

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2017 – 00869

Between

Roger Simon

Audra Simon

Claimants

And

The Permanent Secretary of the Ministry of Education

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Colin Selvon instructed by Ms Delicia Bethelmy for the Claimants

Ms Natoya Moore and Ms Ronelle Hinds instructed by Ms Kadine Matthew for the Defendant

Date: 27 October 2017

JUDGMENT

1. The **Freedom of Information Act, Chap 22:02** has been in effect for 15 years now. Yet still, many claims continue to come before the court. Departments of the State often find difficulty with managing the operation of the Act and litigants sometimes encounter difficulties with clearly setting out what they are seeking information on. But there is guidance available to public officers and to the public. In the course of this claim the court

found a clear reference guide to how the Act is intended to operate on the website of the Ministry of Public Administration and Communications.

2. In a Guide to the Freedom of Information Act, published by the Freedom of Information Unit, Ministry of Public Administration and Communications, the purpose of the Act was identified in these terms:

“The Freedom of Information Act (FOIA) 1999 was assented to on 1 November, 1999 and came into effect on 30 August, 2001 for Part I, April 30, 2001 for Part II and August 30, 2001 for the remaining parts. The FOIA provides a legally enforceable right to members of the public to seek access to information held by public authorities, limited only by exemptions that are deemed necessary for the protection of ‘essential public and private interests’. It also extends the right of an individual to correct personal data that is incomplete, incorrect, out of date or misleading. The FOIA enshrines the concept that information collected and generated by government, is a resource of the people, for the people and is to be accessible as freely as possible by the people. It seeks to promote the principles of accountability, openness, transparency and increased public participation. The Act should NOT displace the formal procedures for access to information but should be regarded as a legislative ‘last resort’.

Objectives of the Act: The objectives of Freedom of Information (FOI) legislation are:

To give people the right to any official information held by public authorities, unless it can be shown that disclosure can cause harm to essential interests

To give persons the right to access their personal information

To encourage transparency, openness and accountability in government

To encourage authorities to disclose more information voluntarily...”

3. Section 3 of the Act mirrors the above statements in these terms:

“3. (1) The object of this Act is to extend the right of members of the public to access to information in the possession of public authorities by—

- (a) making available to the public information about the **operations of public authorities** and, in particular, ensuring that the **authorisations, policies, rules and practices** affecting members of the public in their dealings with public authorities are readily available to persons affected by those authorisations, policies, rules and practices; and
- (b) creating a **general right of access to information** in documentary form in the **possession** of public authorities **limited only** by exceptions and exemptions necessary for the **protection of essential public interests and the private and business affairs of persons** in respect of whom information is collected and held by public authorities.

(2) The provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.”

- 4. A short survey from this and other jurisdictions also provide context to freedom of information legislation consistent with the above quoted legislation.
- 5. In a **Presidential Memorandum on the United States Freedom of Information Act** (January 21 2009) – President Barack Obama, in one of his first statements as President, wrote:

“In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.”

“The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA,

executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.”

“All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

6. In the United Kingdom, the Information Commissioner’s Office, which is the UK’s independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals has stated:

“The main principle behind freedom of information legislation is that people have a right to know about the activities of public authorities, unless there is a good reason for them not to. This is sometimes described as a presumption or assumption in favour of disclosure. The Act is also sometimes described as purpose and applicant blind.

This means that:

- everybody has a right to access official information. Disclosure of information should be the default – in other words, information should be kept private only when there is a good reason and it is permitted by the Act;
- an applicant (requester) does not need to give you a reason for wanting the information. On the contrary, you must justify refusing them information;
- you must treat all requests for information equally, except under some circumstances relating to vexatious requests and personal data... The information someone can get under the Act should not be affected by who they are. You should treat all requesters equally, whether they are journalists, local residents, public authority employees, or foreign researchers; and
- because you should treat all requesters equally, you should only disclose information under the Act if you would disclose it to anyone else who asked. In other words, you should consider any information you release under the Act as if it were being released to the world at large.”

7. In piloting the Freedom of Information Bill, at the third reading and passage, the then Attorney General, Mr Ramesh Lawrence Maharaj, stated (as recorded in Hansard):

“Mr. President, information is the oxygen of democracy. If people are unaware and do not know what is happening in Government, in the state and in their society, then they would not be able to have meaningful participation in the affairs of society. If the actions of Government and the state and those who exercise governmental and public powers are hidden, the people cannot play a meaningful part in the affairs of society. That amounts to alienation and can also be described as discrimination against people.”

“So we see that internationally, both through the Universal Declaration on Human Rights and through the International Covenant on Civil and Political Rights, it was expected that on a domestic basis, the legal frameworks of countries would have laws to give effect to the right to information held by the state or by government. The reason for that, it was recognized that in order to have good, open and transparent government, the people must know what is happening. It has also been recognized that it cannot be an absolute right, in that there would have to be exceptions and they have developed certain internationally recognized principles as to how these exceptions should be.”

8. The local court has also pronounced on the Act. In **CV2016-03631 Ravi Maharaj v The Petroleum Company of Trinidad and Tobago** Des Vignes J stated:

“It is well settled by many authorities that the intention of the FOIA is to promote disclosure of information held by public authorities to the public. Further, there is a presumption that the public is entitled to access the information requested unless the public authority can justify its refusal of access based on the fact that the document is exempt from disclosure. Even when the document is exempt, Section 35 of the FOIA imposes an obligation on the public authority to give access thereto where there is:

“reasonable evidence of significant

- (a) abuse of authority or neglect in the performance of official duty; or
- (b) injustice to an individual; or
- (c) danger to the health of safety of an individual; or

(d) unauthorised use of public funds has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit

9. In CA 170/2008 Caribbean Information Access Ltd v The Minister of National Security Jamadar JA noted:

“There is no dispute that “the policy, purpose and object of the FOIA are to create a general right of access to information in the possession of public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities 6 and to any damage that may arise from doing so.”

“There can also be no dispute that the court in both interpreting and applying the provisions of the FOIA is mandated to do so purposively, so as to further the policy, purpose and object stated above⁷ . The FOIA provides for a statutory right to information held by public authorities, and its effect is to broaden and deepen the democratic values of accountability, transparency and the sharing of and access to information about the operations of public authorities.”

10. In Claim No. CV2006-00037 C.A. No. 58 of 2007 Ashford Sankar v Public Service Commission, Narine JA stated:

“Clearly the intention of the framers of the Act was to promote disclosure of information held by public authorities to the public, as opposed to suppressing or refusing access to information. The presumption is that the public is entitled to access the information requested unless the public authority can justify refusal of access under one of the prescribed exemptions specified under sections 24 to 34 of the Act. Even so, under section 35, although the information requested falls within one of the specified exemptions, the public authority is mandated to provide access where there is reasonable evidence that abuse of authority or neglect in the performance of official duty or injustice to an individual, danger to the health or safety of the public, or unauthorised use of public funds, has, or is likely to have occurred, and disclosure of the information is justified in the public interest.”

11. In CV 2009-00525 Carl Bridgelal v The Commissioner of Police Gobin J. said:

“9. My concern in this regard has been dispelled by a closer consideration of S. 3 of the Act. Our legislature in its wisdom, and in keeping with global trends towards demanding accountability of government agencies and public officers and empowering ordinary citizens, has created a right of access to information, subject only to certain exceptions. This is salutary. In construing the provisions of the Act, I think the recognition of this new right ought to be foremost in the mind of the Court. An approach which detracts from this right or limits it in any way which Parliament could not have intended, might amount to an unwelcome encroachment by the judiciary on the preserve of the legislature. I have concluded in the absence of authority which decides the point, that information is either accessible or it is not and a reviewing court is limited to ordering that it is or not.”

12. From these varying extracts what is clear is that access to information has fast become an essential right in this country as it has become in the United Kingdom and the United States. The legislation is meant to promote openness, transparency, and accountability. It is meant to give persons the right to access their personal information and information of a public nature. Unless it can be shown that it harms a State or private interest, public authorities must lean in favour of disclosure. Disclosure is a presumption. Information should also be freely provided. Recourse to the court ought to be a last resort. All of this has been adopted in this jurisdiction.

13. Having attempted to put the legislation in context I now come to this case.

14. The claimants' daughter wrote the Secondary Entrance Examination in 2016. Before the examination she was performing in the mid 90's in her scores. At the examination she was assessed to have performed in the 80's. Both the child and her parents found this odd.

15. As a consequence of her examination score she did not get her first choice of school placement. She got her third choice. Her parents therefore queried her score and requested to see the Language Arts and Mathematics scripts she had written. They did this under the Act.

16. The Ministry of Education denied the request on the basis that they did not “own” the examination scripts. The Ministry said it was “owned” by the Caribbean Examinations Council (CXC). The Ministry also indicated that the agencies subject to the FOIA are listed in section 4 of the Act under the heading “public authority”. Impliedly, the Ministry asserted that the CXC was not a public authority. As a result, the Ministry concluded, it “would be unable to release the SEA Examination Papers to you”.
17. The claimants complained to the Ombudsman and then filed this application for judicial review.
18. Whether the CXC “owns” the papers or not was not the determining question. Also irrelevant was whether the CXC is a public authority. The application was made to the Permanent Secretary, Ministry of Education.
19. The defendant questioned whether the CXC is directly subject to the operation of the FOIA and submitted it is not. I agree that it is not. While it is incorporated in Trinidad and Tobago under the **Caribbean Examinations Council Act, Chap. 39:07**, it is not directly under the control of the government even though it provides a service which it is contracted to perform by the government. It is a regional body with which the government has a contractual arrangement for the provision and assessment of an examination and its existence is written into the law of Trinidad and Tobago.
20. According to section 4 of the FOI Act, a document is held by a public authority in connection with its functions if the document is in its possession, control or power. The public authority does not have to have created the document. It does not have to “own” the document. The Permanent Secretary is a public authority for the purposes of the Act. The important question is whether the Ministry of Education had or has custody, control or power over the examination scripts.
21. The SEA examination is administered by the Ministry of Education and used for placing children in secondary schools. The placement of children in secondary schools is a key process in the operation of the Ministry of Education, a public authority. Placement is done according to the policies and rules of the Ministry. The examination is used as part of the process of placement of children under the policies of the Ministry. It is clear, therefore, that an examination paper can be considered to be a document for the purpose of the Act.

22. The CXC prepares the SEA examination for the Ministry of Education. The examination scripts are sent to the schools a few days before the examination. The Ministry administers the examination. The children write the examinations on the scripts. These are collected. They are sent by the Ministry to the CXC. The CXC marks the scripts. They send the results to the Ministry of Education. The Ministry makes placements in schools based on its policies and criteria. The CXC is paid to prepare, mark and give the results of the examination within a prescribed time.
23. The scores obtained and placements based on the scores are obviously of immense interest to parents and children. Most parents would like their child to get his or her first choice placement. But since not every child can get their first choice the process becomes very competitive. Thus, parents and children and the public at large necessarily are sufficiently invested in ensuring a fair process which leads to the need to scrutinise how this placement system works. The placement of children has been of national interest and concern for as long as the examination and its forerunner, the Common Entrance examination, has been in existence.
24. Turning to the specifics of this case, Audra Simon indicated her child was averaging 90 plus in the run up to the examination and got 96% in the mock exams held shortly before the examination. In the SEA examination she got 88 in Mathematics and 80 in Language. She obtained 46.51 in ELA writing and 89.86 in the other subject area.
25. Anil Moonsammy, Clerk III at the Ministry of Education, under delegated authority, performs FOIA duties. He received the request. He said in an affidavit that the Education, Research and Evaluation Division had advised that CXC does not fall within the ambit of the Ministry. He said the scripts are under the custody and control of the CXC. The scripts were denied to the claimants. However Mr Moonsammy said the scripts were reviewed by CXC who advised there was no change to the scores.
26. Mervyn Sambucharan, Acting Director of Research and Evaluation of the Ministry of Education, also submitted an affidavit. He said after scripts are received they are placed in the Ministry's vault. CXC officials take possession of the scripts and oversee their marking. After marking, the scores and scripts are conveyed by CXC officials to their headquarters in Barbados for analysis and storage. CXC uploads the information after analysis to the Ministry's online registration system. After this, the data is used for the placement process. Thus the scripts are returned to the custody and control of the CXC.

He further stated it is a general practice of CXC to not release examination scripts to students or parents. He does not, however, say why this is so. He relies on an email from Sandra Thompson, a registrar of CXC, stating that CXC's policy does not allow for viewing of examination papers. This email was, however, not sent by CXC in respect of this specific request.

27. Curiously, an email sent by one Ragendaye Ankatasso, Supervisor of Examinations, to Ms Sandra Thompson made this alarming request:

“Is it possible for us to get a copy of the agreement sign (sic) between CXC and Trinidad and Tobago re the SEA Examination.” (sic)

28. Ms Thompson's reply email did not treat with this request. But the startling revelation is that the Supervisor of Examinations did not have a copy of the agreement regarding the conduct of the SEA examination.

29. What was provided to the claimants were the results of the child of the remarked scores. Once there is an application for review, Mr Sambucharan had said, the scripts are remarked.

30. From the evidence, the Ministry did not have custody of the exam papers at the time of the request. They also did not have physical control over it. The question, however, that remains is whether they could have had control or power over it. That is not as clear.

31. The SEA examination is created and marked by CXC under a contractual relationship with the Ministry of Education which pays the CXC to conduct the examination. The contract or agreement by which this is done has not been placed before the court. Incredibly, it appears the Ministry did not have it. The Ministry's response sounded like it was washing its hands over the issue. It said that CXC says its policy is not to show examination scripts to parents or children. The Ministry seemed content with that position; it did not raise a question nor did it make a request for change of the policy.

32. But what is the position of the child who spends years preparing for this one examination which has a significant effect on the child's future? Why can't the child or parent see the

paper he or she has written? What is the harm to any State interest in allowing the parent and child to view the paper? What is the harm to any private interest? None has been advanced to the court. And what is the Ministry's duty in relation to its own citizens to satisfy them that the marking of the scripts reflects a thorough and careful evaluation of the child's work? Of critical importance here is that this is a mandatory examination for placement of children in public or publicly funded secondary schools. A child who has to attend a secondary school other than a private one must write this examination. It is different from any other type of examination prepared by the CXC.

33. The International Convention on the Rights of the Child enjoins us, when we make decisions, to consider how these decisions impact on children. Denial of a child of a request to see her or his paper after years of preparation for an examination must impact negatively on that child. A child accustomed to performing at a particular level could find it bewildering to find out that she or he was determined to have performed substantially below that level.
34. There are already many contentious issues about the placement of children in schools. In certain schools 80% of the placements are expected to be done on merit, and in other schools 100%. How the other 20 % is placed is a mystery to most citizens. There is always talk about how one child with a lower score got in to "X" school ahead of another child with a higher score. It understandably leads to much speculation about the process; about the hidden interests lying behind the scenes. The issues have been memorialised in calypso in Cro Cro's "Corruption in Common Entrance". Transparency and accountability of the process of marking and placement will shed light on what, for some persons, is a murky affair. The potential for corruption is there when the system of marking of scripts and placement of students is kept as a secret.
35. There seems to be no reason in principle why the Ministry of Education cannot ask CXC to review its policy in providing papers to be viewed on request. This is not likely to open a floodgate since, presumably, children who have obtained their first choice will not make any request. Further, the Ministry pays for the service provided by CXC. As a paying customer surely they can ask for information. CXC would be brazen to refuse a request by a contracting State upon whom it depends for its continued relevance, at least in relation to Trinidad and Tobago students. At best, CXC owns the copyright of the examination paper. It cannot own each individual script. The owners of the individual script are the Ministry of Education and the child who wrote it.

36. There is also no reason in principle under FOI why a parent ought not to be able to request from the Ministry of Education a listing of the scores, without names, of all children placed in a particular school to see if their child merited a placement at that school based on his or her score. The Ministry must have a master copy as well as individual copies for each school showing the placements. The information could be redacted for the public so that the scores of the children who qualified under the 80% intake is listed without names. The scores of those who were admitted under the 20% formula can also be stated, without the names of the students. Thus, from this, it would be clear if a child earned a score above the lowest scoring 80% student admitted. The redacting of the names can adequately protect the rights of other children.
37. There should also be published the criteria for admitting children under the 20% formula.
38. This is exactly the kind of information that Freedom of Information legislation is intended to cover so that light can be shed on how State processes, utilising public funds, are administered. If this kind of information is provided **as a matter of course**, as enjoined by the several sources mentioned at the beginning of this judgment, there would be less need for applications to be made under the FOI Act.
39. I also note that the Ministry's washing of its hands off of this issue has been done without knowing what the agreement is regarding the SEA examination between the Ministry and CXC. This suggests that the Ministry itself has placed the CXC in a position of ascendancy over it when it is the Ministry of Education that is paying CXC to provide a service.
40. Parents also have a constitutional right to provide a school place of their choice for their child or ward. This is not a flippant right or one without meaning. Understandably there are limited spaces in specific schools. This is all the more reason why citizens should at least have the right to know that the placements are being done on merit in relation to the school places.
41. I also disagree with the defendant about the ownership of the script. While CXC owns the examination in the sense of the copyright in the examination paper, when a student writes the examination on a script it seems to me that a strong case can be made as to at least joint ownership of the written examination script by the student. In the same way a patient is entitled to a copy of his medical records, or an accused is entitled to a copy of a confession

statement given by him to the police, or a person is entitled to a copy of a form filled out by that person for a public service, I see no reason in principle why a child who writes a public examination, which is mandatory for the child to be placed in a secondary school, in a competitive process, in schools funded substantially by citizens, should not be allowed to view a copy of his or her paper, through their parent. It is the student's script.

42. What clearly these parents have sought is simply to see the scripts having regard to their child's unusual performance in the exam.
43. In the absence of the Ministry putting before the court the agreement with CXC on the SEA examination, it seems reasonable to me that the Ministry can be seen to have the power to demand production by CXC and sight of the SEA scripts in order to satisfy legitimate requests of parents. The Ministry pays CXC for the service of preparing and marking papers in respect of a national examination to assess placement of children in school. It simply cannot be that CXC could take the approach that it does not allow parents to see a paper and that is the end of it as far as the Ministry is concerned. It must be in the Ministry's power to demand it and consequently gain custody and control of the document. CXC cannot dictate to a sovereign state that pays for its operations what it can and cannot do with an examination script which the State pays for. I reiterate that this is an examination which children **must** write to obtain a placement in a State funded (whether wholly or partially) school.
44. Accordingly, I direct that the Ministry of Education make a formal demand of CXC to provide a copy of the scripts requested by the claimants. The Ministry ought to be prepared to seek to enforce its right to the return of the scripts to them if refused by CXC. Once the scripts are obtained the Ministry is to provide the claimants and the child a reasonable opportunity to view the script within 14 days of receiving it and provide a copy of it to them. If the request is refused by CXC pursuant to CXC's unexplained policy, the Ministry may wish to review its contractual negotiations with the CXC in future with a view to negotiating, if the present agreement does not so provide, that CXC be required to produce the examination papers on request by the Ministry of Education. This is just too important to our nation's children; "let's think about the children" (Merchant). As an aside, it would be interesting to learn if before CXC began marking scripts parents were allowed to see the answer sheets of children who undertook the Common Entrance examination where the answers were shaded.

45. Alternatively, CXC ought to be made to return the examination scripts after final marking. Thus the Ministry will have custody of the scripts (which it paid CXC to prepare) and can make a determination when parents make their requests. Furthermore, the Ministry does not have to obtain approval of CXC or await a response from them to release the scores of all children assigned to the different schools in Trinidad and Tobago. Redacting the names attached to particular scores will sufficiently protect the private rights of the individual children.
46. For completeness, I will address the point raised by the defendant relating to the presumption of regularity. Essentially, the argument was that the Ministry of Education has provided information to the claimants and we should trust the information provided in the absence of any reason to suggest all was not regular. In my view this principle does not apply to this case. This is a FOIA. There is a right to information under the Act as a right in itself. Whether there are grounds for trusting the accurate reporting of the information is respectfully not the issue. The question is whether the claimants are entitled to the information as a right in itself.
47. The defendant also submitted that the court ought to be careful to make any pronouncements on the relationship between the Caribbean Examinations Council and the Ministry of Education because of treaty obligations. I respectfully disagree. The functions of the CXC are incorporated into the domestic law and the agreement establishing the CXC is part of the Act. It is therefore subject to the laws of this jurisdiction as far as the CXC Act is concerned. In any event, I have examined the CXC Act and I find nothing in the Act which prohibits the court making an order in this claim. In fact, the Act does not address any of the items raised by the defendant as concerns the ownership or control of the scripts or the results of the SEA which follows from the examinations.
48. I note that it has not been contended that the document is an exempt document. The contention of the defendant has been the documents are not within its custody, control or power.
49. Citizens have a right to information as provided by the FOIA. Where that information is an examination script which a child has written in the context where it determines that child's school placement in what is expected to be a largely merit based system (save for the 20%) in an examination paid for by taxpayers, it becomes all the more important that information be provided. I would go further and add that information relevant to school

placements, although not requested in this case, should also be provided by the Ministry of Education as a right to information under the Act and as a matter of course. It is time that the mystery of SEA placements is finally brought to light. This approach is consistent with the very clear language on the Ministry of Public Administration's website quoted above that "information collected and generated by government, is a resource of the people, for the people and is to be accessible as freely as possible by the people". The court could not have said it better than that.

50. I thank the attorneys on both sides for their helpful submissions and my Judicial Research Counsel, Mrs Berkley-Biggart, for her research and assistance.

51. The claimants were unsuccessful in respect of certain arguments advanced and successful regarding one aspect of the claim. The defendant must therefore pay half the claimants' costs to be assessed by a Registrar in default of agreement.

Ronnie Boodoosingh

Judge