

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2016-04139**

**BETWEEN**

**CARLTON DENNIE**

**CLAIMANT**

**AND**

**THE MINISTER OF NATIONAL SECURITY**

**DEFENDANT**

**Before the Honourable Madame Justice Margaret Y. Mohammed**

**Dated the 16<sup>th</sup> April, 2018**

**APPEARANCES:**

Mr. Anand Ramlogan S.C., Jayanti Lutchmedial and Mr. Douglas Bayley Attorneys at law for the Claimant.

Mr. Douglas Mendes S.C. and Mrs. Zelica Haynes-Soo-Hon instructed by Ms. Crystal Madhosingh and Mr. Vincent Jardine Attorneys at law for the Defendant.

**JUDGMENT**

1. The Claimant was a former employee of the Strategic Services Agency (“the SSA”). He was employed with the SSA for nineteen (19) years until his employment from his last post of Director, Intelligence was terminated with immediate effect on the 14<sup>th</sup> December 2015. When the Claimant initiated the instant proceedings the Cabinet of Trinidad and Tobago

(“the Cabinet”) was joined as the Second Defendant. After the affidavit was filed on behalf of the Cabinet by Ms. Lucy Rodriguez (“the Rodriguez Affidavit”), the Claimant amended his claim whereby he deleted the Cabinet and instead included the SSA as a new Defendant. On the 22<sup>nd</sup> June 2017 the Court struck out the SSA as a Defendant. The matter only proceeded against the Defendant (“the Minister”).

2. In the Claimant’s amended Fixed Date Claim he seeks the following reliefs:

“1. A declaration that the directive and/or decision of the Minister of National Security contained in letter dated the 13<sup>th</sup> day of November 2015 “to hand over duties and all associated responsibilities” (sic) of the Director of the Strategic Services Agency to Mr. Matthew Andrews, Director of Criminal Intelligence is illegal and ultra vires.

2. A declaration that the Defendants breached their statutory duty under Section 15 of the Freedom of Information Act (FOIA) to take reasonable steps to enable the Claimant to be notified of the approval or refusal as soon as practicable but in any case not later than thirty (30) days after the day on which the request is duly made.

3. An order of certiorari to remove into this Honourable Court and quash the decision of the Strategic Services Agency as contained in its memorandum dated 23<sup>rd</sup> February 2017 to deny access to the information requested by the Claimant in his FOIA application.

4. A declaration that the Claimant is entitled to access the requested information pursuant to his applications both dated 22<sup>nd</sup> September 2015 under the FOIA.

5. An order of mandamus directing the Strategic Services Agency to provide the requested information within seven days;

6 Costs;

7. Such further or other directions or writs as the Court considers just and as the circumstances of the case warrant pursuant to section 8(1)(d) of the Judicial Review Act Chapter 7:08.”

3. With respect to the relief sought at Item 2 in the Amended Fixed Date Claim, I understood this to be only against the Minister since the action was only continued against him.

4. The facts which gave rise to the instant action as set out in the affidavits of the Claimant filed on the 16<sup>th</sup> November 2016 and 5<sup>th</sup> May 2017 were as follows. According to the Claimant by letter dated 13<sup>th</sup> November 2015, the Minister informed the former Director of the SSA, Mr. Bisnath Maharaj, that his instrument of Appointment as Director of the SSA had been revoked by the President, with effect from the 13<sup>th</sup> November 2015 pursuant to section 4(1) of the **Strategic Services Agency Act**<sup>1</sup> (“the SSA Act”).
5. Mr. Andrews issued a memorandum dated the 19<sup>th</sup> November 2015 to all members of staff of the SSA as “Interim Director of the SSA” and again by memorandum dated the 26<sup>th</sup> November 2015, Mr. Andrews issued another directive to all members of staff in his capacity as “Interim Director.”
6. The Claimant emailed Mr. Andrews on the 3<sup>rd</sup> December 2015 to enquire as to his functions and on what basis of authority he had been appointed as the “Interim Director”. The Claimant informed him that unless such authority was provided he was left with no option but to follow the instructions of the “duly appointed Deputy Directors” who in the organizational structure of the SSA were his immediate supervisors.
7. In response to the Claimant’s email, Mr. Andrews summoned the Claimant to a meeting where the Claimant was told that his email was an act of gross insubordination. The Claimant explained that the intention of his email was not to be insubordinate but he was concerned since the Director of the SSA had to be appointed by the President and until and unless such an appointment was made, anyone purporting to exercise such power could be acting illegally with serious legal consequences.
8. Mr. Andrews did not produce any instrument of appointment to the Claimant to indicate that he had been appointed to the position of Director of the SSA despite the Claimant’s repeated requests. The Claimant was terminated shortly after the meeting with Mr. Andrews, by letter dated the 14<sup>th</sup> December 2015 from the Ministry of National Security,

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<sup>1</sup> Chapter 15:06

signed by the Director of the SSA. The Claimant's termination of employment is the subject of other proceedings in the High Court.

9. Subsequent to his termination, on the 11<sup>th</sup> May 2016, the Claimant applied to the Minister for information under the **Freedom of Information Act**<sup>2</sup> ("the FOIA") seeking access to the following information: "*Copies of all instruments of appointment and revocation of Directors of the SSA appointed pursuant to Section 4 of the SSA Act, Chapter 15:06 from the year 2009 to present*" ("the First FOIA Application"). The Claimant received a letter dated 13<sup>th</sup> September 2016 from the Minister which contained the information requested in the First FOIA Application. It revealed that Mr. Andrews was not appointed as the Director of the SSA until the 27<sup>th</sup> November 2015.
  
10. The Claimant then requested from the Minister by FOIA application dated 22<sup>nd</sup> September 2016 ("the Second FOIA Application") the following information:
  - i. *Copies of any Instruments of any acting appointments to the post of Director of the SSA from November 1<sup>st</sup> 2015 to January 31<sup>st</sup> 2016;*
  - ii. *Copies of any letters and/or correspondence signed by Mr. Andrews during the period 13<sup>th</sup>-26<sup>th</sup> November 2015 for and on behalf of and or within the SSA with any confidential and/or exempt information deleted showing clearly the capacity which Mr. Andrews signed those letters;*
  - iii. *The name of the officer who was in charge of the SSA during the period 13<sup>th</sup> – 26<sup>th</sup> November 2015, his job title during this time and a copy of his letter of appointment or other document which authorized him to act or operate in such a capacity;*
  - iv. *A copy of any letter(s) of appointment for Mr. Matthew Andrews to assume the position of "Interim Director" during the period 13<sup>th</sup> November 2015 – 27<sup>th</sup> November 2015;*
  - v. *The number of interceptions of private communications authorised or continued in accordance with the provisions of the Interception of Private Communications Act during the period 13<sup>th</sup> – 26<sup>th</sup> November 2015.*

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<sup>2</sup> Chapter 22:02

vi. *The number of intercepts which were undertaken and authorized by the SSA ( as opposed to the Chief of Defence Staff or the Commissioner of the Police) during the period 13<sup>th</sup> November 2015 to the 31<sup>st</sup> January 2016.*

11. At the same time the Claimant requested from the Cabinet by a FOIA application dated 22<sup>nd</sup> September 2016 (“the FOIA Application to Cabinet”), the following information:  
*“Copies on any cabinet notes and/or decision in relation to the appointment of Mr. Matthew Andrews to the post of “Interim Director” of the SSA during the period 13<sup>th</sup> November 2015- 26<sup>th</sup> November 2015”.*
12. The Claimant also instructed his attorneys to issue a Pre-Action protocol letter dated the 22<sup>nd</sup> September 2016, to the Minister and the Cabinet notifying them of his intentions to apply for judicial review proceedings to challenge the decision of the Ministry and the Cabinet to appoint Mr. Andrews as “Interim Director”. There was no response to the Pre-Action protocol letter.
13. The Minister responded to the Second FOIA Application by letter dated the 6<sup>th</sup> October 2016 and the Cabinet responded by letter dated 10<sup>th</sup> October 2016 acknowledging receipt of the FOIA Application to Cabinet and stated that the matter was receiving attention.
14. The Claimant’s Attorney-at-Law by letter dated 25<sup>th</sup> October 2016, wrote a letter to the Minister and the Cabinet seeking clarification of the appointment of Mr. Andrews.
15. The Minister did not substantively respond to the Second FOIA Application notwithstanding the expiration of the thirty (30) day time period to do so.
16. Subsequent to the initiation of the instant action, the Claimant filed a supplemental affidavit on the 5<sup>th</sup> May 2017 wherein he deposed that the Minister had refused to disclose the information requested at items number 2, 5 and 6 of the Second FOIA Application; at the time the claim was filed no access decision was communicated to him by the Minister; and he was unable to obtain a copy of the annual report from the SSA since it is unavailable

online nor is it available to the public. However, he saw a headline in the Trinidad and Tobago Express Newspaper dated 2<sup>nd</sup> May 2017 which read “Thousands of calls intercepted by the SSA” for the period January 2015 to December 2015. Based on this headline, he formed the opinion that the number of interceptions was disclosed in the annual report. When Mr. Andrews assumed duties as “Interim Director” he functioned as the de facto Director of the SSA and performed all the duties and responsibilities of the Director of the SSA.

17. The response from the Cabinet was provided in the Rodriguez Affidavit which stated that the FOIA Application to Cabinet was not addressed to the Cabinet but it was addressed to and received by the Office of the Permanent Secretary, Office of the Prime Minister. In response to the FOIA Application to Cabinet, Ms. Rodriguez advised Counsel for the Claimant, by letter dated 6<sup>th</sup> October 2016, that the matter was receiving attention. She sought legal advice from the Office of the Solicitor General after which a letter dated 13<sup>th</sup> December 2016 was sent to the Claimant. Ms. Rodriguez advised the Claimant that the Cabinet Secretariat did not have in its possession a Cabinet Note or Minute pertaining to the appointment of Mr. Matthew Andrews as “Interim Director” of the SSA.
18. Ms. Rodriguez also deposed that she was unable to provide a substantive response to the FOIA Application to Cabinet within thirty (30) days since legal advice had to be sought from the Office of the Solicitor General which had to in turn be received and considered before a response could have been drafted. However, the Claimant was aware that a response was forthcoming.
19. Ms. Rodriguez confirmed that: By Cabinet Minute No. 218 (2<sup>nd</sup> Session) dated 5<sup>th</sup> November 2015, the Cabinet agreed to the revocation of the appointment of Mr. Maharaj as Director of the SSA, with effect from 11<sup>th</sup> November 2015. By Cabinet Minute No. 360 (2<sup>nd</sup> Session) dated 26<sup>th</sup> November 2015, Cabinet agreed to the appointment of Matthew Andrews as Director of the SSA with effect from the date of his Instrument of Appointment until 6<sup>th</sup> January 2016. During the period 11<sup>th</sup>-24<sup>th</sup> November 2015, no further submissions

were made to Cabinet regarding the appointment of any person to the post of Director of the SSA.

20. She deposed that the Cabinet Secretary never received any pre-action protocol letter dated 22<sup>nd</sup> September 2016 from the Claimant and that the Office of the Prime Minister never received a letter dated 25<sup>th</sup> October 2016 from the Claimant.
21. Subsequent to the filing of the Rodriguez Affidavit, the Claimant discontinued his claim against the Cabinet.
22. The Minister's response to the Claimant's allegations was set out in the affidavit of Roger Gilkes, Research Officer II of the Ministry of National Security filed on the 3<sup>rd</sup> March 2017 ("the Gilkes Affidavit"). The main points in the Gilkes Affidavit can be summarized as follows. The SSA Act does not make provision for the appointment of an "Interim Director" and there was no decision by the President, Minister or any official of the Ministry of National Security to appoint any person to any post referred to as "the Interim Director".
23. In relation to the Instruments of Appointment of Mr. Andrews, the relevant Cabinet Note in support of the appointment indicated that the Director of Criminal Intelligence took administrative control of the SSA but an appointed Director was required to execute the operational mandate of the SSA. As a consequence, there was a recommendation to appoint Mr. Andrews as the Director until the 6<sup>th</sup> January 2016, by which time it was expected that the process of selecting a new Director would have been completed.
24. The Gilkes Affidavit also stated that by letter dated the 18<sup>th</sup> October 2016, the Director of the SSA indicated that the Second FOIA Application was not made to the relevant public authority in accordance with section 13 of the FOIA. On the 8<sup>th</sup> November 2016, the Permanent Secretary in the Ministry of National Security indicated to the SSA that it had a responsibility to provide the information requested by the Claimant. The Permanent Secretary insisted that if the information was not provided, the Ministry could be held

liable. However, Mr. Randall Hector, Legal Officer attached to the SSA, maintained that the request ought to have been sent to the SSA, and not the Ministry since the SSA was not a department of the Ministry of National Security, but was instead a statutory body, the responsibility for which is assigned to the Minister. This unresolved debate about whether the Second FOIA Application ought to have been directed to the Minister or the SSA led to a letter being sent to the Director of the SSA by the Ministry on the 25<sup>th</sup> November 2016 enquiring as to whether the SSA was in a position to provide the requested information and if the SSA was of the view that the information ought not to be disclosed, the reason should be provided in writing.

25. The Claimant was informed by letter dated the 25<sup>th</sup> November 2016, that the Second FOIA Application was still engaging the attention of the Ministry. There was no direct response from the Director of the SSA to the letter from the Ministry.
26. However, by memorandum dated the 23<sup>rd</sup> February 2017 from the SSA to the Office of the Chief State Solicitor's Office, the SSA stated that: Mr. Andrews was already appointed Director when he issued the Claimant's termination letter; the Second FOIA Application was made to the incorrect public authority and if it was made to the SSA it would rely on certain exemptions for not providing the information. (The contents of this memorandum would be addressed in greater detail later in this judgment.)
27. Based on the reliefs sought in the Amended Fixed Date Claim the issues which arise for determination are:
  - (a) Was the Minister's directive and/or decision contained in the letter dated 13<sup>th</sup> November 2015 "to hand over duties and all associated responsibilities" (sic) of the Director of the Strategic Services Agency to Mr. Matthew Andrews, Director of Criminal Intelligence illegal and ultra vires?;
  - (b) Did the Minister breach his statutory duty under Section 15 of the FOIA to take reasonable steps to enable the Claimant to be notified of the approval or refusal as soon as practicable but in any case not later than thirty (30) days after the day on which the request is duly made?



- (c) Can the Court quash the decision of the SSA to deny the Claimant access to the information requested in the Second FOIA Application?
- (d) Is the Claimant entitled to access the information requested in the Second FOIA Application?

**Was the Minister's directive and or decision contained in the letter dated 13<sup>th</sup> November 2015 "to hand over duties and all associated responsibilities" (sic) of the Director of the SSA to Mr. Andrews, Director of Criminal Intelligence illegal and ultra vires?**

28. It was not in dispute that Mr. Maharaj's appointment as Director of the SSA was revoked by Instrument of Revocation dated the 11<sup>th</sup> November 2015 and he was so informed by the Minister by letter dated the 13<sup>th</sup> November 2015. The Minister admitted that by letter dated the 13<sup>th</sup> November 2015 he directed the then SSA Director, Mr. Maharaj, to "hand over duties and all associate responsibilities" of the Director of the SSA to Mr. Andrews, Director of Criminal Intelligence of the SSA. It was also not in dispute that subsequent to the Minister's letter dated the 13<sup>th</sup> November 2015, Mr. Andrews issued two memoranda dated the 19<sup>th</sup> and the 26<sup>th</sup> November 2015 referring to himself as the "Interim Director" and that there is no such position under the SSA Act. The Minister confirmed that there was no decision of the President, the Minister or any official of the Ministry of National Security to appoint any person to any post referred to as "Interim Director" and that the President appointed Mr. Andrews as the Director of the SSA from the 27<sup>th</sup> November 2015 to 6<sup>th</sup> January 2016.
29. According to paragraphs 3, 4 and 5 of the Cabinet Note dated the 25<sup>th</sup> November 2015 which was annexed as "RG 3" to the Gilkes affidavit:
- "3. According to Section 3(2) of the Act, the functions of the Agency shall be exercised by the Director, following consultation with the Minister, and Section 3(4) provides for the Director to be responsible for the operational, investigative

and administrative control of the Agency and to be the Principal Adviser to the Ministry of National Security on all matters relating to the Act.

4. Cabinet Minute No. 218 (2<sup>nd</sup> Session) dated November 05, 2015 agreed to the revocation of the appointment of Mr. Bisnath Maharaj as director of the SSA, with effect from the date of his Instrument of Revocation. This Instrument was signed by His Excellency the President on November 11, 2015.

5. With effect from November 13, 2015, upon the instruction of the Minister of National Security, Inspector Mathew Andrews, Director Criminal Intelligence, took administrative control of the SSA. However the current situation is such that the operations of the SSA are being severely constrained due to the absence of the appointed Director, vested with the powers necessary to execute the operational mandate of the Agency.”

30. It was contended on behalf of the Claimant that Mr. Andrews appointment as Director of the SSA was dated the 27<sup>th</sup> November 2015 and that there is no power in the SSA Act for the appointment of an “Interim Director” nor an Acting Director under the SSA Act. Therefore, the Minister’s directive was an illegal acting appointment by purporting to assign or transfer to and/or confer upon and/or vest the duties and responsibilities of the Director of the SSA in Mr. Andrews. Furthermore, the assumption by Mr. Andrews of the non-existent position of the “Interim Director” of the SSA was ultra vires and illegal.
31. It was argued on behalf of the Minister that it was not necessary for the Court to make a declaration that the Minister acted illegally by appointing Mr. Andrews as the Interim Director of the SSA since the Minister never claimed that he had such a power and he never appointed Mr. Andrews as the Interim Director. Therefore, there was no error by the Minister and there is no practical significance to make such an order. In support of this position Senior Counsel referred the Court to the learning in **Supperstone and Goudie Judicial Review 4<sup>th</sup> edition**.
32. It was also argued on behalf of the Minister that the Claimant has not indicated that he has suffered any loss during the period 13<sup>th</sup> November 2015 to 26<sup>th</sup> November 2016. He

submitted that the memorandum dated 19<sup>th</sup> November 2015 from Mr. Andrews as Interim Director to all members of staff of the SSA was an internal memorandum reminding the employees of the SSA of their confidential obligations under the SSA Act. Further, Senior Counsel for the Minister submitted that the Claimant could not have suffered any prejudice since the memorandum dated the 26<sup>th</sup> November, 2015 which was signed by Mr. Andrews as Interim Director advised about a delay in salary for the month of November 2015.

33. The SSA Act was introduced in this jurisdiction in October 1995. It established the SSA which consists of the Director and employees. Section 3 (1) of the SSA Act establishes the SSA and section 4 provides for the appointment of a Director. Section 6 of the SSA Act provides the very wide functions of the SSA namely:

“6. (1) The main functions of the Agency are to—

(a) act as an office for centralising information that could facilitate the detection and prevention of illicit traffic in narcotic drugs, psychotropic substances and precursor chemicals, for co-ordinating operations for the suppression of illicit drug trafficking and drug-related matters and for co-operating with the Services or the corresponding Services of other countries;

(b) develop strategic intelligence and make recommendations to Government on the formation of policies in relation to counter narcotics matters;

(c) prepare drug interdiction strategy and stimulate action towards and monitor the implementation of the agreed strategy;

(d) advise on policy formation in respect of the development of human resources engaged in counter drug trafficking activities and maintain an inventory of all training undertaken and seek to identify opportunities for training;

(e) disseminate information and intelligence to the appropriate Services;

(f) provide intelligence and analytical support for the appropriate operational and intelligence arms of the appropriate Services;

- (g) assist in identifying sophisticated drug-related criminal activity and those who engage in it;
  - (h) help the law enforcement effort by identifying links between individuals and organisations involved in the drug trade;
  - (i) provide strategic intelligence to assist and promote the efficient and effective use of operational resources so as to enable the development of law enforcement strategies;
  - (j) identify new trends in, and patterns of drug-related criminal activity;
  - (k) provide a nucleus of specialist intelligence personnel who are able to advise and assist investigating officers concerning operational priorities and deployment of resources;
  - (l) establish channels of communication with domestic and overseas Services and provide a national focal point for the promotion and exchange of information and intelligence about organised drug-related crime and major criminals in the drug trade;
  - (m) do all such things as are incidental or conducive to the attainment of the objectives of the Agency.
- (2) In addition to the aforementioned functions, the Agency shall—
- (a) give its assistance to the Services to which particularly serious or complex and drug-related cases have been referred;
  - (b) provide a central point for the receipt of all disclosures made under the drugs legislation and develop such disclosures through the intelligence process and disseminate to the appropriate Services for further action;
  - (c) (Deleted by Act No. 39 of 1997);
  - (d) prepare, update, monitor and co-ordinate all matters relating to a dangerous drugs supply reduction programme;
  - (e) negotiate foreign technical assistance for the dangerous drugs supply-reduction programme;

- (f) contribute to the training of specialised staff in action against drug trafficking;
- (g) establish and maintain close contact with corresponding Services in other countries in order to achieve—
  - (i) a rapid exchange of information in respect of all aspects of offences related to illicit traffic in dangerous drugs;
  - (ii) broad co-operation in investigations concerning international drug trafficking so as to establish—
    - A. the identity, description, place of residence, movements and activities of drug traffickers,
    - B. the details regarding current or projected drug trafficking transactions,
    - C. the movement of proceeds and property derived from international drug trafficking,
    - D. the movement of dangerous drugs as well as equipment, material, precursor chemicals and instrumentalities used in illicit drug manufacture;
- (h) maintain a database on manufacturers and suppliers of precursor chemicals and other substances and articles used in the illegal production of drugs in Trinidad and Tobago and internationally and the import, export or intransit movement of such precursor chemicals or other substances or articles for dissemination of this information;
- (i) facilitate the exchange of personnel and other experts and the posting of liaison officers;
- (j) co-operate with corresponding services in other countries to organise, where appropriate, regional and international conferences and seminars to stimulate co-operation.”

34. The relationship between the SSA and the Minister is set out in section 3 of the SSA Act which states that the functions of the SSA are performed by the Director after consultation with the Minister. In section 13 the Minister is responsible for causing to be laid in Parliament an annual report of the operations of the SSA within one (1) month after he

received it, or if Parliament is not in session within one (1) month after the commencement of the next session.

35. The role of the Director under the SSA Act is significant. According to section 3 of the SSA Act the SSA consists of the Director and the employees of the SSA. Notably there is no other position set out in the SSA Act except the Director. The importance of the Director's role was understood by Parliament to be so critical that it was specifically legislated at section 4 of the SSA Act that the President appoints the Director for a term not exceeding five (5) years terminable at any time but the person shall be eligible for reappointment at the expiration of the term. Under section 4 (2) the President is empowered to appoint another person as Director in certain circumstances namely where the Director is absent or incapacitated. The term in such circumstances is for six (6) months in the first instance and subsequent term of six months.
36. The Director is responsible for the operational, investigative and administrative control of the SSA. He is also responsible for preparing an annual report on the operations of the SSA which is to be submitted to the Minister within one (1) month after the end of the year to which the report relates and he is the principal adviser to the Minister on matters relating to the SSA Act.
37. In my opinion the legislative scheme of the SSA Act which was passed by Parliament contemplates that the post of Director is not to be left vacant since, even if the appointed person is unable to act, provision is made for it. The SSA Act contemplates that the responsibilities of the Director can only be handed over to another person who is appointed Director or Acting Director which the SSA Act contemplates. The SSA Act does not envisage that the Director can be relieved of his responsibilities and for them to be given to a person who is junior to him.
38. The Minister as a public functionary had a duty under the SSA Act to comply with the provisions contained therein and he failed to comply with same since the effect of the Minister's directive was that he was removing the duties and associated responsibilities

from the former Director of the SSA and bestowing it on a person who was not appointed by the President as Director of the SSA. In my opinion, such actions of the Minister effectively usurped the function of the Cabinet and the President. It could not have been the intention of Parliament for the Minister to be permitted to take such actions since Parliament ensured that there were safeguards to prevent this. For these reasons I am of the opinion that the Minister's directive was ultra vires and illegal.

39. Further, even if as Senior Counsel for the Minister argued that during period 13<sup>th</sup> November 2015 to 26<sup>th</sup> November 2016 Mr. Andrews performed administrative functions, this does not take away from the effect of the Minister's directive. In my opinion the Minister's directive would still be illegal since sections 3 and 4 of the SSA Act specifically contemplates that the SSA must have a person in the position of Director or Acting Director as prescribed by subsection 3(4) of the SSA Act. Therefore, the Minister's directive had the effect of leaving the SSA without an appointed Director or Acting Director.
40. I do not accept the submission by Senior Counsel for the Minister that it is of no practical significance to grant the declaration and that the Claimant has not suffered any prejudice during the period Mr. Andrews function as the Interim Director of the SSA.
41. In **Supperstone and Goudie Judicial Review 4<sup>th</sup> edition** the authors stated that the modern approach is that the Court has a broad discretion in granting declaratory relief in judicial review cases. At paragraph 17.37 the authors stated that:

“The modern cases repeatedly emphasise that the discretion to grant a declaration is a broad one and ‘uniquely flexible, in that the courts may in their own words identify and particularise what is objectionable in legal terms’. This reflects developments in private law claims where the grant or refusal of declaratory relief is not now constrained by artificial limits but is kept in proper bounds by the exercise of the court's discretion. In *Financial Services Authority v Rourke* Neuberger J suggested that the court should ‘take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, whether there are any other special reasons why or why not the court

should grant the declaration. Where in a public law claim the claimant has succeeded in showing that a public body has acted unlawfully, but it is not appropriate to make a mandatory, prohibitory, or quashing order, then it will usually be appropriate to make some form of declaratory order to reflect the court's finding. This does not mean that the court is obliged to act of its own motion where a declaration is not asked of (*Hunt* see below) and normally a claim for declaration must be pleaded. If it is not then the Court may refuse to entertain it.”

42. In **Financial Services Authority v Rouke**<sup>3</sup> Neuberger J stated that the approach the Court should be to “take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose whether there are any other special reasons why or why not the court should grant the declaration.”
43. During submissions the Claimant referred the Court to the learning in English cases of **R (on the application of Hunt) v North Somerset Council**<sup>4</sup>; **The Queen on the application of First Stop Wholesale Ltd v Commissioners for HM Revenue & Customs**<sup>5</sup> and **R v Oxfordshire County Council, ex parte Pittick**<sup>6</sup> I found the cases to be of very little assistance since they all turned on the facts of each case.
44. The learning demonstrate that the Court has the discretion to make declarations based on the facts of each case. In my opinion it is important based on the facts of this case to make the declaration for several reasons. The SSA plays a critical role in the critical role in the gathering of intelligence in this jurisdiction and any failure to observe the statutory requirements a matter which is in the public interest. The role of the Court is to uphold the rule of law and to ensure that persons who perform public functions act within the statutory mandate. It is also important for the Court not to condone acts by public officials who blatantly disregard statutory provisions without any consequences.

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<sup>3</sup> 10 (2002)CP Rep 14

<sup>4</sup> [2015] UKSC 51

<sup>5</sup> [2012] EWHC 1106 (Admin)

<sup>6</sup> [1999] 3 ALL ER 385



**Did the Minister breach his statutory duty under section 15 of the FOIA by failing to take reasonable steps to notify the Claimant of the approval or refusal of the Second FOIA Application?**

45. It was submitted on behalf of the Claimant that the Second FOIA Application was made to the appropriate public authority since under section 22 (2) of the FOIA the decision maker is the Minister and he did not determine it within the statutory time frame prescribed by section 15 of the FOIA. In support of this submission, the Claimant relied on the learning in **The Sanatan Dharma Maha Sabha v the Minister of Finance**<sup>7</sup> and the judgment of Jamadar J in **Chandresh Sharma v The Integrity Commission**<sup>8</sup>. It was also argued that it was not in dispute that the Minister of National Security is responsible for the SSA and that if the Minister's position was that he was not the party responsible for the decision in light of the position taken by the SSA, the Minister could have applied to join the SSA. He also argued that section 22(2) of the FOIA mandated the Claimant to bring the judicial review proceedings against the Minister because there are no arrangements published under any regulation concerning disclosure by the SSA.
46. The Claimant contended that the Minister's unreasonable delay in making a decision or issuing a notice under section 23 is unfair, illegal and contrary to law and as such the Minister failed and/or refused and/ or omitted to perform his duties under sections 14, 15 and 23 of the FOIA. It was also argued that it is not acceptable that the reasons the Minister did not comply with the statutory requirements was because he was seeking legal advice.
47. Senior Counsel for the Minister argued that the declaration being sought against the Minister ought not to be granted since the Minister took reasonable steps to notify the Claimant of the approval or refusal as soon as practicable and not later than thirty (30) days after the Second FOIA Application was made. It was also argued that the Minister was not at fault since he did not have the information and he was trying to obtain it from the SSA which is a public authority under section 4(k) of the FOIA. Senior Counsel submitted that

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<sup>7</sup> Civ Appeal No. 123 of 2004

<sup>8</sup> HCA 2005 of 2004

section 22 of the FOIA was not relevant to the instant proceedings since in the **Maha Sabha** case the issue was whether section 13 had been complied with which is different from the instant matter since there was no decision by the Minister.

48. The Courts in this jurisdiction have recognized that the object of the FOIA as set out in section 3 gives the public a right to access information in the possession of public authorities and there is an inherent bias in favour of disclosure. The bias in favour of the disclosure of information from the public authority has been recognized in several cases in this jurisdiction including the **Sanatan Dharma Maha Sabha v the Minister of Finance**<sup>9</sup>, **Chandresh Sharma v The Integrity Commission**<sup>10</sup>; **Caribbean Information Access v the Minister of National Security**<sup>11</sup> and more recently in **The Minister of Planning and Sustainable Development v the Joint Consultative Council for the Construction Industry**<sup>12</sup>.

49. A “public authority” is defined at section 4 of the FOIA to include a Ministry or department or division of a Ministry, a statutory body, responsibility for which is assigned to a Minister of Government; a body corporate or unincorporated entity which is supported directly or indirectly by Government funds and over which Government is in a position to exercise control. “Responsible Minister” in relation to a public authority means the Minister of Government to whom responsibility for the public authority is assigned or such Minister of Government as the President may by Order declare to be the responsible Minister of the public authority for the purpose of the FOIA establishes a general right of access to documents and information.

50. Section 13 (5) of the FOIA provides that:

“An application for access to an official document held by a public authority referred to in 4(k)(i) or (iii) shall be made to the responsible Minister.”

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<sup>9</sup> CA No 123 of 2004

<sup>10</sup> HCA 2005 of 2004

<sup>11</sup> CA 170 of 2008

<sup>12</sup> CA No 200 of 2014

51. Section 4 Section 4(k) (i) and (iii) defines a:  
“a body corporate or unincorporated entity-  
(i) In relation to any function which it exercises on behalf of the State;  
(ii) .....  
(iii) Which is supported, directly or indirectly, by Government funds and over which Government is in a position to exercise control.”
52. In the instant case, based on the definition of “public authority”, both the Minister and the SSA fall within the definition but section 13 (5) is clear that the application for information is to be made to the responsible Minister.
53. Section 14 of the FOIA bestows a duty on the public authority to take reasonable steps to assist a person who has made a request which does not comply with the requirements of section 13 (2). The requirements of section 13 (2) are that a request shall identify the official documents or provide sufficient information to enable the designated officer or the public authority, or an employee of the public authority who is familiar with the relevant documents, to identify the document with reasonable effort.
54. Section 15 of the FOIA sets out the time frame within which a request for information is to be provided a response. It provides that:  
“A public authority shall take reasonable steps to enable an applicant to be notified of the approval or refusal of his request as soon as practicable but in any case not alter than thirty days after the day on which the request is duly made.”
55. Section 22 of the FOIA makes provision for the appropriate party against whom judicial review proceedings are to be brought where no arrangements have been made and published in compliance with the Regulations under the FOIA. It provides that:  
“Where a request is made to a public authority for a document, and no arrangements in respect of documents of that type have been made and published under the Regulations a decision on that request shall, for the purpose of enabling an

application for judicial review to be made, be deemed to have been made by the responsible Minister of the public authority.”

56. Section 23 of the FOIA sets out the manner in which the public authority is to respond to a FOIA request where an applicant is not entitled to access to a document since it places a responsibility of the public authority to provide reasons for deferment or refusal to provide the information. It states:

“23. (1) Where in relation to a request for access to a document of a public authority, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred or that no such document exists, the public authority shall cause the applicant to be given notice in writing of the decision, and the notice shall—

- (a) state the findings on any material question of fact, referring to the material on which those findings were based, and the reasons for the decision;
- (b) where the decision relates to a public authority, state the name and designation of the person giving the decision;
- (c) where the decision does not relate to a request for access to a document which if it existed, would be an exempt document but access is given to a document in accordance with section 16(2), state that the document is a copy of a document from which exempt information has been deleted;
- (d) inform the applicant of his 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;
- (e) where the decision is to the effect that the document does not exist or cannot, after a thorough and diligent search, be located, inform the applicant of his right to complain to the Ombudsman.”

57. In my opinion the Claimant is entitled to the declaration for the following reasons. Firstly, the Second FOIA Application was made to the appropriate party. In the **Maha Sabha** case the Appellant had submitted a request for information to the Central Bank of Trinidad and

Tobago (“the Bank”). The Bank refused the request claiming that the information was exempt pursuant to sections 34 of the FOIA and section 56 of the Central Bank Act. The Appellant filed for judicial review of the Bank’s decision against the Minister of Finance seeking relief relating to the Bank’s decision to deny the Appellant’s access to the information which it sought. The trial judge dismissed the Appellant’s judicial review application on the basis that the Appellant should have made its application to the Minister of Finance pursuant to section 13 of the FOIA and not to the Bank.

58. On appeal, the Court of Appeal allowed the Appellant’s appeal and set aside the trial judge’s dismissal of the proceedings with the consequential orders for costs. In arriving at this position Mendonca JA examined the purpose of the FOIA which was set out at paragraph 15 to be:

“15. At the time of the passing of the Act it was accepted that access to official information is important to the growth and development of the nation’s democracy. Access to information is a means to meaningful participation in the democratic and governmental processes. It makes the Government more accountable by making it more open to public scrutiny. Access to information promotes openness and transparency in Government. Given the noble aims of having a right to access official information it is perhaps not surprising that the Act specifically provided that its provisions shall be interpreted so as to further the rights set out in section 3(1) and that any discretion conferred by the 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 (see section 3(2)).”

59. In finding that the failure to send a request to the Minister was not a fatal defect in judicial review proceedings Mendonca JA explained at paragraphs 16 to 19 that:

“16. Section 11(1) specifically gives to every person the right to obtain access to official documents. The right is of course subject to the provisions of the Act among which is section 13(5) which, as I have said, required in this case that the application for access to the documents in the possession of the Bank be made to the responsible Minister. But although section 13(5) required the application to be made to the

Minister, there are circumstances that point to the position that the failure to comply with the section cannot automatically lead to the dire consequence of dismissal of the proceedings which the Judge thought it did.

17. If a request which ought to be sent to the Minister is directed to someone else but the Minister responds to the request it could not have been the intention of Parliament that if judicial review proceedings are taken that the person to whom the application was sent could be of any significance. It could not have intended that the ensuing judicial review application, which is seen as one of the avenues to enforce the right to access to information given by the Act, could be defeated by the Minister's claim in the circumstances that the request was not sent to him. I think this can confidently be stated not be the intention of Parliament. So too if the request is not sent to the Minister and that person responds denying the request and in the subsequent judicial review proceedings against the Minister no objection is taken as to the person to whom the request was made, but the request is challenged on other substantive grounds and the Court orders access to the documents, failure to properly direct the request to the Minister can have no significance on an appeal. I think this too can be confidently stated. These matters point to the conclusion that it does not necessarily follow that the failure to send a request to the Minister is a fatal defect that must result in dismissal of the action.

18. Another factor pointing to the same conclusion and more relevant to the circumstances of this case is section 14(1). This section imposes a duty on the public authority to take reasonable steps to assist any person who, inter alia, wishes to make a request under section 13 that he does so in a manner that complies with section 13. It is significant to note that section 14(1) applies to any person who wishes to make a request under section 13. This would include therefore those requests to which section 13(5) applies. I do not think that it could have been the intention of Parliament in the circumstances that although the public authority failed in its duty and did not assist the Applicant in making the request in the manner provided by section 13 that the judicial review proceedings can be defeated on the basis that the request was ill directed.

19. It seems to me that before a court can properly dismiss the judicial review proceedings on the basis only that the request was not made to the Minister, depends on the circumstances of each case. Material considerations include whether the public authority assisted the person in making a proper request, the prejudice to the Minister and the position of the Minister to the information requested. If the Minister, had a request been properly made to him were, prepared to grant it but because the request was ill directed, was unable to treat with it that will be on sound basis on which to dismiss the judicial review proceedings. In such a case the Minister would be faced with proceedings that would have been wholly unnecessary, if the request were properly directed to him. If however it was not his intention to grant the request then he could resist the action on the grounds upon which he wishes to do so. In such circumstances it would be an exceptional case in which the Minister can claim prejudice so as to have the court dismiss the proceeding. This however is subject to whether the decision is that of the Minister as he cannot be the respondent in judicial review proceedings if the decision is not his. I will come to that point shortly. But I do not believe that the proceedings in this matter should have been dismissed for the reason only that the request was made to the wrong person.”

60. In **Maha Sabha** it was also argued on behalf of the Minister of Finance that the decision not to grant the request to the Appellant was not that of the Minister but of the public authority, the Bank. Yet the Minister was the Respondent and as such, the Appellant did not comply with section 13 (5). Mendonca JA examined whether the decision by the Bank not to grant the requested information, although not made by the Minister of Finance might be deemed to be his under section 22 (2) of the FOIA. It was common ground in the **Maha Sabha** case that the Minister of Finance was the responsible Minister for the Bank and that no arrangements contemplated by section 22 (2) of the FOIA had been published under the regulations. The Court held at paragraph 23 that section 22 (2) of the FOIA is a deeming provision and for the purpose of judicial review proceedings it deems as the decision of the responsible Minister, a decision made on a request for a document made to a public authority, where no arrangements in respect of documents of that type have been made and

published under the regulations. The Court also found that section 22 (2) is to facilitate judicial review proceedings and its focus is on the decision and not the request. Therefore, no significance is attached whether the request was made to the Minister since, if no arrangements had been made under the regulations, any decision of the public authority is deemed to be that of the Minister.

61. The Court also held that section 13 (5) did not set out the consequences of failing to comply with the obligation created in it and therefore the statutory framework and the factual circumstances of each case had to be examined to determine the consequence of non-compliance. In the **Maha Sabha** case the Court held that based on the facts of that case the dismissal of a judicial review of the Appellant's action against the Minister who did not make the decision was inconsistent with the purpose of the FOIA which was to facilitate and promote the disclosure of information from public bodies at the lowest reasonable costs.

62. In **Chandresh Sharma** the Claimant made his FOIA application to the Integrity Commission. It was argued on behalf of the Integrity Commission that it was not the appropriate public authority to which the application was to be made. In finding that the Integrity Commission was the appropriate public authority Jamadar J (as he then was) at paragraph 9 of the judgment described the approach which is to be taken by a public authority when interpreting the provisions of the FOIA as:

“In my opinion it would be an unduly rigid approach, in the circumstances of this case (where no responsible Minister exists), to treat the Applicant's request/application as misconceived because it was made pursuant to section 13(1) of the FOIA. Such a formalistic approach fails to give effect to the obvious and declared intention of Parliament. A more reasonable, realistic and pragmatic approach, that would further the intention of Parliament, would be to recognise that where there is no responsible Minister (For the purpose of a (k)(i) public authority) that a request pursuant to section 13 (1) of the FOIA is permissible. Indeed, given the mandate ‘to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information’ (section 3(2) FOIA), Parliament could not have



reasonably intended that in the absence of a responsible Minister an applicant must first take steps (legal if necessary) to have a responsible Minister appointed/declared and then make his/her request for information. No practical system of laws could intend anything so unreasonable.”

63. Jamadar J (as he then was) also found that a public authority had a duty under section 14(1)(a) and (3) to assist any person making an application to access information under section 13 of the FOIA which is in furtherance of the object, purpose and intention of the FOIA.
64. It was not in dispute that the Minister is responsible for the SSA. The Minister’s responsibilities are set out in sections 2, 3, 10 and 13 of the SSA Act. I accept that under section 4 of the FOIA the Minister is defined as a public authority and that the SSA falls into the definition of a public authority under section 4(k) (i) or (iii). Therefore, the Second FOIA Application could have been made to the SSA or the Minister. However, it was made to the Minister and even if he did not have the information, in my view, since there was no evidence placed before the Court by the Minister that he was not the responsible Minister for the SSA and that there were arrangements published by the regulations in the FOIA in respect of the information requested in the Second FOIA Application, he is still the proper party to the proceedings and responsible as the decision maker. In any event, the Minister did not comply with his duty under section 14 (1) to take reasonable steps to assist the Claimant to comply with section 13.
65. Secondly, section 15 of the FOIA sets a statutory time limit of thirty (30) days after the request was made for the public authority to whom the request was made to comply with section 23. It was not in dispute there was no decision from the Minister. The failure to comply within the statutory timeframe has been settled by case law in this jurisdiction.

66. In **Merlin Samlalsingh v The Ministry of Planning , Housing and the Environment**<sup>13</sup> Dean- Armorer J described the duty by a public authority to treat the FOIA Application in a timely manner as:

“In my view, a person is aggrieved for the purposes of the FOIA if his application under the FOIA is not treated, both in terms of timeliness or substance, as that statute requires. If the application is not answered within the time prescribed by the Act, the applicant may be justified in his contention that he is aggrieved.”<sup>14</sup>

67. In **Darren Baptiste v Police Service Commission and anor.**<sup>15</sup> Moosai J (as he then was) at paragraph 53 stated the timeline as:

“Section 15 contemplates a determination and notification within 30 days of the request being duly made, a breach of which allows the Claimant under section 39 to apply for judicial review.”

68. More recently, in the Court of Appeal decision of **The Ministry of Planning and Sustainable Development v the Joint Consultative Council for the Construction Industry**<sup>16</sup> Jamadar JA adopted the principles in **Ashford Sankar v Public Service Commission**<sup>17</sup>. At paragraph 11 of his judgment he stated that:

“11. In my opinion the following principles set out in **Sankar’s** case on this issue remain valid:

- (a) There is a statutory onus and duty on a public authority which is refusing access to information to strictly comply with the requirements of section 15 and 23 of the FOIA. In this regard, the mandatory obligation denoted by the use of the word ‘shall’ in section 23(1) is significant. This is so, even if the consequences of non-compliance is not to deprive a public authority of relying on ‘new reason’. The statute therefore creates a positive obligation to state reasons for a decision to deny access and to do so within thirty days after the date on which

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<sup>13</sup> CV 2009- 00371 delivered on the 19<sup>th</sup> January 2012

<sup>14</sup> Supra paragraph 19

<sup>15</sup> CV 2007-03288 delivered 6<sup>th</sup> November 2009

<sup>16</sup> Civ Appeal No P 200 of 2014 delivered 28<sup>th</sup> October 2016

<sup>17</sup> Civ App No 58 of 2007

the request was made. It is also important to note the positive obligation on the public authority, where it has decided to deny access to information requested, to inform an applicant of his/her right to apply for judicial review (or to complain to the Ombudsman).”

69. Based on the Gilkes affidavit, the Minister did not formally respond to the Second FOIA Application indicating whether the information was being provided or refused. At best the response from the Ministry was that it was being worked on and the last correspondence to the Claimant with this information was more than thirty (30) days after the Second FOIA Application i.e. 25<sup>th</sup> November 2016. In my opinion, the FOIA imposed a positive duty on the Minister to indicate to the Claimant within 30 days from the receipt of the Second FOIA Application if the information was going to be provided and if not the reasons for refusal. It was clear that this did not happen since there was no correspondence from the Minister to the Claimant indicating its position which the Ministry has conceded since at paragraph 7 (x) of the Gilkes affidavit where he deposed that after the 25<sup>th</sup> November 2016 no further response or update was given to the Claimant.
  
70. Thirdly, even if the Minister had taken the position that the Second FOIA Application was made to the wrong public authority, based on the correspondence between the Permanent Secretary and the Director of the SSA, by the 18<sup>th</sup> October 2016 the Minister was fully aware that the information requested in the Second FOIA Application was in the possession of the SSA which had taken a certain position. By the 25<sup>th</sup> November 2016 the Minister was aware that the SSA had not changed its position with respect to the Second FOIA Application. Therefore if this was the position which the Minister intended to take with respect to the Second FOIA Application, then he had a duty under section 23 to inform the Claimant of this position within the time frame as prescribed by section 15. However this still was not done. In my opinion it is irrelevant whether there was a haggling between the SSA and the Ministry on whether the information should be provided. The duty still remained on the Ministry as the public authority to which the request was made to indicate to the Claimant whether it was providing the information requested or it was refusing and if so the reasons for the for refusal and that if there was a refusal, to inform the Claimant

of is right to apply to the High Court for judicial review of the decision and the time within which the application is required to be made. In my opinion from the evidence it cannot be said that the Minister had taken reasonable steps to notify the Claimant of the approval or refusal of the Second FOIA Application.

71. Lastly, it is also important that the Court make the declaration since there was a duty on the Minister, as the public authority to whom the request was made and he did not comply with his duty. Parliament intended that a public authority to act with haste and more importantly to notify the person who made the application of the public's authority's position, the reasons for the position taken and the recourse which is available to the applicant. If the declaration is not made it would undermine Parliament's clear intention in setting a time frame in the FOIA for compliance and it would send the wrong signal to public authorities how they are to treat with FOIA request and their appropriate responsibilities.

72. Therefore, for the aforesaid reasons the Claimant is entitled to the declaration claimed.

**Can the Court quash the decision of the SSA to deny the Claimant access to the information requested in the Second FOIA Application?**

73. By memorandum dated the 23<sup>rd</sup> February 2017 the SSA informed the Minister that if the Second FOIA Application is made to the SSA it would not provide the information. This decision by the SSA was only communicated to the Claimant after he had instituted the instant proceedings when the Gilkes affidavit was filed on behalf of the Minister.

74. It was submitted on behalf of the Minister that even if the Court finds that the information requested is to be provided, the Minister cannot provide it since it is with the SSA and the SSA is not a party to the instant action.

75. In my opinion although the SSA is not a party to the proceedings, it made a decision and it was brought to the attention of the Claimant in the Gilkes Affidavit by the Minister in the instant proceedings. The Minister is responsible for the SSA and therefore he is accountable

for its decision. In my opinion, given that the Courts have continued to apply a purposive interpretation of the provisions of the FOIA, to simply accept that the Court cannot quash the decision of the SSA because it is not a party to the instant proceedings would be to apply a rigid, inflexible approach which would undermine the objects of the FOIA. For these reasons I would quash the decision of the SSA to deny the Claimant access to the information requested in the Second FOIA Application.

76. In **Geeta Dharamdass v The Commissioner of Police**<sup>18</sup> this Court in commenting on the purposive approach adopted in interpreting the provisions of the FOIA made reference to **Caribbean Information Access Ltd v The Honourable Minister of National Security**<sup>19</sup> and noted at paragraphs 21 and 22:

“21. In **Caribbean Information Access Ltd v The Honourable Minister of National Security** the Court of Appeal in this jurisdiction described the intention of Parliament as creating a right of access to information to the public as set out in the legislation as:

“8. 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.”

22. In the aforesaid authority the Court of Appeal adopted a purposive approach in interpreting and applying the provisions of the FOIA to further the objects and policy of the legislation. At paragraph 8 it also stated:

“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 above. The FOIA provides for a statutory right to information held by public authorities, and its effect is to broaden and deepen the

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<sup>18</sup> CV2015-03718

<sup>19</sup> Civ Appeal 170 of 2008

democratic values of accountability, transparency and the sharing of and access to information about the operations of public authorities.” (Emphasis added).”

**Is the Claimant entitled to access the outstanding information in the Second FOIA Application?**

77. At the time of the hearing of the instant matters the information which was still outstanding from the Second FOIA Application were:

*“(a)Copies of any letters and or correspondence signed by Mr. Andrews during the period 13<sup>th</sup>- 26<sup>th</sup> November 2015 for and on behalf of or within the SSA with any confidential and or exempt information deleted showing clearly the capacity which Mr. Andrews signed those letters.*

*(b)The number of interceptions of private communications authorised or continued in accordance with the provisions of the Interception of Private Communications Act during the period 13<sup>th</sup> – 26<sup>th</sup> November 2015.*

*(c )The number of intercepts which were undertaken and authorized by the SSA (as opposed to the Chief of Defence Staff or the Commissioner of the Police) during the period 13<sup>th</sup> November 2015 to the 31<sup>st</sup> January 2016.”*

78. The Claimant has asked the Court to order the SSA to provide the said information within seven (7) days from the order.

79. The SSA’s position on the outstanding request for information as stated in its correspondence dated the 23<sup>rd</sup> February 2017 from the SSA to the Legal Officer Chief State Solicitor (RG 9) is as follows:

“If a request is made to the SSA in accordance with Section 13 it will be considered. Please note that Section 34 of the FOIA exempts documents to which secrecy provision apply and is relevant to any future requests. It states:

34. A document is an exempt document if there is in force a written law applying specifically to information of a kind contained in the document and prohibiting person referred to in the written law from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or quantifications.

Further section 6(5) if the IOCA would also be relevant. It states:

(5) Information lawfully intercepted under this Act is exempt information for the purpose of the Freedom of Information Act.

In light of the foregoing it is unlikely that the SSA would grant Mr. Dennie's 2<sup>nd</sup> and 5<sup>th</sup> requests.

Kindly indicate whether or not the Ministry's representatives intend to adopt a litigation strategy adverse to the SSA's position so that arrangements can be instructed for the SSA's position to be fully protected and advanced before the Court."

80. Section 34 of the FOIA states that:

"34. A document is an exempt document if there is in force a written law applying specifically to information of a kind contained in the document and prohibiting persons referred to in the written law from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions and qualifications."

81. Section 6(5) of the **Interceptions of Communications Act**<sup>20</sup> ("the IOCA") provides that:

"Information lawfully intercepted under this Act is exempt information for the purposes of the Freedom of Information Act."

82. Section 35 of the FOIA provides for the disclosure of information/documents requested that may otherwise be exempt if there is significant evidence that abuse of authority or neglect in the performance of a specific duty or injustice to an individual has or is likely to have occurred or in the circumstances giving access to the document is justified in the

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<sup>20</sup> Chapter 15:08

public interest having regard both to any benefit and to any damage that may arise from doing so.

83. The SSA took the position that the outstanding information requested are exempt so that even if the Claimant had made the Second FOIA Application to the SSA it would rely on the exemption as the reason for not providing the said information.
84. In **Caribbean Information Access Ltd v The Honourable Minister of National Security**<sup>21</sup> Jamadar JA opined that the request for information must be analyzed against the factual matrix of each case. In the instant case the outstanding information in the Second FOIA Application relate to the interceptions of private communications authorized by the SSA during a period 16<sup>th</sup>-26<sup>th</sup> November 2015 when Mr. Andrews referred to himself as the “Interim Director” of the SSA. During that period, there was no Director of the SSA since and the appointment of the Director, Mr. Maharaj, had been revoked. It is reasonable to conclude that the Claimant who was the Director of Intelligence at the SSA at that time was aware that under section 5 of the IOCA the Director of the SSA can authorize the interception of communications. It is against this background the requests must be analysed.
85. From the SSA’s response it has relied on the exemption under section 34 of the FOIA which concerns documents which secrecy provisions apply and section 6 of the IOCA which states that information lawfully intercepted under the IOCA is exempt information under the FOIA.
86. In **Caribbean Information Access** the Court found that where a public authority has sought to rely on an exemption, the section 35 public interest override assessment and analysis must be undertaken by the public authority.
87. Section 35 of the FOIA states:

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<sup>21</sup> Civ Appeal 170 of 2008



“Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that 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 or safety of an individual or of the public; 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 and to any damage that may arise from doing so.”

88. In **Ashford Sankar v Public Service Commission**<sup>22</sup>, at paragraphs 17 and 22, Narine JA held the following in relation to section 35:

“17. 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....

22. It seems to be that having regard to the object of the Act as expressed in section 3 and the obvious bias in favour of providing access to information, there is an onus on a public authority which is refusing access to a document on the ground of public interest to comply strictly with the requirements of sections 23 and 27 (3). The respondent failed to comply with the clear provision of the Act to provide proper reasons for its refusal, so as to enable the appellant to make an informed

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<sup>22</sup> Civ Appeal 58 of 2007

decision as to whether or not he would challenge the refusal by way of judicial review. In these circumstances it is clearly undesirable that the respondent should be permitted to provide new reasons, or to add to, or augment vague or insufficient reasons originally advanced for refusal of access. In my view, to do so will ultimately frustrate the clear purpose of the Act, which is to permit the public to access information unless refusal of access can be brought within one of the exemptions specifically set out in the Act, and adequate and intelligible reasons are provided for such refusal.” (Emphasis added)

89. Further in **Caribbean Information Access**, at paragraph 38, it was held that:

“It is to be noted that section 35 mandates the public authority to consider and override any initial assessment of any claim to exemption, where, any of the first four conditions in section 35 exist and/or where “in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from so doing.”

90. The responsibility of the decision maker in relation to section 35 was described by Boodoosingh J in **Nicholas Cumberbatch v The Minister of National Security**<sup>23</sup> at paragraph 22 as:

“The decision maker must therefore show, by the reasons it advances, that it applied its mind to whether any of the factors in (a) to (d) of section 35 were met or whether “giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.”

91. Therefore, section 35 permits disclosure of information otherwise exempted and the burden of proving that it is not in the public interest to disclose the information lies on the public authority. Once the decision maker forms the view that the requested information is exempt, the onus is on it to make a disinterested assessment of the requested information against the backdrop of the criteria in section 35. In other words, the exemption will stand

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<sup>23</sup> CV 2014-03041

unless there are public interest factors which favour disclosure and which outweigh identifiable public interest considerations, which favour non-disclosure.

92. In the instant case, from the Memorandum there was no assessment of the factors in section 35 by the SSA.
93. In **Chandresh Sharma** there was no consideration of the section 35 factors and the Court remitted the request to the Integrity Commission to reconsider its position in light of the section 35 considerations.
94. In **Caribbean Information Access** the Court was faced with a similar predicament. It remitted the request to the public authority to consider section 35 of the FOIA on the basis that fairness and justice required that in those judicial review proceedings and in the interest of good public administration.
95. More recently in the **Minister of Planning and Sustainable Development v the Joint Consultative Council for the Construction Industry**<sup>24</sup> there was no section 35 analysis done by the Minister of Planning in refusing to provide the information requested. Due to the length of time which had elapsed since the request and the fact that the Minister who had made the decision was no longer in office, the Court of Appeal invited submissions from the parties on the public interest considerations. In a majority ruling the Court considered the public interest considerations and ruled in favour of disclosure.
96. In the instant matter, there was no consideration of section 35 of the FOIA in the SSA arriving at the decision not to provide the requested information. Senior Counsel for the Minister submitted that there was no mystery why the information would be exempt since the SSA is a spy organization and therefore that is the reason the information would not be forthcoming. In my opinion Senior Counsel's submission is insufficient to constitute a proper assessment of section 35. Given the nature of the outstanding information requested, the factual matrix and the basis of the exemption sought, I am minded to adopt an approach similar to that taken by the Court in **Chandresh Sharma** and **Caribbean Information**

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<sup>24</sup> CA No 200 of 2014

**Access** since the consideration of the section 35 was not done by the SSA before deciding to deny the Claimant access to the outstanding information. I will therefore not order the SSA to provide the outstanding information. Instead the SSA is directed to reconsider its decision in light of section 35 of the FOIA. The SSA is ordered to give the Claimant reasons in writing as to whether the mandate in section 35 of the FOIA to grant access to an exempt document applies (or does not) and why this may be so. This is to be done within twenty one (21) days from this order.

### **Conclusion**

97. The SSA Act contemplates that the responsibilities of the Director can only be handed over to another person who is appointed Director or Acting Director. The Minister failed to comply with his duty under the SSA Act by removing the duties and associated responsibilities from the former director of the SSA and bestowing it on a person who was not appointed by the President as Director of the SSA. The Minister's directive was therefore illegal and ultra vires.
98. With regards to the Second FOIA application, the Minister did not comply with his duty under section 14(1) of the FOIA to take reasonable steps to assist the Claimant in complying with section 13 of the FOIA. Sections 15 and 23 of the FOIA imposed a positive duty on the Minister to respond to the Claimant's application within thirty (30) days which he failed to do. The Minister did not take reasonable steps to notify the Claimant of the approval or refusal of the Second FOIA application.
99. The Minister is responsible for the SSA and is accountable for its decisions. In applying a purposive approach to the FOIA, the decision of the SSA to deny the Claimant access to the information requested in the Second FOIA application is quashed.
100. There was no consideration of section 35 of the FOIA by the SSA in arriving at the decision not to provide the requested information to the Claimant. As such, the SSA is directed to reconsider its decision in light of section 35 of the FOIA.

## **Order**

101. It is declared that the directive and/or decision of the Minister of National Security contained in letter dated the 13<sup>th</sup> day of November 2015 “to hand over duties and all associated responsibilities” (sic) of the Director of the Strategic Services Agency to Mr. Matthew Andrews, Director of Criminal Intelligence is illegal and ultra vires.
102. It is declared that the Minister breached his statutory duty under section 15 of the Freedom of Information Act (FOIA) to take reasonable steps to enable the Claimant to be notified of the approval or refusal as soon as practicable but in any case not later than thirty (30) days after the day on which the request is duly made.
103. The decision of the Strategic Services Agency as contained in its memorandum dated 23<sup>rd</sup> February 2017 to deny access to the information requested by the Claimant in his FOIA application dated the 22<sup>nd</sup> September 2016 is quashed.
104. The Claimant’s FOIA Application dated the 22<sup>nd</sup> September 2016 is remitted to the Minister for the SSA to reconsider same with respect to section 35 of the FOIA and come to a decision within twenty one (21) days from this order.
105. The parties will be heard on the question of costs.

**Margaret Y Mohammed**  
**Judge**