



Neutral Citation Number: [2026] CIGC (Civ) 22

Cause No: G 2024-0103

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

BETWEEN:

**THE KING
(On the application of
CARIBBEAN UTILITIES COMPANY, LTD)**

Applicant

-and-

THE CAYMAN ISLANDS OMBUDSMAN

Respondent

UTILITY, REGULATION AND COMPETITION OFFICE

Interested Party

Appearances: Mr Chris Buttler KC instructed by Mr Andrew Jackson and Mr Zuhair Farouki of Appleby (Cayman) Ltd for the Applicant
Mr Tom Lowe KC instructed by Mr Vaughan Carter of Savannah Law for the Respondent

Before: The Honourable Justice Jalil Asif

Heard: 4, 5 and 6 June 2025

Judgment 8 June 2026

Judicial review—challenge to decision of Ombudsman that regulator should disclose documents under Freedom of Information Act—third party having commercial interest in documents—third party not informed of appeal and not afforded opportunity to make representations to Ombudsman—whether to quash decision for procedural unfairness

Constitution, section 15—right to peaceful enjoyment of property—absence in Freedom of Information Act of provision for compensation where property rights infringed by order for disclosure—appropriate interpretation of section 21 of the Freedom of Information Act so as to be consistent with section 15 of the Constitution pursuant to section 5 of the Cayman Constitution Order 2009

JUDGMENT

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A. Introduction

1. This judicial review involves a challenge by the Caribbean Utilities Company Ltd (“CUC”) to the decision of the Ombudsman, dated 5 February 2024, to require the regulator, the Utility, Regulation and Competition Office (“OfReg”) to release into the public domain two studies belonging to CUC. The first study addresses the detailed calculation of the cost of diesel-powered electricity generation in the Cayman Islands (“the COSS”) and the second study concerns the predicted impact on electricity generating costs in the Cayman Islands resulting from increased implementation of solar power (“the IDSS”). In making that decision, the Ombudsman was hearing an appeal and exercising her powers under the Freedom of Information Act (2021 Revision) in respect of an application by a member of the public for release of those documents, which OfReg had refused.
2. The application for judicial review was fully argued before me on 4, 5 and 6 June 2025, when CUC was represented by Mr Chris Buttler KC instructed by Mr Andrew Jackson and Mr Zuhair Farouki of Appleby (Cayman) Ltd and the Ombudsman was represented by Mr Tom Lowe KC instructed by Mr Vaughan Carter of Savannah Law. There was no appearance by or on behalf of OfReg as interested party. I am extremely grateful to the parties for their patience in awaiting this judgment, which has been significantly delayed due to other time sensitive matters before the Court that have had to take priority.
3. In summary, CUC’s case is that:
 - 3.1 The Ombudsman’s decision to require the release of the COSS and the IDSS was procedurally unfair. Notwithstanding that the hearing before the Ombudsman concerned documents that belong to CUC, CUC was not given notice of the hearing, was not provided with the parties’ submissions, was not informed of the questions raised by the Ombudsman during the course of the appeal and, by implication, was not given the opportunity to respond to them in order to provide the Ombudsman with its representations and the correct facts.
 - 3.2 An important part of the Ombudsman’s reasoning in support of the decision to order release of the COSS and the IDSS was her conclusion that CUC has an unfair advantage in the bidding process for electricity generation in the Cayman Islands because it is involved in co-designing the specifications for the bidding process with OfReg. In addition, the Ombudsman concluded

that CUC had not submitted an updated cost of service study since 2014, as it was obliged to do under the terms of its licence. CUC contends that both of these conclusions were factually incorrect, invalidating the Ombudsman's reasoning.

3.3 The Ombudsman's decision was contrary to the Freedom of Information Act ("the FOIA"), when read with section 5 of the Constitution Order and section 15 of the Constitution of the Cayman Islands, because it interfered with CUC's property without CUC having available any right to compensation for that interference.

4. CUC adds that, whilst judicial review is about correcting legal errors and does not require any attribution of blame, much of what went wrong in the decision making underlying this case is the responsibility of OfReg, which it says could and should have ensured that the hearing before the Ombudsman was fair to CUC; and could and should have provided the Ombudsman with sufficient information to avoid her developing a misunderstanding of the bidding process. CUC additionally criticises OfReg for failing to participate in the judicial review despite being named as the Interested Party.

5. The Ombudsman's response to CUC's complaints is that:

5.1 OfReg's shortcomings in putting forward a case at the appeal hearing are CUC's fault, which was on notice of the procedure for an appeal. It was not the Ombudsman who relied on OfReg to ensure natural justice but CUC, who assumed that OfReg would present CUC's case and did nothing. OfReg cannot now complain that this miscalculation is a failure of natural justice.

5.2 CUC failed to advance a coherent case to OfReg on the applicant's original request under the FOIA, so that OfReg could raise this case on the appeal. CUC knew that OfReg was the respondent to the appeal and would have to defend CUC's views. When OfReg asked CUC to produce evidence in July 2023, CUC did nothing to ask OfReg or the Ombudsman whether it could have more time to make its case. In the following months that passed before the Ombudsman made her decision, CUC made no inquiry, did not seek to advance further material and chose not to put its case to the Ombudsman.

- 5.3 CUC seeks to introduce a mass of material in its affidavits on the exemptions that was not available to the Ombudsman and could not therefore have been taken into consideration by her, and which the court should not give any weight.
- 5.4 On the material before the Ombudsman, she was entitled to conclude that the COSS and IDSS had not been shown to be confidential and that it had not been shown that disclosure would destroy its commercial value nor prejudice CUC's commercial interests. CUC cannot show that the contrary would have been established but for a breach of the rules of natural justice.
- 5.5 Even if the Ombudsman were to have concluded that OfReg had been correct on the exemptions, the Ombudsman was entitled to uphold the appeal on the basis that OfReg should have disclosed the COSS and IDSS on public interest grounds. That was part of her reasoning for overturning OfReg's decision, and the public interest is relevant to her decision.
- 5.6 The Ombudsman's alleged errors of fact are not material and have been blown out of all proportion. CUC cannot show that this factor would have changed the Ombudsman's view of the public interest. The Court should conclude that the errors make no difference to the decision on public interest.
- 5.7 CUC should have advanced its constitutional objection when it objected to the initial request under the FOIA and during the FOI appeal. It is now too late for CUC to do so when it did not seek confirmation that it would be compensated before the Ombudsman.
- 5.8 Further, CUC's constitutional claim is nonsensical: either CUC succeeds on the ground that the COSS and IDSS are exempt from disclosure, or it does not. If it succeeds, then it has no complaint. If it loses that is because it had no property requiring protection, either because it has not established confidentiality or it has lost the protection because of the public interest. In either case it cannot complain of a deprivation of its property.

B. The relevant legal and procedural framework for the Ombudsman's decision

6. Section 7 of the FOIA permits a person to apply to a public authority for access to a record, in other words to any information recorded in writing. If that request is refused, section 42 of the FOIA allows the requesting person to appeal to the Ombudsman in writing for a decision that the public authority has failed to comply with the FOIA, provided that they have exhausted the other means of redress

available under the FOIA. Section 9(1) of the Ombudsman Act allows the Ombudsman to use mediation, conciliation or any other alternative dispute resolution process to try to resolve a matter under any scheduled Act, which includes the FOIA. It appears to be the Ombudsman's general practice to attempt informal resolution of appeals before proceeding to a formal hearing.

7. Section 43(1) of the FOIA requires the Ombudsman to decide the appeal after giving both the complainant and the relevant public body an opportunity to provide its views in writing. Section 45(1) of the FOIA empowers the Ombudsman:

"45(1) [...] to conduct a full investigation, including by issuing orders requiring the production of evidence and compelling witnesses to testify [...]"

8. In hearing and determining the appeal, the Ombudsman must comply with section 19(1) of the Constitution:

"19(1). All decisions and acts of public officials must be ... procedurally fair."

9. The Ombudsman has published a *Policy and Procedures* document setting out how she will determine appeals under the FOIA. The stated purpose of the *Policy and Procedures* document, as recorded in section 1 of the document, is:

"[...] to support fairness, certainty, transparency, and efficiency throughout the appeal process."

10. As regards appeals that proceed to the formal stage, the *Policy and Procedures* document includes the following in section 5:

"[...] Under the FOI Act, the Ombudsman must decide on an appeal after giving both parties an opportunity to provide their views in writing.

An FOI hearing involves a number of steps, including:

- *setting the hearing calendar;*
- *issuing the notice of hearing;*
- *providing initial submissions;*
- *the exchange of initial submissions;*
- *providing reply submissions; and*
- *the exchange of reply submissions.*

Once an appeal moves to a hearing, all parties are informed. [...]"

Written hearings before the Ombudsman are the norm, but the Ombudsman may decide to hold an oral hearing, in which case separate instructions would be issued. [...]"

11. In the context of clarifying what information will be published about the identity of the participants, the Ombudsman's *Policy and Procedure* document states:

"The notice of hearing and decision do not identify applicants or third parties who are individuals but they do identify the public authority involved and any interveners that are corporate entities."

Thus, although not specifically addressed in the FOIA or in the Ombudsman's *Policy and Procedure* document, the Ombudsman contemplates that there may be interveners in the appeal process.

12. As to the submissions to be delivered, the *Policy and Procedure* document explains:

"Initial and reply submissions should be:

- no longer than 30 pages each (excluding any affidavits);*
- in 12-point type or clear and legible handwriting; and*
- divided into numbered paragraphs.*

[...]

Hearing participants must cite any sources that they rely on, including orders, court cases, statutes or other legal authorities, books or academic articles, and provide us with copies.

[...]

Initial submissions should address the issues set out in the notice of hearing and include relevant evidence and arguments."

13. Finally, of relevance, the Ombudsman's the *Policy and Procedure* document addresses the burden of proof in section 6:

"[...] the burden of proof is on the public authority to show that its actions comply with the requirements of the FOI Act. The default position in the FOI Act is that all records are open to the public, except where the Act provides a reason for not disclosing them. In the appeal, the public authority has an opportunity to present factual evidence and legal arguments that support its views on the access status of the records in dispute. This should include an interpretation of how the relevant sections of the FOI Act apply in the specific circumstances of the case. In most cases, this means that the underlying reasons for any exemption or exception that is relied on must be explained. It is not appropriate to only state the exemption, without further explanation or reasons. If no or insufficient reasons are given, the Ombudsman may find that the exemption (or other reasons for withholding a record) in a specific case does not apply."

C. The facts

14. I will now set out the facts derived from the documents and affidavits before me for this hearing. I note that the evidence omits any correspondence between the Ombudsman and the applicant for disclosure of the records, other than the Ombudsman's initial acknowledgment of his appeal, the Ombudsman's email dated 30 October 2023 sending out the Notice of Hearing to the parties, and a letter to the applicant from the Ombudsman dated 28 November 2023 indicating that his appeal

was on hold whilst the Ombudsman was awaiting submissions from OfReg. It appears that this omission is because the Ombudsman did not disclose any such correspondence within these judicial review proceedings.

15. Mr Buttler complains that the Ombudsman has failed to comply with her duty of candour in judicial review proceedings. It seems to me that that criticism is justified, having regard to what is said in the English Court of Appeal decision in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 at paragraph 105 and following. Disclosure by the Ombudsman of the correspondence with the applicant and the materials submitted by him would have provided me with a more complete and balanced understanding of the conduct of the appeal. I reject Mr Lowe's submission that any failure to disclose documents by the Ombudsman was inadvertent – it seems to me that the Ombudsman must have made a conscious decision not to disclose any of her correspondence with the applicant. As a result, the following factual narrative is not a complete picture of events because it largely omits the Ombudsman's dealings with the applicant.

C.1 The FOIA request to OfReg

16. On 20 April 2023, the applicant, who has a commercial interest in the supply of renewable energy in the Cayman Islands, applied to OfReg under the Freedom of Information Act for “copies of all fuel efficiency studies and cost of service studies related to the licensee CUC”. On 14 May 2023, OfReg sought input from CUC on whether the COSS that CUC had prepared in 2014 had been made public. CUC responded on 16 May 2023 that CUC had published a press release when the COSS was issued in May 2014, but the full version of the COSS had not been made public due to the commercial sensitivity of its contents.
17. On 17 May 2023, OfReg asked CUC whether it would be possible to release a redacted copy of the COSS or whether CUC considered the entire report to be commercially sensitive. However, apparently without waiting for CUC's response, OfReg responded to the applicant on 19 May 2023 informing him that OfReg considered the studies he had requested to be exempt from disclosure on the ground of commercial sensitivity under section 21 of the FOIA, which is directed at the effect of disclosure on commercial interests.

18. On 24 May 2023, CUC responded to OfReg's enquiry of 17 May 2023. CUC provided a reasonably detailed explanation for CUC's stance that the COSS should not be disclosed. CUC stated:

"Although we have not sought to summarise the particular information which is commercially sensitive in this email, we wish to note that, as you may be aware, OfReg and CUC have been working together to move forward with issuing a RFP for Renewable Energy Auction Scheme Round 1 competitive bid. Furthermore, CUC will participate in the tender process when launched by OfReg. The release of the 2014 COSS at this time could therefore potentially (and may well be likely to) affect the fairness of the competitive procurement process, given that CUC's cost allocations would [be] publicized.

With respect to the further question of disclosing the COSS in redacted form, we are of the opinion that the extent of the redactions to the COSS which would be necessary to protect the commercially sensitive information that it contains would be so extensive that it would be of little or no use to the person making the request.

As such, we do not consider it appropriate to provide the COSS either in redacted or unredacted form, and respectfully suggest that it should be treated as exempt from disclosure pursuant to section 21(1)(b) of the Freedom of Information Act (2021 Revision), and that there is either no, or insufficient, public interest in such disclosure being made (i.e. despite the exemption).

We also believe that the request engages section 9(c) of the Act, which states that 'A public authority is not required to comply with a request where – compliance with the request would unreasonably divert its resources.' If we are required to make (and OfReg is required to review) significant redactions to the COSS, we consider that this request will unreasonably divert the resources of both OfReg and CUC from the RFP preparations noted above."

OfReg does not appear to have communicated to the applicant the substance of CUC's more detailed explanation for refusing disclosure at any time.

19. On 19 May 2023, the applicant requested that OfReg carry out an internal review pursuant to section 33 of the FOIA of its decision to refuse disclosure. On 4 July 2023, OfReg responded to his request stating that it confirmed its decision. OfReg did not provide any reasoning in its response and did not take the opportunity to pass on CUC's explanation for its position detailed in CUC's email of 24 May 2023.

C.2 The informal phase of the appeal to the Ombudsman

20. On 5 July 2023, the applicant appealed to the Ombudsman pursuant to section 42 of the FOIA. In an email sent by the Ombudsman on 6 July 2023 and copied to OfReg, the Ombudsman acknowledged the applicant's appeal. She indicated that she would investigate the appeal, would encourage an informal resolution between the parties and the appeal would proceed to a formal hearing if that was not possible. As provided for in the FOIA, the Ombudsman dealt with the matter on the papers, engaging in correspondence with the applicant and OfReg as necessary. However, at no time did the Ombudsman correspond with or copy CUC into correspondence concerning the appeal.

21. On 10 July 2023, the Ombudsman requested that OfReg provide copies of the records in question for review by the Ombudsman within 7 days. The Ombudsman also forwarded to OfReg a copy of her *Policy and Procedures* document for FOIA appeals.
22. For reasons that are not clear to me due to OfReg's decision not to participate in this judicial review, OfReg appears to have treated the Ombudsman's request as a demand for a full explanation of OfReg's case. OfReg contacted CUC on 12 July 2023 stating that the applicant was appealing OfReg's refusal to release the documents to him and requested that CUC provide an affidavit by 13 July 2023 outlining CUC's reasons why the studies should not be released. There was an exchange of correspondence between OfReg and CUC on 12 July 2023 to clarify what documents were being sought, and it appears that this confirmed that it was both the COSS and IDSS that were in issue.
23. Ms Letitia Lawrence, CUC's Vice President and Chief Financial Officer, swore an affidavit on 13 July 2023, as requested by OfReg, explaining CUC's reasons for saying that disclosure of the COSS would be contrary to section 21 of the FOIA. As an alternative position, Ms Lawrence identified certain passages in the COSS that should remain redacted if the COSS were ordered to be disclosed and exhibited a redacted version of the COSS. Ms Lawrence did not address the IDSS, apparently because this was the first occasion on which CUC became aware that the IDSS was also being sought by the applicant and Ms Lawrence did not have sufficient time to address the IDSS.
24. OfReg acknowledged receipt of Ms Lawrence's affidavit on 14 July 2023. OfReg stated:

“Our team will carefully examine the contents and take the necessary steps to address this matter. Should we require any additional details or have any further questions, we will reach out to you promptly. [...]”
25. OfReg followed up the same day to clarify whether CUC's position was that it was content for the redacted version of the COSS to be disclosed. CUC replied that its preference was not to disclose, but if the Ombudsman concluded that it should be disclosed, then the redacted version could be disclosed. Notwithstanding that OfReg demanded that CUC respond to its request within one working day, OfReg does not appear to have responded to the Ombudsman at the time. OfReg appears also to have sent a version of the COSS with CUC's proposed redactions to the Ombudsman, but the material before me does not indicate when this occurred.

26. On 21 August 2023, the Ombudsman wrote to OfReg indicating that it had reviewed OfReg's responses to the applicant's request. The Ombudsman pointed out that the burden of proof was on OfReg to demonstrate that it had complied with its obligation under the FOIA and requested OfReg to provide arguments to support its decision to exempt the COSS and IDSS from disclosure. The Ombudsman noted that OfReg should address both the commercial sensitivity question and also the issue of the public interest.
27. OfReg responded to the Ombudsman in a memo dated 12 September 2023, quoting extracts from Ms Lawrence's affidavit to justify OfReg's decision to refuse to disclose the COSS and IDSS. As this response was relied upon by OfReg at later stages and sets out OfReg's objections, I will set out the relevant passage in full:

"In regard to the Cost of Service Study ('COSS'), OfReg is of the view that these studies are of a highly sensitive nature to CUC, due to the inclusion of operational intricacies that hold the potential to compromise CUC's stance in upcoming Request for Proposals ('RFPs'). OfReg is actively engaged in ongoing and prospective RFPs for projects to which these specific studies would apply, and be used for their submissions to the Request for Information ('RFI').

The studies in question contain critical details that, if exposed to the public domain, could lead to a compromise of CUC's submissions during the forthcoming RFP process. Specifically, the numbers and associated costs highlighted within these studies could be manipulated by potential bidders in a manner that undermines the integrity of the bidding process for this project.

Furthermore, the financial insights derived from these studies compromise CUC's standing. Should this information be released to the public, it becomes feasible for other enterprises to exploit these figures, thereby jeopardizing the equitable nature of the competitive process.

CUC has also submitted an Affidavit objecting to the COSS being made public. Their cited reasons include:

- *'All of this information is confidential to CUC and OfReg. None of it is in the public domain.*
- *All of this information would have significant commercial value to any person wishing to participate in any competitive bids against CUC, if such a person were to receive it. In particular: OfReg and CUC have been collaborating to issue a request for proposal ('RFP') for Renewable Energy Auction Scheme Round 1 competitive bid.*
- *CUC will participate in the tender process under that RFP when it is launched by OfReg.*
- *The release of the 2014 COSS could materially affect the fairness of the competitive bid process by giving prospective competing bidders (or enabling them to gain) access to CUC's cost allocations.*
- *There is therefore significant commercial value to CUC in this information. I believe that this value would be substantially diminished or destroyed by the disclosure of the information.'*

In light of these considerations, OfReg as a regulator of these business ventures, has taken the stance that confidentiality must be exercised in handling these enclosed studies. Our commitment to upholding a fair and unbiased competitive environment is of paramount importance, and OfReg is required to safeguard the integrity of this process."

28. It appears that OfReg sent the memo to the Ombudsman under a covering email in which OfReg confirmed that it had not shared any of the documents with the applicant, enclosed a copy of Ms Lawrence's affidavit, and invited the Ombudsman to contact OfReg if she required any further information or had any additional questions.
29. On 24 October 2023, the Ombudsman expressly queried whether the IDSS should be treated as being responsive to the applicant's request and also asked whether there were any other records responsive to that request. The Ombudsman provided OfReg with her proposal as to more limited redactions to the COSS for OfReg to consider. This appears to be a response to the proposed redactions that CUC had suggested to OfReg, as exhibited by Ms Lawrence to her affidavit. The Ombudsman indicated that the formal hearing of the applicant's appeal was due to commence on 30 October 2023.
30. OfReg forwarded the Ombudsman's request to CUC for CUC's input. CUC responded on 26 October 2023, forwarding revised redactions to the COSS. CUC invited OfReg to contact CUC if OfReg required anything further. On 27 October 2023, OfReg forwarded the proposed revised redactions to the COSS to the Ombudsman.

C.3 *The formal phase of the appeal to the Ombudsman*

31. On 30 October 2023, the Ombudsman wrote by email to the applicant and to OfReg alone sending them a Notice of Hearing and a copy of the Ombudsman's FOIA *Policy and Procedures* document. The email stated that the hearing would be conducted in writing. The Notice of Hearing identified that the Ombudsman would consider and decide whether the COSS and IDSS were exempt from disclosure under section 21(1)(a)(i) of the FOIA, under section 21(1)(a)(ii) or under section 21(1)(b) and also whether access would nevertheless be in the public interest. The Notice of Hearing indicated that under section 43(2) of the FOIA, the burden of proof was on OfReg to show that it acted in accordance with its obligations under the FOIA.
32. As to the applicable procedural timetable, the Notice of Hearing stated that the parties should deliver their initial written submissions by 6 November 2023 addressing the issues identified in the Notice of Hearing and telling the Ombudsman why a finding should be made in their favour; the

Ombudsman would exchange the submissions between the parties on 7 November 2023; the parties should deliver their reply submissions by 14 November 2023; and the Ombudsman would exchange the reply submissions on 15 November 2023.

33. On 3 November 2023, Mr Lee of OfReg swore an affidavit in response to the applicant's appeal, which provided a chronology of OfReg's handling of his request for disclosure but did not advance any arguments to justify OfReg's decision to exempt the COSS and IDSS from disclosure. In preparing his affidavit, Mr Lee did not seek any further input from CUC despite its offer on 26 October 2023 to assist. In addition, Mr Lee and OfReg ignored the guidance given in the Ombudsman's *Policy and Procedures* document that OfReg would need to file a written submission addressing the issues, and regarding what the Ombudsman expected to be included in any submissions, namely all authorities and other materials on which OfReg relied.
34. It appears that the applicant delivered submissions to the Ombudsman, who quoted from them in her decision. CUC was not provided with a copy.
35. On 28 November 2023, the Ombudsman wrote to OfReg noting that OfReg had provided various documents during the informal resolution phase but complaining that OfReg had not provided any written submissions to justify its decision to exempt the COSS and IDSS from disclosure. The Ombudsman requested that OfReg do so within 7 days.
36. OfReg replied on 1 December 2023 that it relied on its memorandum dated 12 September 2023 and on the explanations advanced by CUC that OfReg had cited in its memorandum. OfReg again did not seek any input from CUC and failed to comply with the Ombudsman's guidance on the need for and content of submissions on the appeal.
37. On 15 December 2023, the Ombudsman wrote to OfReg again to ask various questions regarding its references to "*ongoing and prospective RFPs*". The Ombudsman indicated that OfReg had not provided a clear explanation of the bidding process. The Ombudsman requested that OfReg respond by 21 December 2023. Following a chasing email from the Ombudsman, OfReg responded on 21 December 2023, interlining its responses to the Ombudsman's questions. Yet again, OfReg did not consult with or seek input from CUC and did not adhere to the Ombudsman's guidance.

C.4 The Ombudsman's decision on the appeal

38. On 5 February 2024, the Ombudsman issued her formal decision. She ordered OfReg to disclose the COSS and IDSS in full within 10 days, except for the signature on page 4 of the COSS, which she determined was personal information.

39. The Ombudsman concluded at paragraph 67 of her decision that:

"[...] I make the following findings:

- *the disclosure of the responsive records would not, or could not reasonably be expected to destroy or diminish information of a commercial value. Therefore, the exemption in section 21(1)(a)(ii) is not engaged; and,*
- *the disclosure of the responsive records would not prejudice the commercial interests of any person or organisation. Therefore, the exemption in section 21(1)(b) is not engaged."*

40. The Ombudsman summarised OfReg's position as follows:

"[17] It did not become clear until late in the hearing process, and only after my office made repeated requests for clarification, that OfReg was relying on two documents previously provided to us [...] as its submission in this hearing, namely a memorandum dated 12 September 2023, and an affidavit sworn on 3 November 2023. Furthermore, due to ongoing questions about the nature and relevance of a forthcoming bidding process during the hearing, I also asked OfReg to provide further explanations on the RFP. [...]"

[18] OfReg refers repeatedly to the records being 'commercially sensitive', and 'related to commercial interests', but it appears to quote the wrong sections of the FOIA verbatim, i.e. sections 21(1)(a)(i) and (ii) (respectively relating to trade secrets and commercial value), rather than section 21(1)(b) which relates to commercial interests. Other than quoting the section verbatim, OfReg has not made any reference to, or given any explanation about, trade secrets, even after being asked to do so by my office. [...]"

[19] OfReg has not differentiated between these exemptions, or explained which exemption it is applying to any specific parts of the withheld/redacted records. [...]"

[21] OfReg does not provide much explanation regarding the IDSS, simply stating that 'we will not release it under s. 21 (1) (ii) [sic]'. Most of OfReg's arguments appear to relate to the COSS.

[22] OfReg states that the records,

'... are of a highly sensitive nature to CUC, due to the inclusion of operational intricacies that hold the potential to compromise CUC's stance in upcoming Request for Proposals ('RFPs'). OfReg is actively engaged in ongoing and prospective RFPs for projects to which these specific studies would apply, and be used for their submissions to the Request for Information ('RFI').'

[23] OfReg repeats this same point again, without explaining the nature, scope or timing of the upcoming RFPs, or providing details of the assumed negative impact of the disclosure of the records on that process [...]"

[25] Given that OfReg claims that CUC's competitive position would be harmed in the context of the forthcoming bidding process, I asked for more details on the nature and scope of the RFP, and on the relevance of the withheld/redacted records to that bidding process. OfReg provided a partial answer [...]"

41. In reaching her conclusions, the Ombudsman's discussion included the following passages:

[42] Section 27 demands that reasons be given for decisions. Any exemptions that are claimed need to be explained, and it is not sufficient simply to say 'we will not release it under s.21(1)(ii) [sic]', as OfReg did in regard to the IDSS. [...]

[49] OfReg argues that disclosure would cause prejudice to the commercial interests of CUC in the context of a forthcoming RFP, or bidding process.

[50] While it is understood that the RFP is in development, even after I asked for further explanations on that subject, OfReg provided only sketchy answers, and gave no meaningful explanation of the nature, meaning or potential importance of the records in relation to the RFP, or any causal link between them, or any useful information on the context or scope of the forthcoming bidding process (for instance whether the RFP will involve construction and/or operation of the USRG), or further information on the nature and likelihood of the prejudice claimed.

[51] OfReg does not provide a rationale for the assertion that disclosure of the records would allow potential bidders to manipulate 'numbers and associated costs', and undermine the integrity of the bidding process. [...]

[52] OfReg does not explain the causal link between the disclosure of the COSS – a 2014 study about cost allocations and rate revision, based on data from 2013 or older - and the claimed prejudice to the future bidding process for a renewable energy project. Saying that the commercial interests of CUC will be harmed, is not the same as demonstrating what, how, why, or how likely this would be. OfReg does not meaningfully address these questions.

[53] A link between the IDSS and the forthcoming RFP seems plausible, given that that document is a study of the impact of increased renewable generation on the efficiency of CUC's current fossil-fuel generation. However, that argument has only been implied, not raised, since OfReg is almost completely silent on the subject of the IDSS. In any event, the general conclusions of the IDSS were published.

[54] OfReg points out that CUC has already published two similar fuel efficiency studies on their website, an Interim Renewable Infusion Study, and an Integrated Recourse Plan, which it provided to the applicant. Fuel performance is also published in CUC's quarterly and annual reports. The Distributed Resource Plan and the Interim Renewable Infusion Study are also available on the CUC website. In the absence of any further explanation, this apparent abundance of similar sources in the public domain significantly undermines OfReg's position that the IDSS should be withheld.

[55] In support of the claim of prejudice to the forthcoming bidding process, OfReg points to section 6 of its enabling legislation, the URCA, which states that 'The principal functions of the Office, in the markets and sectors for which it has responsibility, are ... (b) to promote appropriate effective and fair competition'. In doing so, OfReg implies rather than demonstrates a conflict between disclosure and fair competition. The quoted section is undoubtedly an important goal, but OfReg has not demonstrated how the responsive records relate to this, or how their disclosure would cause harm to 'effective and fair competition'.

[56] It is not clear how OfReg intends to safeguard equitable competition principles in the evolving electrical power generation landscape, in the first instance in relation to the RFP which - as both OfReg and CUC stated - is jointly being prepared between them. Admittedly, the RFP involves highly technical matters, and OfReg may very well have to rely on outside help to formulate as complex an RFP as this is likely to be. Nonetheless, since OfReg cites the fairness of the forthcoming bid as a reason for withholding the records, it seems reasonable to take the anticipated process into account. As forthrightly described by OfReg and CUC, it appears that one bidder (CUC), which already holds a monopoly position in terms of the sale of electricity, is co-designing the specifications of the RFP for an upcoming bidding process, in which they, themselves, will be an interested party. In my mind, this has the appearance of a conflict of interest, and it may be fairer in these circumstances to ask whether disclosure of the responsive

records (momentarily setting aside the question of the relevancy of the records to the RFP) would be more likely to undermine, or rather enhance, 'effective and fair competition', given that one party already seems to have an advantage. I address this issue further in my discussion of the public interest, below.

[57] OfReg, itself, seems unsure about the extent to which the information should be shared with bidders (and the general public). On the one hand, it is withholding both records because disclosing them could allegedly undermine the forthcoming RFP, [...] On the other hand, OfReg also indicates that the information will be made available to all potential bidders at the commencement of the actual bidding process [...]

[59] In summary, OfReg claims that the two responsive records must not be disclosed because doing so would undermine the fairness of the bidding process. Consequently, it clearly believes that the two records are 'related' to the RFP, and that they will, therefore, be disclosed to 'all potential bidders'.

[60] I find this reasoning highly confusing: either competitors can manipulate and exploit the records to undermine the fairness of the bidding process and harm the commercial interests of CUC, or they are entitled to the records in order to ensure the fairness of the bidding process. Both statements cannot be true at the same time: either the records cause an unfair advantage to CUC's competitors in the upcoming RFP, or they must be disclosed to all competitors in order to ensure a fair process.

[61] In accordance with section 12 of the FOIA only those parts of a record that are actually exempt can be withheld. As well, as indicated above, exemptions under the FOIA must be interpreted narrowly. OfReg does not seem to have fully considered these points. OfReg speaks of the 'numbers and associated costs' and of 'financial insights' causing harm, but it has withheld most of the COSS and all of the IDSS, including many parts that do not consist of financial data or 'numbers and associated costs'. The claimed connection between the 'numbers' and the RFP, and the alleged causal link with the prejudice to the RFP have not been explained. In any event, some of the redacted information (including numbers and costs) has already been disclosed in the 2013 Annual Report.

[62] OfReg's stated intent to disclose information in the 'RFP package' might allude to a deferral of access under section 11(2)(c), quoted above. However, if this was OfReg's intention, it has not said so, and its position appears to be that the withheld/redacted records should not be disclosed, except in the bidding process.

[63] In stating that disclosure to one party (the applicant) would be unfair, OfReg seems to misunderstand the nature of disclosure under the FOIA. Responsive records are typically disclosed (when they are disclosed) to the 'world at large', and not to a single applicant. This is an important point, since OfReg's concerns in regard to the potentially unfair consequences of disclosing the record to a single party could easily be alleviated by disclosing the records more generally, to the world at large, as is normal practice under the FOIA, so that all interested parties, including any bidders (as well as the general public) gain access to the same information at the same time.

[64] Condition 19.6 of CUC's T&D License demands that a COSS be conducted every five years [...]

[65] In the course of the appeal, my office made repeated inquiries with OfReg whether any other responsive records were held since the FOIA request was clearly for '... cost of service studies related to the licensee CUC', not specifically for the 2014 COSS and IDSS only. We were told there were no other responsive records. Therefore, it appears that CUC did not submit a COSS to OfReg in 2019, as it was purportedly required to do under the T&D License, 5 years after the 2014 COSS. Whatever the explanation, as a public authority with obligations under the FOIA, and as the regulator in these matters, OfReg should have explained the reasons for this apparent omission to the applicant and to my office."

42. It is clear from the Ombudsman's comments in these two sections of her decision that the Ombudsman found OfReg's response to the appeal to be unhelpful and that she was frustrated by OfReg's obfuscatory responses to her questions. I have considerable sympathy with her. OfReg's overall approach to the appeal and to answering the Ombudsman's queries was deeply unsatisfactory and shows an unwillingness to engage that does not befit a public body.

C.5 *The conduct of these proceedings*

43. OfReg communicated the Ombudsman's decision to CUC on 8 February 2024. CUC wrote to the Ombudsman on 9 February 2024 requesting that the 10-day period for release of the COSS and IDSS ordered by the Ombudsman be extended, given the 45-day period in section 47 of the FOIA for any appeal, to allow CUC to consider whether to appeal or to apply for judicial review.
44. On 1 March 2024, Appleby sent a letter before action to the Ombudsman under the pre-action protocol for judicial review claims indicating that CUC intended to apply for a judicial review of the Ombudsman's decision but would do so within the 45-day time period contemplated in section 47 of the FOIA for appeals within the Act, rather than the 3-month period permitted by GCR O.53. The letter noted the Ombudsman's contention that CUC could not pursue an appeal under section 47 of the FOIA because that remedy is only open to the complainant or the relevant public or private body, which, on the facts, did not include CUC, and did not disagree with it.
45. On 8 March 2024, Savannah Law replied on behalf of the Ombudsman. They noted CUC's position that it accepted it could not appeal under section 47 of the FOIA but indicated that, having regard to the terms of the FOIA, they did not accept that CUC could bring a judicial review either. They indicated that the Ombudsman wished to be heard on any application for leave to pursue judicial review in order to make those objections. Savannah Law responded to the substance of CUC's individual grounds for judicial review. Savannah Law did not suggest that CUC could or should pursue an appeal on the merits against the Ombudsman's decision.
46. On 21 March 2024, CUC filed its application for leave to pursue judicial review. It advanced conventional grounds for such a challenge, namely, procedural fairness, error of fact and irrationality, as well as breach of clause 15 of the Cayman Islands' Constitution. CUC did not advance any

challenge to the substantive merits of the Ombudsman's decision. The parties agreed a consent order the same day staying the Ombudsman's decision pending the determination of the application for leave.

47. On 22 April 2024, Savannah Law wrote to inform Appleby that the Ombudsman had decided not to challenge the grant of leave to apply for judicial review, although the Ombudsman continued to maintain that CUC's claim did not have any merit.
48. On 23 September 2024, Richards J considered CUC's application for leave on the papers and granted leave. There is no explanation in the materials before me for the six-month delay from March 2024 to September 2024 for the application for leave to be considered. Following the grant of leave, the parties agreed a further consent order staying the Ombudsman's decision until the determination of the judicial review.
49. On 3 October 2024, CUC filed its originating notice of motion. Like the application for leave, this advanced conventional types of challenges made in judicial review proceedings, and also the constitutional claim, but did not make any challenge to the merits of the Ombudsman's underlying decision.
50. On 28 November 2024, in accordance with the terms of a consent order for directions agreed by the parties but which does not appear to have been sealed by the court, Savannah Law wrote to advise Appleby of:

"[...] all points [the Ombudsman] intends to take in defence of the claim [...]"

Savannah Law reiterated, with some additions, the Ombudsman's response on traditional judicial review grounds to CUC's original letter before action. Savannah Law asserted that:

"[...] the Respondent will assert that its approach was both legal and rational in every respect; and that, in the context of a freedom of information appeal, it dealt with the submissions in an appropriate manner, applied the law correctly, and drew rational conclusions."

Savannah Law did not suggest that the Ombudsman would argue that the court should embark on a full merits appeal.

51. Due to difficulties with suitable listing dates, this matter was assigned to me in March 2025, when I was able to list it for hearing in June 2025.
52. By a summons filed on 3 April 2025, some six weeks before the substantive hearing was fixed to take place, the Ombudsman sought directions pursuant to GCR O.53, r.5(4) that she should be permitted to adduce further evidence in response to CUC's evidence in reply. The Ombudsman filed a skeleton argument in support dated 10 April 2025. A fair reading of the Ombudsman's skeleton argument does not suggest that she intended to argue that the hearing should be a full merits appeal, although she did say that she intended to argue that new evidence was admissible on the issue of whether disclosure of the documents is required in the public interest.
53. In argument on the summons on 22 April 2025, however, Mr Lowe contended for the first time in his reply submissions that the court should consider the merits of the Ombudsman's underlying decision. This prompted a letter from Appleby, on behalf of CUC, dated 16 May 2025 complaining that this was a significant change of position by the Ombudsman, which would fundamentally change the nature of the hearing, and asked for confirmation that this was her intended position.
54. In their reply dated 19 May 2025, Savannah Law, for the Ombudsman, asserted:

“While the Applicant may seek to characterise this case as a straightforward judicial review, the Respondent has been clear from the outset that this Application only afforded CUC the same status as a party who seeks to appeal to the Ombudsman. [...]

[...] In [applying for judicial review], the Applicant nevertheless accepted that it would follow the appellate procedure [in section 47 of the FOIA] [...]

The Respondent's stated position has therefore always been that when the Applicant opted to proceed by way of an Application for Judicial Review, the Applicant could not circumvent the substantive features of the appellate process in section 47(1) of the FOIA. [...] This has never been a simple, self-contained judicial review. Notwithstanding the procedure of a judicial review, the substance of a challenge and the grounds must conform with section 47 of the FOIA. This is a hybrid case that needs to be managed accordingly. [...] The points referenced by the Respondent at the hearing on 22 April 2025 to which the Applicant now objects were a necessary and logical consequence of these peculiar circumstances; they were certainly not new, as the Applicant contends.”

D. Anterior issue for decision: the nature of the hearing

55. As is apparent from the chronology as regards recent events, in April 2025 an issue arose between the parties as to the nature of the hearing. The Ombudsman suggested that the substantive hearing

of CUC's claim should proceed as a full merits appeal as if governed by section 47 of the FOIA. Appleby disputed this. Accordingly, the first issue for determination is the nature of the hearing, namely should it be by way of traditional judicial review, should it be conducted in accordance with section 47 of the FOIA to the extent that that approach is different, or should it be a full merits appeal for which the court would be entitled to consider further evidence that was not available to the Ombudsman. If I conclude that it should proceed by way of a full merits appeal, then CUC invites me not to proceed any further, but to adjourn to allow it to adduce additional evidence that it would have prepared and relied upon if it had understood at an earlier stage that the hearing was intended to take that form.

56. Section 47 of the FOIA provides as follows:

“Appeal from Ombudsman’s decisions and orders

47. (1) The complainant, or the relevant public or private body, may, within forty-five calendar days, apply to the Grand Court for leave to seek judicial review of a decision of the Ombudsman pursuant to section 43 or 44, or an order pursuant to section 45(1).

(2) In any appeal from a decision pursuant to section 43, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under the law.”

57. In summary, CUC's position is:

57.1 Its claim has proceeded at all times and should proceed as a conventional judicial review claim within GCR O.53, not an appeal under section 47 of the FOIA. Indeed, in its pre-action correspondence, the Ombudsman's position was that CUC could not rely on section 47 of the FOIA. The Ombudsman's arguments regarding section 47 of the FOIA are therefore irrelevant.

57.2 If it were to be determined that CUC's claim should proceed under section 47 of the FOIA directly, by analogy or because of any agreement to that effect by the parties, then such a hearing would still be akin to a conventional judicial review having regard to the statutory language of section 47 of the FOIA and to Parliament's intention. In this regard, Mr Buttler suggests that certain aspects of the judgment of Moses J (Ag) in Governor v Information Commissioner [2013] 2 CILR 421, where the learned judge reached the conclusion that section 47 of the FOIA envisages a somewhat wider task, are of questionable validity.

57.3 However, Mr Buttler argues that whatever view one forms of the proper nature of CUC's claim, CUC's claim should not proceed as a full merits appeal *de novo*. That is not the nature of a

conventional judicial review and it is not the appropriate form for an appeal under section 47 of the FOIA either, as confirmed by Moses J (Ag) in Governor v Information Commissioner.

58. The Ombudsman's stance is:

58.1 Even though CUC is pursuing a judicial review claim, its claim should be limited to the grounds that could be advanced on an appeal under section 47 of the FOIA, for example, excluding complaints of procedural fairness.

58.2 Section 47 of the FOIA creates a form of statutory appeal that differs in certain respects from conventional judicial review applications. In particular, Mr Lowe submits that such an appeal should proceed as a full merits review and that it is implicit from the terms of section 47(2) of the FOIA that fresh evidence should be admissible. However, he accepts that the Grand Court should be limited to dealing with only the facts that were in issue before the Ombudsman and that the Court is limited to ascertaining the position at the date of the Ombudsman's original decision.

59. I conclude that the correct approach in law is that CUC's claim should proceed as a conventional judicial review application. Firstly, it is common ground that CUC is not within the scope of section 47 of the FOIA because it is not the complainant nor the relevant public or private body from whom disclosure was sought. Accordingly, CUC is not within the terms of section 47 of the FOIA and has no recourse against the Ombudsman's decision by way of an appeal under the FOIA. On the other hand, CUC is a person who alleges that they have been adversely affected by an administrative decision made by the Ombudsman. It seems to me that natural justice requires that they must have a mechanism by which they can challenge that decision on process grounds. This is the routine territory of judicial review. Moreover, judicial review appears to provide the only legal basis on which CUC's complaints can properly proceed and can be ventilated and determined.

60. Secondly, I do not accept Mr Lowe's submission that the "constricted" appeal process in the FOIA should be treated as applying with the same rigour to someone who is outside the scope of the FOIA. I do not agree with Mr Lowe that it would be "manifestly wrong" for CUC to be able to pursue a judicial review of full scope where it can demonstrate that it has been adversely affected by the Ombudsman's decision in question. I reject Mr Lowe's criticism that doing so would involve CUC

being “able to circumvent the statutory constraints of the appellate regime that would apply to the public authority in an appeal.” The limited ability to pursue an appeal within the FOIA is understandable and fair where the complainant and the public or private body have had a full opportunity to participate in the appeal to the Ombudsman. Where a third party has not had that opportunity, for example, because it is not the body from whom disclosure has been sought and therefore has no right to take part and has not intervened, but it has a genuine interest in whether or not disclosure should be ordered and is adversely affected by the Ombudsman’s decision, then I do not see there is anything unfair about allowing such a third party to pursue a judicial review in the conventional way. To the contrary, this scenario is highly likely to give rise to precisely the kinds of arguments by the third party about procedural unfairness that Mr Lowe argues by analogy with section 47 of the FOIA should not be available. It seems to me that, if Mr Lowe were right, then that would create real unfairness for the third party in question, who would be left without any possible redress, however poor the Ombudsman’s decision-making process has been and in circumstances where they were not able to or did not participate in the appeal through no fault of their own.

61. Thirdly, I am not satisfied having read the correspondence between the parties from March and April 2024 that there was any agreement or arrangement between the parties that the hearing should proceed differently from a conventional judicial review application and, in particular, that it should proceed as if brought under section 47 of the FOIA or subject to such limitations as would apply to such an appeal.
62. Fourthly, I accept Mr Buttler’s submission that it is now far too late for the Ombudsman to raise this issue. I have set out earlier in this judgment the relevant procedural chronology. In my judgment, the Ombudsman has had multiple opportunities to make clear that she intended to argue that the hearing should take the form of a full merits review and instead has approached the matter at all times until April 2025, six weeks before the final hearing, on the basis that it should be conducted as an appeal on law under section 47 of the FOIA. It is not fair and it would not do justice between the parties to allow the Ombudsman to change her position so late in the day.
63. In light of these conclusions, I will deal only briefly with Mr Buttler’s and Mr Lowe’s further arguments on the proper approach to an appeal under section 47 of the FOIA, as I consider that they do not strictly arise.

64. Mr Lowe submits that whilst the wording of section 47 includes both of the terms “*judicial review*” and “*appeal*”, it is clear that section 47 of FOIA provides a specific form of statutory appeal, involving a full merits review, and not a judicial review-type remedy. He says that this follows from considering the wording of section 47 in its statutory context and in light of the approach in the UK to the similar legislation there, by which he says the Cayman Islands FOIA was heavily influenced. Mr Lowe also argues that there is a practical necessity for the Grand Court to decide the matter on the basis of a merits review rather than to quash and remit to the Ombudsman for her to make her decision again, because once the Ombudsman has determined the appeal, she becomes *functus officio*. Mr Lowe relies on the English case of *Information Commissioner v Bell* [2014] UKUT 0106 (AAC). I have read that case carefully but I do not consider that it supports Mr Lowe’s argument that the Grand Court cannot remit a matter to the Ombudsman if necessary and appropriate to do so.

65. Mr Lowe contends that:

“It is unlikely that the legislation was intended to depart radically from the UK scheme which it ... has adopted throughout. It is submitted that the Grand Court should adopt substantially the same approach as the UK does with appeals [...]”

He says that in the UK, the First Tier Tribunal, which is tasked with hearing appeals from the Information Commissioner, conducts such hearings on a full merits basis. He therefore submits that the approach of the Grand Court should be the same.

66. On the other hand, Mr Buttler argues that the use of “*appeal*” in section 47 is not indicative of the nature of the hearing but that the use of “*judicial review*” is a clear indication that what is intended is an appeal on points of law only, which is to be taken to be the same as judicial review: see the English Court of Appeal’s decision in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at paragraph 42. Mr Buttler points out that Hansard records that the Minister who sponsored the Freedom of Information Bill described three levels of appeal comprising first, internal review by the public or private body, secondly, appeal to the Information Commissioner and:

“Thirdly, if he or she is still dissatisfied at that stage, there is provision for cases to be ultimately brought before the Grand Court for judicial review.”

He submits that this shows that to the extent that it is appropriate to consider Parliament’s intention, its intention was that an appeal pursuant to section 47 should be in the nature of a judicial review.

67. I note in passing that the record of the debate in Hansard seems to me to undermine Mr Lowe's submission that the FOIA was not intended to depart from the UK scheme. In my view, it is clear from Hansard that, whilst the UK Freedom of Information Act might have been the initial inspiration for the Freedom of Information Bill, there was wide consultation within the Cayman Islands on the Bill and many amendments were made as a result in the course of finalising the text of the Bill. I consider that it is open to serious argument whether the FOIA was intended to take the same approach as in the UK to the nature of appeals to the Grand Court against the Ombudsman's decisions.

68. Mr Buttler submits that part of the purpose of section 47 of the FOIA is to reduce the period within which the judicial review must be commenced from the 3 months permitted in GCR O.53 to 45 days, as provided for in section 47 of the FOIA. He argues that Moses J (Ag) did not consider this aspect when he was considering the purpose of section 47 of the FOIA in Governor v Information Commissioner [2013] 2 CILR 421 and when he said at paragraph 25 that:

"25. It is necessary to decide what is meant by 'an appeal ... by way of judicial review of a decision.' Plainly, as Mr Bourne submitted on behalf of the Governor, it is more than merely judicial review since if the only means of challenge for a disappointed applicant or a public authority were judicial review then there already exists a system of judicial review within the Cayman Islands. [...]"

Mr Buttler says that the reduction in the period to commence an appeal provides the statutory purpose for section 47 of the FOIA for which Moses J (Ag) was looking. Whilst I can see that there might be merit in Mr Buttler's argument, I do not need to decide whether he is correct for the purpose of this case, as Mr Buttler recognises himself in paragraph 28 of his skeleton argument. Given that Moses J (Ag) was an extremely experienced English judge specialising in public law and judicial review cases, I would want to hear full argument on this point before concluding that I should disagree with him. I therefore do not consider it would be appropriate to do so now.

69. In any event, Mr Buttler relies on Moses J (Ag)'s judgment in Governor v Information Commissioner to establish that whatever the nature of the appeal under section 47 of the FOIA, it is not a full merits review, contrary to Mr Lowe's submission. Moses J (Ag) said:

"27. The provision in s.47(1) indicates to me the type of appeal available for one who challenges a decision of the Commissioner. The appeal is not an appeal de novo in which the parties can start again at a re-hearing on the basis of new evidence and arguments based on that new evidence. [...]"

31. [...] s.47(2) is not a licence to the public authority to start all over again as if there had been no consideration by the Commissioner. The appeal is against her decision. The decision of this court on appeal must be based on the evidence and material before the Commissioner. It is not, I repeat, an appeal de novo. Fresh evidence is only legitimate on ordinary Ladd v Marshall principles, and failure to advance that evidence earlier must be explained. New arguments based on that evidence would, however, be permitted provided it is based on evidence and material before the Commissioner at the time of her decision.

33. The essential question, both for the Commissioner and for the court on appeal by way of review, is to consider whether the Governor complied with her obligations. Unless she shows that she had, then there must be disclosure. [...]

34. This court must therefore consider whether the Commissioner was right in concluding that the complaint and response were not exempt from disclosure. It is open to this court to disagree, provided it is satisfied that the decision was wrong. This court is not confined to consideration of whether the Commissioner was entitled to reach her conclusion. In short, it is not confined to a traditional judicial review approach. [...] I also add that the reference in the law to judicial review indicates the appropriate procedure for launching an appeal and the remedies available to the court. Rather than merely allowing or dismissing the appeal, it is open to this court to quash the decision with or without an order for reconsideration.”

In my view, this passage is clear authority that an appeal under section 47 of the FOIA should not proceed as a full merits review, albeit it should be wider than a conventional judicial review claim.

70. I also note that in the concluding passage that I have set out, Moses J (Ag) endorsed that even under section 47 of the FOIA the court can quash the Ombudsman’s decision – the functions of the Information Commissioner were later transferred to the Ombudsman – and remit the matter to her, which is consistent with the conclusion that I have already reached on that point.

71. I will now turn to CUC’s complaints, which as I indicated earlier in this judgment, are:

71.1 the appeal was conducted in a way that was procedurally unfair in that CUC was not given notice of the hearing, was not provided with the submissions filed by the applicant and by OfReg, and was not informed of the questions raised by the Ombudsman despite that the hearing directly concerned CUC’s property;

71.2 important foundations for the Ombudsman’s decision were her erroneous factual conclusions that CUC was co-designing the specifications for the bidding process for renewable electricity generation with OfReg and her reasoning, based on that error, that CUC had an unfair advantage in the bidding process as a result, and that CUC had failed to produce a further COSS since 2014 and that OfReg had not required CUC to do so, and had therefore failed in its regulatory function;

71.3 the Ombudsman's decision was contrary to section 15 of the Constitution because it would involve an interference with property for which no compensation is available.

E. Procedural unfairness

E.1 *CUC's arguments*

72. I can summarise CUC's case regarding procedural unfairness as follows, omitting references to the English case law authorities on which Mr Buttler relies:

72.1 It is a fundamental principle that a person whose personal or property rights are likely to be detrimentally affected by the exercise of a statutory power must be given an opportunity to make representations unless the statute in question excludes that obligation or the circumstances make it impossible, impractical or pointless to do so.

72.2 Whether there has been procedural unfairness is an objective question for the court. The belief of the decision-maker that the process has been fair is irrelevant.

72.3 It is irrelevant whether anyone is at fault. The focus is entirely on whether the process overall has been fair.

73. As noted earlier in this judgment, the Ombudsman's Policy and Procedure document expressly contemplates that there may be interveners in the appeal process. Mr Buttler submits that that opportunity is meaningless unless the potential interveners are sent the Notice of Hearing. He says that it is the Ombudsman's duty to consider whether there might be interveners and, if so, to send the Notice of Hearing to them as well as to the parties. As a fall back, Mr Buttler argues that the public body should notify potential interveners of whom it is aware. If the third party chooses not to respond, then it will be very difficult for them subsequently to argue unfairness.

74. Mr Buttler submits that the possibility that CUC might wish to intervene in this case should have been obvious, and if CUC had been sent the Notice of Hearing, whether by the Ombudsman or by OfReg, and given an opportunity to participate, it would have done so.

75. Turning to this specific case, Mr Buttler submits that:

- 75.1 The Ombudsman must have known that CUC had a direct interest in whether or not the COSS and IDSS were disclosed, and probably knew that they were CUC's property, but did not communicate with CUC or ask for it to make representations at any stage.
- 75.2 None of the materials submitted by the applicant, including his grounds of appeal, his request for a formal determination and his evidence and detailed submissions in support, have ever been disclosed to CUC, so that CUC did not know the case to which it should respond or the assistance that it could usefully give to OfReg to support its position that the COSS and IDSS should be exempt from disclosure. I note in passing that, due to the Ombudsman's approach to disclosure in this matter, it is not apparent to me from the evidence that has been adduced that the applicant's materials were provided to OfReg. Unless they were, that would provide a further ground for CUC to argue that there was real procedural unfairness.
- 75.3 The factual chronology that I have set out earlier in this judgment indicates the limited contact that took place between OfReg and CUC during the informal stage of the appeal to the Ombudsman and the absence of any contact during the formal stage. In particular:
- (a) On 12 July 2023, OfReg notified CUC of the applicant's appeal and gave CUC one working day to provide an affidavit justifying non-disclosure of the COSS and IDSS. CUC complied with that requirement (for which there was no basis), but Ms Lawrence says that if she had been given more time and had known what were the issues on which the Ombudsman was seeking input, she could and would have prepared detailed representations for the Ombudsman.
 - (b) Neither the Ombudsman nor OfReg provided CUC with the Notice of Hearing, which would have enabled CUC to provide a more useful and cogent submission to the Ombudsman. The Ombudsman's evidence is that:

"This would have been an obvious opportunity for [OfReg] to consult with [CUC] to inform the rationale for the exemptions it was advancing."

CUC agrees.
- 75.4 CUC was not aware of the content of OfReg's response to the appeal, and the documents on which OfReg relied, namely Mr Lee's affidavit and its memo dated 12 September 2023, nor that it disclaimed reliance on Ms Lawrence's affidavit (save in limited respects). OfReg did not provide a copy of Mr Lee's affidavit to CUC or liaise with CUC, so that CUC was not able to

remedy the obvious deficiencies in the material submitted to the Ombudsman by OfReg. If CUC had been aware, it would have ensured that properly expressed and cogent arguments were advanced, and that the Ombudsman's various queries were properly addressed.

75.5 CUC was not aware of the Ombudsman's follow up with OfReg in December 2023. CUC agrees with the Ombudsman's comment that:

“Given that this was a critical juncture and [the Ombudsman] had expressly advised [OfReg] that its submission was not sufficiently clear and that specific clarifications were required, this would appear to be a particularly opportune time for [OfReg] to consult with [CUC].”

However, neither the Ombudsman nor OfReg contacted CUC for its input. Again, CUC would have ensured that the Ombudsman's queries were addressed if it had known of them.

75.6 Alternatively, CUC would have advanced the argument that any disclosure should be delayed until the completion of the planned bidding process for renewable electricity generation.

75.7 In addition, CUC would have addressed the Ombudsman's other concerns by explaining, for example, that CUC had prepared and submitted a COSS in 2023; CUC's role in the preparation of the RFP; the reasons why the COSS and IDSS should be treated as confidential and exempted from disclosure for that additional reason as well as on the basis of the adverse effect on CUC's commercial interest.

E.2 The Ombudsman's arguments

76. On behalf of the Ombudsman, Mr Lowe submits that the starting point is the FOIA itself. He says that the FOIA gives rights only to the applicant and to the public body, and not to any third parties. He says that the appeal will only be pursued before the Ombudsman if the public body has refused disclosure, and that the interests of the public body and a third party such as CUC will therefore always be aligned. He argues that the Ombudsman is entitled to rely on the public body to put forward the third party's arguments on its behalf, and it is not the Ombudsman's fault if the public body fails to do so or to do so adequately.

77. Mr Lowe contends that the FOIA only requires the Ombudsman to give the applicant and the public body the opportunity to make representations, and that this informs the extent to which a third

party has a right to participate. Mr Lowe cautions that the court should not re-write the statutory mechanism in the FOIA by concluding that a third party does have such a right.

78. Mr Lowe also submits that to suggest that the Ombudsman was required to conduct an investigation, when she was not on notice of additional facts, subverts the scheme of the legislation, which gives her a discretionary power as to how to carry out any investigation.
79. Next, Mr Lowe submits that the Ombudsman's task when determining the appeal under the FOIA was to decide whether OfReg dealt with the request lawfully. He asserts that the Ombudsman is not entitled to make the decision on the request afresh. The Ombudsman was accordingly required to focus on the adequacy of OfReg's reasons for refusing disclosure of the studies, and not on CUC's reasons for wishing to prevent disclosure. Mr Lowe says that this has a limiting effect on the material that could properly be put before the Ombudsman and should result in the exclusion of the material on which CUC now relies. Mr Lowe complains that whilst there is scope for the Ombudsman to admit new evidence, it cannot be adduced to prove new facts and evidence of later facts cannot ordinarily be admitted because the Ombudsman's decision must be based on the date of refusal to disclose the documents in question. Mr Lowe says that the evidence now adduced by CUC as to what it would have said in response to the appeal and to the Ombudsman's enquiries was not available. He submits that unless the Ombudsman can be criticised on a *Tameside* basis, i.e. that she failed to take reasonable steps to inform and acquaint itself with the relevant information needed to make a lawful and rational decision, which is not argued in this case, then CUC's judicial review is untenable.
80. Finally, Mr Lowe complains that CUC failed to take any steps to protect its own interests, failed to follow up with OfReg or with the Ombudsman on progress of the appeal and, essentially, is the author of its own misfortune. He says that CUC cannot therefore successfully assert that it is the victim of procedural unfairness.

E.3 CUC's response

81. Mr Buttler disagrees that the interests of the public body and the third party will always be aligned, as argued by Mr Lowe. He says that it is easy to contemplate a situation where the public body decides not to advance specific grounds or arguments why the documents might be exempt that the

third party would wish to advance. In fact, this was the situation in this case, with CUC raising points that OfReg did not advance at all or on which it disclaimed reliance.

82. As to Mr Lowe's final complaint, Mr Buttler responds that, whilst fault is not a relevant issue, in circumstances where CUC had provided input at the informal stage of the hearing and then heard nothing further, it was entitled to assume that the matter had been resolved.

E.4 Discussion and decision on procedural fairness

83. In R v. Home Secretary, Ex p. Doody [1994] 1 AC 531 Lord Mustill summarised the English law on procedural fairness as follows at 560D-G:

“(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

84. In Bank Mellat v HM Treasury (No.2) [2013] UKSC 39, Lord Sumption said at paragraphs 29 and 32:

“29 The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. [...]

32 In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, [...] this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. [...] It had, and was intended to have, a serious effect on their business, which might well be irreversible [...]. Secondly, it came into effect almost immediately. [...]. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. [...]. Fourth, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. [...]”

85. Lord Neuberger expressed it this way at paragraph 179 of Bank Mellat:

“179 In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute.”

86. I consider these statements of English common law to be equally applicable in the Cayman Islands and to be a useful guide to whether the Ombudsman’s duty to invite representations from CUC was engaged in this case.
87. The FOIA includes a number of different exemptions that may justify refusing disclosure of documents sought by an applicant. In addition to section 21 covering documents relating to commercial interests:
- 87.1 section 15 exempts documents where disclosure would prejudice the security, defence or international relations of the Cayman Islands;
 - 87.2 section 16 exempts documents relating to law enforcement in certain circumstances;
 - 87.3 section 17 exempts documents from disclosure if they would be privileged from production in legal proceedings; where disclosure would involve a breach of confidence, contempt of court, infringement of the privileges of Parliament; or where the document contains legal advice from the Attorney General or the Director of Public Prosecutions;
 - 87.4 section 18 exempts documents where their disclosure would or would reasonably be expected to have a substantial adverse effect on the economy of the Cayman Islands;
 - 87.5 section 19 exempts documents revealing the Government’s deliberative process;
 - 87.6 section 20 exempts documents whose disclosure would be likely to prejudice the effective conduct of public affairs;
 - 87.7 section 22 exempts documents relating to heritage sites etc;
 - 87.8 section 23 exempts documents which would involve the unreasonable disclosure of personal information; and

87.9 section 24 exempts documents where disclosure would be likely to endanger health and safety of any individual.

88. Many of these provisions are unlikely to involve consideration of the position of any third party when deciding whether or not to uphold a decision not to disclose a record in a particular case, namely, sections 15, 16, 18, 19, 20 and 22. Some of these provisions have the potential to require consideration of the position of third parties, namely, sections 17, 21, 23 and 24. Accordingly, it has to be recognised that appeals to the Ombudsman will differ in the considerations that they raise, and the extent to which they may be apt to engage reflection on the position of third parties. Mr Lowe is right to say that the Ombudsman has a broad discretion as to how to conduct appeals and that what procedural fairness requires is context and fact specific. However, in my judgment, the existence of that broad discretion supports rather than negatives the conclusion that the Ombudsman may have to give positive consideration in appropriate cases to seeking representations from third parties who may be adversely affected by her decisions. In reaching this conclusion, I disagree with Mr Lowe that this involves rewriting the terms of the FOIA: to the contrary it is entirely consistent with the existence of the Ombudsman's broad discretion and her duty under section 19(1) of the Constitution to act fairly, which feeds into how she should exercise that discretion.

89. I accept Mr Buttler's submission that, where the appeal raises the prospect of adverse effect on a third party, it is not necessarily safe for the Ombudsman to rely on the public body to advance all of the relevant arguments on behalf of the third party. As Mr Buttler postulates, it is easy to identify situations where the public body may not put forward all of the arguments on which the third party would wish to rely to support the decision to exempt the record in question from disclosure.

90. Thus, in my judgment, the Ombudsman should give active thought to whether her duty of fairness requires that she seeks representations from relevant third parties and, in appropriate cases, that they are permitted to intervene. I note the reference to interveners in her *Policy and Procedures* document but also the absence of any guidance from the Ombudsman as to when and how interveners will be invited or permitted to take part. The issue is not, as Mr Lowe argues, whether the third party should have a right to participate, but whether the Ombudsman's discretion as to how to conduct appeals and her admitted duty of fairness requires the Ombudsman to give such a third party the opportunity to make representations to her.

91. Whilst Mr Lowe argues that the Ombudsman's function was limited to determining whether OfReg had acted in accordance with its obligations under the FOIA, this appears to be wrong for four reasons.

91.1 First, it is contrary to the judgment of Owen J (Ag) in *Governor v Information Commissioner* [2015] 1 CILR 258, where the learned judge held that the public body was entitled to raise new exemptions for disclosure before the Information Commissioner on a remitted rehearing. It follows that the Ombudsman must have such a power on any hearing of an original appeal.

91.2 Secondly, it conflicts with the terms of the Ombudsman's *Policy and Procedure* document, which states:

“Introducing new exemptions

During the appeal, the public authority may be encouraged to reconsider its position on the reasons for withholding records. This may involve abandoning certain exemptions and introducing others. While new exemptions are allowed, raising new reasons for withholding records late in the appeal is burdensome and may be unfair, particularly after the formal hearing process has started.”

91.3 Thirdly, it is inconsistent with the way that the Ombudsman approached the conduct of the appeal, and with her evidence in response to this application for judicial review, which shows that she sought to give full consideration to all aspects of the claimed commercial interests exemption and also to consider the public interest arguments that she believed OfReg had not addressed in its own decision making.

91.4 Fourthly, it is inconsistent with the fact that the Ombudsman broadened the content of the matters relevant to the hearing by asking follow-up questions, including concerning the role of CUC in the RFP process.

92. Having determined that that was the way in which the Ombudsman would exercise her discretion to carry out her investigation and to conduct the appeal, in my judgment principles (5) and (6) in Lord Mustill's summary in *Ex p. Doody* and Lord Neuberger's guidance in *Bank Mellat* became of direct application in this case. CUC was a person who would clearly be adversely affected by the decision to direct release of the COSS and IDSS. Even if the Ombudsman was not aware that CUC was asserting that they were confidential, as Mr Lowe submits, she knew that CUC was saying that disclosure would adversely affect its commercial interests to a significant degree. There was no reason in the FOIA, the Ombudsman Act or other legislation and no relevant circumstances

pertaining to the appeal itself why CUC should not be given the opportunity to make representations. Moreover, there was a positive obligation on the Ombudsman under section 19(1) of the Constitution to act fairly, which must include an obligation to act fairly to CUC as well as to the applicant and to OfReg.

93. The Ombudsman's own argument in her affidavit is that she gave OfReg opportunities to make further submissions because she was not happy that it had properly made its case. She relies on this as giving OfReg the opportunity to consult further with CUC, which she says she would have expected OfReg to do. In other words, the Ombudsman was on notice of the need to obtain information regarding CUC's position and relied on OfReg to provide that information. Mr Lowe argues that the Ombudsman was entitled to rely on OfReg to put forward CUC's position on its behalf.

94. I expect that in many cases, this would be sufficient. But the circumstances in this case were materially different from most other cases.

94.1 First, the appeal concerned what would happen to CUC's property and risked seriously adversely affecting CUC commercial interests. Applying *Ex p. Doody* and *Bank Mellat* procedural fairness *prima facie* required that CUC be given notice: that the formal hearing was taking place; of the arguments being advanced; of the Ombudsman's concerns; and an opportunity to make representations in response to both the applicant's case and to the Ombudsman's questions. I note that the Ombudsman recognises in her evidence that where the public body is a regulator and the responsive records relate to, and/or are generated by, the regulated entity, "*consultation may be apposite*".

94.2 Secondly, the Ombudsman could easily have conducted the appeal in a manner that would have been procedurally fair. For example, by inviting CUC to make representations directly or to become an intervener. Mr Buttler submitted that the process could have been made fair if the Ombudsman had obtained confirmations from OfReg that it had provided CUC with the notice of hearing and the parties' written submissions, had related to CUC the concerns raised by the Ombudsman, and that OfReg had fed back CUC's representations in response. I do not express a concluded view on whether that would necessarily have complied with the guidance in *Ex p. Doody* and *Bank Mellat*, and I have some doubts that it would be sufficient. However, in this case, the Ombudsman did not obtain any such confirmation from OfReg. This was

despite her obvious concern that OfReg had not properly put forward its own case, to say nothing of CUC's case, and her apparent frustration and dissatisfaction with the responses that she did get from OfReg. It must have been obvious to the Ombudsman that she was not getting the assistance from OfReg that she was entitled to receive. Notwithstanding this, the Ombudsman did not seek any representations from CUC directly.

94.3 Thirdly, so far as CUC is concerned, objectively the procedure was not in fact fair. CUC was not given notice that a formal hearing was taking place, was not told of the arguments being advanced by the applicant and by OfReg, was not told of the Ombudsman's concerns, and was not given any opportunity to make representations in response despite the fact that the outcome of the appeal was likely to have a significant effect on its property rights.

94.4 Fourthly, had the identified unfairness as regards CUC been addressed, Ms Lawrence's evidence demonstrates that CUC could have made meaningful representations with a real prospect of assisting the Ombudsman to reach better informed conclusions on whether the COSS and IDSS should be exempt from disclosure or exempt from disclosure until the conclusion of the RFP process, or should be redacted before disclosure to protect CUC's commercial interest and/or property rights, and, to the extent relevant, whether the COSS and IDSS should nonetheless be disclosed in the public interest.

Accordingly, in my judgment, the conduct of the appeal before the Ombudsman was not procedurally fair as far as CUC was concerned.

95. In the circumstances, the appropriate outcome is that I quash the Ombudsman's decision and remit the matter to the Ombudsman for her to conduct the appeal again having regard to the requirement for procedural fairness. I do not consider that it is for me to direct the Ombudsman how to conduct that appeal so that it will be procedurally fair, and I will leave it to her to consider how to exercise her discretion as to the conduct of the appeal consistently with the duty upon her to act fairly.

F. Factual errors and impact on decision that disclosure would be in the public interest

96. In light of my decision on procedural fairness, the issue does not strictly arise whether the Ombudsman made a factual error that justifies quashing her decision or entitles the court to consider for itself whether disclosure of the COSS and IDSS would be in the public interest.

Nevertheless, I will briefly express my conclusions on this in case they become relevant in connection with any appeal against my order that might be pursued.

F.1 CUC's arguments

97. CUC's case is that the Ombudsman's decision that (a) disclosure would not affect CUC's commercial interests and (b) in the alternative, disclosure would be in the public interest, was founded on her understanding that CUC was co-designing the specifications for the imminent bidding process with OfReg. However, the Ombudsman's understanding was wrong. Her decision was therefore vitiated by an error of fact and/or process irrationality.

98. Mr Buttler's analysis of the process for issuing requests for proposals for new electricity generation capacity is as follows. Mr Lowe did not indicate any disagreement with this summary of the content and effect of the licence, although he described CUC's case on this aspect as *"dancing on a pinhead"*.

98.1 The process for soliciting new generation capacity is governed by Part V of the Transmission and Distribution Licence dated 3 April 2008 granted by the Government of the Cayman Islands to CUC ("the Licence").

98.2 Condition 31.1 of the Licence provides that OfReg is *"responsible for the solicitation process"*. OfReg issues an *"RFP"*, which the Licence defines as *"a request for proposals issued by [OfReg] whereby [OfReg] solicits competitive proposals for the approved incremental need for Generating Capacity"*.

98.3 Condition 31.1.2 of the Licence provides that once the need for generating capacity has been identified, OfReg *"will prepare and publish the solicitation package, including the criteria (both quantitative and qualitative will be used) that they will use to evaluate bids, and the timetable for the solicitation. ... Criteria and relative weighting will be transparent and set forth in the RFP ... A scoring system indicating the relative weights of the various factors influencing the evaluation of proposals will be developed by [OfReg] and described in the RFP."*

98.4 Condition 31.1.4 of the Licence states that OfReg *"will issue the RFP."*

98.5 Condition 31.1.7 of the Licence provides that OfReg *"will set and enforce level playing field rules for competitive bidding."*

CUC has two roles in the process:

98.6 Condition 31.1.5 of the Licence requires CUC to submit a sealed bid in response to the RFP. Ms Lawrence's unchallenged evidence is that the purpose of doing so is to enable OfReg to evaluate any other bids and to provide competition.

98.7 Condition 31.1.8 of the Licence requires CUC to develop a draft PPA, which the Licence defines as "a power purchase agreement between [CUC] and another Generation Licensee for the purchase of the Generating Capacity or electricity generated." Ms Lawrence's unchallenged evidence is that:

"43. [...] CUC did not and will not prepare or help prepare an RFP. That is the responsibility of OfReg. In accordance with its obligations under condition 31.1.8 of its Licence, CUC prepared a draft Power Purchase Agreement (i.e. a contract for the supply of electricity to CUC by another electricity generator) for OfReg ('PPA'). The PPA is one of the documents to be included by OfReg with its RFP. The PPA enables bidders to understand the technical requirements with which they will need to comply, in order to integrate with CUC's grid, if their bid is successful. This is standard practice for generation solicitation in many jurisdictions."

99. Relying on *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at paragraph 66, Mr Buttler submits that mistake of fact gives rise to a separate head of challenge in an appeal on a point of law, at least in cases where the parties share an interest in co-operating to achieve the correct result, which must be the case in respect of FOIA appeals.

100. Mr Buttler submits that the Ombudsman's conclusion that OfReg and CUC were co-designing the specifications for the imminent bidding process for renewable electricity generation within the Cayman Islands is demonstrably wrong. He says that this factual error gives rise to a separate ground of challenge to the validity of the Ombudsman's decision on the ground of unfairness, sometimes described as process irrationality. He says that the Ombudsman's factual error satisfies the legal requirements specified in *E v Secretary of State for the Home Department* at paragraph 66 that: (1) The Ombudsman made a factual error. (2) Her mistake is objectively verifiable. The Licence provides that OfReg is solely responsible for the RFP specifications. Both CUC and OfReg could have confirmed that CUC has no role in setting the RFP specifications. (3) CUC is not responsible for the mistake. The Ombudsman had put her questions about the RFP process to OfReg alone and OfReg had not communicated those questions to CUC. (4) The mistake was material to the Ombudsman's conclusions, as is clear from the terms of her decision.

101. Mr Buttler also relies on a second factual error in that the Ombudsman wrongly understood that CUC had not prepared a COSS since 2014, when it had in fact prepared a new COSS in 2023. This error also satisfies the four requirements set out in *E v Secretary of State for the Home Department*.
102. As to what difference CUC might have made to the outcome, Mr Buttler argues that the public interest issue should be focussed on holding Government to account, not on the activities of private companies such as CUC. There was no obvious reason why the technical information in the IDSS, which is not material to the task of holding the Government to account, should need to be disclosed on the ground of public interest and, even if there were some legitimate public interest in doing so, how that outweighed CUC's commercial interest. If CUC had known the issues in play in the appeal, it could and would have advanced such arguments against disclosure of the COSS and the IDSS being required in the public interest or at least that appropriate redactions be made to them to protect CUC's commercial interest.

F.2 The Ombudsman's arguments

103. Mr Lowe accepts that *E v Secretary of State for the Home Department* sets out the applicable test. However, he describes CUC's argument that the Ombudsman made a fundamental error of fact as "*spurious*". Mr Lowe argues that the difference between the Ombudsman's understanding of CUC's role in the process, as recorded in her decision, and what CUC is required to do under the terms of the Licence is "*a distinction without a difference and only a matter of degree.*" He says the error has been blown out of all proportion and was not material to the Ombudsman's conclusion on disclosure being required in the public interest.
104. Mr Lowe submits that the primary question is whether the public interest requires disclosure of the COSS and IDSS and that, in effect, CUC's complaint that the Ombudsman made an error of fact is an irrelevant distraction.
105. Mr Lowe argues that there is an important public interest in transparency and debate over the use of renewable energy in the Cayman Islands. He adds that it is plainly a matter of public interest whether CUC deals fairly with those who seek to provide or use renewable energy and how CUC intends to deal with competition. Mr Lowe says that the collaboration between OfReg and CUC on

renewables is of intense public interest because CUC has a clear self-interest in blocking renewables being adopted by its customers, unless it can get ahead of the game.

F.3 Discussion and decision on errors of fact and public interest

106. In my judgment, it is clear that the Ombudsman made the two relevant factual errors identified by Mr Buttler. The Ombudsman concluded in paragraphs 56, 65, 68, 69, 73 and 74 of her decision that:

“56. [...] As forthrightly described by OfReg and CUC, it appears that one bidder (CUC), which already holds a monopoly position in terms of the sale of electricity, is co-designing the specifications of the RFP for an upcoming bidding process, in which they, themselves, will be an interested party. In my mind, this has the appearance of a conflict of interest [...]

65. [...] In the course of the appeal, my office made repeated inquiries with OfReg whether any other responsive records were held [...] We were told there were no other responsive records. Therefore, it appears that CUC did not submit a COSS to OfReg in 2019, as it was purportedly required to do under the T&D License, 5 years after the 2014 COSS. Whatever the explanation, as a public authority with obligations under the FOIA, and as the regulator in these matters, OfReg should have explained the reasons for this apparent omission to the applicant and to my office.

68. Since OfReg claimed that the exemptions were engaged, it was required to conduct a public interest test pursuant to section 26(1). However, it did not do so, even after being reminded by my office. OfReg did not provide any public interest arguments for or against disclosure.

69. Since I have found that the exemptions do not apply, I am not required to conduct a public interest test. However, for clarity, if one or more of the above exemptions in section 21 were engaged (which they are not), I would have to consider whether disclosure would nonetheless be in the public interest [...]

73. If a public interest test were required in the circumstances of this case, the following factors would weigh strongly in favour of disclosure:

- The promotion of greater understanding of the decisions of OfReg, in its role as utilities regulator, particularly in regard to electrical rates for consumers;*
- The provision of reasons for the decisions taken by OfReg in respect of electrical rates;*
- The public interest in holding OfReg accountable in its role as utilities regulator, in accordance with its enabling legislation and its duty to, amongst other things, ‘protect the short and long term interests of consumers’;*
- Improving the regulatory role of OfReg and its responsiveness to the needs of the public;*
- Deterring potential maladministration and conflicts of interest, in particular in regard to the development of an RFP by OfReg together with one of the interested parties, and the compliance of CUC and OfReg with the provisions of the T&D License [...];*
- Revealing incomplete information, in the form of the apparently missing 2019 COSS for which no reason was given.*

74. There is a very strong public interest in ensuring a level playing field in bidding processes for utility services, in general, specifically in relation to the forthcoming bidding process for USRG. Transparency is key to a fair bidding process, and although the relevancy of the documents in the forthcoming bid has not been demonstrated, the close involvement of CUC in co-designing the RFP with OfReg underscores the importance of transparency.”

107. The Ombudsman's conclusions were factually incorrect because CUC's role was to assist with drafting the power purchase agreement, which set out the basis on which bidders under the RFP would be obliged to contract with CUC to sell the electricity that they generated. CUC was not permitted under the terms of the Licence to participate in the preparation of the RFP itself: that was OfReg's sole responsibility. The Ombudsman made a second factual error in that CUC had submitted a second COSS in 2023.
108. Secondly, the Ombudsman's mistakes are objectively verifiable by consideration of the terms of the Licence that I have already set out in this judgment and from the existence of the COSS submitted in 2023.
109. Thirdly, CUC was not responsible for the Ombudsman's errors, which were caused by OfReg. CUC was not made aware, either by the Ombudsman or by OfReg, of the Ombudsman's questions regarding the RFP process and the absence of a COSS since 2014 and had no role in OfReg providing the Ombudsman with insufficient or misleading responses.
110. Fourthly, I do not accept Mr Lowe's submission that the Ombudsman's errors of fact were trivial and of no materiality. I do not disagree with Mr Lowe that there is an important debate to be had in the Cayman Islands regarding the use of renewable energy. However, that does not justify the misapplication of the FOIA. In my judgment, the only fair conclusion to be drawn is that the Ombudsman's mistakes were material to her conclusion that disclosure was required in the public interest.
- 110.1 The materiality of the Ombudsman's error regarding CUC's role in the RFP process is demonstrated by the Ombudsman saying that there was an appearance of a conflict of interest and that disclosure was required to deter potential maladministration and conflicts of interest. In my view, if the Ombudsman had properly understood CUC's role as being limited to preparing the terms of the power purchasing agreement by which CUC would buy electricity from other generators to feed it into the existing grid, then it is unlikely that she would have formed the view that there was a possibility of a conflict of interest, and would certainly not have concluded that there was an appearance that there was such a conflict of interest.

110.2 The materiality of the Ombudsman's error regarding CUC's role in the RFP process is further demonstrated by the fact that the Ombudsman's concern about the appearance of a conflict of interest resulting from her understanding of CUC's role was the only factor singled out for mention in the Ombudsman's press release dated 7 February 2024 following the publication of her decision.

110.3 As regards the Ombudsman's erroneous conclusion that no COSS had been prepared since 2014, the Ombudsman expressly relied on it as being a factor weighing strongly in favour of disclosure, which indicates that it must have been material in her own mind.

110.4 The other reasons that the Ombudsman gave for determining that disclosure of the COSS and IDSS was in the public interest did not have any clear link to the content of the COSS and IDSS but appear to have been based on the Ombudsman's broader intention to make OfReg's decision making more transparent and for which, disclosure of the COSS and IDSS would not appear to be necessary or appropriate.

111. In this context, it is also possible that, if she had received appropriate representations from CUC, the Ombudsman may have decided that the public interest in debating the use of renewable energy in the Cayman Islands would sufficiently be met by requiring disclosure of a redacted version of the COSS and/or the IDSS omitting CUC's commercially sensitive financial information concerning charges and margins; or she may have decided that disclosure should be ordered at a future date, once the forthcoming RFP process for renewable electricity generation had been completed. However, in my view, it is not appropriate for me to try to resolve this question.

112. I consider that there is a real prospect that the Ombudsman would have reached a different conclusion on the public interest test if she had not made the errors of fact in question. It follows from this that I would also quash the Ombudsman's decision on this basis, if I were to be wrong on the question of procedural fairness. The Ombudsman should reconsider the question of the public interest in disclosure of the COSS and IDSS, or redacted versions of them, once she has had the benefit of full and detailed representations from CUC, which will occur as the result of the quashing decision that I have already made.

G. The Constitutional claim under section 15**G.1 *CUC's arguments***

113. Finally, Mr Buttler advances an argument that the Ombudsman's decision involves an interference with CUC's property in circumstances where no provision has been made for payment of any compensation to CUC. He points out that the Ombudsman did not identify any defence to this part of CUC's claim in its letter dated 28 November 2024, which was required to advise CUC of "*all points it intends to take in defence of the claim*", although he did not go so far as to suggest that Mr Lowe should not now be permitted to put forward contrary arguments.
114. Mr Buttler submits that the result of the Ombudsman's decision contravenes the requirements of section 15 of the Constitution. Mr Buttler's position is that section 5 of the Cayman Constitution Order 2009 requires existing laws to be read with such modifications, adaptations, qualifications and exceptions as are necessary to bring them into conformity with the Constitution. He says that the FOIA came into force on 5 January 2009, before the enactment of the Constitution on 10 June 2009 and before it came into force on 6 November 2012. The FOIA is therefore an "*existing law*" for the purposes of section 5 of the Cayman Constitution Order. In this regard, the revisions to the FOIA since 2009 have not involved material amendments. In the Cayman Islands case of *Changyou.com Ltd v Fourworld Global Opportunities Fund Ltd* [2025] UKPC 12, the Privy Council concluded at paragraph 93 that the test is whether there have been material amendments to the provision in question. If not, then the provision continues to be existing law, even if other provisions in the Act have been amended.
115. Mr Buttler argues that the COSS and IDSS are property or possessions in the sense required by section 15 of the Constitution, having regard to Article 1 of the First Protocol to the European Convention on Human Rights, which is equivalent to section 15 of the Constitution: see *Changyou.com Ltd* at paragraph 65.
116. In support of his argument that the COSS and IDSS constitute property or possessions, Mr Buttler draws my attention to the decision of the English Court of Appeal in *R (Veolia ES Nottinghamshire Ltd) v Nottinghamshire County Council* [2010] EWCA Civ 1214, which held that the concept of

possessions for this purpose covers valuable commercial confidential information. Mr Buttler contends that:

116.1 the COSS and IDSS were bought by CUC;

116.2 the IDSS is a marketable asset that could be sold to a third party;

116.3 the IDSS is one of CUC's assets that would affect the price for which CUC could be sold; and

116.4 the IDSS contains commercially confidential information that would be of economic value to CUC's competitors.

117. Mr Buttler submits that if the COSS or the IDSS were to be disclosed, their commercial value would be destroyed, which is sufficient to amount to a serious interference with CUC's enjoyment of its property.

118. Section 15 of the Constitution provides that:

"15.—(1) Government shall not interfere in the peaceful enjoyment of any person's property and shall not compulsorily take possession of any person's property, or compulsorily acquire an interest in or right over any person's property of any description, except in accordance with law and where—

- (a) the interference, taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and*
- (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and*
- (c) provision is made by a law applicable to that interference, taking of possession or acquisition—
 - (i) for the prompt payment of adequate compensation [...]*
 - (ii) securing [...] a right of access to the Grand Court, whether direct or on appeal from any other authority, for the determination of his or her interest or right, the legality of the interference with [...] the property, interest or right, and the amount of any compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation; and*
 - (iii) giving to any party to proceedings in the Grand Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction."**

119. Mr Buttler submits that:

119.1 CUC is a legal person;

119.2 “government” includes public officials: see section 1(3), and public officials includes any person carrying out a public function: see section 28, so that the Ombudsman is equivalent to government because she is performing a public function;

119.3 the COSS and IDSS are CUC’s property or possessions, as already addressed, so that section 15 protects CUC’s right of peaceful enjoyment of that property;

119.4 the FOIA is a law, so that the requirement for any interference with CUC’s rights to be by operation of law is satisfied; but

119.5 there is no law in the Cayman Islands that provides for compensation to be paid where property rights are interfered with as the result of an order for disclosure under the FOIA.

120. Mr Buttler argues that the least intrusive modification of the FOIA, consistent with the requirement in section 5 of the Cayman Constitution Order, is to exempt from disclosure under the FOIA any record that is third party property within the meaning of section 15 of the Constitution. Mr Buttler contends that this also requires the court to exclude such records from disclosure in the public interest under section 26 of the FOIA, which seems to me to involve a more substantial reading down of the wording of the statute. He proposes two alternative forms of words, namely to add to section 21 of the FOIA, and presumably to section 26 as well, “*except where disclosure would give rise to interference with the quiet enjoyment of property*” or “*except where disclosure would breach section 15 of the Constitution*”. Mr Buttler says that it would then be for Parliament to fashion a right to compensation for any affected third party, if it wished to bring such documents back within the scope of disclosure under the FOIA.

121. If the FOIA were read down in this way, then Mr Buttler says that the Ombudsman did not have statutory power to order disclosure of the COSS and IDSS and her decision was *ultra vires* and should be quashed for that reason.

G.2 The Ombudsman’s arguments

122. The Ombudsman raises eight arguments in response to CUC’s constitutional claim, which I can summarise as follows.

122.1 As indicated in my summary of the Ombudsman’s case earlier in this judgment, the Ombudsman complains that it is too late for CUC to raise its constitutional argument.

122.2 The public interest may be held to override commercial confidentiality in appropriate cases: see the helpful guidance of the English Court of Appeal in London Regional Transport v The Mayor of London [2001] EWCA Civ 1491.

122.3 This is not a simple case of governmental interference – CUC provided the documents to OfReg for regulatory reasons. Freedom of information is underpinned by the Constitution and provides for a balancing of interests.

122.4 The right in section 15 is not absolute, section 15(3) provides that:

“(3) Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that the law in question makes provision for the interference with or compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds.” (Mr Lowe’s emphasis)

122.5 Section 3 of the Law Revision Act (2020 revision) provides that the revised version of an Act of Parliament is the only proper version of the law. Although not expressly stated in his skeleton argument, it appears that Mr Lowe argues that this displaces the Privy Council’s conclusion in Changyou.com Ltd that I have set out above, notwithstanding that Changyou.com Ltd was heard in October 2024 and the opinions delivered on 11 March 2025, long after the Law Revision Act (2020 revision). Of more potential significance, Mr Lowe argues that it is sufficient for the provision in question to be treated as new law that it has been considered by Parliament, even if Parliament has decided not to amend it. He says that this is the case in respect of the FOIA, which was reviewed by Parliament, firstly in 2017, when it moved responsibility under the FOIA from the Information Commissioner to the Ombudsman, and again in 2018 when it amended section 43 of the FOIA. However, it was agreed between counsel following the hearing before me that the amendment to section 43 in 2018 was simply to move what was previously section 42(4) to become section 43(5) of the FOIA. CUC says it is therefore not a material amendment, whilst the Ombudsman contends that it is because the amendment in question was made by the same provision in the amending statute that substituted two new subsections in section 42 of the FOIA.

122.6 The information contained in the COSS and IDSS does not constitute “property” for the purpose of section 15 of the Constitution. The Grand Court should not follow the decision of the English Court of Appeal in Veolia ES Nottinghamshire Ltd in light of the subsequent English High Court decision to the contrary effect in Force India Formula One Team Ltd v 1 Malaysia Racing Team SDN BHD [2012] EWHC 616 (Ch), although Mr Lowe concedes that Force India was not addressing the meaning of property for the purpose of Article 1 of the First Protocol to the European Convention on Human Rights.

122.7 CUC’s constitutional claim does not stand up to scrutiny because: if CUC succeeds on the ground that the COSS and IDSS are exempt from disclosure, then it has no complaint; and if it loses then that is because it had no property requiring protection either because it has not established confidentiality or commercial interest or it has lost the protection because of the public interest.

122.8 Mr Lowe concludes by saying that it is premature to decide CUC’s constitutional claim if I were to quash the Ombudsman’s decision and remit the matter to her for rehearing.

G.3 CUC’s response

123. In response to Mr Lowe’s argument that it is sufficient for the statutory provision in question to be treated as new law if it has been considered by Parliament, Mr Buttler submits that that is contrary to the Privy Council’s decision in Changyou.com Ltd. As to what constitutes “property”, Mr Buttler relies on Recovery Partners GP Ltd v Rukhadze [2025] UKSC 10 to rebut Mr Lowe’s argument.

124. On the question of prematurity, Mr Buttler urges me to decide the question now because it goes directly to the Ombudsman’s consideration of the appeal in respect of the exemption under section 21 of the FOIA as well as to disclosure in the public interest under section 26; and also in order to avoid the parties having to make a further application to the Court if the Ombudsman decides to order disclosure of the COSS or the IDSS that does not adequately protect CUC’s commercial interests following any rehearing that is to take place before her.

G.4 Discussion and decision on the Constitutional claim under section 15

125. I accept Mr Buttler's argument that the Ombudsman needs to know whether or not she should treat sections 21 and 26 of the FOIA as being read down in order properly to conduct the rehearing of the appeal before her. For that reason, I have determined that I should express a concluded view on this point. This is notwithstanding that it is likely only to make a difference to the outcome on the rehearing if the Ombudsman were otherwise to reach the same conclusion that the COSS and IDSS should be disclosed without any redactions other than that of the signature on the COSS.

126. I agree with Mr Buttler that CUC's right under section 15 of the Constitution to peaceful enjoyment of its property would be engaged by any order by the Ombudsman that the COSS and IDSS be disclosed in a form that does not redact CUC's commercially confidential information to protect damage to CUC's property rights in the COSS and IDSS. In the absence of any contrary argument from Mr Lowe, I also accept that there is no law in the Cayman Islands that provides for compensation to be paid where private property rights are interfered with as the result of an order for disclosure under the FOIA.

127. I do not agree with Mr Lowe that it is too late for CUC to raise its constitutional complaint for three reasons.

127.1 Firstly, section 26 of the Constitution provides that a claim that government (i.e. the Ombudsman) has breached or threatened his rights and freedoms must be made to the Grand Court and, if the issue arises before any other court, must be referred to the Grand Court for decision. I do not consider that the Ombudsman, who incidentally is not a court, therefore had power to decide the constitutional issue even if it had been raised before her.

127.2 Secondly, CUC was not a party to the appeal to the Ombudsman and did not make any representations to her. CUC therefore cannot be said to have waived any right to make such a claim now.

127.3 Thirdly, there is no suggestion by Mr Lowe of any prejudice that will be suffered by allowing CUC to raise the constitutional issue at this point.

128. I have carefully read what was said in London Regional Transport v The Mayor of London regarding the circumstances in which the public interest may override commercially confidential interests in certain cases, and the suggested approach of the English Court of Appeal to how a court might carry out the necessary balancing exercise. However, I do not find that case to be helpful in determining the different issue whether CUC's right under section 15 of the Constitution should have the result that sections 21 and 26 of the FOIA should be read down to make them consistent with section 15.
129. I do not follow Mr Lowe's third point. The fact that CUC provided the COSS and IDSS to OfReg for regulatory reasons does not seem to me to affect whether CUC can continue to rely on its section 15 rights in relation to any action in relation to those records that would amount to an interference with CUC's peaceful enjoyment of its rights in them. The fact that freedom of information is addressed in the Constitution does not automatically have the effect that it overrides a person's section 15 rights, if that is what Mr Lowe is arguing.
130. Mr Lowe's reliance on the qualification in section 15(3) of the Constitution is misplaced. That proviso only applies where the property is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds. CUC is not such an entity, amongst other reasons because a sizeable proportion of its shares are in public ownership and are traded on the Toronto Stock Exchange.
131. In addition, I do not accept Mr Lowe's argument that section 3 of the Law Revision Act has the effect of overriding the decision of the Privy Council in Changyou.com Ltd, which post-dated its coming into force, that what is necessary for the purpose of section 5 of the Constitution Order is whether there have been material amendments to the statutory provision in question and, if not, then the provision continues to be existing law. I think there may be more mileage in Mr Lowe's argument that it is sufficient for a provision to be treated as new law that Parliament has reviewed the statute in question, or the relevant part of the statute, and has decided not to make any amendments to it. However, Mr Lowe did not identify any authority in support of this proposition and Mr Buttler appears to have cogent arguments against that approach based on the Privy Council's decision in Changyou.com Ltd. In the circumstances, I would need to consider very carefully what the Privy Council said on this point in Changyou.com Ltd before I would be willing to accept Mr Lowe's argument as correct, and I am not content to make that decision now in this case.

132. What constitutes “property” for the purpose of section 15 of the Constitution raises some thorny questions. Veolia ES Nottinghamshire Ltd directly concerned what constitutes property/possessions for the purposes of Article 1 of the First Protocol to the European Convention on Human Rights. Lord Justice Rix, with whom the other members of the English Court of Appeal agreed, said this at paragraphs 120 and 121:

“120. The concept of ‘possessions’ is broad and covers a wide range of things which have significant economic value. It extends to business goodwill and to various forms of intellectual property, including copyright, although there is apparently no case which expressly covers confidential information: see for instance R (Nicholds) v Security Industry Authority [2007] 1 WLR 2067, para 70, citing Strasbourg authority for the concept to include shares, patents, planning permissions, leases and licences, social security and pensions, and choses in action, and at para 71 touching on goodwill, the Strasbourg jurisprudence concerning which was discussed in R (Malik) v Waltham Forest NHS Primary Care Trust [2007] 1 WLR 2092.

121. Although the parties were unable to cite any Strasbourg authority which expressly covers confidential information as a form of ‘possessions’, no case was cited against that proposition. I can see no reason, in the light of the Strasbourg jurisprudence which does exist, why valuable commercial confidential information, such as the evidence in this case demonstrates is in question here, particularly with respect to the second disputed documents, cannot fall within the concept of ‘possessions’. Of course, its protection is subject to the question of justification under the second paragraph of article 1 of the First Protocol.”

133. In Force Indig, relied upon by Mr Lowe, Arnold J was addressing the meaning of “property” in the context of a claim for breach of confidence and breach of copyright in respect of designs for a Formula 1 racing car. At paragraphs 376 to 378 Arnold J said:

“376. Confidential information is not property, however, even though businessmen often deal with confidential information as if it were property and judges often use the language of property when discussing breach of confidence: see Jefferys v Boosey (1854) 4 HLC 814 at 966 (Lord Brougham); E.I. Du Pont de Nemours Powder Co v Masland (1917) 244 US 100 at 102 (Holmes J, US Supreme Court); Federal Commissioner of Taxation v United Aircraft Corp (1943-44) 68 CLR 525 at 534 (Latham CJ, High Court of Australia); Nicrotherm Electrical Co Ltd v Percy [1957] RPC 207 at 209 (Lord Evershed MR, with whom Hodson and Romer LJ agreed); Boardman v Phipps [1967] 2 AC 46 at 89G-90A (Viscount Dilhorne), 102G (Lord Cohen) and 127F-128A (Lord Upjohn); Fraser v Evans [1969] 1 QB 349 at 361 (Lord Denning MR); Moorgate Tobacco Co Ltd v Philip Morris Ltd [1985] RPC 219 at 234 (Deane J, with whom the other members of the High Court of Australia agreed); Cadbury Schweppes Inc v FBI Foods Ltd [2000] FSR 691 at [39]-[48] (Binnie J delivering the judgment of the Supreme Court of Canada); Douglas v Hello! Ltd (No 3) [2005] EWCA Civ 595, [2006] QB 125 at [126]-[127] (Lord Phillips of Worth Matravers MR delivering the judgment of the Court of Appeal) and [2007] UKHL 21, [2008] 1 AC 1 at [276] (Lord Walker of Gestingthorpe); and Coogan v News Group Newspapers Ltd [2012] EWCA Civ 48 at [39] (Lord Neuberger of Abbotsbury MR, with whom Lord Judge CJ and Maurice Kay LJ agreed). (It may be noted that Rix LJ’s statement in Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council [2010] EWCA Civ 1214, [2011] Env LR 12 at [111] that ‘confidential information is a well recognised species of property’ was made without reference to any of these authorities, although Coogan v News Group was of course decided later.) It follows that the user principle is not directly applicable to claims for breach of confidence. Although proprietary remedies have sometimes been granted in breach of confidence

cases, these have been based not purely upon breach of confidence, but upon breach of a fiduciary duty, as for example in Boardman v Phipps.

377. Although confidential information is not property, intellectual property lawyers treat breach of confidence as a branch of intellectual property law. This is partly for the practical reason that, commercially, confidential information is often dealt with as if it were intellectual property (for example, know-how is often licensed together with patents). It is also partly for the doctrinal reason that in commercial contexts breach of confidence is a form of unfair competition, and in that sense akin to infringement of an intellectual property right. Indeed, breach of confidence claims are often combined with claims for copyright infringement, database right infringement and so on.

378. Whether confidential information truly counts as intellectual property depends on the context. [...]"

134. In paragraph 111 of his judgment in Veolia ES Nottinghamshire Ltd, Rix LJ was addressing the common law meaning of “property” and not the different meaning required in respect of the European Convention on Human Rights. Rix LJ said:

“111. [...] Whether or not the protection of confidential information can be properly described as a ‘fundamental human right’ or a ‘basic tenet of the common law’ (to which Lord Hobhouse referred) is something which I will consider further below, after discussing the Convention’s article 8 and article 1 of the First Protocol. However, confidential information is a well recognised species of property, protected by the common law, and recognised in other relevant statutes such as the [Freedom of Information Act 2000], as well as in EU law such as in Directive 2004/18. Commercial confidential information may well constitute the life blood of an enterprise.”

Accordingly, I do not consider that Arnold J’s criticism of Rix LJ’s statement in paragraph 111 of his judgment in Veolia ES Nottinghamshire Ltd undermines the force of what Rix LJ said in paragraphs 120 and 121 about the meaning of property/possession for the purposes of Article 1 of the First Protocol to the European Convention on Human Rights in light of the European jurisprudence on the point.

135. Finally, it is useful to consider the UK Supreme Court’s judgment in Recovery Partners GP Ltd v Rukhadze, sitting as a seven-judge court. Both Mr Buttler and Mr Lowe recognise that this is also not a case concerning the meaning of property/possessions for the purposes of Article 1 of the First Protocol to the European Convention on Human Rights and instead concerned liability for breach of fiduciary duty. The leading judgment was given by Lord Briggs, with whom Lords Reed, Hodge and Richards JJSC agreed. Lords Leggatt and Burrows and Lady Rose each gave concurring judgments, but their reasons differed to a greater or lesser extent from those of Lord Briggs. Mr Lowe points out that the other judges of the Supreme Court did not endorse Lord Leggatt’s concurring judgment, and he argues that Lord Leggatt’s discussion of whether knowledge or information should be considered

to be *obiter*. Nevertheless, I consider it is useful to consider Lord Leggatt JSC's discussion and explanation of the decision of the House of Lords in Boardman v Phipps in paragraphs 101 to 104 of his judgment:

“101. On the appeal to the House of Lords different views were expressed about whether knowledge or information can properly be described as property. Of the majority, Lord Cohen accepted that information is not property ‘in the strict sense of the word’: Boardman v Phipps [1967] 2 AC 46, 102G. By contrast, Lord Hodson ‘dissent[ed] from the view that information is of its nature something which is not properly to be described as property’, observing that it ‘may be very valuable as an asset’ and that the information acquired by Boardman ‘was capable of being and was turned to account’ (p 107B-C). Similarly, Lord Guest saw ‘no reason why information and knowledge cannot be trust property’ and considered that all the information which Boardman obtained in acting on behalf of the trust ‘became trust property’ (p 115E). Of the minority, Viscount Dilhorne was willing to accept that ‘some information and knowledge can properly be regarded as property’ but did not think that the information obtained by Boardman about the affairs of the company was ‘to be regarded as property of the trust in the same way as shares held by the trust were its property’ (pp 89G-90A). Lord Upjohn acknowledged that information which it would be a breach of confidence to disclose ‘is often and for many years has been described as the property’ of the person to whom the duty of confidentiality is owed and that ‘the books of authority are full of such references’. But he insisted that ‘in the end the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship’ (pp 127G-128A).

102. In expressing these apparently discordant views, the law lords were, I would suggest, mostly talking past one another. There is no single or universal concept of property. The term ‘property’ can have different meanings depending on the context and the rights in view. Thus, to ask, for example, whether so called ‘intellectual property’ is ‘really’ property is to ask a meaningless question. What matters is not the label but the nature of the rights.

103. When rights are described as property rights, this is sometimes intended to signify that they are rights against the whole world and that they automatically attach to whoever is the owner of the object or item in question. If the term ‘property’ is used in this sense, then plainly information cannot be property. I take this to be what Lord Cohen and Lord Upjohn meant when they said that information is not property ‘in the strict sense of the word’ or ‘in any normal sense’. But a central, and for some purposes defining, feature of property is the right of the owner to determine how an object is used as between that person and one or more others. Information can be the object of such a right. In that sense information can properly be regarded as property or – if we wish to confine the term to a narrower meaning – treated as analogous to property in deciding how the law should protect this right.

104. Thus, where, as between a principal (P) and fiduciary agent (A), P has the exclusive right to use and control the use of information, and A without the consent of P uses the information for A's own benefit, the law provides similar protection to that afforded when tangible property is used without the owner's consent. This protection includes imposing a liability on A to surrender to P any benefit derived from using the information. The liability may be enforced by ordering an account of profits. This remedy may be awarded when confidential information is misused: see eg Peter Pan Manufacturing Corpn v Corsets Silhouette Ltd [1964] 1 WLR 96 and Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109. The same principle applies to the misuse of protected ‘intellectual property’. A patent, trademark or copyright confers an exclusive right to exploit the patented invention, trademark or copyrighted work. If another person does so without the consent of the owner of the right and makes a profit from doing so, that person may be ordered to account for the profit by paying it over to the owner of the right.”

136. In paragraph 102, Lord Leggatt makes the important point, which must be right, that “*property*” has different meanings in different contexts and depending on the nature of the rights in question. In this case, I am concerned with the meaning of property for the purpose of section 15 of the Constitution in the specific context of the protection of individual property from inappropriate state interference, and where any such interference should be at the price of payment of compensation. I think that Mr Buttler is right to argue that both the COSS and the IDSS have inherent value due to the commercially confidential information that they contain. As Mr Buttler says, they could each be sold by CUC for valuable consideration. By analogy with Lord Leggatt’s discussion in paragraph 103 of his judgment, that leads me to the conclusion that it is right to treat the COSS and the IDSS as “*property*” for the purpose of section 15 of the Constitution because the state’s interference with CUC’s rights in the COSS or the IDSS by requiring disclosure to the public will destroy that value. Such an interpretation of the meaning of “*property*” is entirely consistent with the purpose of section 15 of the Constitution. In reaching this conclusion, I am supported by the reasoning of Rix LJ in *Veolia ES Nottinghamshire Ltd*, based on the European jurisprudence, which I consider does provide useful insight into how section 15 of the Constitution should be interpreted given that it is equivalent to Article 1 of the First Protocol to the European Convention on Human Rights.
137. I agree with Mr Lowe that if CUC were to succeed on the ground that the COSS and IDSS are exempt from disclosure or that the COSS and IDSS should be disclosed only in a form redacted to remove any adverse impact on CUC’s property right in the COSS and IDSS, then CUC would have no valid complaint under section 15 of the Constitution. However, I do not think it follows that if CUC were to lose on that issue, then it could not maintain a constitutional objection. It is not a foregone conclusion that a decision by the Ombudsman that the public interest requires disclosure of the COSS and/or IDSS in a form that would adversely affect CUC’s property rights in the COSS and IDSS necessarily outweighs CUC’s ability to rely on section 15 to try to prevent such disclosure taking place in the absence of an ability to claim compensation. Further, there is no suggestion that the Ombudsman, who is not a court for the purposes of section 26 of the Constitution, could somehow require that CUC be compensated. It seems to me that there are multiple difficulties with such a suggestion: what is the source for such a power vested in the Ombudsman; by whom and against who would an order for compensation be made; how would such compensation be calculated and

by whom; how would any order for compensation be enforced? These are all questions without any obvious answer.

138. In the circumstances, I think that Mr Buttler is correct to say that the least intrusive modification of the FOIA under section 5 of the Cayman Constitution Order is to exempt any record from disclosure under section 21 of the FOIA that is third party property within the meaning of section 15 of the Constitution. Of the two alternative additional wordings to be added to section 21 of the FOIA, I prefer Mr Buttler's second formulation, namely: *"except where disclosure would breach section 15 of the Constitution"*.

139. I am more hesitant about whether the court should also exclude such records from disclosure in the public interest under section 26 of the FOIA in every case, as Mr Buttler submits. I consider that that should very likely be the practical outcome. However, my view is that there may be cases, and I say nothing about this case, where there is a very strong public interest in disclosure under the FOIA that should properly override the Constitutional right to compensation. I therefore conclude that a blanket qualification to section 26 to exclude cases involving a breach of section 15 of the Constitution would not be appropriate in relation to section 26 of the FOIA provided that the inability of the third party to obtain compensation for that interference, and the resulting breach of the requirements of section 15 of the Constitution, are treated as weighing very heavily in the balance against disclosure being ordered under section 26 of the FOIA in such a case.

H. Disposal

140. For the reasons that I have set out fully in this judgment, I conclude that I should quash the Ombudsman's decision dated 5 February 2024 and remit the matter to the Ombudsman for her to rehear the appeal in a way that is procedurally fair to the applicant, to OfReg and to CUC. In light of that conclusion, I do not need to express a concluded view on CUC's complaint that her decision was also vitiated by two material errors of fact that she made. However, it does seem to me that the Ombudsman's *obiter* decision that disclosure would be in the public interest was seriously flawed for that reason. I also conclude that section 21 of the FOIA should be read down to exempt disclosure of records where there would be an adverse effect on the property rights of a third party, contrary to section 15 of the Constitution. However, I anticipate that in many such cases, suitable redaction

of the records should be able to cater for this issue. I do not accept Mr Buttler's argument that section 26 of the FOIA should also be read down, provided that the Ombudsman considers that any breach of section 15 of the Constitution that would result from an order for disclosure in the public interest should weigh very heavily against such an order being made.

141. I will hear the parties further on the questions of consequential orders and costs.

Dated 8 June 2026



**THE HONOURABLE JUSTICE JALIL ASIF
JUDGE OF THE GRAND COURT**