

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV: 2014-00334

Between

IN THE MATTER OF THE JUDICIAL REVIEW ACT NO. 60 OF 2000

AND

**IN THE MATTER OF AN APPLICATION BY WESCAN TRINIDAD AGENCY FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW PURUSANT TO THE PROVISIONS OF
THE JUDICIAL REVIEW ACT 2000**

AND

**IN THE MATTER OF THE CONTINUING OMISSION, FAILURE BY AND/OR
REFUSAL OF THE NATIONAL INSURANCE PROPERTY DEVELOPMENT
COMPANY LIMITED TO PERFORM ITS STATUTORY DUTY UNDER THE
FREEDOM OF INFORMATION ACT (“FOIA”)**

BETWEEN

WESCAN TRINIDAD AGENCY

Claimant/Applicant

And

THE NATIONAL INSURANCE PROPERTY DEVELOPMENT COMPANY LIMITED

Defendant/Respondent

Before Her Honour Madam Justice Eleanor J. Donaldson-Honeywell

Appearances:

Mr. Vivek Lakhan-Joseph, Attorney at Law for the Claimant

Ms. Dominique Martineau, Attorney at Law for the Defendant

Delivered on 16th November, 2017

Judgment

I. Introduction.

1. The present application is one for judicial review of the Defendant's decision not to disclose certain documents requested by the Claimant under the **Freedom of Information Act, Chap. 22:02** ("FOIA"). The Claimant outlines the undisputed facts in its submissions as follows:
 - a. The Public Transport Service Corporation (the "PTSC") commenced the subject tender process in March 2012 for the supply and delivery of 100 right hand drive, air-conditioned, GPS compatible, CNG powered buses for the PTSC – Phase 1.
 - b. Subsequently, the PTSC engaged the Defendant to assume the responsibility for the procurement process of Phase 1.
 - c. The Defendant conducted its own tender process for this and sent out its RFP in May 2012.
 - d. The Claimant submitted bids on behalf of Higer Bus Company with respect to this RFP and was fully compliant with all of the Defendant's rules and regulations pertaining to same.
 - e. It was always the position of the Defendant that this was in respect to Phase 1 of the project which was for 35 buses.

- f. The position has always been that phase 2 and phase 3 of the project would entail completely different tendering process for which a new RFP would be produced for each. The same bidders were not bound to apply for phases 2 and 3 of the project. Indeed, separate bidders could bid in phases 2 and 3.
- g. The Defendant made it clear by its RFP and at all material times that it would not be bound to choose the successful bidder of phase 1 for the other phases.
- h. A different bidder, Super Industrial Services Limited (SIS) was successful in its bid for Phase 1. The contract was awarded to it in early June 2013.
- i. Subsequent to the completion of the tendering process with respect to Phase 1, and being aggrieved thereby, requests for information were sought by the Claimant relative to this process. This is reflected by the Claimant's substantive FOIA application and the pre-action protocol which has been sent by the Claimant's former attorney.
- j. The said 17th August 2013 FOIA application by the Claimant requested:

*“All information/documentation produced/involved in the recommendation/awarding of the tender known as:
“Supply and Delivery of 100 right hand drive, air condition, GPS compatible, CNG Powered buses for Ministry of Transport Phase 1” to SIS Company”*
- k. The information and/or material and/or documentation requested was specific to SIS being the bidder which was successfully awarded the said contract.
- l. There was an express refusal by the Defendant as contained in its 4th September 2013 letter which detailed the history of the tender and the scores for the Higer Bus company for whom who the Claimant acted. The Defendant provided the Claimant with the list of proponents who submitted bids, the composition of the evaluation committee and the breakdown of the Claimant's scores in the scoring categories as well as its ranking in the evaluation. In the September 4 FOIA response letter the Defendant also placed blanket reliance on s.31 of the FOIA by stating briefly that the material requested was exempt.
- m. Pre-action protocol letter from the Claimant's then attorney-at-law, highlighted that the Defendant:

- i. Had failed to list the documents in its possession with respect to the said tender;
 - ii. Failed to particularise which of the documents in its opinion were exempt by virtue of Section 31 FOIA; and
 - iii. Called upon the Defendant to provide the Claimant with a list of all documentation in its possession with respect to the said tender and to specify which of those documents in its opinion fell under the ambit of the said Section 31.
 - n. The Defendant by letter dated 12th November 2013 provided a response thereto and stated that in assessing whether to disclose the requested information it considered – Section 31(a) of the Act and fully recited the said section.
2. Thereafter, the Claimant applied for leave to apply for judicial review with an affidavit of Inge Lalchan in support on 28 January, 2014.
3. The Defendant filed the affidavit of Davendra Ramdhan in response on 25 February, 2014. The Claimant in turn filed a supplemental affidavit of Inge Lalchan on 14 March, 2014 in reply.
4. On 14 June 2017 leave was granted to the Claimant to seek judicial review. The Claimant's claim form sought the following reliefs:
 - a. An order extending the time for making the application for leave to apply for judicial review to the date of the granting of the leave;
 - b. A declaration that the Applicant is entitled to the information set out in its application made under the provisions of the Freedom of Information Act ("FOIA") dated 17th August 2013.
 - c. A declaration that the omission and/or continuing failure and/or refusal of the Respondent to provide the information requested by the Applicant in its said FOIA application is unreasonable, irregular and/or an improper exercise of discretion and further amounts to an abuse of power.

- d. A declaration that the omission and/or continuing failure and/or refusal of the Respondent to provide a list of all documentation in its possession, pertaining to the information sought in the said FOIA application and in the 15th October 2013 letter from the Applicant's attorney-at-law, is unreasonable, irregular and/or an improper exercise of discretion and further amounts to an abuse of power.
- e. An order of mandamus to compel the Respondent to provide the Applicant with the requested information as set out in the said FOIA application.
- f. Costs.
- g. Pursuant to Section 8 of the **Judicial Review Act, Chap. 7:08** such further orders, directions or writs as the Court considers just and as the circumstances warrant.

II. Issues

5. The issues arising in the present case are whether:
 - a. The documents requested by the Claimant should be exempted from disclosure pursuant to S.31 (a)
 - b. The Defendant has provided sufficient reasons for considering the documents requested exempt under S.31 FOIA
 - c. The documents requested by the Claimant should be exempted from disclosure pursuant to S 33(1)(d) and.
 - d. Whether the Defendant should be required to produce a list of documents in its possession relative to the information sought

III. Law and Analysis

6. **S.31** provides as follows:

“A document is an exempt document if its disclosure under this Act would disclose information acquired by a public authority from a business, commercial or financial secrets, undertaking, and—

- (a) *the information relates to trade secrets or other matters of a business, commercial or financial nature”*

7. The Claimant submits that the Defendant has not provided sufficient reasons for considering the documents requested exempt under S.31 and is therefore in breach of its statutory duty. Citing **Caribbean Information Access Limited v The Honourable Minister of National Security CA 170/2008** the Claimant submits that where a claim of exemption is relied upon, the Defendant must satisfy a court of the reasonableness of that claim. The Court in that case considered that there was no presumption in favour of exemption from disclosure, particularly in light of the statutory right to access and the mandate to disclose even exempt documents where it is in the public interest to do so. The sufficiency of reasons provided, as explained in that decision, would be determined by the circumstances and context which surround the particular request made and exemptions claimed.
8. In the present case the Defendant has not outlined any reasons for its consideration that provision of the documents would be against the commercial interests of the bidders in its initial response to the Claimant's request. The Defendant has, however, made submissions on these reasons in the present case.

Defendant's reasons for non-disclosure given to the Court

9. Firstly, the Defendant relies on section 31(a) as the basis for the decision in its response letter to the Claimant on 4 September, 2013. The request by the Claimant was for all information/documentation produced/involved in the recommendation/awarding of the tender. It is clear that the tender process would have included all documents submitted by each bidder pursuant to the RFP form as well as the evaluation and ranking of these bidders by the Defendant itself. The Defendant has not specifically identified any particulars which if disclosed would be adverse to the commercial interests of the bidders but has stated that all documents submitted would fall under this category.
10. Among the documents that would have been included by each bidder, there are certain documents which can be reasonably expected to be of a sensitive and confidential nature. This may include documents concerning litigation, recently audited financial statement, information on bankruptcy and other banking information. This is less patent in regard to

the other documents involved in the bidding process which include training services offered, experience of the company and basic details of the firms. Further, the Defendant has not supplied any specific justification as to why releasing its own evaluations and rankings would be prejudicial to the commercial interests of the bidders.

11. The UK equivalent of S.31 lies in its **S.43 Freedom of Information Act 2000**:

“(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

12. Disputes involving the UK FOIA are heard before the Information Tribunal and although these decisions have little persuasive authority on a decision of this court, it is useful to examine the reasoning applied in decisions of the tribunal involving similar facts. One such decision is that of **Fred Keene v the Information Commissioner & The Central Office of Information EA/2008/0097**. This was an appeal against a decision of the Information Commissioner (“IC”) not to disclose evaluation documents relating to the selection by the Central Office of Information (“COI”) of reprographic suppliers following a tender exercise.

13. The IC’s decision was based upon S.43. The decision is instructive as it examines the type of evidence that would assist in proving that documents should be considered exempt. Firstly, the disputed information was in fact provided to the Tribunal but kept confidential to the Appellant in order for the Tribunal to make a fully informed decision. Secondly, there was evidence given by two witnesses for the Respondent on the reasons for considering the information exempt.

14. The first witness was a Deputy Director at COI and he stated that *“the Disputed Information contains markings, comments and notes showing the views of COI in relation to key aspects of the applicants’ business and contains commercially sensitive information. Given the importance and credibility of COI in relation to tendering for the kinds of*

services in question, release of the Disputed Information would adversely affect the reputation of those applicants where COI reached negative conclusions. In turn, this is likely to adversely affect the amount of information some companies tendering for business would be willing to supply to COI in the future.”

15. The second witness was a Director of Consultancy & Best Practice of the Incorporated Society of British Advertisers who represented the interests of the Society’s members. She gave evidence on the possible repercussions of such disclosure on these members and their future reluctance to provide such information.

16. It is also quite telling that even in the face of such evidence the Tribunal found that even this evidence was insufficient to prove potential commercial prejudice. The tribunal considered that the most pertinent evidence would have been evidence directly from the businesses which had submitted tenders. The tribunal therefore embarked on its own consideration of the disputed information and concluded that the evaluation forms contained mostly factual expressions based upon the information received from the bidders.

17. The relevance of this U.K. approach is useful for consideration in the Trinidad and Tobago context as it is mandated by **S.31(3)** of the FOIA that the views of the company regarding disclosure be sought:

“Prior to making a determination under subsection (1) as to whether the disclosure of information would expose an undertaking to disadvantage, a public authority shall notify the undertaking which has supplied the relevant document or documents that the public authority has received a request for access to the document and shall—

(a) seek the undertaking’s view as to whether disclosure should occur; and

(b) notify the undertaking where the public authority after consultation has decided to disclose the document and in such a case notify the undertaking of the right to apply to the High Court for judicial review of the decision and the time within which the application for review is required to be made.”

18. In the present case there is no indication whether views of other bidders were taken into account by the Defendant in deciding not to release the information. There is also no evidence from the bidders themselves before the Court concerning any commercial prejudice. Further as seen from the evaluation form submitted to the Claimant of his own scores, such information is in the form of number scores and rankings. There is no evidence that this scoring would be prejudicial to the commercial interests of the companies bidding as they should be based upon an objective evaluation of the company's own submitted documents. There does not appear to be any risk of new bidders having a competitive advantage over the initial bidders as the documents to be submitted should be authentic and verifiable. The Defendant has not provided any specific explanation as to how "tailoring their bids" could occur.
19. On a balance of probabilities, due to the sparseness of the evidence in the present case, the Defendant has only succeeded in proving that the commercial interests of the bidders may be prejudiced by the disclosure of documents relating to litigation, recently audited financial statement, information on bankruptcy and other banking information. However, it has not succeeded in proving such prejudice in relation to the other documents involved in the bidding process which includes training services offered, experience of the company and basic details of the firms as well as its own evaluations and rankings.
20. The Second reason for its decision given to the Court by the Defendant in affidavits and submissions is the contention that the Claimant's request was made in the context of a three-phase tender and only phase 1 had been completed. It submits that the current review should be considered in the context of the time at which the decision was made. The Defendant submits that contracts are still to be awarded for the supply and delivery of buses for the outstanding phases and as a result, disclosure of information required would be highly prejudicial to the other proponents who submitted proposals for phase 1. The Defendant submits that sufficient nexus between the phases had been established by the evidence despite the Claimant's contention that the next stages involved separate desired requirements.

21. The Defendant submits at [27] of its submissions that new potential bidders will have a competitive advantage over the initial bidders as they will have the advantage of seeing the bidders' shortcomings and amending/tailoring their bids to undercut the competition.
22. The same scarcity of evidence of prejudice in relation to the documents other than those relating to litigation, recently audited financial statements, information on bankruptcy and other banking information leads to the conclusion that the second and third phases of the tendering process would not be affected by disclosure.
23. Further, the Claimant points out in its reply submissions that this argument is artificial and tenuous given the length of time that has passed since the first phase ended and the paucity of evidence that any progress or action or advancement towards Phase 2 has begun.
24. Thirdly, the Defendant in submissions to the Court now submits that the requested information is also exempt under **S.33(1)(d)** which states:
- “A document is an exempt document if – subject to subsection (4), it contains information obtained by a public authority from a third party who has consistently treated it as confidential and the disclosure of that information to a competitor of a third party, would be likely to prejudice the lawful commercial or professional activities of the third party”*
25. The Defendant cites the decisions of **Ramjitsingh (T/A Shambrin’s general Contractors) v Estate Management and Business Development Company Limited CV2014-01458** and **Samlalsingh v Ministry of Planning, Housing and the Environment CV2009-03711** in this regard. However, as pointed out by the Claimant, this is a totally novel submission and not the basis of the decision cited in the Defendant’s correspondence to the Claimant denying the FOIA request. In any event, such consistent treatment of the information as confidential has not been borne out by evidence in this case. This is, therefore, not a factor to be considered in reviewing the decision given by the Defendant.

26. Furthermore, even if it had been relied on by the Defendant in making its decision (which has not been proven), the section only covers documents containing “information obtained by a public authority from a third party”. This therefore would not cover material created by the Defendant such as the detailed scoring breakdown.
27. Fourthly, the Defendant now submits that the public interest in accountability of government agencies for the decisions that they make does not outweigh the public interest in refusing access to the requested information. They make this submission based upon the existence of a public interest in maintaining the confidentiality of sensitive commercial and business information about third parties in the hands of government – **Maddock, Lonie & Chisholm v Department of State Services [1995] WAICmr (2 June 1995)** as well as in protecting an undertaking’s commercial information from its competitors, the disclosure of which would likely be used by its competitors to gain a competitive advantage – **Diehm v Greater Taree City Council [2010] NSWADT 241**.
28. The **Diehm** case was cited by the Claimant as an authority for the proposition that a report which contained evaluations of competitive tenders would, if disclosed, have an adverse effect on the business and commercial affairs of the Council and others and could prejudice the future supply of such information to the Council. It does appear, however, from the wording of the conclusion that the tender process in that case was not yet concluded. At [75] it states:
- “Mr Diehm said that **he was not seeking information on successful tenders nor pricing schedules from either successful tenders or unsuccessful tenders for a Regional Waste Management Contract. This is precisely what the Waste report discusses. I accept that, as such, it contains matters which, if disclosed, would disclose information relating to the business, commercial and financial affairs of Council and others, and could reasonably be expected to have an unreasonable adverse effect on those affairs or to prejudice the future supply of such information to Council. This is so as the tender process was expressed to be confidential. To now release a comparative analysis of the tenders, given the closeness in time of***

the tender process, could have adverse commercial consequences on those involved and prejudice future participation in confidential tenders to Council.”

29. However, there is little information in the judgment on what exactly the report contained apart from a discussion and evaluation of competitive tenders. Such a discussion as contained in the Report would likely be much more detailed than the scoring of the Defendant in the present case and the information therein has not been examined in enough detail to provide an accurate comparison to the present case.
30. The Defendant further submits under this head that the disclosure of the requested information that went into the recommending/awarding of the tender would likely prejudice its own commercial interests by adversely affecting its bargaining position during future contractual negotiations of similar tenders.
31. The official UK Guidance documents published by the ICO provides a useful guide to their FOIA. These documents provide authoritative guidance on the interpretation of their FOIA. Although our jurisdiction has not produced similar guidelines, the UK documents are a helpful aide to interpretation of similar sections.
32. In considering the public interest test to be applied in public procurement cases, the **Awareness Guidance on Commercial Interests (section 43) 20170810 Version 1.0** at pg. 14 provides a summary of the arguments both in favour of and against disclosure. The following represent some cogent points in favour of disclosure that are highly relevant in the present case:
 - a. *“Openness and transparency – Public authorities should bear in mind the strong case for openness and transparency in their affairs when balancing public interest arguments” - **Hugh Mills v Information Commissioner EA/2013/0263**.*
 - b. *“Accountability for the spending of public money – disclosure of commercial information can make public authorities more accountable for how they spend public money. This argument is applicable to both purchasing of goods or services and awarding grants to private sector companies. If people have a better*

understanding of how public money is spent, this may give them more confidence in the integrity of the public authority and in its ability to effectively allocate public funds. Alternatively, it may enable them to make more informed challenges to the spending of public money by public authorities.

- c. *Promoting competition in procurement via transparency – there is a public interest in encouraging competition for public sector contracts. Greater transparency about the tendering process and the negotiation of public sector contracts may encourage companies to take part in the process and help them improve their bids. This will increase competition and therefore help public authorities to get value for money. Transparency of tender information is therefore beneficial to the whole process and should not deter contractors from making bids for public authority contracts, particularly as the value of these contracts also provides a clear incentive to tender for the work.”*

33. In the **Hugh Mills** decision, the Tribunal found that disclosure about a tender process would be likely to prejudice a Healthcare Trust’s commercial interests and then went on to consider the public interest balance. It outlined the following factors in favour of disclosure:

- a. It would inform the public of the activities carried out on their behalf, allowing for more user involvement and collaborative decision making.
- b. It would enable the public to better scrutinise the public monies spent.
- c. It would ensure the tender process was open and transparent.
- d. It would show that the calculation of the ceiling rate followed a transparent and fair process.
- e. It would help to ensure clarity around fairness, equity, value for money and quality of care in the overall tender process.
- f. Disclosure of the disputed information to potential bidders would lead to better value for money for the Trust.

34. The Tribunal finally found that public interest balance favoured disclosure. The factors in favour of maintaining the exemption “*should be given less weight than those in favour of*

disclosure particularly because no individual confidential information of existing suppliers is being requested.”.

35. The Guidance considerations against disclosure relevant to the present case were similar to those outlined by the Defendant:

- a. *“Competition – there is a public interest in allowing public authorities to withhold information which if disclosed, would reduce its ability to negotiate or compete in a commercial environment.*
- b. *Reputational damage/loss of customer confidence – disclosure of information may cause unwarranted reputational damage to a public authority or another organisation whose information it holds, which may in turn damage its commercial interests through loss of trade.*
- c. *Impact on other negotiations – revealing information such as a pricing mechanism can, for example, be detrimental to a public authority’s negotiations on other contracts and procurements. If an organisation knows how a public authority costs an item or service for example, then it can exploit this for profit or other gain.”*

36. In the instant case the public interest lies in favour of disclosure of the documents relating to the tender other than financial statements, documents relating to litigation, information on bankruptcy and other banking information on the bidders. Disclosure of the latter would expose highly confidential information of the companies as well as create mistrust in the Defendant authorities in the tendering process. As regards the other documents, however, the Defendant has failed to show that the public interest lies in protecting the evaluation scores so that to disclose them will not uphold the public interest in accountability and transparency in public procurement. As a result, these documents should be produced to the Claimant under the FOIA and should not be considered exempted by virtue of S.31(a).

37. The final submission of the Defendant relates to the Claimant’s request for a list of documents that it considers exempt and the reasons for such consideration. The Defendant argues firstly that the Claimant is already aware of the documentation involved as it is set out in the RFP. They secondly submit that there is no duty to provide such a list aside from

the duty of candour. They cite the decision of **Keirnan v Commissioner of Police of New South Wales Police [2007] NSWADT 18** as authority for the proposition that an applicant under the FOIA was only entitled to apply for a document already in existence and the Act did not require a public authority to create a new document, such the list requested by the Claimant in this case.

38. In the present case, the Claimant is not just requesting a list under the FOIA. Rather, the Claimant is expressing dissatisfaction with the Respondent's dismissal of its application without giving proper and detailed reasons for its refusal. Such reasons should reasonably include a list so as to properly explain what is not being disclosed and the reasons why not. It is difficult to see how else a proper explanation could be given. The Claimant rightly argues that a public authority cannot merely cite an exemption without detailing the reasons why the documents in its possession satisfy the requirements of that exemption.

39. In the present case, it is patent that the Defendant has not sufficiently addressed the application of the Claimant. This is clear from the Defendant's attempts to introduce new exemptions for consideration in its submissions as well as from the lack of reasons provided up to this stage for refusal to disclose any specific documents aside from financial statements.

IV. Decision

40. It is apparent that the Defendant has not sufficiently proven that all the requested documents should be considered exempt under S.31(a) of the FOIA. This is mainly due to a paucity of evidence on the potential prejudicial effect of their disclosure on third parties. There is no evidence that S.31(3) of the FOIA was complied with in order to obtain the views of the affected parties.

41. The Defendant's failure to provide full and detailed reasons for its decision in respect of all the documents it possessed forced the court to embark upon consideration of these issues without the benefit of the full contents of the documents. However, what has been submitted to the Claimant in respect of its own evaluation provides a sufficient sample of

what is contained in the evaluations of each bidder. There does not appear to be any prejudicial effect of disclosure of this information in relation to the other bidders which would outweigh the public interests in accountability and transparency in public procurement processes. The Claimant is therefore entitled to these documents.

42. Similarly, there has not been sufficient reasons put forward for the non-disclosure of other documents relating to the businesses of the tenderers aside from the documents relating to litigation, recently audited financial statements, information on bankruptcy and other banking information. However, due to the lack of evidence of the specific contents of these other documents as well as lack of evidence from potentially interested parties this decision must be quashed and remitted to the Defendant for reconsideration.

43. In light of the above considerations, I conclude that the Claimant has succeeded in proving that the Defendant's decision not to disclose the evaluation scores and rankings of the other bidders was unreasonable, irregular and/or an improper exercise of discretion. The Claimant is therefore entitled to receive these documents.

V. Order

44 It is hereby declared THAT:

- a. The omission and/or continuing failure and/or refusal of the Defendant to provide the information requested by the Claimant in its said FOIA application aside from the documents relating to litigation, recently audited financial statements, information on bankruptcy and other banking information is unreasonable, irregular and/or an improper exercise of discretion and further amounts to an abuse of power and
- b. The Claimant is entitled to the evaluation scores and rankings of the other bidders in the Defendant's possession.

45. The decision of the Defendant not to disclose the remaining documents requested under the FOIA application dated 17th August 2013 is quashed and remitted to the Defendant for reconsideration.

46. The Defendant is to pay the Claimant's costs of the Claim.

Delivered on November 16, 2017

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Eleanor Joye Donaldson-Honeywell
Judge.

Assisted by: Christie Borely JRC I