

**Ombudsman Appeal Lindsay 202000917**  
**Hearing 83 – 202000817**  
**Submissions By Alric Jeremy Lindsay (the “Appellant”)**  
**30 November 2020**

IN THE MATTER OF A REFUSAL TO GRANT ACCESS TO RECORDS UNDER THE  
FREEDOM OF INFORMATION LAW (2020 REVISION)

**BETWEEN: (1) ALRIC JEREMY LINDSAY**

**APPELLANT**

**AND: (1) THE CABINET OF THE CAYMAN ISLANDS**

**RESPONDENT**

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**SUBMISSIONS BY ALRIC JEREMY LINDSAY**

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Submissions

1 This appeal concerns a request<sup>1</sup> dated 24 June 2020 made by the Appellant pursuant to the Freedom of Information Law (2020 Revision) (the “FOI Law”) for disclosure of information held by the Cabinet Office. The information in issue includes the following:

“2. Confirmation whether any exemptions were granted at any time whatsoever in connection with The Smith Barcadere Redevelopment Project.”

“3. If any exemptions were granted, please provide copies of signed minutes of meetings recording such exemptions.”

2 On 1 July 2020, Davina Wilson, the Deputy Clerk of Cabinet, refused the Appellant’s request for disclosure on the following basis<sup>2</sup>:

“Please be informed that the Cabinet Office only holds records in relation to item numbers 2 and 3 of your application. However, Cabinet records are exempt under Section 19 (1) of the FOI Law which states that : “subject to subsection (2), a record is exempt from disclosure if it contains a record of consultations or deliberations arising in the course of, proceedings of the Cabinet or a committee thereof.

Under section 33 of the Freedom of Information Law, you may ask for an Internal Review of a response to your request:

- a) refusing to grant access;
- b) granting partial access to the record(s) specified in your application;
- c) deferring the grant of access to the document;
- d) refusal to amend or annotate an official document containing personal information; or
- e) charging a fee for action taken or as to the amount of the fee charged;”

3 In compliance with the time period under 34(2) of the FOI Law for an application for an internal review, the Appellant sent an email dated 25 July 2020<sup>3</sup> to the Cabinet Office FOI Manager (attaching a letter dated 24 July 2020), applying to the Cabinet Office on the following bases:

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<sup>1</sup> See Cabinet FOI Application dated 24 June 2020 sent by the Appellant to the Cabinet Office FOI Manager set out in Exhibit A

<sup>2</sup> See email from Davina Wilson dated 1 July 2020 included in Exhibit B

<sup>3</sup> See email from Appellant to Cabinet Office FOI Manager dated 25 July 2020, included in Exhibit C

“...any exemption claimed by the Cabinet Office under section 19(1) is subject to section 19(2). According to section 19(2), section 19(1) “does not apply to records which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature” (the “Permitted Records”). Items 2 and/or 3 of the FOI Request clearly fall within the Permitted Records as they comprise materials of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature in relation to RFQ No.: T2019/007 issued to prospective respondents to submit non-binding quotations for The Smith Barcadere Redevelopment Project. In order to comply with the FOI Law, the Cabinet Office must provide all of the Permitted Records in relation to the FOI Request.”

“... access shall be granted if such access would nevertheless be in the public interest.”

“It is a matter of public interest to access information which explains reasons for decisions taken by Government including any exemptions granted at any time whatsoever in connection with The Smith Barcadere Redevelopment Project, in order to promote the accountability of and within Government, to promote accountability for public expenditure or the more effective use of public funds in relation to plans and/or meetings (whether public or private) for The Smith Barcadere Redevelopment Project and to deter or reveal wrongdoing or maladministration and to reveal untrue, incomplete or misleading information.”

- 4 In breach of section 34(3) of the FOI Law, the Cabinet Office failed to take a decision within a period of thirty calendar days after the date of receipt of the Appellant's application for internal review.
- 5 In compliance with section 42(2) of the FOI Law, which allows an appeal by the Appellant where no notification of the decision taken on an internal review has been given by the Cabinet Office to the Appellant within the period required by the FOI Law,

the Appellant sent an email dated 16 September 2020<sup>4</sup> to the Ombudsman’s Office requesting an appeal on the following bases:

“...(a) there was a failure to comply with the obligation under the FOI Law to take a decision within a period of thirty calendar days after the date of receipt of the 25 July 2020 application for internal review of the 1 July Correspondence;

(b) there was a failure to communicate the information contained in a record within the time allowed by the FOI Law (the information requested was not exempt from the FOI Law as it comprised materials of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature in relation to The Smith Barcadere Redevelopment Project);

(c) this is a matter of public interest.”

6 The Appellant now makes the following submissions in support the Appellant’s appeal:

*Cayman Islands Constitution Order 2009*

(1) The Cayman Constitution contains various affirmations<sup>5</sup> 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<sup>6</sup> of the Cayman Islands whereby the “Legislature’s freedom to legislate is therefore constrained to the extent that it

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<sup>4</sup> See email dated 16 September 2020 from the Appellant to the Ombudsman’s Office, included in Exhibit D

<sup>5</sup> See pages 12 -13 of Cayman Islands Constitution Order 2009

<sup>6</sup> See paragraph 14 of Civil Causes 111 and 184 of 2018 (Day/Bush)

must not pass legislation that is inconsistent with or repugnant to the fundamental rights and freedoms enshrined and protected by the Constitution”.

- (3) The Cayman Constitution states the following:

**“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.”

**“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.”

**“Cabinet Secretary**

48. (1) There shall be –

(a) a Cabinet Office, which shall be an office in the Government;

and

(b) a Cabinet Secretary, whose office shall be a public office, who shall be a person who is a Caymanian and who shall be appointed by the Governor, acting after consultation with the Premier.

(2) The Cabinet Secretary shall have charge of the Cabinet Office.

(3) The responsibilities of the Cabinet Secretary shall include -

...

(c) providing for administrative and secretarial support for the Cabinet and the Premier in order to allow high-quality and effective government;

(d) arranging the business for, and keeping the minutes of, the meetings of the Cabinet or any Cabinet committee and conveying the conclusions reached at the meetings to the appropriate person or authority;

and the Cabinet Secretary shall have such other functions as the Governor, acting after consultation with the Premier, may from time to time direct.

*Freedom of Information Law*

(4) The FOI Law was enacted by the Legislature (now Parliament) to (purportedly) 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 Law states the following:

**“Objects of Law**

4. The objects of this Law 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 Law, 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 Law or if it can be demonstrated to the satisfaction of the Ombudsman that the exemption reasonably continues to apply.

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

**Partial access**

12. (1) Where an application is made to a public authority for access to a record which contains exempt matter, the authority shall grant access to a copy of the record with the exempt matter deleted therefrom.

(2) A public authority which grants access to a copy of a record in accordance with this section shall inform the appellant —

(a) that it is such a copy; and

(b) of the statutory provision by virtue of which such deleted matter is exempt matter.

**Records revealing Government’s deliberative processes**

19. (1) Subject to subsection (2), a record is exempt from disclosure if it contains opinions, advice or recommendations, or a record of consultations or deliberations —

(a) prepared for or arising in the course of proceedings of the Cabinet or the National Security Council or a committee of the Cabinet or the National Security Council; or

(b) prepared for the Governor or a Minister relating to the formulation or development of Government policy

(2) Subsection (1) does not apply to records which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature.

(5) In the circumstances of this case, the decision of the Cabinet Office that was initially sent by email to the Appellant on 1 July 2020 that “*Cabinet records are exempt under Section 19 (1) of the FOI Law which states that : “subject to subsection (2), a record is exempt from disclosure if it contains a record of consultations or deliberations arising in the course of, proceedings of the*

*Cabinet or a committee thereof*” is incorrect and/or flawed and/or misguided and/or unlawful and/or irrational and/or unreasonable and/or irrational and is a breach of the Appellant’s constitutional right of access to information held by the Cabinet Office as a public authority for the following reasons:

- (a) Article 122 of the Cayman Constitution utilized by the Legislature to create a law for freedom of information (i.e. the FOI Law) 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 exceptions stated in Section 19 (1) of the FOI Law appear to be wider than those listed in article 122 of the Cayman Constitution. In order to comply with and be compatible with the Cayman Constitution, the exceptions stated in Section 19 (1) of the FOI Law can 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”. Therefore, Section 19 (1) of the FOI Law appears to be incompatible with article 122 of the Cayman Constitution and the actions of the Cabinet Office and/or the Cabinet Office Information Manager are unlawful and a Cabinet has breached or threatened to breach the Appellant’s constitutional right of access to the records.
  
- (b) Even if Section 19 (1) of the FOI Law is constitutional, it is subject to Section 19 (2) of the FOI Law which states that Section 19 (1) of the FOI Law does not apply to records which contain material of a purely factual nature or reports, studies, tests or surveys of a scientific or technical nature. The records requested by the Appellant in relation to The Smith Barcadere Redevelopment Project contain material of a

purely factual nature or reports, studies, tests or surveys of a scientific or technical nature. The Appellant seeks a declaration of the Office of The Ombudsman to this effect.

- (c) The basis of the refusal decision by the Cabinet Office is contrary to the general spirit of the objects of the FOI Law, which are to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy, namely — governmental accountability and transparency. The general spirit of the objects of the FOI Law must be applied in respect of all of the provisions of the FOI Law. As such, the records must be provided to the Appellant to demonstrate government’s commitment to the foregoing principles. In particular, governmental accountability and transparency are especially critical in this case and have been breached for the following reasons:
- 1.3 million dollars was to be expended in phase one of The Smith Barcadere Redevelopment Project under the direction of an “ad-hoc” committee but “there is no written record marking the formation of the Smith’s Barcadere Re-Development Committee its members did meet with a Civil Service technical design committee” ... “there are no specific written document that exist which represent the formation of the Smith’s Barcadere Re- Development Committee but the committee reviewed designs produced by the Civil Servants led technical design committee and gave direction”<sup>7</sup>
  - the Ministry of Commerce, Infrastructure & Planning (in Exhibit F) confirmed that in “in all other meetings directives were given [by the “ad-hoc” committee] verbally and acted upon”

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<sup>7</sup> See Decision Letter - FOI Request 89791 dated 8 September 2020 from the Ministry of Commerce, Planning & Infrastructure, as set out in Exhibit F.

- the Ministry of Commerce, Infrastructure & Planning (in Exhibit F) confirmed that “the funds were to be taken from the Ministry of CPI’s budget appropriation EA142 which was allotted \$1 million dollars in 2020 and also for the 2021 budget cycles”.

The Appellant seeks a declaration of the Office of The Ombudsman that the actions and the decision taken by the Cabinet Office to refuse the Appellant’s request for disclosure for records is contrary to the general spirit of the objects of the FOI Law, the Cabinet Office is in breach of the FOI Law, including the fundamental principles underlying the system of constitutional democracy, namely — governmental accountability and transparency and, further the Cabinet Office is in breach of the Cayman Constitution which calls for “an open, responsible and accountable government” as there does not appear to be any written record of the formation of Smith Barcadere Re- Development Committee but such committee, made up of civilians (and led by a member of Parliament) gave directions to the government, gave verbal directives (which were not reduced to a written record) to the government (which the government acted upon) in relation to funds to be taken from the Ministry of Commerce, Planning & Infrastructure’s budget appropriation EA142 which was allotted \$1 million dollars in 2020 and also for the 2021 budget cycles.

- (d) Failing the foregoing, even if Section 19 (1) of the FOI Law is constitutional (and while the Appellant does not agree that partial access is sufficient in respect of the spirit of the objects of the FOI Law and/or that partial access is satisfactory in connection with the Appellant’s constitutional right to access under the Cayman Constitution), the refusal by the Cabinet Office does not indicate whether partial access to the records may be granted to the Appellant pursuant to Section 12 of the FOI Law which states that, where an

application is made to a public authority for access to a record which contains exempt matter, the authority shall grant access to a copy of the record with the exempt matter deleted therefrom. The Appellant seeks a declaration of the Office of The Ombudsman that, where full access is not granted, then at least partial access to the records must be granted to the records requested by the Appellant.

- (e) Under the Cayman Constitution, the responsibilities of the Cabinet Secretary shall include arranging the business for, and keeping the minutes of, the meetings of the Cabinet or any Cabinet committee and conveying the conclusions reached at the meetings to the appropriate person or authority. In the absence of a definition of “appropriate person” under the FOI Law, the Appellant must be deemed an appropriate person as the Appellant is a person to whom article 122 of the Cayman Constitution contemplates as a member of the public entitled to access to the records. The Appellant seeks a declaration from the Office of The Ombudsman that the Appellant is an appropriate person to whom the Cabinet Office must convey conclusions.
  
- (f) Subject to compatibility with the Cayman Constitution, all of the provisions of the FOI Law must be interpreted so as to further the Objects set out in section 4 of the FOI Law. Specifically, all exemptions under the FOI Law (applicable to the granting to the public of a general right of access to records held by public authorities) must be balanced against the public interest<sup>8</sup> as required by section 4 of the FOI Law. This is the case even though Section 26(1) of the FOI Law does not expressly refer to Section 19 (1)(a) of the FOI Law as being subject to the public interest test.

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<sup>8</sup> Public interest is defined on page 7 of The Freedom of Information (General) Regulations, 2008

The requirement for a public authority (in this case, Cabinet) 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)*<sup>9</sup> 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 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

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<sup>9</sup> 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))

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

- the actions of the Cabinet Office are unlawful
- the actions or inaction of the Cabinet Office are a breach of the Appellant’s constitutional right to access information from a public authority
- all of the provisions of the FOI Law must be interpreted so as to further the Objects set out in section 4 of the FOI Law, including the fundamental principles underlying the system of constitutional democracy, namely — governmental accountability and transparency and that the Cabinet Office is in breach of these principles as no written record was made of the formation of Smith Barcadere Re- Development

Committee but such committee, made up of civilians (and led by a member of Parliament) gave directions to the government, gave verbal directives (which were not reduced to a written record) to the government (which the government acted upon) in relation to funds to be taken from the Ministry of Commerce, Planning & Infrastructure’s budget appropriation EA142 which was allotted \$1 million dollars in 2020 and also for the 2021 budget cycles..

- The decision of the Cabinet Office to refuse disclosures to the Appellant be quashed for the reasons set out in these Submissions and on the basis that Cabinet did not properly consider the balance of exemptions 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.

This must be done (a) to enable the public to understand and, if appropriate, criticise decisions taken by Cabinet to grant exemptions in relation to The Smith Barcadere Redevelopment Project (b) to enable the public to understand whether proper governance procedures were in place where Cabinet may have permitted an ad-hoc committee of civilians to oversee a government project (the time spent by government officials on such an ad-hoc committee should be deemed an inappropriate use of government time and if any monies were spent, the same should be deemed to be a misuse of government funds) (c) to

enable the public to be fully informed about the reasons for exemptions in relation to The Smith Barcadere Redevelopment Project (d) ) to enable the public to be fully informed about the members of the ad-hoc committee (as may be referred to in the minutes of Cabinet) so that they could, if appropriate, criticise the establishment of the ad-hoc committee

While:

- (g) paragraph 67 of ICO Hearing 40-02813 – Part 2 indicates that the Cabinet minutes in that case clearly constituted “a record of consultations and deliberations arising in the course of proceedings of the Cabinet”, which is what the exemption in section 19(1)(b) is intended to protect, and the exemption is therefore engaged in relation to these sections of the minutes and;

(h) paragraph 68 of ICO Hearing 40-02813 – Part 2 states the view of the Ombudsman’s Office that “I do not believe that the partial disclosure of any of the information within these three sections is possible as the exemption applies to every part of these sections of the minutes”,

it was never drawn to the attention of the Ombudsman’s office that (i) the exemptions stated under Section 19 of the FOI Law exceeded the exemptions which were allowed under article 122 of the Cayman Constitution (which relates to the enactment of a law for freedom of information), such restrictions and exceptions being 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 and (ii) there is at least an implication under the objects of the FOI Law that all exemptions under the FOI Law (applicable to the granting to the public of a general right of access to records held by public authorities) must be balanced against the public interest. In light of the

foregoing, the Office of the Ombudsman may now (in the Appellant’s case) seek a more accurate interpretation as to the applicability of the Section 19 exemption, which may be different from the conclusions reached in ICO Hearing 40-02813.

- (6) Notwithstanding any of the foregoing, the Office of 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 my opinion, voluntary disclosure is particularly appropriate where a matter of great public interest is concerned, such as many of the matters discussed and decided by the Cabinet. Although obvious progress has been made, I have raised the point on a number of occasions, that the government ought to do more to publish information proactively, both because doing so would ensure better communications and improve understanding of government, and also because it would reduce the need for the general public to utilize the formal, and sometimes slow, FOI process to gain access to significant information”. The Appellant therefore requests that the Office of The Ombudsman ask Cabinet Office to consider voluntary disclosure in this case as there is great public interest in the overall governance of The Smith Barcadere Redevelopment Project, including transparency and accountability. The Appellant seeks a declaration from the Office of The Ombudsman that there is great public interest for the foregoing reasons and voluntary disclosure is encouraged.

(7) Remedies

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

the basis of the decision of the Office of the Ombudsman or through voluntary disclosure by the Cabinet Office);

- (b) In addition, the Office of the Ombudsman refers the matter to the appropriate authorities (including the Auditor General) where it appears that a criminal offence has been committed.
- (c) Further, that the Office of the Ombudsman, refers the matter to the appropriate authorities (including the Auditor General) where it appears that the Cabinet Office has breached fundamental principles underlying the system of constitutional democracy, namely — governmental accountability and transparency by allowing a committee, made up of civilians (and led by a member of Parliament) to give directions to the government, give verbal directives (which were not reduced to a written record) to the government (which the government acted upon) in relation to funds to be taken from the Ministry of Commerce, Planning & Infrastructure’s budget appropriation EA142 which was allotted \$1 million dollars in 2020 and also for the 2021 budget cycles but not maintaining any records for any of the foregoing;
- (d) the Office of the Ombudsman monitor and report on the compliance by the Cabinet Office and/or the Cabinet FOI Manager with their obligations under the FOI Law;
- (e) the Office of the Ombudsman make recommendations for reform both of a general nature and directed at the Cabinet Office;
- (f) the Office of the Ombudsman make such further and/or other decisions, declarations and/or relief as the Office of the Ombudsman deems fit.
- (a) Where the Ombudsman does not have the power to declare incompatibility of any provision of the FOI Law with the Cayman Constitution (including the incompatibility of Section 19(1)(a) of the FOI

**Ombudsman Appeal Lindsay 202000917**  
**Hearing 83 – 202000817**  
**Submissions By Alric Jeremy Lindsay (the “Appellant”)**  
**30 November 2020**

Law and article 122 of the Cayman Constitution), it is the intention of the Appellant to apply for judicial review and ask the court for a declaration of incompatibility.