

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**No. CV 2018-04447**

**IN THE MATTER OF AN APPLICATION BY VISHAL SINGH FOR AN ADMINISTRATIVE ORDER  
UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES 1998**

**AND**

**IN THE MATTER OF AN APPLICATION BY VISHAL SINGH UNDER THE FREEDOM OF  
INFORMATION ACT, CHAP 22:02**

**BETWEEN**

**VISHAL SINGH**

**Claimant**

**AND**

**THE COMMISSIONER OF POLICE**

**Defendant**

**Date of Delivery February 7, 2020**

**Before the Honourable Madam Justice Margaret Y Mohammed**

**Appearances:**

**Mr. Anand Ramlogan SC, Mr. Ganesh Saroop and Ms. Alana Rambaran Attorneys at law for  
the Claimant.**

**Mr. Joel Roper and Ms. Shaun Morris Attorneys at law for the Defendant.**

## JUDGMENT

*“The Trinidad and Tobago Freedom of Information Act is a novel piece of legislation that purports to lift the veil of secrecy which had been ingrained in the country's public service and other institutions in the country. It is but one of several pieces of public interest legislation enacted to ensure that in our quest to become a developed nation, our citizens could participate not only to the fullest extent possible, but also with a high degree of confidence, in the democratic process. Indeed, an important justification for FOI legislation is that a well-functioning democracy requires an informed electorate and properly informed political debate. This assumes greater significance in the light of what is happening around us both locally and globally, where more and more governments are able to utilize significant State resources, resources which in fact belong to the people, to influence and shape public opinion about their governance. Countervailing public interest considerations are therefore required to strike an appropriate balance.”<sup>1</sup>*

### **INTRODUCTION**

1. Almost 13 years after Moosai J (as he then was) made the aforesaid remarks on the Freedom of Information Act<sup>2</sup> (“the FOIA”) in this jurisdiction, they are still relevant today. The FOIA was introduced in 2000 and for the last 19 years, there has been a high volume of case law generated where several sections of the FOIA have been analysed by the Courts of every level in this jurisdiction. Despite the guidance given by the Courts to public authorities/public officials there remains a lack of awareness or appreciation of the duty imposed by the FOIA on them. The instant action is yet another such case.

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<sup>1</sup> Moosai J (as he then was) at page 10 in CV2006-00037 Ashford Sankar v PSC delivered on 2 April 2007.

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

## **BACKGROUND**

2. The Claimant is police officer who was shot in August 2015 and injured during the course of his duty in Sangre Grande by a prisoner officer, Mr Ruel Accoo (“Mr Accoo”). On the 9 August 2018 (“the FOIA Request”) he requested the following information from the Defendant under the FOIA:
  - (i) A copy of the Firearm User’s Licence (FUL) for the gun which was used by Mr Accoo to shoot PC Vishal Singh 18523 (the Claimant) on August 10, 2015 at Guaico Trace Extension.
  - (ii) A copy of the receipt for the said FUL when it was last renewed;
  - (iii) Information pertaining to whether or not Mr. Accoo was, at the material time a licensed firearm holder and if so, whether he held a valid FUL for the gun which he used to shoot PC Vishal Singh (the Claimant) on August 10, 2018;
  - (iv) Whether or not the Commissioner of Prisons is authorized to lawfully issue a firearm to a prison officer for his personal protection;
  - (v) The status of the investigation into the shooting of PC Vishal Singh (the Claimant) by Mr Accoo;
  - (vi) A reason and/or explanation for not charging Mr. Accoo with the shooting of PC Singh to date;
  - (vii) Whether or not any investigation is in fact on going into the shooting of PC Singh and if so, by which officer and the present status,
  - (viii) Copies of any statements taken, extracts from station diaries, pocket diaries or other extracts made with respect to the reporting and responding to the incident on August 10, 2015 which led to PC Singh being shot while in the course of duty;
  - (ix) The Standard Operating Procedure which governs the investigation of incidents in which a police officer is shot in the execution of his duties; and
  - (x) Any policy, procedure or practice which governs the continuation of investigations after the investigating officer resigns.

3. The Defendant did not respond and he failed to provide any decision to the Claimant within the statutory time limit of 30 days from the date the request was made<sup>3</sup>.
4. The Claimant caused his Attorney at law to issue a pre-action protocol letter on the 10 September 2019, one month after he had made the FOIA Request, whereby he indicated his intention to file an application for judicial review challenging the Defendant's failure to comply with Sections 15 and 35 of the FOIA.
5. The Defendant responded on the 21 September 2018 whereby he only annexed a copy of the Station Diary Extract which was a partial response to item (viii) of his FOIA Request.
6. On 1 October 2018<sup>4</sup> the Claimant's Attorney at law responded to the Defendant's letter<sup>5</sup> whereby it was indicated that the response was only a partial response to item (viii) of the FOIA Request and it also indicated that there was no response to the other items requested.
7. The Claimant filed the application supported by his affidavit ("the Claimant's Principal Affidavit") for permission to pursue a claim in judicial review against the Defendant on 28 November 2018 whereby he sought permission of the Court to pursue the following reliefs:
  - i. A declaration that the Defendant breached 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 of the FOIA Request as soon as practicable but in any case no later than 30 days after the day on which the request is duly made;
  - ii. An order of mandamus to compel the Defendant to render a decision on the FOIA Request within 7 days of any order as to whether his application has been approved or refused in accordance with Section 15;

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<sup>3</sup> Section 15 of the FOIA

<sup>4</sup> Exhibit V.S.4 to the Claimant's Principal Affidavit

<sup>5</sup> Exhibit V.S.3 to the Claimant's Principal Affidavit

- iii. Alternatively, and/or additionally a declaration that the Claimant is entitled to access the requested information pursuant to the FOIA;
  - iv. Costs;
  - v. Such further other orders, directions or writs as the courts considers just and as the circumstances of this case warrant pursuant to Section 8 (1) (d) of the Judicial Review Act 2000.
8. After the Claimant had filed the application for permission to pursue a judicial review claim, he received a letter (dated 14 November 2018 and received on the 5 December 2018) on behalf of the Defendant requesting an extension of time for disclosing the requested documents. It also indicate that, “as soon as the information is forthcoming it will be forwarded to you.”
9. At this stage, it was reasonable for the Claimant to believe that despite the delay of 3 months from the date of the FOIA Request he was going to be provided with the information, albeit at an unknown date.
10. On 30 November 2019 (“the November 2018 Order”), I ordered the Claimant to serve the application for permission on the Defendant and for:
  - (i) The Defendant do file a notice on or before 9 January , 2019 indicating:
    - i. Whether he consents or objects to the application for leave to apply for Judicial Review.
    - ii. Whether he consents or objects to the provision of the further information requested and if he so consents setting out the time within which the said further information can be provided to the Claimant.
11. At that time the Defendant was represented by attorneys at law from the office of the Chief State Solicitor and the Solicitor General’s Department. The Defendant’s then attorney at law filed a Notice dated 10 January 2019 (“the January Notice”) consenting to the provisions of items (i), (ii), (iii), (vi), (vii) and (viii) as set out aforesaid. It stated that the Defendant did not consent to the provision of item (iv). It did not state the

Defendant's position with respect to items (ix) and (x). It also did not state when the Defendant would provide the information he had agreed to.

12. The hearing of the leave application came up before me on the 1 February 2019. Mr. Nairob Smart, Attorney at law appeared for the Defendant indicated that the requested information will be provided on or before 28 February 2019. On this basis, Counsel for the Claimant agreed to adjourn the hearing of the leave application. However, the information was not provided.
13. On 20 March 2019 the Claimant's attorney at law received a letter dated 14 February 2019<sup>6</sup> ("the February 2019 Letter") from the Defendant indicating that he had decided to refuse the request for items (i) to (iii) on the basis that they were exempt pursuant to section 30 (1) of the FOIA.
14. The Claimant filed a supplemental affidavit in support of his application for leave on the 25 April 2019 ("the Claimant's supplemental Affidavit"). At the hearing on 25 April 2019 I granted the Claimant permission to file a claim for judicial review which was filed on the 3 May 2019.
15. The Defendant's response was contained in an affidavit of Christian Chandler ("the Chandler Affidavit"), Attorney at law and Director of Legal Services of the Trinidad and Tobago Police Service<sup>7</sup>. The Claimant replied on 22 July 2019 ("the Claimant's Affidavit in Reply").

#### **THE ISSUES**

16. The issues to be addressed are:
  - (a) Did the Defendant comply with section 15 of the FOIA?
  - (b) Can the Defendant withdraw the January Notice?
  - (c) Can the Defendant refuse disclosure of items (i) to (iii)?

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<sup>6</sup> Exhibit V.S.1. to the supplemental affidavit of Vishal Singh filed on April 25<sup>th</sup>, 2019

<sup>7</sup> Filed 5 July 2019

- (d) If the exemptions for items (i) to (iii) are properly invoked should the information be disclosed pursuant to section 35 of the FOIA?
- (e) Did the Defendant comply with the FOIA with respect to item (iv)?
- (f) Did the Defendant make a decision for items (v), (vi), (vii), (ix) and (x) and if so how should the Court treat with this?

**DID THE DEFENDANT COMPLY WITH SECTION 15 OF THE FOIA?**

17. It was not in dispute that the Defendant is a public authority under section 4 of the FOIA. Section 3 of the FOIA sets out the object of the FOIA. It states:

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

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

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

18. Section 11 of the FOIA states:

- (1) Notwithstanding any law to the contrary and subject to the provisions of this Act, it shall be the right of every person to obtain access to an official document.
- (2) Nothing in this Act shall prevent a public authority from—
  - (a) giving access to documents or information;
  - (b) amending documents, other than as required by this Act where it has the discretion to do so or where it is required to do so by any written law or order of a Court”.

19. Section 13 of the FOIA lays out the procedure to be followed by a person who is seeking to access official documents as:

- “13. (1) A person who wishes to obtain access to an official document shall make a request in the form set out in the Schedule, to the relevant public authority for access to the document.
- (2) A request shall identify the official document, or provide sufficient information to enable the designated officer of the public authority, or an employee of the public authority who is familiar with the relevant documents, to identify the document with reasonable effort.
  - (3) A request may specify in which of the forms described in section 18 the applicant wishes to be given access.
  - (4) Subject to section 21, a request under this section may be made for access to all records of a particular description or all records relating to a particular subject.
  - (5) An application for access to an official document held by a public authority referred to in section 4(k)(i) or (iii) shall be made to the responsible Minister.”



20. Section 15 of the FOIA sets out the period within which a public authority must respond to a request for information under the FOIA. It states:

“15. 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 later than thirty days after the day on which the request is duly made.”

21. 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. 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 documents 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.”

22. In **Caribbean Information Access Ltd v The Honourable Minister of National Security**<sup>8</sup> the Court of Appeal in this jurisdiction 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 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<sup>9</sup>. The FOIA provides for a statutory right to information held by public authorities, and its effect is to broaden and deepen the democratic values of accountability, transparency and the sharing of and access to information about the operations of public authorities<sup>10</sup>.” (Emphasis added).

23. It was not in contention that the Defendant failed to notify the Claimant of his decision with respect to the FOIA Request within the statutory period as set out in section 15 of the FOIA. For this reason, the Claimant is entitled to a declaration that the Defendant was in breach of section 15 of the FOIA.

#### **CAN THE DEFENDANT WITHDRAW THE JANUARY NOTICE?**

24. It was submitted on behalf of the Claimant that the Defendant cannot resile from the position as set out in the January Notice since upon its receipt the Claimant acted to his detriment by waiting for the information to be provided as promised in the January Notice. It was also submitted that the Defendant had not withdrawn the January Notice which remained before the Court.
25. Counsel for the Defendant argued that there was no specific application or procedural challenge before the stage of submissions for the Defendant out to be bound by the January Notice. It was also argued that in the absence of a specific challenge to the continuation of proceedings, the Claimant’s submission on the validity of the January

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<sup>8</sup> Civ Appeal 170 of 2008

<sup>9</sup> HCA S 2005/2004 Sharma v the Integrity Commission at page 5 and section 3 (2) of the FOIA

<sup>10</sup> Section 3(1) of the FOIA

Notice became moot upon the continuation of proceedings and receipt of directions in the substantive matter.

26. In my opinion, even after Counsel for the Defendant appeared and indicated that the Defendant was relying on the exemptions not to provide the information requested, the January Notice remained in effect for the following reasons.
27. First, the Defendant did not file any document or request permission from the Court to withdraw the January Notice. The January Notice was filed in order to comply with the November 2018 Order. It was filed 1 day outside of the time fixed by the Court. It complied with the November 2018 Order since it expressly stated that the Defendant consented to the application to apply for judicial review with respect to items (i), (ii), (iii), (vi), (vii), and (viii) once they are in the Defendant's position. The January Notice also expressly stated that the Defendant did not consent to the provision of the information with respect to item (iv). The Court was simply informed at a hearing subsequent to its filing that the Defendant was invoking certain exemptions for not providing the information requested. In my opinion, the onus was on the Defendant who filed the Notice to seek permission to withdraw it. It was not the responsibility of the Claimant to do anything to have the Defendant bound by the January Notice since in the absence of its withdrawal the Defendant remained bound by its contents.
28. Secondly, there was absolutely no explanation provided by the new Attorney at law for the Defendant at any of the hearings subsequent to the filing of the January Notice, in the Chandler Affidavit and/or in the written submissions to account for the remarkable about turn made by the Defendant with respect to the position stated in the January Notice. The Chandler Affidavit failed to indicate the instructions which were given by the Defendant to his then Attorney at Law from the Chief State Solicitor's Office which resulted in the filing of the January Notice. It also failed to indicate the reasons there was a change in instructions for the Defendant refusing to disclose the information (except item (viii)) in the FOIA Request. In my opinion in the absence of any reasonable explanation from the Defendant for the change in position,

there is no basis for the Court treating the contents of the January Notice as not representing the position of the Defendant.

29. Thirdly, the effect of the January Notice was not moot after directions were given in the substantive matter. The January Notice expressly stated that the Defendant consented to the application for leave to apply for judicial review with respect to items (i), (ii), (iii), (vi), (vii) and (viii) once they were, in the possession of the Defendant. In my opinion once the Defendant had consented for the leave to be granted for the Claimant to pursue his substantive relief the documents could still have been disclosed since the January Notice expressly stated that they would have been provided once they are in the Defendant's possession.
30. Lastly, it would not be in furtherance of the overriding objective of the Civil Proceedings Rules ("the CPR") which mandates that cases be dealt with justly having regard to the Court's resources. The parties are required to assist the court in furthering the overriding objective<sup>11</sup> and the Court must further the overriding objective<sup>12</sup> by (a) encouraging the parties to co-operate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; and (d) deciding the order in which issues are to be resolved.
31. At the time the leave application was filed, it was clear from the Claimant's Principal Affidavit that the Defendant had failed to comply with section 15 of the FOIA and he had failed to respond to the Claimant's Pre-Action Protocol Letter. The Court was mindful that judicial review proceedings are to be dealt with expeditiously and it was in this context the November 2018 Order was issued. In order to save on costs, save judicial time, and to encourage the parties to co-operate in the conduct of the matter the Defendant was given another opportunity to indicate his position with respect to the FOIA Request. The Court was mindful that the granting of leave without this opportunity to the Defendant would increase costs.

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<sup>11</sup> Rule 1.3 of the CPR

<sup>12</sup> Rule 1.4 of the CPR

32. The then Attorney at law for the Defendant filed the January Notice albeit 1 day out of time and at the hearing on the 1 February 2019 he led the Court and the Claimant to believe that the information would be provided by the 28 February 2019. By this time costs was being saved since the Defendant's position was that most of the documents requested would be provided. However the documents were not provided as promised. It was only on at the next hearing, on the 15 March 2019, new Attorney at law for the Defendant indicated that the Defendant would be invoking exemptions in relation to some of the documents. By this time, there was a delay by 6 months since the deadline had expired for the rendering of an access decision and 2 months since the January Notice was filed which expressly stated that the documents would be disclosed.
33. In my opinion, to permit the withdrawal of the January Notice is to condone totally unacceptable conduct by the Defendant in circumstances where there was no explanation for such conduct and more particularly where his conduct delayed the proceedings in this matter. This conduct is inconsistent with the modern approach of civil litigation in this jurisdiction under the CPR. It also has caused the parties to be placed on an unequal footing since the Claimant is a police officer has had to incur costs for a trial of the substantive issues against the Defendant who is the Commissioner of Police and who has the resources of the State to fund his litigation.
34. Having found that the January Notice is still valid, the challenge in moving forward with this matter is that the Defendant did not state a time frame with which he would provide the documents which he agreed to disclose. This is contrary to the object of the FOIA. Further, the Defendant stated that he did not consent to the provision of item (iv) of the FOIA Request without providing any reasons and he did not state his position with respect to items (v), (ix) and (x). It is therefore necessary for the Court to examine in detail at the trial of the matter the other issues as identified aforesaid.

### **CAN THE DEFENDANT REFUSE DISCLOSURE OF ITEMS (I) TO (III)?**

35. In the February 2019 Letter the Defendant indicated to the Attorney at law for the Claimant that items (i) to (iii) of the FOIA Request were not approved as these documents are exempt under section 30(1) of the FOIA.
36. It was submitted on behalf of the Claimant that the information requested in items (i) to (iii) are not personal information as defined by section 4 of the FOIA and ought to be disclosed; the Defendant failed to show in the February 2019 Letter that the disclosure of the information , if deemed personal would be unreasonable; and even if the Court finds that the information is personal, it is empowered to redact the photograph and signature of the licensee from the information requested.
37. Counsel for the Defendant argued that the information requested is personal since the FUL contains information that is specific to the licensee, namely his address, the extent of the licensee's authority for ammunition he may possess at any one point in time and the amount he may acquire at any one time or over the course of a year<sup>13</sup>. This information is peculiar to the particular licensee in the course of holding a valid FUL and it is not ordinarily known to others.
38. It was also argued on behalf of the Defendant that the disclosure of the information requested at items (i) to (iii) would be unreasonable on the basis that it extends no further than the Claimant's curiosity and has not prevented him from instituting proceedings against Mr Accoo; it would create a precedent for licenses of that nature to be disclosed relative to public and private officials and if the validity of Mr. Accoo's firearm possession/ownership is challenged, that request can be made in the proceedings against Mr. Accoo who is under the same obligation of disclosure as the Claimant which is more prudent with good administration rather than placing the Defendant in a position to effect any third party disclosure.

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<sup>13</sup> Paragraph 9, Affidavit of the Chandler Affidavit

39. Section 30 of the FOIA provides:

“30. (1) A document is an exempt document if its disclosure under this Act would involve the **unreasonable** disclosure of personal information of any individual (including a deceased individual).

(2) Subject to subsection (4), the provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

(3) Where a request by a person other than a person referred to in subsection (2) is made to a public authority for access to a document containing personal information of any individual (including a deceased individual) and the public authority decides to grant access to the document, the public authority shall, if practicable, notify the individual who is the subject of that information (or in the case of a deceased individual, that individual’s next-of-kin) of the decision and 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.

(4) Nothing in this Act shall be taken to require a public authority to give information as to the existence or non-existence of a document of a kind referred to in subsection (1) where information as to the existence or non-existence of that document, if included in a document of a public authority, would cause the last-mentioned document to be an exempt document by virtue of this section.

40. Personal Information is defined in section 4 of the FOIA as:

“Personal information” means information about an individual, including –

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex or marital or family status of the individual;
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of an individual or

information relating to financial transactions in which the individual has been involved;

- (c) any identifying number, symbol or other particular assigned to the individual;
- (d) the address, telephone number, fingerprints or blood type of the individual;
- (e) the personal opinions or views of the individual except where they relate to another individual;
- (f) correspondence sent to a public authority by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the individual;
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual".

41. Both parties relied on the learning of Moosai J (as he then was) in **Darren Baptiste v Police Service Commission and the Commissioner of Police**<sup>14</sup> on the approach the Court ought to take in determining whether a document contained personal information and if so whether it should be disclosed. At paragraph 14 Moosai J (as he then was ) stated:

“In the case of Stewart and Department of Transport<sup>2</sup> F.N. Albietz, the Information Commissioner for Queensland, Australia, advised on the approach to be taken when applying the foregoing section:

The application of this provision calls for a two-step process: first, determine whether a document contains information relating to the personal affairs of any person; and if so, then determine whether disclosure of that information would be unreasonable.

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<sup>14</sup> CV 2007-03288



I respectfully add that in answering the first question the logical starting point must be to determine the meaning and effect of the term “personal information” in the context of the relevant legislation. This is a precursor to a necessary juxtaposition of the meaning of the term alongside the features and characteristics of the information contained in any requested documents.”

42. At paragraph 21 of **Darren Baptiste** Moosai J ( as he then was) stated the following in the local context:

“Based however on the Trinidad and Tobago legislation, information relating to the education or employment history of an individual is considered “personal information”. However, our Australian counterparts have provided useful guidance on what may be within and out with the scope and ambit of the definition. Thus the more important consideration is whether the disclosure of same would be unreasonable in the circumstances. (Emphasis added).

43. The burden is on the Defendant to first demonstrate that the documents requested in items (i) to (iii) fall under the definition of “personal information” in this jurisdiction. Secondly, the Defendant must then cross the more challenging second hurdle in the test, which is whether the disclosure of the documents “would be unreasonable in the circumstances”. There is no duty on the Claimant to provide any reasons for requesting the information.

44. The February 2019 Letter did not indicate which subsection under the definition of “personal information” the Defendant was of the opinion that he considered the information requested under items (i) to (iii) to be personal information. Paragraph 9 of the Chandler Affidavit sought to bring clarity to this issue. He stated that:

“Upon perusal, the FUL itself contains a Licence a No., a photograph of the Licensee as well as his signature and reveals all of the Firearms a licensee is authorized to keep in his possession and moreover, the extent of his authority for ammunition he may possess at any one point in time and the amount he may acquire at any one time or over the course of a year. The Respondent’s position is that this information falls within the definition of Personal Information for the

purposes of Freedom of Information, as the level of detail denoted by the License is plainly specific to the licensee himself and is not something which is ordinarily discussed or observed by others.”

45. In the Court of Appeal judgment in **Minister of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry**<sup>15</sup> (“the **JCC case**”) the Court was of the view that there was nothing in the FOIA which prohibited a public authority from relying on a reason for non-disclosure of a document in an affidavit filed in judicial review proceedings and which was not stated in the section 23 notice to the Applicant. Jamadar JA in his judgment summed up the position at paragraph 14 where he stated:

“In my opinion therefore, a public authority is not prohibited from relying on ‘new reasons’, but to do so the authority must satisfy a court, in the exercise of its judicial discretion that to grant permission will enable the court to deal with the matter justly (and all that that concept incorporates in the current jurisprudence of Trinidad and Tobago to hold otherwise would be to practically render otiose the purposes intended by sections 15 and 23(1) (a), (d) and (e ) of the FOIA.

46. In my opinion the reasons set out in the Chandler Affidavit, though not in the February 2019 Letter, provided information which would assist the Court in assessing if the information requested under items (i) to (iii) should be disclosed.
47. Form 2 of the Firearms Regulation to the Firearms Act<sup>16</sup> sets out the information contained in the FUL. There is a photograph and signature of the Licencee. In my opinion, the photograph and the signature of the Licencee both fall within the definition of section 4 (c) since they are particular in identifying him. Form 2 also sets out the name of the person to whom the Licence is granted. In my opinion, this is also personal information since it identifies the Licencee.

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<sup>15</sup> Civ Appeal No P 200 of 2014

<sup>16</sup> Chapter 16:01

48. The other information which is set out in the Form 2, is the type, quantity, make, calibre, identification numbers and any other distinguishing marks; the maximum of type, quantity and calibre of ammunition the Licensee is allowed to be in possession of; the maximum type and quantity of ammunition the Licensee is allowed to be in possession of for 1 year and the maximum he is permitted to acquire at any one time. In my opinion this information does not fall into any of the other categories as identified in section 4 of the FOIA and as such it is not personal information.
49. The second step which the Defendant was under a duty to perform in deciding that the information requested is exempted under section 30 of the FOIA is to determine if it is reasonable not to disclose it. The duty extends to considering whether it is reasonable to disclose the information with parts redacted. In **Caribbean Information Access v the Minister of National Security** Jamadar JA (as he then was) described the approach as:
- “27. The FOIA has provided a statutory right to information from public authorities subject to exceptions and exemptions. It is always for the public authority to show that it is entitled to rely on an exemption claimed and to not grant access to the documents requested. The exemptions provided for in section 28 are quite specific and limited. Thus given the statutory right to access, the duty to assist in facilitating disclosure, the mandate to disclose even exempt documents where on a balance it is in the public interest to do so, the mandate to redact exempt documents in order to render them non-exempt so to facilitate disclosure, and the duty to interpret and apply the provisions of the FOIA (including the exemption provisions) in such a way so as to ‘facilitate and promote...the disclosure of information’, there is no presumption in favour of exemption from disclosure of or access to documents held by public authorities...” (Emphasis added).
50. The February 2019 Letter is absolutely silent on if the Defendant took this second step.
51. Was it reasonable not to disclose the information? In my opinion, the factual matrix in the instant case supports the position that it is reasonable to disclose part of the

information with the photograph, signature and name of the Licencee redacted. The Claimant is a police officer who was allegedly shot while on duty by a prison officer, Mr Accoo, in August 2015. This is a serious matter since it involved two officers from different arms of law enforcement and it is unknown if Mr Accoo was or was not charged for utilising a licensed firearm.

52. For these reasons, I am of the opinion that it is reasonable to disclose the information requested in items (i) to (iii) Of the FOIA Request with the photograph, signature and name of the Licencee redacted. This is of course subject to the section 35 public interest override.

**IF THE EXEMPTIONS ARE PROPERLY INVOKED SHOULD THE INFORMATION BE DISCLOSED PURSUANT TO SECTION 35 OF THE FOIA?**

53. Section 35 of the FOIA provides:

“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.”

54. In **Caribbean Information Access v the Minister of National Security** the Court of Appeal considered the issue of “what is required of a public authority when it claims exemptions of disclosure and the granting of access to information and documents under the FOIA”. At paragraphs 18 and 19 the Court explained the approach a public authority must take as:

“18.... where a claim of exemption is relied on under the FOIA, a Respondent must satisfy a court of the reasonableness of the claim. This is because the FOIA specifically provides:

- (i) That where a decision is made that an applicant is not entitled to access to information requested, that the reasons for that decision must be given in writing; and
- (ii) That a person aggrieved by any decision of a public authority to refuse to grant access to information requested under the FOIA, may apply to the High Court for judicial review of that decision.

19. The sufficiency of reasons will always be determined by the circumstances and context which surround the particular request made and exemptions claimed. However, when one considers section 23 of the FOIA it is clear that once a decision is made that an applicant is not entitled to access to the document requested, then the statutory obligation to give reasons requires that all of the relevant requirements of section 23(1) and (2) must be satisfied. For example the findings of any material question of fact, with reference to the material, must be stated and if a document requested does not exist or cannot be located, that must be stated; and if a document is exempt under section 24, 25 or 28, the decision to refuse access may be stated in terms which neither confirm or deny the existence of any document. It therefore follows that where exemption is claimed, the reasons must address the specific considerations identified in the sections and subsections relied on." (Emphasis added).

55. The Court further stated at paragraphs 27 and 28:

"27. The FOIA has provided a statutory right to information from public authorities subject to exceptions and exemptions. It is always for the public authority to show that it is entitled to rely on an exemption claimed and to not grant access to the documents requested. The exemptions provided for in section 28 are quite specific and limited. Thus given the statutory right to access, the duty to assist in facilitating disclosure, the mandate to disclose even exempt documents where on a balance it is in the public interest to do so, the mandate to redact exempt documents in order to render them non-exempt so to facilitate disclosure, and the duty to interpret and apply the provisions of the FOIA (including the exemption provisions) in such a way so as to 'facilitate and promote...the

disclosure of information”, there is no presumption in favour of exemption from disclosure of or access to documents held by public authorities. The minimum standard of proof that the public authority must attain to justify exemption under section 28 is reasonableness- that is, as the wording of section 28 (1) indicates, “a document is an exempt document if its disclosure would, or would be reasonably likely to...

28. Exemptions are also to be approached in a careful and contextually sensitive manner. This is so particularly in the class of exemptions provided for by section 28 – Law Enforcement Documents. A delicate balancing of competing policy interest must be engaged. Thus in my opinion the appropriate test, as I have indicated, is one of reasonableness: Is it reasonable, balancing the competing interests and in light of the explanations given (and where necessary, the evidence supplied), to uphold the exemptions claimed? This is an objective test and the public authority must satisfy the court on the civil standard of likelihood.” (Emphasis added).

56. The position was repeated by Narine JA In **Ashford Sankar v Public Service Commission** who stated the following on section 35 at paragraph 17:

“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 ( Emphasis added)

57. In **the JCC case** Jamadar JA (as he then was) was of the view that the public interest in section 35 of the FOIA to be “necessary for the protection of essential public interest”. He stated:

**Statutory Underpinnings**

22. The specific statutory underpinning is clearly section 35 of the FOIA. However, section 35 itself exists contextually within the FOIA. Section 3 of the FOIA establishes as the objective of the legislation, “the right of members of the public to access to information in the possession of public authorities...Section 3(2) effectively gives rise to a general presumption in favour of disclosure. There is therefore to be ‘freedom of information’. This objective of a presumptive general right to information, is to be “limited only by exemptions and exemptions necessary for the protection of essential public interest...”

Section 3(2) effectively gives rise to a general presumption in favour of disclosure. There is therefore to be ‘freedom of information’. This objective of a presumptive general right to information, is to be” limited only by exemptions and exemptions necessary for the protection of essential public interest ...”

23. Section 3(1)(b) of the FOIA thus assists in the interpretation of section 35, by further qualifying the mandate that “... a public authority shall give access to an exempt document 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 doing so.” That is to say, the denial of justification in the public interest must be ‘necessary for the protection of essential public interests’. Thus, denial of the section 35 public interest override, in cases of exempt documents, is only justified where to do so is necessary for the protection of essential public interests having regard to both the benefit and damage that may arise from granting access. The word ‘essential’; qualifies both the type of public interests and the degree of circumstances that justify denial of the section 35 override.”

58. The **JCC case** was referred to by the Privy Council in **Ravi Balgobin Maharaj v The Petroleum Company of Trinidad and Tobago Privy Council Appeal**<sup>17</sup> on the approach to be taken by the Court in judicial review proceedings with respect to section 35 of the FOIA. Lord Sales stated:

13. It is common ground that section 35 has two distinct limbs. A public authority is required to give access to an exempt document (i) where there is reasonable evidence that one or more of the matters set out in the sub-paragraphs has or is likely to have occurred, or (ii) 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 doing so.

...

39. As emerges from these and other cases, an important issue is the proper legal approach to judicial review of a decision of a public authority not to disclose an exempt document taken under limb (ii) of section 35. Is such a decision to be reviewed according to a simple rationality standard or does the court have a role itself as primary decision-maker to decide how the public interest factors for and against disclosure of that document are to be balanced? ....

40. The Council for the Construction Industry case concerned an application for disclosure of legal advice given to the Minister. The relevant documents were exempt documents, but by a majority the Court of Appeal held pursuant to limb (ii) of section 35 that disclosure should be given. Beraux JA noted that the intention of the FOIA in making information available about the operations of public authorities “is a radical departure from the culture of secrecy and confidentiality which pervaded the public service at the time of the Act’s passage” (para 69). He observed that in that case it did not appear that any section 35 balancing exercise had been performed by the Minister (para 71), and it was on that basis that he held that it fell to the court to decide the public interest issues under limb (ii) of section 35 (para 75). His conclusion, after performing the relevant balancing exercise, was that the legal advice in question should be

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<sup>17</sup> No 47 of 2018



disclosed (para 84). Although Bereaux JA appears to have considered that it was the absence of consideration by the Minister of the balance between any benefit and any damage to the public interest which opened the way to consideration of that balance by the court itself, he did not propose that the decision should be remitted to the Minister, as might have been expected if he was of the view that the Minister should be treated as the primary decision-maker subject to ordinary judicial review on grounds of rationality.

41. Although he was in the minority as to the result in the case, Narine JA regarded the issue of deciding how the balance was to be struck in relation to the public interest as one for the court, and did not suggest that it was a precondition that the Minister had failed to carry out the relevant balancing exercise himself: see paras 71-81 of his judgment.

42. Jamadar JA was explicit at para 40 of his judgment that “when one comes to the evaluative exercise demanded by section 35 of the FOIA, in so far as denial of access to information is justified, both a public authority (initially) and a court of review (subsequently) are obliged to carry out the required balancing exercise in the context of the ... statutory and constitutional framework and values”. That is to say, although the public authority must carry out the relevant balancing exercise for the purposes of limb (ii) of section 35 in the first place, the court has an independent role in carrying out its own balancing exercise thereafter to rule on whether the right of a member of the public to be given access to information in the possession of a public authority has been infringed by the decision taken by that authority. After performing that balancing exercise in the case at hand, Jamadar JA concluded, in agreement with Bereaux JA, that the legal advice in question should be disclosed (para 47). Jamadar JA’s statement at para 40 of his judgment was cited by Rampersad J as part of the relevant guidance regarding the application of section 35, at para 27.13 of his judgment in the Port Authority case cited above.” (Emphasis added).

59. 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 Defendant. Once the public authority 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 unless there are public interest factors which favour disclosure and which outweigh identifiable public interest considerations which favour non-disclosure.

60. The February 2019 Letter is absolutely silent on whether the Defendant applied section 35 of the FOIA. The Chandler Affidavit stated at paragraphs 13 to 15 that:

“13. Accordingly, the Claimant has not explained to any sufficient degree as to why knowledge of how many arms the Prison Officer in question was authorised to possess and how much ammunition is allowed to possess and/or acquire is in anyway relevant to his case. The Respondent is of the view that these affairs extend no further than the Claimant’s mere curiosity, rather than critical explanatory evidence of the factual circumstances of the Claimant’s prospective proceedings.

14. The Respondent is of the view that the Claimant is inviting the Honourable Court to set a dangerous precedent in which the ordinary public may have access to information relative to the Firearm Licences of any person be it members of protective services or other members of the public.

15. Access to the information requested may set precedent that place Police Officers, business persons or any other public official who own firearms in vulnerable positions where elements criminal or otherwise know the extent to which they carry arms and even details relative to the amount of ammunition they are authorised to carry. The Licence, therefore, does not merely denote the fact that a given person may carry a firearm, but also the extent of their capacity to defend themselves with same based on how much ammunition they are allowed to carry as well as the type, quantity and calibre of their weapon(s).”

61. The Defendant's concerns, as set out in the Chandler Affidavit, were the request was based on the Claimant's curiosity, it would set a dangerous precedent since it may cause more persons to request similar information of persons in private and public life and it would make private and public persons who hold valid FULs to be in a vulnerable position with criminal elements in society.
62. In my opinion, the concerns raised by the Defendant in the Chandler Affidavit are baseless for the following reasons. First, the request is not based on curiosity since the Claimant set out a paragraphs 8 and 9 in the Claimant's Affidavit that he requested the information in order to examine his options in pursuing legal redress. Second, Mr. Accoo is a not a businessman or a regular private citizen. He is a prison officer who is also involved in law enforcement. Third, the Defendant did not place any evidence before the Court that disclosure of such information would cause other persons to make similar request for information. Indeed, under the FOIA if such a request is made, the Defendant has to examine the facts of each case before a decision is made. Lastly, there was no evidence from the Defendant that if this information is disclosed it would place public and private FUL holders in a vulnerable position with criminal elements. It is reasonable to conclude that one of the reasons these persons requested and received the FUL was to protect their person and property.
63. In my opinion, there are exceptional circumstances which tilt the scales in favour of the disclosure of the redacted information in the public interest.
64. First, the disclosure of the information requested would go a long way in allaying any perception from members of the police service that the Defendant is not involved in any cover up of the incident. This is not a case where the Claimant is randomly requesting someone's FUL. In this case, the Claimant is a police officer who is requesting the FUL of a person who shot him during the course of his duty and there has been little if any investigation into the incident to date. In this case, the shooter is a prison officer and who may or may not have possibly used an illegal firearm. In my opinion the failure to disclose the information would reinforce the Claimant's

suspicion that there was a cover up in the investigation of the incident when he was shot.

65. Second, it would also improve the public's perception of the Defendant that the police service is serious in having persons who are culpable held responsible for their actions. It is unknown if Mr Accoo was or was not charged for utilising a firearm. It is a serious matter in this jurisdiction if a person who is not the holder of a valid firearms licence shoots a police officer in the line of his duty. If Mr. Accoo was not the holder of a validly issued FUL at the time he shot the Claimant, he would be in contravention of the Section 6 of Firearms Act<sup>18</sup> and liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment of eight years; or on conviction on indictment to imprisonment for fifteen years.
66. Third, it would be an injustice to the Claimant if the redacted information is not disclosed since it is required by the Claimant to pursue his legal remedies. It was submitted on behalf of the Defendant that the Claimant can access the same information through alternative methods such as disclosure in legal proceedings which he has already and can institute.
67. At paragraphs 8 and 9 of the Claimant's Principal Affidavit the Claimant stated the reasons he required the information he requested. He stated:
- "8. I am desirous of instituting constitutional proceedings against the Attorney General of Trinidad and Tobago for breach of my constitutional rights to security of the person, due process and protection of the law. The negligence and failure to conduct investigations in a timely, professional and efficient manner in this matter leads to the inescapable inference of an attempt to shield certain facts or persons.
9. Without the requested information I would be severely prejudiced in advancing my claim for assault and battery and constitutional redress. The requested documents are also necessary to enable me to obtain full and proper

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<sup>18</sup> Chapter 16:01

legal advice on the merits of any claim I may have against the Attorney General or Mr Accoo.”

68. The Claimant was seriously injured and hospitalized for a long time as a result of this shooting. His medical reports are contained in the Claimant’s Affidavit in Reply show that the Claimant still has a bullet lodged in his back. If Mr. Accoo is not fit for an FUL and one was in fact issued to him by the Defendant, then there would be a serious breach of statutory duty and negligence by him which by extension would mean that Mr Accoo may be a threat to society.
69. In this jurisdiction in **Curtis Ramjitsingh v Estate Management and Business Development Company Limited**<sup>19</sup>, Rajkumar J (as he then was) held at paragraph 36: “If the information requested had been exempt however, and the issue of the public interest did fall for determination, I consider that **injustice to an individual** as referred to in that section, should not be interpreted restrictively. It must be relevant to a consideration of whether injustice has occurred in the circumstances...”
70. Rajkumar J (as he then was), further held at paragraph 38: “38. Further, the **public interest** must include the right of the individual to (a) access to the civil justice system...”
71. In my opinion, the Claimant has set out sufficient reasons to demonstrate that he has a valid reason for requesting the information. Further, an alternative route to access the information requested is not a valid reason for the Defendant to not disclose documents under the FOIA. The Claimant has a right to pursue a claim to vindicate his constitutional right to protection of the law and due process in order to ensure that a proper investigation be done into this shooting and the requested documents at (i) to (iii) above is important for him to substantiate his claim.

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<sup>19</sup> CV 2014-01458

**DID THE DEFENDANT COMPLY WITH THE FOIA WITH RESPECT TO ITEM IV?**

72. In the January Notice the Defendant stated that he did not consent to the provision of the information in item (iv). No reason was stated.
73. The February 2019 Letter the Defendant stated that the information requested in item (iv) was “not within the purview of the Trinidad and Tobago Police Service.”
74. Paragraph 17 of the Chandler Affidavit explained the Defendant’s position by stating:  
“17. With respect to item (iv) of the Claimant’s request, I am of the view that this is information not within the purview of the Respondent to provide as the Commissioner of Prisons is an entity answerable to the Ministry of National Security via the Inspector of Prisons and not the Commissioner of Police. The separation between the Police Service and the Prison Service entails that the Respondent cannot be expected to speak to the power or lack thereof of the Commissioner of Prisons.”
75. It was argued on behalf of the Defendant that the request for item (iv) was improperly made to him, as such he was not obligated to provide it and the request was properly refused. In support of this position Counsel for the Defendant relied on section 18 of the FOIA and the Prison Rules and Regulation 1943.
76. The Claimant’s position was that the Defendant is the proper authority to which the FOIA Request was sent and if he was not, then he had a duty under the FOIA to assist the Claimant by responding to the FOIA Request or the Pre-Action letter and inform the Claimant that he was not the proper public authority to which the request was made.
77. Section 23 of the FOIA sets out the manner in which the public authority is to respond to a FOIA request where a Claimant is not entitled to access to a document. 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 documents 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.”

78. In my opinion, the response from the Defendant did not comply with section 13 of the FOIA. He failed to indicate if he had or did not have the information. If he had the information, he failed to indicate if it was exempted and the reasons and the section of the FOIA he relied on for the exemption. He also failed to assist the Claimant by pointing out regulations 217 and 218 of the Prison Rules and Regulations and their relevance to the Claimant’s FOIA request for item (iv).

79. In any event, the reliance on Regulations 217 and 218 of the Prison Rules and Regulation are misguided. Rules 217 and 218 of the Prison Rules and Regulations provide:

## FIREARMS

217 - Firearms Male Officers shall be instructed in the use of firearms. The Commissioner may order officers in charge of prisoners within or without any prison to carry firearms.

218 - Firearms The use of firearms should be resorted to only in cases of extreme necessity, when all other measures have failed, in order to protect life, to frustrate mass attacks or escapes or mutiny, or to prevent the setting on fire of Government property.”

80. In my opinion those Regulations deal with prison officers using firearms when in charge of prisoners. Further, section 7 of the Firearms Act only exempts a prison officer from having a FUL once he is acting in his capacity as such. In the instant case the Claimant was a police officer who was shot by Mr Accoo in Sangre Grande, outside a prison.
81. I would therefore remit item (iv) of the Claimant’s FOIA Request to the Defendant for him to provide the Claimant in writing within 14 days of this order with a response which complies with section 23 of the FOIA.

### **DID THE DEFENDANT MAKE A DECISION FOR ITEMS (v), (vi), (vii), (ix) AND (x) AND IF NOT HOW SHOULD THE COURT DEAL WITH THIS?**

82. In the January Notice the Defendant indicated that he would have provided the information in items (vi), (vii) and (viii) once they are in the Defendant’s possession. The information for item (viii) had already been provided previous to the January Notice. The other information for items (vi) and (vii) were not provided. There was no position stated with respect to items (v), (ix) and (x).
83. The February 2019 letter stated that with respect to items (v) and (vi) “ I am instructed that the complaint in relation to this matter was registered at the Police Complaint Registry Section on October 18<sup>th</sup> 2018 as CR. No. 670/2018 and currently has not been



assigned to an investigator as yet. The February 2019 Letter did not state the Defendant's position with respect to items (vii), (ix) and (x).

84. Paragraph 18 of the Chandler Affidavit stated the following:

"I am of the view that items (v) to (vii) of the Claimant's request has been answered by the Respondent. It has been explained to the Claimant by way of inter partes correspondence dated 14 February, 2019 to the effect that the matter was in fact registered at the Police Complaints Registry Section on October 18<sup>th</sup> 2018 bearing the number CR No. 670/2018 but was not assigned to an investigator. A true copy of the aforesaid correspondence dated 14<sup>th</sup> February, 2019 is hereto annexed and marked 'C.H. 3'".

85. Paragraphs 19 to 21 of the Claimant's Affidavit in Reply addressed paragraph 18 of the Chandler Affidavit. It stated:

19. My request was directed to the Commissioner of Police, not the Police Complaints Authority. I want to know from the Commissioner of Police, what is the status of the criminal investigation into my unlawful shooting. My request was not concerned with whether or not the Police Complaints Authority is investigating the matter. The PCA does not have the jurisdiction to investigate a criminal offence.

20. I have reason to believe that nothing was done in the Police Service to further the investigating into this matter since the retirement of Inspector Nisha. This is clear from the failure of the Defendant to respond to (vi) and (vii) of my request.

21. The Defendant has skirted the issue and attempted to mislead the court by saying that, "*I am instructed that the complaint in relation to this matter was registered at the Police Complaints Registry Section on October 18<sup>th</sup>, 2018 as CR No. 670/2018 and currently has not been assigned in an investigator as yet.*" I am well aware of this complaint. I am the person who instituted this complaint. This however does not answer my question about what was done by the TTPS to date to further any investigation in this matter and the status of the said investigation in the TTPS. The Defendant attempted to conflate

the TTPS and PCA when in truth and in fact my request was clear and unambiguous. In any event, there has been no resolution to my complaint at the PCA to date and it remains "pending".

86. It was submitted on behalf of the Claimant that there was no clear access decision made by the Defendant with respect to items (v), (vi), (vii), (ix) and (x). Senior Counsel argued that the FOIA Request was made to the Defendant and not the Police Complaints Authority ("the PCA") and that the position stated by the Defendant about the PCA conducting an investigation is an attempt to skirt the issue. It was also submitted on behalf of the Claimant that the burden lies with the Defendant to show why the documents and/or information requested at items (v), (vi), (vii), (ix) and (v) of the FOIA Request are exempt but he failed to do so.
87. Counsel for the Defendant submitted that the information requested under items (v) to (vii) are exempted under section 28 of the FOIA since they form part of an investigation. It was also submitted that the Defendant was not obliged to provide the information requested under items (ix) and (x) of the FOIA request. There was no reliance on any exemption.
88. It is clear from the February 2019 Letter that the Defendant failed to indicate to the Claimant whether he had approved or refused the disclosure of items (v), (vi), (vii), (ix) and (x).
89. The Chandler Affidavit did not bring any clarity to the Defendant's position with respect to these items since the Defendant's reference to the PCA with respect to the FOIA Request for items (v) and (vi) are irrelevant. It also demonstrated a total lack of understanding and appreciation of the Defendant's duty under the FOIA. Item (v) of the FOIA Request concerned the status of the investigation of the shooting of the Claimant by Mr Accoo. Item (vi) is related to item (v) since it requested information for the reason/ explanation for Mr Accoo not being charged for shooting the Claimant.

90. In my opinion, the FOIA request was not made to the PCA but to the Defendant as the head of the Trinidad and Tobago Police Service. The Defendant's duty under the FOIA was to either provide the information or if not, provide reasons for not doing so. If he was the incorrect public authority he was required to indicate this to the Claimant and state the public authority the Claimant should make the request to. This was not done by the Defendant.
91. In my opinion the effect of the February 2019 Letter and the Chandler Affidavit was that the Defendant made no decision with respect to items (v) and (vi) of the FOIA Request. With respect to items (vii), (ix) and (x) the Defendant also made no decision. The first time the Claimant became aware of any reliance by the Defendant on exemption under section 28 for the information requested in items (v) to (vii) was in the Defendant's closing submissions in the instant matter. By this time more than 12 months had passed since the Claimant was entitled to obtain a response for the FOIA Request from the Defendant.
92. Section 28 deals with the exemptions from disclosure for law enforcement. It provides that:
- "28. Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to –
- (a) Prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;" (Emphasis added).
93. Even if the section 28 exemption was properly raised by the Defendant with respect to items (v) and (vi) of the FOIA request, there was absolutely no evidence supplied by the Defendant how the disclosure of the documents can prejudice the investigation. The Chandler Affidavit failed to indicate if any investigator was appointed and if so who was the investigator. Indeed it was the Claimant who deposed at paragraph 20 of the Claimant's Affidavit in Reply that he believed that there has been no further investigation done by the Trinidad and Tobago Police Service in the shooting incident involving him after the retirement of Inspector Nisha and in the absence of such

evidence, I have to conclude that the reliance by the Defendant on exemption 28 is unreasonable.

94. In any event, no exemption is absolute. Any exemption claimed under section 28 is still subject to the overriding public interest under section 35 which is mandatory and a failure to perform the said exercise invalidates the entire decision. In the instant case there were no public interest factors set out in the Chandler Affidavit which the Defendant relied on for items (v) and (vi). As a consequence, the failure by the Defendant to consider the overriding public interest under section 35 of the FOIA means that the Defendant's decision on items (v) and (vi) is illegal, null, void and of no legal effect.
95. The information requested in item (vii) was if the investigation concerning the shooting of the Claimant by Mr Accoo was on going, the present status and the officer who was conducting the investigation. Item (ix) was the Standard Operating Procedure which governs the investigation of the incident in which a police officer is shot in the execution of his duties and item (x) is any policy, procedure or practice which governs the continuation of investigations after the investigating officer resigns.
96. Again the February 2019 Letter and the Chandler Affidavit are silent on the Defendant's consideration of any exemption and on the overriding public interest under section 35 of the FOIA. With respect to items (vii), (ix) and (x) of the FOIA Request. As a consequence, although I have concluded that there was no decision by the Defendant on these items, even if there was, the failure by the Defendant to consider both any exemption and more importantly the overriding public interest under section 35 of the FOIA means any such decision was still illegal, null, void and of no legal effect.
97. It was submitted on behalf of the Claimant that a decision arrived at without consideration of section 35 is defective and illegal and cannot be retroactively cured in such a manner as it is procedurally unfair and contrary to the supervisory role of the court in judicial review. Senior Counsel argued that the correct approach is to

invalidate the decision and remit the matter to the Defendant to consider the section 35 overriding public interest<sup>20</sup>.

98. There are two options available to the Court on judicial review in circumstances which have arisen with respect to items (v), (vi), (vii), (ix) and (x). The first option is under section 22 of the **Judicial Review Act**<sup>21</sup> which permits the Court to remit it to the decision maker for consideration:

21. If, on an application for judicial review seeking an order of certiorari, the Court quashes the decision to which the application relates, the Court may remit the matter to the Court, tribunal, public body, public authority or person concerned, with a directive to reconsider it and reach a decision in accordance with the findings of the Court.

99. The second option is the Court can perform the section 35 override. This was set out at paragraph 29 of the Privy Council decision in **Ravi Doodnath Jaipaul v the Public Service Commission**<sup>22</sup>:

“29. ...The recent case law now establishes that it is generally for the public authority to establish that there was no overriding Section 35 interest which would allow access to an exempt document. Therefore, the trial judge was in error to dismiss this aspect of the Appellant’s case without a proper consideration of the Section 35 overriding discretion. However, in the JCC case, Beraux JA also indicated that it may be that an applicant can establish the need for the Section 35 override, but if there is no such evidence then the duty falls back to the public authority and ultimately to the court to establish this Section 35 override. I agree with the opinion of Beraux JA.”

100. In **the JCC case** there was no section 35 analysis done by the public authority, 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

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<sup>20</sup> See paragraphs 62 to 65 of submission in Reply filed on 10 January 2020

<sup>21</sup> Chapter 7:08

<sup>22</sup> CA No 162 of 2011

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.

101. Based on the nature of the information requested, the peculiar facts of the instant matter and the decision maker is the still in office, I have decided in the instant case not to order the Defendant to disclose the information for items (vii), (ix) and (x) but instead to remit them to him to reconsider his position in light of section 35 of the FOIA.

### **COSTS**

102. The award or costs is discretionary and the usual order for costs is that the unsuccessful party us to pay the successful party's costs. I have no reason to depart from the usual order for costs. In my opinion, the Defendant's conduct in this matter is not consistent with the object of the FOIA and the overriding objective of the CPR. The Defendant failed to comply with the provisions of section 15 of the FOIA; the Defendant failed to comply the Pre-Action letter and the Defendant changed the reason for not providing the requested documents during the duration of the instant matter and the Claimant had no recourse but to institute the instant action to obtain the requested documents.
103. I order the Defendant to pay the Claimant's costs certified fit for Junior and Senior Counsel to be assessed by the Registrar pursuant to Rule 67.12 of the CPR in default of agreement.

### **ORDER**

104. It is declared that the Defendant has breached his statutory duty in 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 30 days after the day on which the FOIA request was made.
105. It is declared that the Claimant is entitled to the information requested in items (i), (ii) and (iii). The information to be redacted from items (i) to (iii) are the photograph,

signature and name of the licensee. The Defendant is to provide this information to the Claimant within 14 days from the date of this order.

106. Item (iv) of the Claimant's FOIA Request is remitted to the Defendant for him to provide the Claimant in writing within 14 days of this order a response which complies with section 23 of the FOIA.
107. Items (v), (vi), (vii), (ix) and (x) in the Claimant's FOIA Application dated 9 August 2018 are remitted to the Defendant to reconsider with respect to section 35 of the FOIA and to provide the Claimant in writing within 14 days of this order a response which complies with section 35.
108. The Defendant is to pay the Claimant's costs for Senior and Junior Counsel pursuant to Rule 67.12 of the CPR to be assessed by the Registrar in default of agreement.

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