Hearing 103-202300443

Decision

Utility Regulation and Competition Office (OfReg)

Sharon Roulstone
Ombudsman

5 February 2024

Summary

An applicant made a request to the Utility Regulation and Competition Office (OfReg) under the Freedom of Information Act (2021 Revision) (FOIA) for "copies of all fuel efficiency studies and cost of service studies" related to the Caribbean Utilities Company Ltd. (CUC).

This appeal involved two records, the Cost of Service Study, 2014 (COSS), and the Incremental Distributed Solar Study, dated January 2023 (IDSS). OfReg pointed out that some additional information was available on the CUC website. During the appeal, some parts of the COSS were disclosed, but the IDSS remained entirely withheld.

OfReg applied the exemptions under the FOIA relating to commercial values and interests, claiming that disclosure would undermine the fairness of a forthcoming bidding process for utility-scale renewable generation (USRG). However, the Ombudsman found that the relevance of the records to the bidding process and the harm disclosure was claimed to cause had not been demonstrated, and that the exemptions did not apply. Even if one or both of the exemptions had applied, the records should be disclosed in the public interest. Apart from a signature in the COSS, which was found to be exempt as personal information, the Ombudsman therefore required OfReg to disclose both records.

Statutes considered[1]

Freedom of Information Act (2021 Revision) (FOIA)
Freedom of Information (General) Regulation (2021 Revision) (FOI Regulations)
Utility Regulation and Competition Act (2021 Revision) (URCA)

[1] In this decision, all references to sections are to sections of the Freedom of Information Act (2021 Revision), and all references to regulations are to the Freedom of Information (General) Regulations (2021 Revision), unless otherwise specified.

Contents

A. INTRODUCTION

[1] On 20 April 2023, the applicant made a request under FOIA to OfReg for:

> *… copies of all fuel efficiency studies and cost of service studies related to the licensee CUC.*

[2] The Information Manager (IM) acknowledged the request, and on 19 May 2023 responded that the requested records were exempt under section 21, the exemption relating to commercial interests. The IM also pointed the applicant to a 2014 press release available on the CUC website.

[3] The applicant raised several reasons why he thought the requested records should not be withheld, and asked for an internal review pursuant to section 33.

[4] The internal review decision was communicated on 4 July 2023, outside the statutory timeline. It confirmed the position taken by the IM. The applicant then made an appeal to the Ombudsman under section 42.

[5] The OMB accepted the appeal on 6 July 2023 and started an attempt at informal resolution. We requested and obtained copies of the responsive records.

[6] We analyzed the records and the exemptions claimed, and made a (non-binding) recommendation for partial disclosure of the records. The IM did not agree with all our suggestions, but did release some parts of the COSS. The other record, the IDSS, remained entirely exempted.

[7] The matter could not be resolved informally, and on 29 October 2023 the applicant requested a formal hearing decision by the Ombudsman.

B. CONSIDERATION OF ISSUES

General

[8] There are two responsive records in consideration in this hearing, namely:

1. The Incremental Distributed Solar Study (IDSS), dated January 2023, is withheld in full. OfReg describes it as follows:

> *The Incremental Distributed Solar Study can be considered a fuel efficiency study, CUC refers to it as an "infusion study report" to quantify the change in fuel cost from higher levels of distributed solar generation causing diesel generation to operate at a less efficient output level.*

2. The Cost of Service Study (COSS), dated 2014, is partially redacted. It is described in an unredacted part of the document as:

> *In accordance with Condition 19.6 of the Electricity Transmission and Distribution Licence (the "T&D Licence"), Caribbean Utilities Company, Ltd. (the "Licensee" or "CUC") may apply to the Electricity Regulatory Authority (the "Authority") for certain revisions to the electric rates (the "Base Rates") based on comprehensive allocated cost of service study. [The COSS is] a comprehensive allocated cost of service study for the purpose of developing proposed revisions to the Base Rates to be implemented effective June 1, 2014 in connection with the annual rate level adjustment prescribed by the Rate Cap and Adjustment Mechanism (the "RCAM") in the T&D Licence.*

Legal definitions and interpretation

[9] I am required to apply the civil standard of proof (the balance of probabilities), which means that a matter is "more likely than not" to have occurred.

[10] Section 6(1) states:

> ***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.*

[11] Section 43(2) states:

> *(2) In any appeal under section 42, the burden of proof shall be on the public or private body to show that it acted in accordance with its obligations under this Act.*

[12] Section 21 states:

> ***Records relating to commercial interests***
> ***21****. (1) Subject to subsection (2), a record is exempt from disclosure if —*
> *(a) its disclosure would reveal —*
> *(i) trade secrets;*

(ii) any other information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(b) it contains information (other than that referred to in paragraph (a)) concerning the commercial interests of any person or organisation (including a public authority) and the disclosure of that information would prejudice those interests.

(2) Subsection (1) shall not apply where the applicant for access is the person or organisation referred to in that subsection or a person acting on behalf of that person or organisation.

[13] Section 11(2)(c) states:

Deferment of access

…

(2) A public authority may defer the grant of access to a record —

…

(c) if the premature release of the record would be contrary to the public interest, until the occurrence of any event after which or the expiration of any period beyond which, the release of the record would not be contrary to the public interest.

[14] Section 12(1) states:

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.

[15] Section 26 states:

Granting access to exempt information

26. (1) Notwithstanding that a matter falls within sections 18, 20(1)(b) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest.

(2) Public interest shall be defined in regulations made under this Act.

(3) Notwithstanding that a record or part thereof is exempt from disclosure, access shall be granted to personal information if disclosure would be required under the Data Protection Act, 2017 [Law 33 of 2017].

[16] Section 27 states:

Making of decisions and reasons public

> *27. Public authorities shall make their best efforts to ensure that decisions and the reasons for those decisions are made public unless the information that would be disclosed thereby is exempt under this Act.*

The position of OfReg

[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 by the IM 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. This approach caused delays in the hearing process.

[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. Therefore, I consider that the exemptions being claimed are sections 21(1)(a)(ii), relating to commercial values, and 21(1)(b), relating to commercial interests.

[19] OfReg has not differentiated between these exemptions, or explained which exemption it is applying to any specific parts of the withheld/redacted records. Out of an abundance of caution, I will assume that it is the intention that both of the above exemptions, relating to commercial values and commercial interests, are applied to all parts that have been withheld or redacted.

[20] I will consider the exemptions together since they are closely related and involve prejudice tests as well as a potential public interest test.

[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:

… [the responsive records] 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.

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.

[24] OfReg also quotes a communication received from CUC, which repeats the same points:

- *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.*

[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, as follows:

a) The bidding is for companies to provide USRG capacity for the Cayman Islands.
b) OfReg is currently in the process of finalizing an RFP bid package, which is still work in progress. Once the RFP is completed OfReg will release it, which is expected by the first quarter of 2024.
c) All related information pertaining to the RFP package will be shared with all potential bidders at the same time. Prematurely disclosing this information can give a potential

bidder an unfair advantage over other interested parties thereby potentially compromising the bid process which is an extensive process.

d) This bidding process will not be subject to the Procurement Act (2023 Revision). This project is one where OfReg will be asking bidders to provide renewable energy to the Cayman Islands. The Electricity Sector Law (2019 Revision) Sec 9. (2) (f) states *"(2) Without prejudice to subsection (1), the principal functions of the Office shall include —to solicit additional generation capacity and conduct the generation solicitation process;"*

e) The Utility Regulation and Competition Act (2021 Revision) (URCA) states: "*6(1) 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".*

The position of the applicant

[26] The applicant states that "*OfReg/CUC do not have a valid basis to withhold information from the public regarding service costs that are ultimately paid by the public." Such "non-transparency … lends itself to potential corruption and overspending."*

[27] Based on a 2009 report from the Auditor General, the applicant states that CUC has a "well documented track record of overspending consumers money for decades".[2]

[28] The applicant also claims that OfReg lacks technical competency, and points to a 2020 report in which the Auditor General found that OfReg had a history of "repeated regulatory failure".[3]

[29] According to the applicant, OfReg's claims of commercial sensitivity have no merit, for the following reasons:

- There is no competition for CUC in the sale of electricity to consumers, therefore the claim that the cost of the service is commercially sensitive is "absurd and simply illogical". As well, "there is no risk from any other fossil fuel competitor in this country in regards to the fossil fuel energy produced from these resources which consumers pay for today."

- The claim that the records are commercially sensitive in view of the RFPs for "future potential projects" is incorrect, since the projects this refers to are:

  … utility scale solar systems … which the Government has already announced THEY (the Govt/people) are going to own and control as a matter of policy (Per section

[2] Cayman Compass, *AG Accused CUC of "gold-plating",* 8 July, 2009, available on: https://www.caymancompass.com/2009/07/08/ag-accused-cuc-of-gold-plating/

[3] Office of the Auditor General, "OfReg has had difficult first few year but improvements are being made", press release, 22 June 2020, available on: https://www.auditorgeneral.gov.ky/powerpanel/modules/custom/html/uploads/pdfs/1592927195OAG-PRESS-RELEASE_Efficiency-and-Effectiveness-of-OfReg.pdf

3.2.1.3 of the NEP[4]) NOT CUC. CUC have no future commercial interest in something the Government as a matter of policy has already said they will now take over controlling interest in for future utility scale generation.

- Relying on sections 32.1 and 32.2 CUC's T&D (Transmission and Distribution) License[5] government policy is supreme in regard to renewable energy generation. The applicant states:

As such CUC nor Ofreg have any legal or policy basis for using this as a reason to deny consumers insight into the unrelated costs which CUC are charging consumers for today for services which have nothing to do with utility scale solar plants in the future, that the CI Govt is going to own anyway.

[30] In support of this view, the applicant points to a 2022 government press release in which the, then, Premier and Minister for Sustainability & Climate Resiliency appeared to announce a policy change, saying:

… The intent is to have a majority ownership stake in future utility scale renewable energy generation assets in partnership with other investors and individual citizens…[6]

[31] The Press also remarked on the apparent change of government policy:

The move appears to dispense with a bid process recently unveiled by energy sector regulator OfReg, that would have involved an auction process to allow private companies, from all over the world, to bid to build solar and wind farms and similar facilities in Cayman.[7]

[32] The applicant claims that CUC is "trying desperately to convince government to overturn this policy decision and remove their policy to invest in sustainable energy projects…".

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[4] Cayman Islands Government, *National Energy Policy, 2017-2037. Cayman Islands.* 21 February 2017, available on: https://www.energy.gov.ky/documents/National-Energy-Policy-20200318020549.pdf

[5] Government of the Cayman Islands, *Electricity Transmission and Distribution License Granted to Caribbean Utility Company,* Ltd, 3 April 2008, available on: https://www.cuc-cayman.com/otherpdf/download_pdf?file=1606315589cuc_t_d_licence_08.pdf. This approach is also included in the 2023 Public Consultation Draft of the Cayman Islands National Energy Policy, 2023-2050, see: https://www.gov.ky/content/published/api/v1.1/assets/CONTD6A172DF9B114EEC8DE2D4FB09B97C1B/native?cb=_cache_5691&channelToken=c915417e96ad49e2bcda2e4d22158c40&download=true

[6] Cayman Islands Government, "*Premier Presents at 14th Annual CREF",* Press release, 27 April 2022, see: https://www.gov.ky/news/press-release-details/premier-presents-at-14th-annual-caribbean-renewable-energy-forum

[7] James Whittaker, "Cayman government to be majority owner of renewable-energy plants. Premier announces policy shift at energy conference" in: Cayman Compass, 27 April 2022, see: https://www.caymancompass.com/2022/04/27/cayman-government-to-be-majority-owner-of-renewable-energy-plants/

[33] Finally, the applicant states:

> *… The bid CUC and OfReg are referring to was announced before the Government announced they would the owners of these RE generation systems going forward and as noted prior Government policy trumps CUC's license*
> *…*
> *The only opportunity for future RFP's CUC is entitled to is to "build" utility scale RE systems that the Government will own and their current costs of service has absolutely nothing to do with what bid they may or may not submit for such an RFP. Every person bidding to build those systems (its called an EPC RFP) will have to bid the lowest cost possible based on the criteria in the RFP and any company's internal costs or business expenses is utterly irrelevant.*
> *…*
> *CUC and OfReg do not want consumers or any 3rd parties to see what CUC is really charging customers. CUC risks being in obvious problems of overcharging (YET AGAIN) if found to be doing so and OfReg for failure to identify and do something about it if so…*

Discussion

General application of the FOIA

[34] Pursuant to section 3, the FOIA applies to public authorities (as defined in section 2), including statutory bodies and authorities such as OfReg, but the FOIA does not apply directly to private companies such as CUC.

[35] Nonetheless, government holds many records relating to third-party, private businesses. These are often held by virtue of government's regulatory functions, and, as such, they are subject to the FOIA. Amongst other things, such records are important in holding regulators accountable.

[36] Section 3(2) allows for the expansion of the FOIA to any company specified in a Cabinet Order, in particular "any body or organisation which provides services of a public nature which are essential to the welfare of the Caymanian society…". A number of jurisdictions around the world have used similar provisions to extend FOI legislation to private companies that provide important public services.[8] However, the mechanism in section 3(2) has not yet been used in the Cayman Islands.

Third-party consultation

[37] There is no objection to a public authority consulting with a third-party business, particularly when a responsive record directly relates to that business. Consultation with a third party may help the public authority reach a better decision. In any event, it is the public authority that is answerable

[8] *Freedom of Information in Relation to Private Companies. Comparative law research project prepared for the Hungarian Civil Liberties Union.* Oxford Pro Bono Publico, May 2013, available at: https://www.law.ox.ac.uk/sites/default/files/migrated/1._freedom_of_information_in_relation_to_private_companies_.pdf

under the Act, whether its decision is in agreement with the third-party, or not. It is the public authority that decides whether to grant access under the FOIA, and if it withholds a record in full or in part, to provide reasons for that decision.

Discussion of the applicant's arguments

[38] The importance of the public service provided by CUC to the Cayman Islands cannot be overstated. However, the fact that the general public pays for the services of CUC is neither here nor there in terms of the disclosure of the responsive records under the FOIA. Many other goods and services provided by the private sector are paid for by the general public, but that does not grant the public a right of access under the FOIA, unless a relevant responsive record is held by a public authority.

[39] The Auditor General's 2009 finding (quoted by the applicant) that CUC had a track record of "gold-plating… in both generating plant and transmission and distribution assets", and the reports of OfReg's "regulatory failure", are not relevant to my determination of the exemptions claimed, except, possibly, in the context of a public interest test, should one be required.

[40] The applicant's argument that it is not possible for CUC to have a commercial stake in any future USRG because such project would be owned by the government, appears inaccurate. The contention that government will outright own the USRG is based on Press reports about statements made by the former Premier and Minister of Sustainability at a 2022 conference. However, this intention is not mentioned in the 2017 NEP, nor in the 2023 consultation draft of the NEP. Contrary to the applicants' assertions, section 3.2.1.3. of the NEP only goes as far as stating that "Government may authorise any sustainable/renewable energy project to receive public funding support." In any event, even if government were to provide public funding or take a controlling interest in such facilities, this does not mean that there could not be a commercial role for the private sector.

[41] In questioning the commercial sensitivity of the records, the applicant raises CUC's monopoly in the sale of electricity, asking what harm disclosure of the responsive records could cause, if there is no competition in terms of fossil fuel power generation and sales? The applicant also believes that the responsive records are "unrelated" to future USRG plants. These points are further addressed below.

Discussion of OfReg's arguments

[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.

[43] According to guidance from the UK Information Commissioner, a prejudice-based exemption is one where "the authority has to satisfy itself that the prejudice or harm that is specified… would or

would be likely to occur."[9] This is relevant to the exemptions relating to commercial values and commercial interests, except that under the exemptions in section 21 OfReg has to demonstrate that:

- the disclosure of the records "would, or could reasonably be expected" to destroy or diminish information of a commercial value (section 21(1)(a)(ii)); or,
- the disclosure of the records "would" prejudice the commercial interests of any person or organisation (section 21(1)(b)).

[44] The UK Information Tribunal confirmed that the term "would" means:

> *"more probable than not" that there will be prejudice to the specific interest set out in the exemption*…[10]

[45] Demonstrating prejudice involves a three-step test:

- Identify the "applicable interests" within the relevant exemption;
- Identify the "nature of the prejudice". This means:
  - Show that the prejudice claimed is "real, actual or of substance"; and,
  - Show that there is a "causal link" between the disclosure and the prejudice claimed;
- Decide on the "likelihood of the occurrence of prejudice".[11]

[46] It is a commonly accepted principle of statutory interpretation that exemptions in the Act should be interpreted narrowly given the purpose and intent of the FOIA. This principle has been expressed by the UK Information Tribunal, as follows:

> *... we consider we should generally adopt a narrow interpretation of "exclusions" from the Act unless it is clear that Parliament intended otherwise. This is the view the [First Tier Tribunal] and higher courts have largely taken of the exemptions.*[12]

And,

> *I am content to proceed on the basis that... exemptions should be interpreted narrowly*.[13]

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[9] Information Commissioner's Office (UK) *The prejudice test. Freedom of Information Act. Version 1.1* 5 March 2013, p. 3; See: UK Information Tribunal, *Hogan and Oxford City Council v Information Commissioner,* EA/2005/0026 and 0030, 17 October 2006, paras 28-36.

[10] UK Information Tribunal, *Ian Edward McIntyre v Information Commissioner and Ministry of Defence,* 11 February 2008, EA/2007/0068, para 40

[11] *The prejudice test,* op cit, p.5. See also: Information Commissioner, Hearing 41-00000 Decision. The Governor's Office, 10 July 2014

[12] First Tier Tribunal (UK), *Brendan Montague v Information Commissioner and HM Treasury*, EA/2013/0074, 13 November 2013, para 51

[13] Upper Tribunal (Administrative Appeals Chamber), *DEFRA v Information Commissioner and Simon Birkett,* GIA/1694/2010; and Home Office v Information Commissioner, GIA/2098/2010, para 26

[47] The terms “commercial value” and “commercial interests” are not defined in the FOIA. Therefore, in accordance with the principles of statutory interpretation, these phrases should be given their ordinary meaning, as follows:

- The definition of “commercial value” as outlined in a decision of the Queensland Information Commissioner is as follows:

> *… information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "one-off" commercial transaction.*[14]

- I accept the definition of “commercial interests” used by the previous Ombudsman, as:

> *… interests that relate to trading such as the sale or purchase of goods which are undertaken for the purpose of revenue generation and normally take place within a competitive environment.*[15]

[48] I accept that the two responsive records are of a commercial nature, since they relate to the activity of buying and selling.

[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. This same general argument was made by CUC:

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[14] Information Commissioner (Queensland), *Cannon v Australian Quality Egg Farms Ltd* (1993 S0094, 30 May 1994), para 54.

[15] Ombudsman, *Hearing Decision 72-201800330/72-2018000337, Ministry of Commerce, Planning and Investment*, 18 October 2018, para 17(iii).

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.

[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.[16]

[54] OfReg points out that CUC has already published two similar fuel efficiency studies on their website, an Interim Renewable Infusion Study[17], and an Integrated Recourse Plan,[18] 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

[16] The general conclusions of the IDSS were published in a press release on 10 February 2023, see: https://www.cuc-cayman.com/fronthome/download_pdf?file=1676322130ofreg_releases_3mw_to_core_and_der_100223.pdf
[17] https://www.cuc-cavman.com/renewable-enercfy/interim-renewabfeinfusion-stucfv-report/
[18] https://www.cuc-cayman.com/renewabie-energy/integrated-resource-plan-irp/

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, as already quoted above:

> *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.*

[58] 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, stating:

> *All related information pertaining to the RFP package will be shared with all potential bidders at the same time, prematurely disclosing this information can give a potential bidder an unfair advantage over other interested parties thereby potentially compromising the bid process which is an extensive 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.[19] 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, as follows (my emphasis):

> *19.6 Separately or in conjunction with other rate adjustments as set forth above, the Licensee may adjust Base Rates to achieve other objectives upon approval of the Authority. Such adjustments may include but are not limited to revising the rate design, rebalancing rate levels between Consumer classes, redefining Consumer classes or creating new Consumer classes, or implementing incentive rate structures or optional rates. It is expected that any such revisions would be supported by appropriate analysis from the Licensee and subject to review and approval by the Authority. Notwithstanding any specific analyses and adjustments,* ***the Licensee shall provide the Authority with a comprehensive allocated cost of service study of Base Rates at least 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.

[19] See, for instance: Ombudsman, *Hearing 84-202000834 Decision, Portfolio of Legal Affairs*, 25 March 2021, para. 35.

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.

[66] Finally, I also note that section 107 of the URCA provides a mechanism for designating information provided to OfReg as "confidential". OfReg has not indicated that the two responsive records were subject to such a designation, and there is no claim under section 17(1)(b)(i) of FOIA relating to an actionable breach of confidence. Therefore, I assume CUC and OfReg did not utilize this mechanism to designate either of the responsive records as "confidential".

[67] **In conclusion, on the balance of probabilities and for the above reasons, 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.**

Public interest

[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, pursuant to section 26(1) which states:

> ***Granting access to exempt information***
> *26. (1) Notwithstanding that a matter falls within sections 18, 20(1)(b) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest.*

[70] The public interest is (non-exhaustively) defined in regulation 2, 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.

[71] A public interest test essentially involves weighing relevant public interest factors in favour and against disclosure to determine whether, in all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in disclosing the requested information.

[72] Public interest can include a wide range of values and principles relating to the public good or what is in the best interests of society. It is something that is of serious concern and benefit to the general public, not just something of interest to an individual. It serves the interests of the public at large, although it does not necessarily relate to the entire population. However, public interest is not the same as "something the public is interested in". It is what is in the interest of the public good or society at large.[20]

[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, particularly against the backdrop of "regulatory failure" reported by the Auditor General in 2020;
- 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.

[20] Information Commissioner's Office (UK), *The Public Interest Test: Freedom of Information Act*, Version 2.1, 19 July 2016. See, for instance: Ombudsman, *Hearing 96-202100364 Decision. Ministry of Health and Wellness*, 10 February 2023, paras 42-45

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.

[75] Even though it appears that it has not been updated since 2014 (apparently contrary to the T&D License) the COSS provides the basis for electricity rates and increases in Grand Cayman, which are reviewed and approved by OfReg. The other record (the IDSS) is about the efficiency of fossil-fuel generation subject to incremental increases in solar generation, and provides factual information about the introduction of renewable energy and ultimately also informs the cost of electricity. These records are important in holding the utilities regulator (OfReg) to account in relation to its statutory mandate to "protect the short and long term interests of consumers". Accountability and trust can only be achieved with an appropriate level of openness, transparency and public scrutiny.

[76] A countervailing public interest in facilitating and supporting free competition, and protecting businesses from disclosing pricing information, is severely reduced in the circumstances of this case, relating to these responsive records, since CUC does not have commercial competitors, and the relevance of the responsive records to the forthcoming bidding process has not been demonstrated, as discussed in more detail above.

[77] Considering the strength of the public interest factors in favour of disclosure listed above, I cannot think of any other factors in favour of maintaining the exemptions (if they had been found to be engaged).

[78] **Therefore, I conclude that – if a public interest test had been required – the public interest in disclosure would far outweigh the public interest in maintaining the exemptions. In other words, even if one or both of the exemptions claimed by OfReg were to apply to the responsive records - which I have found <u>not</u> to be the case – disclosure of the responsive records would be required in the public interest.**

Personal information

[79] As a separate point, the name on page 1 of the COSS and the name and signature on page 4 constitute the personal information of the consultant who conducted the study. That individual is not a civil servant or a consultant of a public authority, and therefore the name and signature meet the definition of personal information in schedule 1 of the Regulations.

[80] However, while the disclosure of the signature would pose a risk of identity theft, the name of the consultant is readily available online as being connected with the types of services provided by the company that conducted the study, and therefore it is not exempt as it is already in the public domain.

[81] In consideration of sections 23(5) and 26(3), the Data Protection Act (2021 Revision) neither permits, nor requires the disclosure of the signature.

[82] **Therefore, the signature on page 4 of the COSS is exempted under section 23(1).**

[83] I have considered the public interest under section 26(1), and there appears to be no public interest in the disclosure of the signature, while protection against identity theft is a matter of public interest.

[84] **Therefore, I find that the public interest in maintaining the exemption of the signature on page 4 of the COSS outweighs the public interest in disclosure, and the exemption stands.**

C. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Act, for the reasons outlined above, I make the following findings and decisions:

a) 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.

b) 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.

c) Even if one or both of the exemptions claimed by OfReg were to apply to the responsive records - which I have found not to be the case – disclosure of the responsive records would be required in the public interest.

d) The signature on page 4 of the COSS is exempted under section 23(1), since it is personal information that is not reasonable to disclose. The public interest in maintaining the exemption of the signature outweighs the public interest in disclosure.

e) In accordance with the above findings, I require OfReg to disclose the responsive records, except for the signature on page 4 of the COSS, within 10 days.

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Sharon Roulstone
Ombudsman