IN THE MATTER OF ACCESS TO RECORDS UNDER THE FREEDOM OF INFORMATION ACT (2021 REVISION)

BETWEEN: (1) ALRIC JEREMY LINDSAY

APPELLANT

AND: (1) THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

INITIAL SUBMISSIONS BY ALRIC JEREMY LINDSAY

Background

1 This appeal concerns a request[1] dated October 7, 2024 made by the Appellant pursuant to the Freedom of Information Act (2021 Revision) (the "FOI Act") for disclosure of information held by the Director of Public Prosecutions. The information includes:

> "1. Number of matters that the DPP decided not to prosecute from 2017 to date.
>
> 2. Nature of allegations in 1 above.
>
> 3. Reasons for each decision in 1 above."

2 On November 4, 2024, the Appellant received the following response from the office of the DPP:

"Thank you for your attached FOI request.

Your FOI request has been reviewed and it has been determined that to provide the information requested would unreasonably divert resources. See section 9 (c) of the Freedom of information Act (2021 Revision).

If you could reformulate your application perhaps we can identify the records you are researching and provide the information."

3 On November 4, 2024, the Applicant responded to November 4, 2024 email from the office of the DPP as follows

"Dear FOI Manager,

Good afternoon.

Presumably, the DPP keeps good records and would have maintained a list of matters where a decision was made not to prosecute and the reason why.

In the circumstances, it appears that this exercise should require minimal resources and there is no need to reformulate the request.

If your decision remains the same, please confirm whether an internal review is possible as I do not know whether a chief officer was involved in the request.

[1] See FOI Application dated October 7, 2024, sent by the Appellant to the DPP set out in Exhibit A

If an internal review is unavailable, I will submit an appeal to the office of the Ombudsman."

4 On November 26, 2024, the office of the DPP responded to the Applicant's email dated November 4, 2024, as follows:

"Dear Mr. Lindsay,

Thank you for your FOI request regarding the number of cases that the DPP decided not to prosecute from 2017 to 2024.

Please be advise that pursuant to s9 (c) of the Freedom of Information Act (2021 Revision) to provide the requested information would unreasonably divert the department's resources for the following reasons:

- The ODPP receives 2,500 annually to rule on.
- A proportion of those cases will be decisions not to proceed because of insufficient evidence or for public interest reasons: these would involve decisions not to prosecute.
- Cases which go to court are subject to continuous review and some may be withdrawn before getting to a jury/judge for determination: these also involve decisions not to prosecute.
- Indictments/charges sheets will include numerous offences and decisions may be made to accept alternative charges : these also involve decisions not to prosecute.
- To compile a list from 2017 to 2024 is too wide even if we started the process, resources would take weeks."

5 In an effort to reduce the amount of work to be performed by the office of the DPP, the Applicant sent an email dated November 27, 2024 as follows:

"Dear FOI Manager,

If the request is too broad for the DPP to comply with, please provide the records for the period 2022 to 2024. Failing this, I will make the usual application to the Ombudsman."

6 In response to the Applicant's email dated November 27, 2024, the DPP responded as follows on November 27, 2024:

"Dear Mr Lindsay,

I hope you are well.

I have been included in your correspondence. Reducing the time period from 2017 to 2024 to 2022 to 2024 would limit the amount of time and resources.

However, this would still be a mammoth job and, for the same reasons as set out by my colleague Ms McCarthy, we are unable to assist with this request.

Kind Regards,

Simon

Simon Davis

Director of Public Prosecutions"

7 On December 2, 2024, the Applicant submitted an appeal to the office of the Ombudsman, appealing the decisions of the Director of Public Prosecutions.

Submissions

8 The Appellant now makes the following submissions in support the Appellant's appeal:

Cayman Islands ConstitutionOrder 2009

(1) The Constitution contains various affirmations[2] of the intention of people of the Cayman Islands to be:

"A country with open, responsible and accountable government, that includes a working partnership with the private sector and continuing beneficial ties with the United Kingdom"

"A country that fosters the highest standards of integrity in the dealings of the private and public sectors"

(2) The Constitution is the supreme law[3] of the Cayman Islands whereby the "Legislature's freedom to legislate is therefore constrained to the extent that it must not pass legislation that is inconsistent with or repugnant to the fundamental rights and freedoms enshrined and protected by the Constitution".

(3) The Constitution states the following:

[2] See pages 12 -13 of Cayman Islands Constitution Order 2009
[3] See paragraph 14 of Civil Causes 111 and 184 of 2018 (Day/Bush)

"**Declaration of incompatibility**

23. (1) If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility.

(2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.

(3) In the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility."

"Duty of public officials

24. It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified."

"Director of Public Prosecutions

57. (1) There shall be a Director of Public Prosecutions for the Cayman Islands, whose office shall be a public office and who shall be appointed in accordance with section 106.

(2) The Director of Public Prosecutions shall have power, in any case in which he or she considers it desirable to do so -

(a) to institute and undertake criminal proceedings against any

person before any court in respect of any offence against any law in force in the Cayman Islands;

(b) to take over and continue any such criminal proceedings that have been instituted by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

"Freedom of information

122. A law enacted by the Legislature **shall** provide for a right of access to information held by public authorities, for the conditions for the exercise of that right, and **for restrictions and exceptions to that right in the interests of the security of the Cayman Islands or the United Kingdom, public safety, public order, public morality or the rights or interests of individuals**."

Freedom of Information Act

(4) The FOI Act was meant to be enacted by the Legislature to provide for a right of access to information held by public authorities, for the conditions for the exercise of that right, and **for restrictions and exceptions to that right in the interests of the security of the Cayman Islands or the United Kingdom, public safety, public order, public morality or the rights or interests of individuals**. Regarding this, the FOI Act states the following:

""**public authority**" means—

(a) a ministry, portfolio or department;

(b) a statutory body or authority, whether incorporated or not;

(c) a government company which — (i) (ii) is wholly owned by the Government or in which the Government holds more than fifty percent of the shares; or is specified in an Order under section 3(2); or

(d) any other body or organisation specified in an Order under section 3(2);

"**Objects of this Act**

4. The objects of this Act are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely — (a) governmental accountability; (b) transparency; and (c) public participation in national decision-making, by granting to the public a general right of access to records held by public authorities, **subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information**.

"General right of access

6. (1) Subject to the provisions of this Act, every person shall have a right to obtain access to a record other than an exempt record.

(2) The exemption of a record or part thereof from disclosure shall not apply after the record has been in existence for twenty years unless otherwise stated in this Act or if it can be demonstrated to the satisfaction of the Ombudsman that the exemption reasonably continues to apply.

(3) An applicant for access to a record shall not be required to give any reason for requesting access to that record.

(4) Where a record is — (a) open to access by the public pursuant to any other enactment as part of a public register or otherwise; or (b) available to the public, or a particular individual, as the case may be, in accordance with administrative procedures established for that purpose, and irrespective of whether it is available — (i) (ii) after payment of a reasonable fee; or without payment of a fee, access to that record shall be obtained in accordance with the provisions of that enactment or those procedures.

(5) Where the factors in favour of disclosure and those favouring non-disclosure are equal, the doubt shall be resolved in favour of disclosure but subject to the public interest test prescribed under section 26."

"**Forms of access**

10. (1) Access to a record may be granted to an applicant in one or more of the following forms —

(a) the applicant may be afforded a reasonable opportunity to inspect the record;

(b) the authority concerned may furnish the applicant with a copy of the record;

...

(5) In the circumstances of this case:

(a) It is noted that while the office of the Ombudsman does not have the power to declare an incompatibility of the FOI Act with the Applicant's constitutional right of access to information held

by the DPP as a public authority, a declaration of incompatibility should be sought with the Grand Court for the following reasons:

- Article 122 of the Constitution utilized by the Legislature to create a law for freedom of information (i.e. the FOI Act) expressly states that a law enacted by the Legislature "shall provide for a right of access to information held by public authorities, for the conditions for the exercise of that right, **and for restrictions and exceptions to that right in the interests of the security of the Cayman Islands or the United Kingdom, public safety, public order, public morality or the rights or interests of individuals.**"

- The restrictions or exceptions stated in Section 9 of the FOI Act, including the one relied upon by the DPP that "A public authority is not required to comply with a request where... (c) compliance with the request would unreasonably divert its resources" is wider than the restrictions or exceptions listed in article 122 of the Constitution. The exceptions stated in Section 9 of the FOI Act, being primary legislation, cannot be wider than the limited exceptions set out in the Constitution, which is the supreme law of the Cayman Islands.

- In order to comply with and be compatible with the Constitution, the exceptions stated in Section 9 of the FOI Act shall only extend to "the interests of the security of the Cayman Islands or the United Kingdom, public safety,

public order, public morality or the rights or interests of individuals."

- In the circumstances, Section 9 of the FOI Act is inconsistent with or repugnant to the fundamental rights and freedoms enshrined and protected by the Constitution and appears to be incompatible with article 122 of the Constitution. An action ought to brought to the Grand Court to obtain a declaration of incompatibility. The Ombudsman should also reach a decision that the actions of the DPP in this matter are unlawful as they are outside the restrictions or exceptions stated in the Constitution.

(b) The basis of the refusal decision by the DPP under Section 9 of the FOI Act is contrary to the general spirit of the Constitution which contains various affirmations[4] of the intention of people of the Cayman Islands to be "A country with open, responsible and accountable government, that includes a working partnership with the private sector and continuing beneficial ties with the United Kingdom." In particular, when the DPP claims an inability to produce statistical information about prosecutions and reasons for not prosecuting due to resource constraints, several governance, transparency, and accountability issues emerge:

- Governance Issues:

[4] See pages 12 -13 of Cayman Islands Constitution Order 2009

- ❖ Leadership and Oversight: The inability to provide information can indicate a lack of effective leadership and oversight within the DPP's office. Governance structures should include mechanisms for regular reporting and accountability, and failure in this area raises questions about the operational efficiency and effectiveness of the DPP's office.

- ❖ Policy Implementation: Governance frameworks often require adherence to policies regarding data collection and reporting. The DPP's inability to provide this data suggests potential gaps in policy implementation or a failure to prioritize essential functions.

• Transparency Issues:

- ❖ Public Confidence: Transparency is crucial for public trust in the justice system. When the DPP cannot share statistical information, it may lead to public scepticism about the fairness and effectiveness of prosecutorial decisions, which can undermine confidence in the legal system.

- ❖ Lack of Accountability: Transparency allows stakeholders, including the public, to hold the DPP accountable for its prosecutorial decisions. Without access to information, it becomes difficult to assess whether decisions not to prosecute are justified or

consistent, leading to potential perceptions of arbitrary or biased decision-making. In fact, if transparency is provided by the DPP, then it may reveal that decisions to prosecute or not to prosecute are primarily based on nationality. Factual examples are years of DPP decisions not to prosecute non-Caymanians arriving at the airport with firearms and cannabis. In a majority of these cases, Caymanians are prosecuted and get a criminal record while non-Caymanians only receive a fine.

- Accountability Issues:
  - ❖ Performance Measurement: Accountability frameworks often depend on clear metrics for evaluating performance. Without statistical data, it becomes challenging to assess the DPP's effectiveness in managing prosecutions, leading to potential inefficiencies and a lack of accountability for outcomes.
  - ❖ Resource Allocation: Claims of insufficient resources can highlight broader systemic issues, such as inadequate funding or support for the justice system. This raises questions about how resources are allocated and whether the DPP's office is being appropriately supported to fulfill its mandate.

- Implications for Justice:
  - ❖ Impact on Victims and Society: If the DPP is unable to provide transparency regarding prosecutorial decisions, it can have serious implications for victims of crime and society at large, particularly concerning the perceived legitimacy of the legal system and the protection of public safety.
- Overall, the inability to produce statistical information due to resource constraints raises critical concerns about governance, transparency, and accountability within the prosecutorial system, highlighting the need for systemic reforms to ensure that the DPP can fulfill its essential roles effectively. Specific concerns arise under section 57 of the Constitution because in the absence of records, it cannot be confirmed how or whether the DPP is effectively discharging its functions. If the DPP is not effectively discharging its functions, then appropriate disciplinary action should be recommended under Section 106 of the Constitution.

(c) Even if Section 9 of the FOI Act was constitutional, the decision of the DPP is contrary to the general spirit of the objects of the FOI Act (which are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely (a) governmental accountability; (b) transparency; and (c) public participation in national decision-making, by granting to the public a general right of access to

records held by public authorities) for the same reasons stated in (b) above.

(d) The Applicant humbly requests the Ombudsman to apply the public interest test, referred to in regulation 2 of the Freedom Information (General) Regulations (2021 Revision), to the DPP's decision. This states as follows:

- "public interest" means but is not limited to things that may or tend to
  - ❖ (a) promote greater public understanding of the processes or decisions of public authorities;
  - ❖ (b) provide reasons for decisions taken by Government;
  - ❖ (c) promote the accountability of and within Government;
  - ❖ (d) promote accountability for public expenditure or the more effective use of public funds;
  - ❖ (e) facilitate public participation in decision making by the Government;
  - ❖ (f) improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;
  - ❖ (g) deter or reveal wrongdoing or maladministration;

- (h) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
- (i) reveal untrue, incomplete or misleading information or acts of a public authority.

The Applicant humbly requests the Ombudsman to consider that there are many more factors in favour of disclosure than those favouring non-disclosure, and to resolve the matter in the public interest.

(e) The requirement for a public authority to complete a "balancing exercise" appears to be confirmed in the Privy Council judgment *of Maharaj (Appellant) v Petroleum Company of Trinidad and Tobago Ltd (Respondent) (Trinidad and Tobago)*[5] wherein it was stated that:

"43…If such an argument were accepted after full examination at the substantive judicial review hearing, that would mean that it is arguable that either the Decision Letter should be quashed and the matter remitted to Petrotrin to consider the balance of public interest factors properly or the court should proceed to conduct the balancing exercise itself."

"44. If the proper approach to limb (ii) of section 35 is that indicated by Jamadar JA, the Board again considers that Mr

[5] Paragraph 43-49 of UKPC 21 Privy Council Appeal No 0047 of 2018 (of Maharaj (Appellant) v Petroleum Company of Trinidad and Tobago Ltd (Respondent) (Trinidad and Tobago))

Maharaj has a reasonably arguable claim for judicial review of the Decision Letter. This is on the basis that there is a realistic prospect that the court might conclude, on conducting the relevant balancing exercise itself, that disclosure of the Baptiste and Chan Tack statements is required in the public interest pursuant to that provision. On the basis of such a conclusion it would be open to Mr Maharaj to contend that the Decision Letter is contrary to law, that it failed to observe conditions required by law, that it conflicted with the policy of the FOIA, that it proceeded on the basis of an error of law or that it involved a breach of or omission to perform a duty, within the meaning of one or more of the subparagraphs in section 5(3) of the Judicial Review Act set out above."

"46. So far as concerns possible benefits for the public interest of disclosure of the Baptiste and Chan Tack statements, the Board considers that it is arguable that they are of significant weight, with a view to securing transparency and accountability in relation to relevant decisions in a number of respects. Without seeking to be in any way exhaustive, the Board refers to the following possible public interest benefits of disclosure: (a) to enable the public to understand and, if appropriate, criticise decisions taken by Petrotrin in embarking on the joint venture and in entering into the guarantee which have proved to be so costly to it; (b) to enable the public to be fully informed about those matters and Mr Jones's involvement in them so that they could, if appropriate, criticise or oppose the appointment of Mr Jones to roles within government with a focus on energy matters, such as his appointment as a member of the Cabinet Standing Committee on Energy; and (c)

to enable the public to understand, and if appropriate criticise, the decisions to bring the civil claim against Mr Jones in the first place and then to abandon it."

The Applicant humbly submits that no "balancing exercise" was completed in this case and one ought to have been done.

(f) It is noted that Section 10 of the FOI Act states:

" (1) Access to a record may be granted to an applicant in one or more of the following forms — (a) the applicant may be afforded a reasonable opportunity to inspect the record; (b) the authority concerned may furnish the applicant with a copy of the record;"

In the circumstances where the DPP implied that it may have not had time to compile records, it could have allowed the Applicant a reasonable opportunity to inspect the records.

The Applicant also draws to the attention of the Ombudsman that the November 26, 2024 email from the DPP stated that "To compile a list from 2017 to 2024 is too wide even if we started the process, resources would take weeks." It is now six months later, meaning that, instead of resisting compilation and disclosure of records, the DPP could have provided the requested records by now. In the circumstances, the lack of transparency and access appears to be intentional.

(g) It is noted that the Freedom of Information (General) Regulations (2021 Revision) states as follows:

"**Reasonable search**

6. (1) An information manager shall make reasonable efforts to locate a record that is the subject of an application for access.

(2) Where an information manager has been unable to locate the record referred to in paragraph (1), the information manager shall make a record of the efforts that information manager made."

Based on the Ombudsman's analysis in Hearing 97-202200318 on April 28, 2023, the Applicant humbly submits that the DPP information manager breached regulation 6 of the Freedom of Information (General) Regulations (2021 Revision) in that no reasonable efforts were made to locate the records requested and there is no record of the efforts that the information manager made.

(h) In addition to the above observations, it is appears that the DPP's statement that, "To compile a list from 2017 to 2024 is too wide even if we started the process, resources would take weeks" is an admission from the DPP that it is not properly maintaining records as required by the relevant statute.

In particular, section 6 of the National Archive and Public Records Act (2015 Revision) states:

"General duties as to public records

6. (1) Every public agency shall make and maintain full and accurate public records of its business and affairs, and such public records shall be managed and maintained in accordance with this Law.

(2) It shall be the responsibility of the most senior officer in every public agency to ensure that public records of that public agency — (a) are maintained in good order and condition; and (b) are created, managed and disposed of in accordance with records management standards and disposal schedules drawn up under this Law."

"public agency" includes — (a) the Cabinet; (b) the Legislative Assembly; (c) a ministry, portfolio or department; (d) a statutory body or authority, whether incorporated or not; (e) an office established by any Law; (f) a court or tribunal; (g) a company in which the Government has a controlling interest, or any subsidiary of such a company; or (h) a prescribed person or body;

"public record" means information, in any form, created, received, or maintained by a public agency in the course of, or as evidence of, a transaction or activity effected or undertaken in the conduct of its business or affairs;

"record" means information — (a) that is inscribed, stored or otherwise maintained on a tangible medium; or (b) that is stored in an electronic or other medium and is accessible in a perceivable form, and includes a public record; and "records management standard" means a standard in force under section 7."

In the absence of a compilation of the requested records by the DPP, the Applicant humbly suggests that the Ombudsman ought to reach a conclusion that the DPP breached section 6 (2) of the

National Archive and Public Records Act (2015 Revision) because the most senior officer of the DPP failed to ensure that public records of the DPP (a) are maintained in good order and condition; and (b) are created, managed and disposed of in accordance with records management standards and disposal schedules drawn up under the National Archive and Public Records Act (2015 Revision).

Based on the Ombudsman's decision in Hearing 98-202200552 on June 22, 2023, the Ombudsman ought to recommend that the DPP seek the assistance of the Cayman Islands National Archive in order to ensure its compliance with the legal requirements for the management, retention and disposal of records in its custody and control, in particular records of cases prosecuted, not prosecuted and reasons for the foregoing, as required under the National Archive and Public Records Act (2015 Revision).

The Ombudsman may also recommend the provision of training to the DPP's officials on the right of access to records; or refer a matter to the appropriate disciplinary authority under Section 106 of the Constitution where there has been an egregious or wilful failure to comply with an obligation under the FOI Act.

(i) Notwithstanding any of the foregoing, the Ombudsman stated in paragraph 71 of ICO Hearing 40-02813 that "even where an appellant may not have a statutory right to obtain access to a record or part thereof, a public authority can still decide to disclose it voluntarily, either in response to a request, or proactively, after considering (I would advise) whether liability may arise from the

disclosure of any private, sensitive or confidential matters contained in the record.

In the Applicant's view, voluntary disclosure is particularly appropriate where a matter of public interest is concerned, such as set out herein.

(j) The Appellant seeks the above declarations from the Office of the Ombudsman and declarations that:

- The actions of the DPP were and continue to be unlawful and/or irrational and/or disproportionate and/or procedurally unfair
- The DPP information manager breached regulation 6 of the Freedom of Information (General) Regulations (2021 Revision) in that no reasonable efforts were made to locate the records requested and there is no record of the efforts that the information manager made.
- The actions or omissions of the DPP were and continue to be in breach of the National Archive and Public Records Act (2015 Revision)
- The actions or omissions of the DPP were and continue to be a breach or a threatened breach of the Appellant's constitutional right to access information from a public authority (restrictions or exceptions explored by the DPP under the FOI Act cannot be wider than those stated in the Constitution)

- All of the provisions of the FOI Act must be interpreted so as to further the spirit of the Constitution for accountability and transparency

- The decision of the DPP to refuse disclosures to the Appellant be quashed for the reasons set out in these Submissions and on the basis that the DPP did not properly consider a balancing exercise against public interest factors. Failing, this the court may be asked via a procedure of judicial review to proceed to conduct the balancing exercise itself.

- The benefits for the public interest of disclosure of the information requested by the Appellant are of significant weight, with a view to securing transparency and accountability and the Ombudsman should find that there are more benefits of disclosure in the public interest than non-disclosure.

(6) Remedies

(a) The Appellant humbly seeks the above-noted declarations from the Ombudsman, including full disclosure of the records requested;

(b) The Applicant humbly requests that the Ombudsman refers breaches by the DPP to the appropriate authorities referred to under section 106 of the Constitution for further disciplinary action;

(c) the Ombudsman monitor and report on the compliance by the DPP with its obligations under the National Archive and Public Records Act;

(d) the Ombudsman make recommendations to the Governor for reform both of a general nature and directed at the DPP;

(e) the Ombudsman make such further and/or other decisions, declarations and/or relief as the Ombudsman deems fit;

(f) Where the Ombudsman does not have the power to declare incompatibility of any provision of the FOI Act with the Constitution (including the incompatibility of Section 9 of the FOI Act with article 122 of the Constitution), it is the intention of the Appellant to apply for judicial review and ask the Grand Court for a declaration of incompatibility.