

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-02003

**IN THE MATTER OF AN APPLICATION BY KIRK WAITHE UNDER THE PROVISIONS
OF THE FREEDOM OF INFORMATION ACT CHAPTER 22:02**

AND

**IN THE MATTER OF AN APPLICATION BY KIRK WAITHE FOR JUDICIAL REVIEW
UNDER THE JUDICIAL REVIEW ACT CHAPTER 7:08**

AND

**IN THE MATTER OF THE FAILURE OF THE COMMISSIONER OF POLICE
A PUBLIC AUTHORITY UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT
TO COMPLY WITH SECTION 15 OF THE FREEDOM OF INFORMATION ACT CHAPTER 22:02**

Between

KIRK WAITHE

Claimant

And

THE COMMISSIONER OF POLICE

Defendant

Before the Hon. Madam Justice C. Gobin

Date of Delivery: April 22, 2022.

Appearances:

Mr Navindra Ramnanan instructed by Mr Ricky Pandohee Attorney at Law for the Claimant

Mr Lester Chariah instructed by Mr Joel Roper Attorney at Law for the Defendant

REASONS

Background

1. By application dated 8th March 2019, the Claimant requested information from the Commissioner of Police, pursuant to Section 13 of the Freedom of Information Act, Chapter 22:02 (“FOIA”). The request was dispatched with a pre-action protocol letter dated 11th March 2019 to the Claimant’s Attorneys.
2. The request was for the following :
 1. *Copy of the communication formally requesting/recommending that digital style uniforms be used as uniforms for special units within the Trinidad and Tobago Police Service (TTPS).*
 2. *Copy of the communication formally granting concurrence and stamp approval by the Minister of National Security for digital style uniforms to be used by special units within the TTPS.*
 3. *Proof that the approval for the use of digital style uniforms as prescribed by the Commissioner of Police and Minister of National Security was gazetted in the form of a copy of the said gazette.*
3. On 10th May 2019, at a time when the Claimant claimed to have received neither a response nor the requested information, the Claimant’s Attorneys filed a Notice of Application for leave to apply for Judicial Review of the failure and or neglect and or refusal of the Commissioner of Police to provide the requested information. The Notice of Application was supported by an affidavit in which the Claimant deposed that he heard nothing since submitting his request.
4. The matter was docketed to Kokaram J, as he then was. The Claimant filed a supplemental affidavit on 15th May 2019 to which he attached a response from the Defendant that he claimed was received by his Attorney on 10th May 2019, but only after the filing of his Leave Application.
5. The Defendant’s letter dated 3rd April, 2019, contained a refusal of the request, the reasons for which were summarized in these words:

Upon review, it was determined, that the documents you seek are exempted from mandatory public disclosure, and is being withheld, under the FOIA Exemptions Section 24 (1) (c); Section 25 (1) (2), 26 (d); 27 1 (a), (b) and 28 (d) of the Freedom Information Act, Chapter 22:02.

Allegation of non-disclosure against the Claimant

6. Five days after the Claimant filed the Leave Application, the court received evidence of the refusal letter via the submission of a supplemental affidavit. The Defendant, however, raised an issue as to the date on which the Claimant received its response. In affidavits filed on 19th December 2019 on behalf of the Defendant, Mr Christian Chandler, former Director of Legal Services of the office of COP, and instructing Attorney Mr Joel Roper, claimed that the response dated 3rd April 2019, was in fact actually delivered to the Claimant's Attorneys on 7th May 2019, before the Leave Application was filed but that the Claimant had deliberately refused to disclose it, that his non-disclosure of it was material to the application and it should operate against him. I took this to mean that leave should therefore be refused.

7. I have considered the Defendant's submissions on this issue and find that there is no merit in them. I have rejected the evidence on it. Both deponents made the allegations based on hearsay statements that are inadmissible as to their truth. In the case of Mr Roper, at the date of filing his affidavit on 19th December 2019, he attached an email dated 28th June 2019, which he had dispatched to TTPOST seeking confirmation of the date of delivery. He stated that the response would prove that the refusal letter was delivered on 7th May 2019. Mr Roper's email letter was addressed to renee.bodoosingh@ttpost.net, with the subject line "Request for particulars of delivery" reads:

I refer to the matter at caption and herein respectfully request the particulars of delivery of the package No. RD 500 600 089 TT delivered via TT Post.

Up to the date of filing of his affidavit (almost six months later) he could produce no response, but he undertook to provide it as soon as it became available. This matter languished in the system for more than two years after that date. No response was produced from TTPOST, even up to March 2022. In the circumstances, I have drawn adverse inferences from the failure to produce the evidence as promised.

8. Further, it seems inherently implausible, that a Claimant who has in hand an express denial of his request under the FOIA, which could only add support for his leave application, would deliberately withhold it, only to disclose it five days later, even before any intervention from the Court. I find that

the refusal letter reached the Claimant's Attorneys on 10th May 2019 but subsequent to the filing of the Leave Application.

Procedural Directions

9. On 15th May 2019, Kokaram J, as he then was, ordered service of the Leave of Application on the Defendant with a further direction for the Defendant to file a Notice indicating its consent or objection. The Honourable Judge made the following order:

1. *The Notice of Application filed on the 10th day of May, 2019 for leave to apply for Judicial Review be served on the Respondent.*
2. *The Respondent do file a notice on or before 14th June, 2019 indicating:-*
 - i. *whether it consents or objects to the application for leave to apply for Judicial Review.*
 - ii. *whether it consents or objects to the provision of the further information requested and if it so consents setting out the time within which the said further information can be provided to the Applicant.*
3. *The Notice of Application is fixed for hearing on 28th June 2019, at 12:30pm in Court Room SF07, Hall of Justice, Port of Spain.*

10. By Notice dated and filed on 17th June 2019 the Defendant indicated his refusal to consent to the application and a desire to be heard on the Leave Application. The Defendant further drew to the attention of the Court the publication of Legal Notice No 103 of 2019, which contained orders, made pursuant to Regulations 121 of the Police Service Regulations, which purportedly permitted the wearing of urban digital camouflage. The production of Legal Notice 103 effectively answered request No. 3 of the Claimant's original request. The Legal Notice was gazetted on 15th May 2019, a few days after the Claimant's filing of the Leave Application. The Defendant brought the publication of the Legal Notice to the Claimant's attention, by a letter dated 29th May 2019.

11. As a consequence of the belated receipt of the Defendant's refusal letter on 10th May 2019 and the subsequent publication of the Legal Notice No. 103, by Notice filed on 26th September 2019, the

Claimant sought leave to amend the grounds of Leave Application to reflect these two developments that had occurred since the filing of his original application. The need for some of the relief as initially formulated, was overtaken by these two subsequent events.

12. On 27th September 2019, at a hearing which was attended by both sides, the Judge made an order essentially granting the Claimant leave to file a Fixed Date Claim on or before 14th November 2019, but explicitly reserving the right of the Defendant to set aside leave *for any specific relief sought*. (emphasis mine). By order dated 18th November 2019 the Judge amended the order of 27th September 2019. The clear purpose of the amendment was to correct the reference to the draft order that was filed initially on 10th May 2019 to specifically replace it with the amended draft order which accompanied the amended application of 26th September 2019. I infer from this that the Judge, having heard the parties, granted the amendment sought by Notice of 26th September 2019.

Delay

13. There is no record that the Defendant raised the issue of delay at the hearing before the Judge, but in its final submissions, the Defendant addressed it. At the the same time, it contended that the Claimant brought the claim prematurely. The inconsistency speaks for itself. But the claim of delay was premised on the submission that the Claimant's amended Notice of 26th September 2019 was a device utilised to place new claims before the Court, which we filed out of time. I reject this submission. The need for the amendments arose as a result of two things. First, the receipt of the Defendant's response on 3rd April 2019. Secondly, the publication of the Legal Notice. The amendments introduced no fresh claims that invoked a fresh start to the running of time.
14. The amendments in the circumstances were not only justifiable, but the Claimant, in seeking them, was acting consistently with the overriding objective, narrowing issues, removing from the Court's consideration issues which had been rendered academic and reformulating reliefs in the circumstances of developments which had occurred after the filing of the original leave application which confirmed the denial of the request. The submission that the application was not made 'promptly' by reason of the alleged effects of the amendment is rejected.

Ruling by This Court

15. This matter was reassigned on three occasions and eventually reached my docket. At the first scheduled hearing 17th January 2022, the parties confirmed that affidavits and submissions were all before me, and that the matter was to be treated as a rolled-up hearing of the Defendant's setting aside application, as well as the Claimant's claim for substantive judicial review. On 31st March 2022, I indicated my decision to refuse the Defendant's application to set aside the grant of leave and my finding that the Claimant was entitled to the reliefs claimed in the amended Claim Form. The Claimant was directed to send a draft for approval, and the Defendant was invited to consider the terms. On 11th April 2022, I made the following order:

1. The Respondent's Notice of Application filed on 19th December, 2019 seeking to set aside the grant of leave by the orders of the Honourable Mr. Justice V. Kokaram is refused.

2. The Respondent's Notice of Application filed on 19th December, 2019 seeking to strike out and/or dismiss the grant of substantive reliefs claimed in the Amended Fixed Date Claim Form is refused.

3. The Court hereby grants the following reliefs:

a) A Declaration that the Claimant is entitled to access the requested information at (i) and (ii) of his application dated the 8th day of March, 2019 under the Freedom of Information Act Chapter 22:02.

b) A Declaration that the access decision contained in letter dated 3rd April, 2019 not to release the requested documents at (i) and (ii) of the Claimant's application dated the 8th day of March, 2019 is invalid and illegal and defective and contravenes the provisions of the Freedom of Information Act Chapter 22:02 and the public interest.

c) An Order of Certiorari to remove into the Honourable Court and quash the decision of the Defendant in letter dated the 3rd day of April, 2019 to refuse disclosure of the documents

requested at (i) and (ii) of the Claimant's application dated the 8th day of March, 2019 under the Freedom of Information Act Chapter 22:02.

d) An Order of Mandamus to compel the Defendant to furnish the Claimant with the documents requested at (i) and (ii) in the Claimant's Application dated the 8th day of March, 2019 made under the provisions of the Freedom of Information Act Chapter 22:02 within Seven (7) days.

e) A Declaration that the Defendant's failure and/or refusal to give the Claimant the requested information at (i) and (ii) in the Claimant's Application dated the 8th day of March, 2019 is unlawful on the ground that the decision was procedurally improper and/or irrational and/or unreasonable.

f) The Defendant pay the Claimant's costs to be quantified by the Assistant Registrar in Chambers on a date to be fixed pursuant to Part 67.12 of the CPR.

g) Stay of Execution for Twenty-Eight (28) days.

Issues

16. The issues for determination were:

- i. Whether on the basis of the sections of the Freedom of Information Act cited by the Defendant the information sought was exempt; and
- ii. If so, whether the section 35 override should be applied, the statutory exemptions notwithstanding.

17. Any consideration of an application under section 13 should begin with a reminder of the policy behind the legislation which is expressly laid out in Section 3 of the Act which provides:

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.

18. There is clearly a presumption in favour of disclosure. The objects and the statutory mandate contained in section 3(2) above, as well as general principles of statutory interpretation, demand that claims to exemptions as have been made in this case, must be carefully scrutinized and exemption provisions strictly construed. The burden is on the public authority, which claims the exemption to particularize the provision and demonstrate by evidence that it applies to the request.

19. The Defendant's response indicated the specific exemption provisions upon which it relied and the reasons. The response is set out in full:

3rd April, 2019

Ms. Kumari Baksh

Attorney-at-Law

Tunapuna Plaza,

No. 84 Eastern Main Road,

TUNAPUNA

Dear Madam,

This letter is in reference to your Freedom of Information Act (FOIA) request dated 8th March 2019, which we received on 19th March, 2019 where you sought:

- **A copy of the communication formally requesting that the approval granted for the use of digital style uniforms by special units within the Trinidad and Tobago Police Service TTPS be gazetted.**
- **A copy of the gazette in which the notification appears that digital style uniforms can be used by the TTPS.**

Pursuant to your request, we examined the documents, which were relevant to your request. Upon review, it was determined, that the documents you seek are exempt from mandatory public disclosure, and is being withheld, under FOIA Exemption sections 24 (1) (c); 25(1) (2); 26(d); 27(1) (a), (b) and 28 (d) of the **Freedom of Information Act, Chapter 22:02**.

Section 24 (1) (c) states A document is an exempt document if it is a document prepared for the purpose of briefing a Minister of Government in relation to issues to be considered by Cabinet;

25(1) a document is an exempt document if it contains information, the disclosure of which would be likely to prejudice the defence of the Republic of Trinidad and Tobago.

(2) a document is an exempt document if it contains information, the disclosure of which would be likely to prejudice the lawful activities of the security or intelligence service.

26(d) would divulge any information communicated in confidence by or on behalf of an international organisation of State or a body thereof to the Government of the Republic of Trinidad and Tobago or to a person receiving a communication on behalf of that international organisation body.

27(1) (a) and (b) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to:

- a) Would disclose matter in the nature of opinion advice or recommendation prepared by an officer or Minister of Government or consultation or deliberation that has taken place between officers, Minister of Government, or an officer and a Minister Government, in the course of or for the purpose of the deliberative processes involves in the function of a public authority and*
- b) Would be contrary to the public interest.*

28 (a) disclosure methods or procedures for preventing detecting, investigating or dealing with matters arising out of breaches or evasions of the law the disclosure of which would, or would be reasonably likely to prejudice the effectiveness of those methods or procedures.

The Commissioner of Police and the Minister of National Security held talks relative to the use of camouflage uniforms by the Trinidad and Tobago Police Service (TTPS) in their operations. The discussions between parties has been ongoing and it was clearly recognised that this has been the practice by some specialist unit within the Trinidad and Tobago Police Service since their inception.

Continued dialogue and the associated documentation which were, and are being exchanged by the Commissioner of Police and the Minister of National Security contain sensitive information, most of which touch and concern issues of National Security. The dissemination of this would definitely prejudice the security of the Republic of Trinidad and Tobago, when considering the newly implemented and anticipated strategies to reduce crime.

International guidance on this matter has also been sought in order to conform to international standards, whereas research and consultation was conducted in confidence with international states and bodies to the Republic of Trinidad and Tobago and vice versa. This communication would subsequently, form part of the communication between the Commissioner of Police and the Minister of National Security which would cause these documents to fall within the category of exempt documents.

Notwithstanding the aforementioned, access to the documents requested must be deferred because the information requested consists of opinions, recommendations, and other

reflections of staff thinking integral to the pre-decisional, deliberative process and is to be presented to Parliament and/or released to the media.

*Even if one was to argue the application of **Section 35** of the Freedom of Information Act, the public interest would not override the assessment, analysis and decision by this public authority, not to disclose the requested documents. This is premised upon the fact that, the public interest is clearly sought and considered in maintaining a matter which touches and concerns national security, which is ultimately in the public's interest.*

Therefore, the information would rather be for your client's personal knowledge and not the public interest.

In light of the fact that your request has been denied and wish to seek redress you have a right to apply to the High Court for judicial review as soon as possible but no later than three (3) months after this decision is made or you become, or reasonably should have become aware of this decision, in accordance with section 11 of the Judicial Review Act, 2000.

20. I shall make some general observations about the contents above. There is an inconsistency on the face of the Defendant's response which raises what I consider to be an obvious question as to the rationality of the decision. The letter stated:

...the request should be deferred because it consisted of opinions, recommendations, reflections of staff thinking integral to the pre-decisional deliberative process and is to be presented to Parliament and or released to the media. (emphasis mine)

If the Defendant considered a deferral appropriate because as is stated, there was an intention to present information to the Parliament and or the media at the end of a "deliberative process" that was ongoing it seems to me there must have been some recognition that the information was disclosable in the public interest and that all that was required was more time. The Defendant proceeded nevertheless to deny the refusal, unconditionally. The inconsistency has not been explained.

21. Secondly, the tenor of the Defendant's response reflects a lack of appreciation for the fact that the Act creates a right of access to information by every citizen. The reason he or she requires it is immaterial. It is sufficient if he requires it for his personal knowledge. Finally, on the general observations, the Defendant's approach to the making of the decision to deny the request, as can be seen from the refusal response as well as from the affidavit of Mr Chandler was ill-informed by the notion there are blanket exceptions for "matters of National Security", matters pertaining to "law enforcement", and communications between "the top security officials". Mr Chandler went so far as to assert as a basis for the denial of the request, that "the correspondence sought" is not ordinarily discussed or observed by others or "in the public domain". It is precisely because the information is not readily available to in Mr Chandler's words the "ordinary citizens" or the "ordinary public", that Parliament created a right of access subject to well-defined exceptions. It is the whole point of the FOIA. A public authority is not entitled to extend the scope of the statutory exemptions because it is not or has not been the practice to disclose or because it believes it is not in the public interest to do so. The public interest is best served by compliance with the law and by all public authorities facilitating disclosure as is mandated by the Act.

The Specific Exemption Provisions Relied Upon by the Defendant

22. I turn to the specific provisions under the terms of which the Defendant claimed the documents were exempt. The refusal letter identified them as follows:

- 1) Section 24 (1) (c)
- 2) S25 (1) and S25 (2)
- 3) S26 (d)
- 4) S27 (1) (a) and (b)
- 5) S28 (d).

23. Section 24 (1) (c) provides:

*24. (1) A document is an exempt document if it is—
(c) a document prepared for the purpose of briefing a Minister of Government in relation to issues to be considered by Cabinet;*

24. The Defendant failed to consider the express terms of section 24 (4) which provides:

For the purposes of this Act, a certificate signed by the Secretary to Cabinet certifying that a document as described in a request would, if it existed be one of a kind referred to in subsection (1), establishes that, if such a document exists, it is an exempt document.

A public authority is not entitled to claim the exemption under section 24 in the absence of section 24 (4), a certificate of the Secretary to Cabinet. In my opinion, the absence of the required certificate is fatal to the claim of exemption. A mere assertion by a public authority is not sufficient. The clause does not permit the establishment of a claim that a document is exempt by any other means.

25. Section 25 (1) and (2) provide:

25. (1) A document is an exempt document if it contains information, the disclosure of which would be likely to prejudice the defence of the Republic of Trinidad and Tobago.

(2) A document is an exempt document if it contains information, the disclosure of which would be likely to prejudice the lawful activities of the security or intelligence services

The Defendant claimed these exemptions without regard for the provision for certification under section 25 (3) which provides:

(3) For the purposes of this Act, a certificate signed by the Minister to whom responsibility is assigned certifying that a document as described in a request would, if it existed, be one of a kind referred to in subsection (1) or (2), establishes that if such a document exists, it is an exempt document.

The absence of the required certificate here, if these sections were relevant at all, similarly, put this claim to rest.

26. Section 26 (d) provides:

26. A document is an exempt document if disclosure under this Act would be contrary to the public interest and disclosure—

(d) would divulge any information communicated in confidence by or on behalf of an international organisation of States or a body thereof to the Government of the Republic of Trinidad and Tobago or to a person receiving a communication on behalf of that international organisation or body.

The Defendant has failed to demonstrate by evidence how this exemption could possibly apply in the context of the Claimant's application. The appeal to it invites the question as to whether the Defendant gave proper consideration to the request at all.

27. Section 27 (1) (a) and (b) provide:

27. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—

(a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister of Government, or consultation or deliberation that has taken place between officers, Ministers of Government, or an officer and a Minister of Government, in the course of, or for the purpose of, the deliberative processes involved in the functions of a public authority; and

(b) would be contrary to the public interest.

The Defendant failed to state and to properly identify the "public interest considerations" on which the decision is based as required by section 27 (3). Insofar as the purported considerations are concerned, I consider them to be misguided and invalid.

28. The final ground for refusal as contained in the letter was 28 (1) (d) which provides:

28. (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—

(d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

29. In his affidavit in opposition and without any reference to this section, Mr Chandler shifted to reliance on section 28 (c) which provides as follows:

(c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;

30. It is not permissible for an Authority, which relies on a particular exemption to justify its denial at the time it considers a request to simply resort to another section of the Act in the Judicial Review proceedings. Again, it begs the question of the rationality of the original denial and the level of care and seriousness of the approach of the decision-maker to the consideration of the request as well. One would be justified in asking whether the authority applied its mind to the request and to the exemption provisions, or did it simply pick out, randomly, and reproduce them in the response.

31. In his affidavit Mr Chandler sought to avail himself of the new ground and then he went on to say:

The information requested with respect to the use of camouflage “is clearly confidential information in relation to the “enforcement of law” and therefore, it was determined that this was further exempt by this section.

Mr Chandler clearly misconstrued the section as even on the plainest reading section 28 (c) aims to protect persons and their identities. He also failed to demonstrate the relevance of the provision in the context of the specific request. But more fundamentally, he was purporting to extend the scope of the exemptions to matters he deemed “clearly confidential”, and pertaining to “law enforcement”, it seems generally. His refusal for these reasons was illegal.

32. The Claimant at all times raised what appears to be a relevant and legitimate concern as to whether the use of camouflage whether approved by the Minister or not, contravenes section 98 of the Summary Offences Act, Chapter 11:02 which provides:

98. (1) A person not serving in the Trinidad and Tobago Defence Force shall not wear, without the Minister's permission, the uniform of any member of that Force, or any dress having the appearance or bearing any of the regimental or other distinctive marks of any such uniform: This enactment shall not prevent any person from wearing any uniform or dress in the course of a stage play performed in a place duly licensed or authorised for the public performance of stage plays, or in the course of any bona fide military representation.

(2) Any person who contravenes this section is liable to a fine of two hundred dollars.

(3) Any person not serving in the Trinidad and Tobago Defence Force who wears, without the Minister's permission, the uniform of any member of those Forces, or any dress having the appearance or bearing any of the regimental or other distinctive marks of any such uniform, in such a manner or under such circumstances as to be likely to bring contempt upon that uniform, or employs any other person so to wear that uniform or dress, he shall be liable to a fine of four hundred dollars.

33. Further section 219 of the Defence Act, Chapter 14:01 provides:

219. A person, other than a member of the Defence Force, who without lawful excuse (the proof whereof shall lie on him)—

(a) wears the uniform or any portion of the uniforms of a member of the Defence Force; or

(b) wears any costume or any article of clothing or apparel so closely resembling the uniform or any portion thereof of a member of the Defence Force, as may cause such person to be mistaken for a member of the Defence Force,

is liable on summary conviction to a fine of one thousand dollars and to imprisonment for eighteen months.

34. This issue of a breach of the criminal law having been raised, it was incumbent on the Defendant to demonstrate that the provisions of section 28 (2) did not apply to exclude the exemption cited in support of the refusal of request of for items (1) and (2). Section 28 (2) provides:

(2) This section does not apply to any document that is—

(a) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law;

(b) a document revealing the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law;

(c) a document containing any general outline of the structure of any programme adopted by a public authority for investigating breaches of, or enforcing or administering the law;

(d) a report on the degree of success achieved in any programme adopted by a public authority for investigating breaches of, or enforcing or administering the law;

(e) a report prepared in the course of routine law enforcement inspections or investigations by a public authority which has the function of enforcing and regulating compliance with a particular law other than the criminal law;

(f) a report on a law enforcement investigation, where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation, if it is in the public interest that access to the document should be granted under this Act.

35. Section 98 of the Summary Offences Act and section 219 of the Defence Force Act both criminalize the wearing of camouflage or any dress having the appearance of it without the Minister's permission. While the publication of Order 103 of 2019 satisfied item 3 of the requests it did not settle the question of the legality or illegality of the camouflage policy and I wish to emphasize that is not a matter for determination by this Court on this application. I have had to consider it in the context of the availability the applicability of section 28 (2) (b) .The information contained in the documents is clearly relevant to the issue of the legality of the use of camouflage as a method of preventing , detecting, investigating or dealing with matters arising out of breaches or evasions of the law, I have had to consider whether the documents listed at 1 and 2 of the request are capable of falling within the contemplation of the section 28 (2) (b) and I conclude that they do so.

36. Regulation 121 of the Police Service Act is subsidiary legislation made pursuant to section 78 of the Act which empowers the President to make regulations "to give effect to the purpose of the Act", and in particular for Section 78 (1) (j),

the description and issue of arms, ammunition, accoutrements, uniform and necessaries to be supplied to the Police Service;

Section 121 of the regulations provides:

The description of all items of uniform and the orders of dress to be worn by officers shall be as set out in Appendix C and D or as prescribed by the Commissioner with the approval of the Minister and shall be published in the Gazette.

37. This regulation could not have the effect of amending the provisions of the primary legislation, the SOA and the DFA, which expressly require the permission of the Minister to wear such uniforms. As to whether the legal notice promulgated under regulation 121 can be taken to satisfy the requirement for Minister's approval is yet another matter that is not for my determination. It may be of some relevance on that issue that Legal Notice No 52 of 1980 effected amendments to some provisions of the SOA and in particular to the identification and role of some public officers thereunder. There was no change to section 98.
38. For all of the reasons above, I hold that the documents sought by the Claimant are not exempt, and the refusal of the Defendant to disclose was not lawful. In the circumstances, it is not necessary for me to consider the section 35 override. However, if I am wrong, I find that the public interest demands disclosure. In the absence of an amendment to the Summary Offences Act and the Defence Act, the unanswered question as to the legality even of the order permitting the use of camouflage by police demands a ruling for disclosure in the public interest. The circumstances give rise to section 35 (a) considerations of abuse of power or neglect in the performance of official duty as well as obvious questions of unauthorised use of public funds.
39. If the policy to allow the new uniforms encouraged a breach of the criminal law by the Defendant with the approval of the Minister, then the use of public funds to acquire them, could not have been authorised. The provisions which criminalize the wearing of camouflage by persons outside of the Defence Force remain in force. Even when they have been criticized as being anachronistic, Parliament has not sought to repeal them. It is the police who enforce these laws which remain on our statute books. It is in the public interest that information which is relevant to the thinking behind

it and the implementation of, or establishment of a policy, which allows the enforcers to appear to breach the law, should be disclosed.

40. Ours is a democracy in which the lines between the operations of our military defence force and our police force have been long and clearly demarcated. The wearing of camouflage has been the preserve of the army. The Defendant's policy which permits the wearing of camouflage, even of different shades, by police officers, can give the impression, that special units within the Police Service are being "militarised". The desirability of this is doubtful, especially at a time when confidence in the police is low and continues to be eroded as a result of continuous and well documented claims of illegal and or excessive force. The use of camouflage, even of different hues can also lead to confusion in the minds of "ordinary citizens" as to the identity of and scope of the legal authority of persons who may be carrying arms. The faintest possibility of either of these consequences, i.e. the impression that we are militarising our police, even in appearance only, or the lack of certainty as to whether the person carrying a weapon is a police officer, an army officer, or indeed a dangerous armed criminal in camouflage is sufficient to mandate disclosure of items 1 and 2, of the Claimant's request, in the public interest.

CAROL GOBIN

Judge