOMMENDATIONS

17. As mentioned earlier, while the recommendations aimed at addressing the wrong or injustice done to a complainant are of great importance, the wide power to make such recommendations as he sees fit allows the Commissioner to make general recommendations aimed at preventing a repetition of the maladministration. The sixteen (16) such recommendations made could be summed up in the following groups.

- ❖ **Agencies should follow their service charters.** These usually promise that employees (and the service they provide) will be friendly, courteous, professional and the like; that letters will be answered and telephone calls returned; that responses will be prompt and that the department will update applicants and other customers from time to time if a resolution is taking longer than anticipated.
- ❖ **Agencies should keep proper and complete records** of meetings, calls, decisions on a matter.
- ❖ **Agencies should have in place and use a robust complaints system** or, to put it another way, a robust quality assurance programme. Reluctance to deal with complaints was at the root of several complaints. It is an uphill struggle to convince agency heads to apply even the limited complaints procedures set out in their service charters. In July, we circulated to all government departments the outlines or features of an internal complaints system.
- ❖ **Agencies should acknowledge wrong actions or mistakes and make up to the persons wronged.**
- ❖ Another recommendation was that the Public Works Department should institute a contracts management manual of procedures with adequate checks and balances, which should be followed in practice.

III. BUDGET AND FINANCE

18. The funds of the Commissioner are to come from

- a) Such monies as are appropriated to him by the House of Assembly for the purposes of the Act;
- b) Monies received by the Commissioner from agencies, other than the Government, approved by the Minister of Finance; and
- c) Donations, endowments and other gifts received by the Commissioner.

The amount of \$200,000 was appropriated by the House by the Appropriation Act 2009 (No. 8 of 2009) passed on 28th April, 2009. No funds or gifts were received from any outside source. In order to start up at minimum cost the Commission gratefully accepted some furniture left behind by the departing Audit Department.

19. The Act says that the funds of the Commissioner **shall** be kept in such bank as the Minister of Finance may approve. The Legislature, however, chose to appropriate the funds in the form of an itemized separate head of the Estimates, Head 715, to be accessed through the Treasury as with any Government department. Early representation to the Ministry of Finance during March, before the Standing Finance Committee had met to consider the Estimates, that the funds should be appropriated rather as a grant to be paid to the Commission in the form of a subvention (as in the case of statutory bodies that receive public funds) did not bear fruit. The representation to the Minister of Finance was renewed in December for the year 2010. This quest, and that for approval of a bank in which accounts could be kept, will be pursued, as an important point of independence of the office is at stake. The House's action in setting up the separate head rather than approving a grant was probably intended to emphasize the independence of the office, but it had, in fact, the effect of potentially limiting that independence. The more that the Commission has to be entangled with Government agencies such as the Treasury and Ministry of Finance in day to day administration of its operations, the less will be the appearance and reality of the independence of action in carrying out its functions. Put another way, the mode of funding by subvention would be more in the spirit of the constitutional stipulation that "in the exercise of his functions, the Complaints Commissioner shall not be subject to the direction or control of any other person or authority." To quote from a 1998 paper by Dean Gottehrer and Michael Hostina:

7. The office [should have] a budget funded at a level sufficient to carry out the purposes established in law and spends and accounts for its funds directly to the legislative body. An inadequately funded office will not be able to perform the functions required by law, and thus will lack true independence. The Ombudsman spends budgeted funds independent of any approving authority and accounts for its expenses directly to the legislative body.⁵

⁵ Dean M Gottehrer and Michael Fostina, "The Essential Characteristics of a Classical Ombudsman", 8th April, 1998.

SPECIAL CHALLENGES

21. We list these briefly.

- The lack of committed staff support until mid August curtailed the output of the office. It led to the decision to decline or defer investigation of some complaints.
- Lack of funding and uncertainties over future budget meant that little could be done about setting up a website, a very important tool for promotion of, and ease of access to, the Commission's service; or developing an electronic tracking system the need for which was by year's end becoming very clear. It was a challenge to keep all the investigations moving at a reasonable pace.
- A major challenge that became more evident as the year went on was the lack of ready legal advice on matters as they arose. The funds available for paying salaries did not appear to permit the engagement of a lawyer on staff and there were also no funds in the budget to pay for legal opinions in the private bar. The already overburdened Attorney General's Chambers was not in a position to issue quick opinions. In the circumstances we had to fall back on our own resources but this lack hampered the effectiveness of the Commission.
- Another challenge was the fear, on the part of some would-be complainants, of retaliation by government agencies for complaining to the Commissioner. I was not able to persuade many of such persons that their fears were unfounded. The hope is that as word of the Commission's work gets around such fears will diminish. The Governor and Cabinet, as well as Chief Executive Officers and Permanent Secretaries, have a major role to play on stamping out any tendencies on the part of employees to victimisation of persons who complain.

ACKNOWLEDGEMENTS

The Deputy Governor's Office staff, especially Mrs. Helen Seymour and Mrs. Gerda Frett, designated the office space and did most to get it ready for occupancy. Since the 2009 Budget was not passed until the end of April all spending up to that time (and well beyond) was ably and considerately handled by the Finance Officer, Mrs. Kara Penn-Stoutt, and her staff. The Communications Officer, Miss Aisha Hill, helped with publicity.

I must make special mention of the persons who served as secretary/receptionist/office assistant on loan until mid August when our first member of staff joined. These were Mrs. Dian Liburd, Personal Assistant to the Premier's Permanent Secretary, in the early weeks; Mrs. Sandra Herbert, over the months April to May; and University student, Miss Feliza Fenty, during July and early August. Appreciation is due to Mrs. Rosalie Adams and Ms. Julia Christopher, Permanent Secretaries in the Offices of the Premier and Deputy Governor, respectively, for the loan of these officers.

Being completely new to the work I had to lean on the experience of others elsewhere. Much was available through research on the worldwide web, but that source has its limitations. For 'hands on' advice and support I am most indebted to the Bermuda Ombudsman, Attorney Arlene Brock, who readily supplied in generous measure relevant printed and electronic material and gave critiques of my early draft reports. She also kindly hosted the Assistant Commissioner for a very productive week-long training attachment at her office in Bermuda. I must acknowledge the support of the new Complaints Commissioner for the Cayman Islands, Ms. Nicola Williams, who took up her appointment in August. She invited me to attend, without charge, a December training course on investigations (titled "Sharpening Your Teeth) conducted by the Ombudsman of Ontario and his lead investigator, a course arranged for officers of that Territory. The Ombudsmen of Barbados, Grenada and St. Lucia (on behalf of CAROA, the Caribbean Ombudsman Association) sent warm greetings that were much appreciated. I was left in no doubt that I could call on them for any assistance that they could provide.

The Governor, Mr. David Pearey, was unfailingly supportive, acknowledging and commenting on reports. The Deputy Governor, Mrs. Inez Archibald, did a great deal to impress on top managers the importance of the Office and the need to take its work seriously.

APPENDICES

Appendix 1

List Government Departments

Adina Donovan Home
Attorney General Chambers
Audit Department
Archives & Records Management Unit
BVI Finance Centre
BVI Fishing Complex
BVI Shipping Registry
Conservation & Fisheries
Customs Department
Department of Disaster Management
Department of Human Resources
Deputy Governor's Office
Development Planning Unit
Education Department
Department of Culture
Facilities Management Unit
Governor's Office
House Of Assembly
Fire and Rescue Service
High Court Registry
Department Of Immigration
Department of Information & Technology
Information & Public Relations
Inland Revenue
Internal Audit

Labour Department
Land Registry
Library Services
Magistrate's Court
Ministry of Communications & Works Ministry
of Education & Culture
Ministry of Finance
Ministry of Health & Social Development
Ministry of Natural Resources & Labour
Environmental Health Division
Registry & Passport Office
Police
Premier's Office
Her Majesty's Prison
Public Works
Solid Waste
Social Development
Survey Department
Telephone Services Department
Town and Country Planning
Trade and Consumer Affairs
Training Division
Treasury
Vehicle Licensing
Water & Sewerage Department
Youth Affairs and Sports

Appendix 2

Public Authorities

Financial Investigation Agency*
Judicial and Legal Services Commission*
Police Service Commission*
Public Service Commission*
Teaching Service Commission*
National Disaster Management Council*

BVI Tourist Board
Board of Immigration
H Lavity Stoult Community College
Planning Authority
Planning Appeals Tribunal
Social Security Board
Wickhams Cay Development Authority

Financial Services Commission*
Income Tax Appeal Board*
National Bank of the Virgin Islands Limited*
Stamps Advisory Committee*
Central Tenders Board

Allied Health Services Authority*
BVI Health Services Authority
Medical and Dental Council
Nurses and Midwives Council
Public Assistance Committee

Airports Authority Limited
BVI Electricity Corporation
Building Authority
Telecommunications Regulatory Commission

Board of Film Censors*
Early Education Advisory Committee*
Education Advisory Committee*
Festivals and Fairs Committee
Library Services Committee*
Prison Visiting Committee
Scholarships Committee
Scholarship Trust Fund Board
.....

National Parks Trust
Land Survey Board

[*Financial Investigation Agency Act, 2003*]
[*Virgin Islands Constitution, 2007*]

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“

“

[*Disaster Management Act, 2003*]

[*Tourist Board Act, Cap. 280*]
[*Immigration and Passport Act, Cap. 130*]
[*H. Lavity Stoult Community College Act, 1991*]
[*Physical Planning Act, 2004*]
[“]
[*Social Security Act, Cap. 266*]
[*Wickhams Cay Dev. Authority Act, Cap.281*]

[*Financial Services Commission Act, 2000*]
[*Income Tax Act, Cap. 206*]

[*Public Finance Management Regulations 2005*]

[*British Virgin Islands Health Services Authority Act 2004*]
“
“

[*Public Assistance Act, Cap. 265*]

[*Airports Act, 2003*]
[*British Virgin Islands Electricity Corporation Act, Cap 277*]
[*Buildings Ordinance, Cap. 234*]
[*Telecommunications Act, 2006*]

[*Cinematographs Act, Cap. 236*]
[*Education Act, 2004*]
”

[*V.I. Festival and Fairs Committee Act, 2005*]
[*Public Library Services Act, Cap. 117*]

[*Scholarship Trust Fund Act, Cap. 118*]

[*National Parks Act, 2006*]
[*Land Surveyors Act, Cap. 21*]

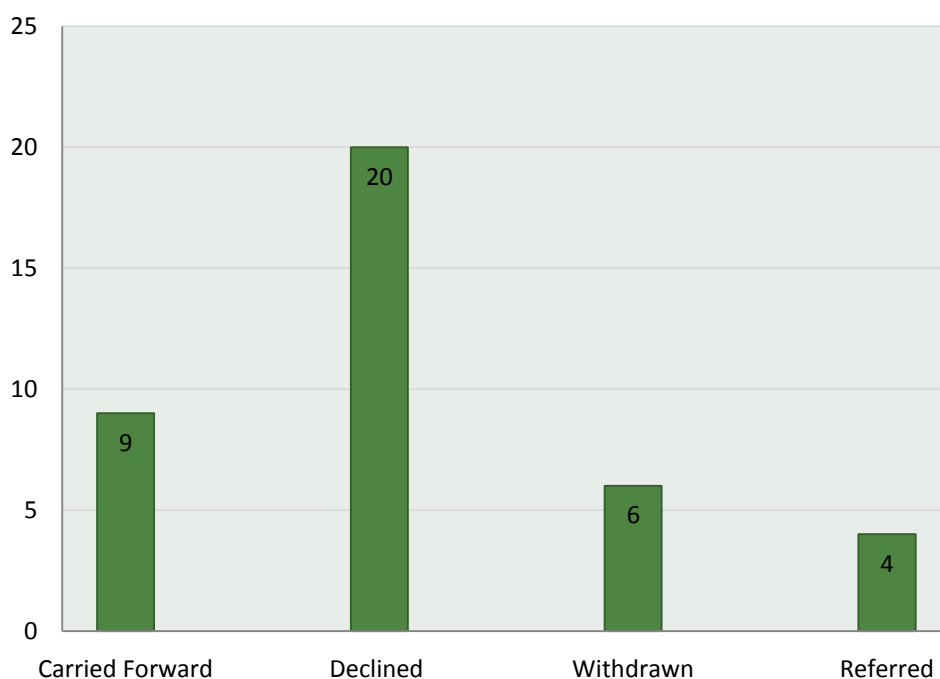
Appendix 3

STATISTICS

2009 SUMMARY

Statistics Summary 3 March, 2009 - 31 December, 2009	
Total enquiries	49
Number of complaints declined	20
Number of complaints withdrawn	6
Number of complaints referred to other agencies	4
Number of complaints investigated	14
Number of investigations/reports completed	5
Number of investigations open/carried forward	9
Number of own motion investigations started/completed	1/0
Number of investigations requested by Members of House of Assembly	0
Number of special reports sent to be laid	1
Total number of recommendations in completed reports	24

Status of Complaints



DISPOSITION OF COMPLAINTS NOT REFERRED
3 MARCH, 2009 - 31 DECEMBER, 2009

BY MINISTRY		OPEN	DECLINED		CLOSED AFTER PRELIMINARY INQUIRY OR INVESTIGATION				
					Informal Resolution	MALADMINISTRATION		NO MALADMINISTRATION	
			Not in Jurisdiction	Withdrawn		Specific Complaint Rec	General Practices Rec	Value Added	No Action
Ministry of Education and Culture	3								
Central Office	2		2						
Her Majesty's Prison	1			1					
Ministry of Communications and Works	8								
Central Office (Systemic Report)	2					1	1		
B.V.I. Electricity Corporation	3		2				1		
Public Works Department	1						1		
Vehicle Licensing Department	2		1				1		
Ministry of Finance	4								
Inland Revenue Department	2	1				1	1		
Her Majesty's Customs	1		1						
National Bank of the Virgin Islands	1			1					
Ministry of Health & Social Development	6								
Central Office	2	2							
B.V.I. Health Services Authority	1	1					1		
Social Development Department	2		1 (V)					1	
Solid Waste Department	1		1						
Ministry of Natural Resources and Labour	4								
Central Office	2			1	1 (V)				
Labour Department	2			2					
Governor's Group	10								
Department of Human Resources	7		7 (V)						
Magistrate's Office	2		2 (V)						
Police Department	1	1							
Office of the Premier	8								
Central Office	1	1							
Immigration Department	3	1		1			1		
B.V.I. Ports Authority	2		2						
Town and Country Planning Department	2	1	1						
House of Assembly	1								
Office of the Clerk	1	1							
TOTALS	44	9	20	6	1	2	7	1	

(V) indicates "Value Added" = informal assistance or valuable advice rendered.

Number of dispositions exceeds number of complaints as some complaints had both specific and general recommendations.

**MALADMINISTRATION ALLEGED
FOR THE PERIOD MARCH 1, 2009 - DECEMBER 31, 2009**

Ministry	Inefficient	Improper	Unreasonable Conduct	Unreasonable Delay	Abuse of Power	Improperly Discriminatory	Mistake of Law or Fact	Unresponsive	Totals
Ministry of Communications and Works									
B.V.I. Electricity Corporation	1							1	2
Public Works Department			1						1
Vehicle Licensing Department			1						1
Ministry of Finance									
Inland Revenue Department				2					2
Ministry of Health and Social Development									
Ministry of Health and Social Development				1			1		2
B.V.I. Health Services Authority				1				1	2
Social Development Department							1		1
Ministry of Natural Resources and Labour									
Ministry of Natural Resources and Labour				1					1
Governor's Group									
Police Department								1	1
Office of the Premier									
Office of the Premier								1	1
Immigration Department			1	1					2
Town and Country Planning Department								1	1
House of Assembly									
Office of the Clerk			1						1
TOTALS	1		4	6			2	5	18

Appendix 6

THE COMPLAINTS COMMISSION (OFFICE OF THE COMPLAINTS COMMISSIONER)

Commentary on

STATEMENT OF ACCOUNTS for the Financial Year ending 31st December 2009

The Complaints Commissioner Act, 2003 states in section 17:

- 17.** (1) The Commissioner shall cause proper accounts of all financial transactions to be kept in such form as the Chief Auditor may direct.
- (2) The Commissioner shall, as soon as practicable after the end of the financial year, prepare a statement of his accounts.
- (3) The accounts required to be kept under subsection (1) and the statement of accounts required under subsection (2) shall be audited, as soon as practicable and in any case within four months after the end of each financial year, by the Chief Auditor or an auditor appointed for the purpose by the Chief Auditor.

2. The Act clearly envisages the funds of the Commissioner being provided in grant or subvention form and kept in a bank account. In that case, the Commissioner would have to keep proper accounts in a form satisfactory to the Auditor General. In the event, although the funds were originally requested as a line item of the Deputy Governor's budget titled "Office of the Complaints Commissioner" in an amount of \$200,000, the House of Assembly preferred to appropriate the funds in the form of a separate head in the Estimates with the Complaints Commissioner as the Accounting Officer. This came about at the end of April when the 2009 Appropriation Act was passed.

3. The format restricts the Commissioner in utilizing his budget to the greatest effect. He has to follow all the Public Finance Management Regulations in the course of spending, which tends to inhibit the best use of scarce resources. He has to get permission from the Financial Secretary to re-allocate funds between items (e.g. local and overseas travel) so is not free to switch funds as he sees the need to do. He also must get permission to spend from "reserved" votes. He has to comply with any restrictions that are centrally imposed from time to time and that may affect his capacity to investigate. Since the Government operates on a cash accounting basis, rather than an accrual basis funds unused in 2009 are 'lost' to the Commission, as they are returned to the Consolidated Fund. This inhibits multi-year planning and 'saving' for projects, among other things. It is also not possible to predict when particular services will be needed. So the strait jacket of the normal budget head restricts flexibility.

4. Until the office acquired staff and the proper Treasury systems were put in place, the expenditure for the office and from the Vote was handled by the Finance and Accounts Unit of the Deputy Governor's Office. It was not until October that a Vote Book was opened and the Complaints Office started to do its own accounts work.

5. In the circumstances, the “accounts of financial transactions” had to be kept in the standard Treasury forms and were part of the centralized JD Edwards system. The Auditor General thus did not have to be involved in that aspect as envisaged by the Act.

6. Of the total of **\$200,000 approved** for the Office an amount of **\$114,734** had been charged to the vote by year’s end. Other recurrent expenditure that should be charged (if and when the proper journal entries are done) would be \$21,000 in salaries and \$16,083 in office rent. Further, messenger service was provided by the Deputy Governor’s Office, no item for this having been included in the budget. A value of \$1,000 would be a reasonable estimate for this item. The true **operating total expenditure** for the year would then amount to **\$152,817**.

7. In addition, the Deputy Governor’s Office supplied by purchase out of their central Furniture and Fixtures vote other items, including two filing cabinets, two bookcases, and two small conference tables with six chairs, a total \$7,284. After some dialogue that Office also graciously agreed to waive the charge of \$3,500 that it had earlier imposed for a complete set of the Laws of the Virgin Islands for which no financial provision had been made. If one adds these contributed start-up costs totaling **\$10,784** then the **total relevant expenditure** on the office rises to **\$163,201**.

8. The itemized detailed expenditure direct from Head 715 and the Auditor General’s comments on the accounts are appended. The minor exceptions listed in the audit memorandum have been taken on board for guidance going forward.



.....
Complaints Commissioner

May, 2010

Appendix 7

Head 715: OFFICE OF COMPLAINTS COMMISSIONER 2009

ACCOUNT DESCRIPTION	APPROVED	SPENT	BALANCE
Personal Emoluments	153,500.00	97,562.30	55,937.70
Operating Expenses			
General Office Expenses	4,000.00	3,821.12	178.88
Printing & Stationery	2,770.00	1,017.53	1,752.47
Books & Subscriptions	1,000.00	76.50	923.50
Operating Expenses	7,770.00	4,915.15	2,854.85
Utilities			
Telephone/Telexes/Faxes	3,200.00	1,295.97	1,904.03
Electricity	3,000.00	568.18	2,431.82
Water	1,000.00	429.64	570.36
Postage	700.00	135.43	564.57
Utilities	7,900.00	2,429.22	5,470.78
Fixed & Moveable Assets			
Equipment (minor)	800.00	205.22	594.78
Maintenance & Hire	1,230.00	1,228.03	1.97
Fixed & Moveable Assets	2,030.00	1,433.25	596.75
Rental Expenses			
Office Rent	19,300.00	0.00	19,300.00
Rental Expenses	19,300.00	0.00	19,300.00
Travel			
Overseas Travel	6,000.00	5,760.57	239.43
Local Travel	2,900.00	2,370.92	529.08
Travel	8,900.00	8,131.49	768.51
Departmental Expenses			
Entertainment	600.00	262.50	337.50
Departmental Expenses	600.00	262.50	337.50
TOTALS	200,000.00	114,733.91	85,266.09

Appendix 8



GOVERNMENT OF THE VIRGIN ISLANDS OFFICE OF THE AUDITOR GENERAL

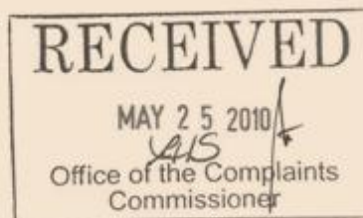
PO Box 174, Road Town, Tortola, British Virgin Islands
Telephone: (284) 468-4144, Facsimile: (284) 468-4148

AUDIT NOTE

TO: Complaints Commissioner

FROM: Auditor General

DATE: 14th May, 2010



Audit Examination of the Vote Book of the Office of the Complaints Commissioner for the period ended 31st December, 2009

An audit examination of the above captioned Vote Book revealed the following matters for your attention:

1. Subhead 60300-Staff total expenditure included an amount of \$3,500 posted by journal entry T2-990 for payment of salaries for the period 16-29 May that should have been posted to subhead 60200-Head.
2. Subhead 61610-Overseas Travel, commitment ledger inquiry on the JD Edwards system has a negative balance of \$10.78. This amount represented a reimbursement that was not properly processed through the system.
3. The inventory folio number was not recorded in the vote book for items purchased under subheads 61100 Office and General and 61325 Equipment (Minor).

Recommendations

1. An Accounting Officer shall ensure that expenditure is classified in strict accordance with the expenditure votes. *Refer to PFMR, 2005, Part 3 - Section 10 (1)*


Amoret Davies (Ms.)
Audit Manager
For Auditor General

/ms