THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2012-04538

Between

THE JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY

Claimants

And

THE MINISTER OF PLANNING AND SUSTAINABLE DEVELOPMENT

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. Kingsley Walesby for the Claimant
2. Mr. Russell Martineau S.C. and Mr. Kelvin Ramkissoon and Mr. Shiv Sharma, instructed by Ms Petal Alexander and Ms. Leah Thompson for the Defendant

Date of Delivery: 14th July, 2014

Decision

1. Before the Court for its determination, is the Claimant's claim for judicial review filed on the 14th October, 2013 whereby the Claimant sought judicial review of the continuing decision of the Defendant by its letter dated the 16th August, 2012 to refuse to provide copies of the written instructions, the legal advices and the identity of the author(s) of such legal advices received from the legal unit of the Defendant and from the Office of the Attorney General ("the said information") and which said information was requested by the Claimant in its Freedom of Information application dated the 20th April, 2012.

2. The reliefs sought by the Claimant are as follows:

   i. (a) A declaration that the continuing decision of the Defendant by letter dated the 16th August, 2012 to refuse to provide the said information which was requested by the Claimant in its Freedom of Information application dated the 20th April, 2012 is illegal, null and void and of no effect.

      (b) A declaration that the Defendant is not entitled to rely upon the additional reasons for its refusal to provide the said information as set out in its letter dated the 4th December, 2012 as a ground for its refusal to provide the said information.

   ii. A declaration that the Claimant is entitled to the said information.

   iii. An order of Mandamus compelling the Defendant to provide the said information.

   iv. Damages.

   v. Interest.

   vi. Costs.

vii. Pursuant to section 8 of the Judicial Review Act 2000, such further orders and directions as the Court considers just and as the circumstances warrant.

Background information

3. The Ministry of Planning and Sustainable Development was formerly known as the Ministry of Planning and the Economy until the year 2012. Senator the Honourable Minister Dr. Tewarie (the Minister) while functioning under the Ministry of Planning and the Economy initiated a Request for Proposal process to select a developer or developers for state lands located at Invader's Bay.

4. The Claimant contends that the request for proposal process amounted to a tender process and by letter dated 14th December, 2011 called upon the Minister to explain how this was possible under the Ministry when the Central Tenders Board has the sole and exclusive authority to act for and on behalf of the government subject to limited exceptions which did not apply in this case.

5. The Claimant requested a response from the Ministry on this apparent circumvention of the Central Tenders Board and described same as a 'matter of grave public concern'.

6. By letter dated the 21st December, 2011, the Minister informed the Claimant that with respect to its query, advice was being sought from the Attorney General on the matter.

7. By letter dated the 1st March, 2012, the Minister wrote to the Claimant indicating *inter alia* that based upon advice received from the Office of the Attorney General the Request for Proposals process was not required to be in conformity with the Central Tenders Board Act (Chap. 71:91).

8. By letter dated the 29th March, 2012, the Claimant called upon the Minister to publish the legal advice received with respect to the Central Tenders Board Act.

9. By letter dated the 20th April, 2012 the Claimant wrote to the Ministry pursuant to the Freedom of Information Act requesting access to various information including a printed copy of the following documents and information:-

    i. *"Has MPE had legal advice on the applicability of the CTB Act to this RFP process?*
    ii. *When did MPE request that legal advice? To which legal adviser did MPE make that request?*
    iii. *We are requesting copies of the written instructions and the legal advices both from the Legal Unit of MPE and the office of the Attorney General."*

10. Having received no acknowledgement or substantive response to the said letter, the Claimant wrote to the Ministry again indicating that its previous letter had not been acknowledged by the Ministry and that the Ministry was in breach of section 15 of the Freedom of Information Act by failing to indicate within thirty (30) days whether it was acceding to or refusing the Claimant's request for the requested documents.

11. By letter dated 5th July, 2012 the Ministry acknowledged receipt of the Claimant's letter and apologized for the delay and informed the Claimant that the matter was receiving its attention.

12. By letter dated the 13th July, 2012 the Claimant wrote to the Respondent referring to its letter dated the 29th March, 2012 and indicated that it was still awaiting a copy of the said information.

13. By letter dated the 10th August, 2012 the Claimant through its Attorneys at law sent a pre-action protocol letter to the Respondent indicating that the Ministry in failing to indicate whether it was approving or refusing to grant the information requested by the Claimant was in direct and continuing breach of Section 15 of the Freedom of Information Act. The Respondent was requested to provide its substantive response on or before the 24th August, 2012 failing which it was indicated that the Claimant would apply for judicial

review of the said continuing refusal and/or failure of the Ministry to provide its substantive response to the request.

14. By letter dated the 16th August, 2012, the Permanent Secretary, Ministry of Planning and Sustainable Development refused to provide the legal advice obtained on the matter and informed the Claimant as follows:

    "The instructions for the provision of the legal advice, the advice and its author are however considered exempt according to Section 27(1) of the Freedom of Information Act. The revelation of same cannot be seen to be justified in the public interest since relevant information surrounding process is now provided. Further the decision to move forward with the process and the selection of the three (3) chosen investors was agreed by cabinet."

15. Further by Letter dated the 4th December, 2012 the Respondent indicated that the information requested by the Claimant is exempt under section 29(1) of the Freedom of Information Act on the ground of legal professional privilege and therefore could not be made available to the Claimant.

The Affidavit Evidence

16. The Claimant relied on the affidavits filed by Afra Raymond on the 31st October 2012, 11th January 2013 and 14th October 2013. The Defendant relied on the affidavits of Andrea Julien filed on the 6th and 10th December 2013.

Submissions

17. The parties relied on the submissions they filed at the leave stage as well as on the further submissions which the Claimant filed on 28th March 2014 and the Defendant filed on 19th May, 2014. The Claimant also filed submissions in Reply on the 5th June, 2014 and on the 2nd July, 2014 and the Defendant filed additional submissions on the 4th July, 2014.

The issues to be determined

i. Whether the requested information is exempt under Section 27(1) of the Freedom of Information Act and whether a public interest assessment ought to have been undertaken before the decision to refuse the request was made.

ii. Whether the Defendant is entitled to rely upon the additional reason for its refusal to provide the said information as set out in its letter dated 4th December 2012 namely that Section 29(1) of the Freedom of Information Act protected the said information from being disclosed.

iii. Whether the said information is protected from disclosure under section 29 (1) of the Act.

iv. Whether the Defendant's statement in the Senate on the 28th February 2012 amounted to a waiver of legal professional privilege.

v. Whether the Claimant can rely on the statement made by the Defendant as a basis of waiver in light of the doctrine of parliamentary privilege;

vi. Whether the Ministry ought to have conducted an analysis of the public interest pursuant to Section 35 before it decided whether to refuse the request or not and whether in any event the Information should be disclosed in the public interest.

Resolution of the issues

The first issue

18. The Defendant in its Notice of Refusal dated 16th August, 2012 relied on Section 27 of the Freedom of Information Act as the basis for refusing the requested documents.

19. Section 27 (1) provides as follows:

"Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act:-

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

(b) *Would be contrary to the public interest."*

20. By the said Notice, the Defendant relying on section 27 informed the Claimant that the documents were exempted and gave the following two reasons for this position:

    i. That since relevant information surrounding the process is now provided, disclosure was not justified in the public interest; and
    ii. That the decision to move forward with the process and the selection of the three (3) chosen investors was agreed to by Cabinet.

21. By its Submissions the Claimant submitted that the reasons provided by the Defendant in its letter dated the 16th August, 2012 when carefully scrutinized, are untenable and that the Defendant on whose shoulders the burden lies to demonstrate why the granting of access to the requested information would be contrary to the public interest wholly failed to provide compelling reasons as to why such access should be withheld.

22. The Claimant further submitted that its reasonable and legitimate expectation to gain access to the requested information under the Freedom of Information Act far outweighed the explanations provided by the Defendant in its letter dated 16th August, 2012.

23. In addition it was submitted that the clear intention of the legislation was for information requested under the Act to be supplied save and except in limited exceptions and circumstances which are necessary to protect essential public interests and private business affairs and in this case the public interest exception in withholding the requested information does not apply.

24. The Freedom of Information Act allows public authorities to refuse disclosure of information requested if one or more of the exemptions contained in the Act are applicable. Some of these exemptions are absolute, while others are qualified.

25. The Claimant advanced that the Defendant does not have an automatic right to non-disclosure, and that the Defendant must have considered whether the public interest in keeping the information confidential was of greater importance, than the public interest in disclosing the said information.

26. The argument advanced by the Claimant is that the onus is on the Defendant to show that it is entitled reasonably to rely on an exemption claimed and to not grant access to the documents requested. In *Nimmo v Alexander Cowan and Sons Ltd. [1968] A.C. 107 at 130* Lord Wilberforce stated:

> *"the orthodox principle (common to both the criminal and the civil law) that exceptions etc., are to be set up by those who rely on them."*

27. In addition the Claimant contends that the Defendant having decided that the said information was exempt was required to carry out a section 35 public interest override assessment and analysis so as to determine whether disclosure ought to be made notwithstanding the fact that the information requested may have been exempt.

28. Section 35 of the Freedom of Information Act 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 of performance or 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 of giving access of the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so."

29. The Defendant submitted that there was no obligation in this instance to set out reasons relating to section 35 since the Claimant placed no evidence before it to consider.

30. In Ashford Sankar .v Public Service Commission CA. No. 58 of 2007, the Court of Appeal recently held that where a defendant refuses to provide information by relying on section 27 of the Act, the defendant must outline the public interest consideration that it relies upon. Further, any such considerations ought to be communicated to the claimant prior to the claimant's institution of a claim for judicial review.

31. At paragraph 20 from line 2 the Court of Appeal stated that:

> *"Clearly what is required by section 27(3) and section 23 (1), is that the applicant be provided with reasons for the decision, and informed of his right to challenge the decision by way of judicial review. Clearly this was not done in this case, and accordingly, the PSC was in breach of sections 27(3) and section 23 of the Act."*

32. At paragraph 25 of the said judgment the Court of Appeal went on to state:

> *"In my view, the evidence in this case is clear. The reason provided for refusal by its letter was simply that the documents are internal working documents and are exempt under section 27 of the Act. The respondent should not be permitted to introduce a completely different reason and to rely on public interest considerations, which were not communicated to the appellant before he made his application for judicial review."*

33. **The Defendant failed to adequately outline its reasons for adopting the position that the disclosure of the requested information would be contrary to the public interest. The clear intention of the legislation was and is for the provision of the requested information save and except in limited circumstances as outlined in the Act, there was therefore an onus on of the Defendant, having formed the view that the information requested was exempt, to carry out a Section 35 public interest override assessment and analysis so as to determine whether disclosure was necessary. The onus was not on the Claimant to place evidence before the Defendant to enable a consideration of the Section 35 assessment and the Act placed no such obligation on a party who has made a request for information.**

34. **Accordingly, the Defendant's decision as outlined in its letter dated 16th August 2012 was flawed in so far as the defendant failed to adequately outline his reasons and or the public interest considerations that formed the basis of his decision not to disclose the said requested information.**

Resolution of the second issue

Whether the Defendant is entitled to rely upon the additional reason for its refusal to provide the said information as set out in its letter dated 4th December 2013, namely that Section 29(1) of the Freedom of Information Act protected the said information from being disclosed.

35. At paragraph 60 of this Court's decision to grant leave to the claimant to file the instant claim, this Court stated that the argument that the Defendant is limited to the reasons upon which it relied at the time of the refusal, was not an arguable ground that had a realistic prospect of success.

36. In Bowbrick v. Information Commissioner *App no EA/2005/0006* at paragraph 42 it was stated:

> *"If a public authority does not raise an exemption until after the s 17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect, it is giving part of its notice late. However FOIA does*

not say that that failure to specify the exemption within the 20 working day time limit means that the authority is disentitled thereafter from relying on the exemption in any way. If the intention of FOIA had been that the exemption could no longer apply to the information in such circumstances then it would have been expected that the Act would say this in very clear terms, because otherwise it is a very draconian consequence of the failure to comply with the statutory time limit."

37. **The Court therefore repeats the aforementioned position and is of the view that the Defendant is entitled to rely upon additional reasons with respect to the refusal to disclose the said information.**

Resolution of the third, fourth and fifth issues

Whether the said information is protected from disclosure under section 29 (1) of the Act.

Whether the Defendant's statement in the Senate on the 28th February 2012 amounted to a waiver of legal professional privilege.

Whether the Claimant can rely on the statement made by the Defendant as a basis of waiver in light of the doctrine of parliamentary privilege.

38. The Claimant's position is essentially that the said information may under normal circumstances have attracted legal professional privilege, however by virtue of a response made by the Defendant in the Senate to a question posed by a fellow Senator on 28th February 2012, that privilege was waived .

39. The Question posed to the Minister in the Senate was "did the publication of the Request for Proposals (RFP) conform to the Tenders Board Act" and the Answer given by the Minister was: "the publication of the request for proposals was not the subject of nor required to be in conformity with the Central Tender's Board Act. Advice to this effect was received from the Legal Unit of the Ministry of Planning and the Economy, and subsequently from the Office of the Attorney General."

40. Section 29(1) of the Act provides:

"A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege."

41. It cannot be disputed that the said information requested, is information that would ordinarily attract legal professional privilege.

42. According to *Waterford v Commonwealth (1987) 163 CLR 54, 63—4* professional privilege protects confidential communications between a lawyer and client, made for the dominant purpose of giving or receiving legal advice, or for use in actual or anticipated litigation.

43. The critical questions that must be considered are:
    a. Whether the right to rely on legal professional privilege was waived by the Minister?
    b. Whether the Claimant can rely on the Minister's statement in light of the doctrine of parliamentary privilege?

44. In *Mann v Carnell (1999) 201 CLR 1* it was stated at paragraphs 28, 29 and 34 respectively as follows:

> *"[28] At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the*

institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.

[29] Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognizes the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege… What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

[34]… Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency.

45. The factors laid down in the case of *Mann v Carnell (1999) CLR 20* are the relevant factors that ought to be considered when determining the issue of waiver and these are namely:

    I. Whether the privilege information was circulated confidentially;
    II. The purpose for which the privilege material was created;
    III. How widely the privilege material has been circulated;
    IV. Whether the circumstances of disclosure is inconsistent with the maintenance of confidentiality;
    V. The nature of the obligation of confidentiality in the recipient.

46. In *Goldberg v Ng (1995) 185 CLR 83* Deane, Dawson and Gaudron JJ held that:

"In considering whether there is an imputed waiver of legal professional privilege, the governing consideration is whether fairness requires that the privilege should cease irrespective of the intention of the holder of the privilege."

47. In the case of *Bennett v Chief Executive Officer, Australian Customs Service (2011)EWCA CIV 1606* it was held that the voluntary disclosure of the gist or conclusion of legal advice in the circumstances of the case amounted to a waiver of the whole advice, including the reasons for the conclusion. The substance and the effect of the advice was communicated in order to emphasize and promote the strength and substance of the case to be made. At paragraph 6 of his High Court Judgment found at 210 A.LR 220, Tamberlin J stated.

    "It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice is that certain action will be taken or not taken. In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered. However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege. The whole point of an advice is the final conclusion. This is the situation in this case."

48. In the submissions filed 19th May 2014, the Defendant referred to the case of *British American Tobacco Australia Ltd. V. Secretary, Department of Health and Ageing, (2011) FCAFC 107* (the BAT case). In that BAT case, the Appellant, BAT made a request to the Respondent, Secretary of the Department of Health and Ageing for access to a copy of a memorandum of advice provided by the Attorney General's Department. The advice concerned legal and constitutional issues relative to the generic packaging of cigarettes.

49. Disclosure was refused on the grounds of privilege. BAT challenged the decision and inter alia, contended that the right to rely on privilege had been waived.

50. The five acts of disclosure which were alleged to have amounted to waiver were set out by the Court as follows:
    a. Reference to aspects of the legal advice in a Government Response paper which was tabled in the Senate and incorporated in full into the Hansard;
    b. Subsequent publication of the Government Response on a government website;
    c. The provision of a summary of the legal advice to a working group;
    d. The provision of a summary of the legal advice to the Ministerial Tobacco Advisory Group;
    e. The provision of the summary of the legal advice which had been provided to the working group to BAT during the course of proceedings before the Administrative Appeals Tribunal (the tribunal responsible for reviewing the refusal to disclose the information in the first instance.)

51. The Court analyzed the law relating to waiver at paragraphs 39 to 47 of the judgment and traced the modern authorities by firstly referring to the illuminating dictum at paragraphs 28-29 of *Mann* (supra).

52. Their Lordships noted that in *Goldberg* (supra) that the focus was on the fairness of allowing the privilege to stand. Their Lordships went on to state that the focus should be upon consistency of conduct and that in determining whether there has been inconsistency of conduct, fairness ought to be a consideration.

53. Their Lordships starting at paragraph 43 also conducted a detailed analysis of the case of *Osland v. Secretary, Department of Justice (2008) 234 CLR 275* and at para. 44 they stated:

    > *"It is now clear that disclosure of the gist of a privileged communication does not necessarily effect a waiver of legal professional privilege"*.

54. In the *Osland* case a convicted murderer was sentenced to 14 ½ years imprisonment and petitioned the Governor of Victoria for a pardon. The Attorney General sought the joint advice from three eminent barristers. The Attorney General subsequently issued a press

release in which he stated inter alia that *"the joint advice recommends on every ground that the petition should be denied."* Ms. Osland later applied under the Freedom of Information Act for access to certain documents including the joint advice. The High Court of Australia held that there was no inconsistency between disclosing the fact of and the conclusions of the independent advice for the purpose of showing that the government had acted responsibly and yet wishing to maintain the confidentiality of the advice.

55. The High Court held inter alia at page 3 of the judgment that:-

> *"A court considered the supposed waiver in the context of all the relevant circumstance. What was normally involved was a question of fact and degree. The search was not for the actual or imputed intention of the party said to have waived its privilege. It was a search for the objective consequent of that party's conduct in revealing, some, but not all, of the particular advice."*

56. In the *Osland* case, Maxwell P of the Court of Appeal of Victoria reviewed the authorities and concluded at paragraphs 49-51 as follows:

> "*Disclosure of the conclusion (or the gist, substance or effect) of legal advice may, or may not, amount to a waiver of privilege in respect of the advice as a whole. Whether it does in a particular case will depend on whether, in the circumstances of the case, the requisite inconsistency exists, between the disclosure on the one hand and the maintenance of confidentiality on the other. In Bennett, the majority of the Full Federal court judged that there was inconsistency and hence waiver; in British American Tobacco Australia Services Ltd. V. Cowell (discussed below), this Court judged that there was not. In each case, there was a disclosure of the gist or substance of advice given. That opposite conclusions were arrived at is simply a reflection of the different circumstances of the respective cases.*
>
> *The content of an advice will often include confidential information about instructions given by the client, or about evidence to be given by a witness, or*

about forensic investigations being or proposed to be undertaken. These examples are sufficient to demonstrate why it is simply not the case that the disclosure of the conclusions necessarily amounts to, or necessarily entails, the disclosure of the content. There is no necessary inconsistency between disclosure of the one and non-disclosure of the other.

As Carnell demonstrates, the inconsistency test readily accommodates the notion that, in appropriate circumstances, the privilege-holder may disclose the content of legal advice to a third party for a particular purpose without being held to have waived privilege in the advice. Likewise, in my opinion, the test of inconsistency is well capable of accommodating the notion that, in appropriate circumstances, the privilege-holder should be able to disclose publicly that it is action on advice and what the substance of that advice is, without being at risk of having to disclose the confidential content of the advice."

57. In its submissions filed 28th March 2014, the Claimant sought to distinguish the factual circumstances that operated in the *Osland* case from the instant case and this Court accepts the submissions advanced in this regard. In *Osland*, the petition was premised upon an appeal to an executive discretion and this was in context of an established practice of not advancing reasons for any decision either to grant or to refuse the issuing of a pardon.

58. In the matter before this Court, the Defendant in his capacity as a Member of Government and as a Senator had an obligation and duty to account to the Senate and the citizens of Trinidad and Tobago as to the legality of the Request of Proposals process that was adopted and to justify his decision. The Minister was not vested with an executive discretion as that which applied in the *Osland* case.

59. In the submissions filed on 29th March 2014, the Claimant also raised at paragraphs 6.2, 7.1 and 7.2 objections in relation to admissibility and weight of statements made by Ms. Andrea Julien. The Defendant in its submissions filed 19th May at paragraph 14 however

agreed with and accepted the Claimant's submissions made of at paragraphs 6.2, 7.1 and 7.2. Accordingly the Court did not consider the statements of Ms. Julien to which the objections were advanced.

60. The Defendant submitted that the finding of waiver must be made after an objective assessment of the circumstances and without regard to intent, consistent with the approach adopted in *Osland*.

61. **The facts before this Court can be distinguished from the facts that operated in the *Osland* case. In the case before this Court the gist and substance of the advice was revealed and there is inconsistency between that disclosure on the one hand and the maintenance of confidentiality on the other.**

62. **The objective consequence of the Defendant's statement, surmised the nature and purport of the advice obtained and relied upon and the said response could therefore amount to a waiver of legal professional privilege. The effect of the Defendant's statement secured a benefit and/or advantage or justification for the Defendant, in so far as his maintenance that the decision to issue the Request for Proposals without ensuring that same had to conform with the provisions of the Central Tenders Board Act, was a sound and legally valid one.**

63. **This Court is of the view that the Defendant's statement in response to the question posed was not consistent with maintenance of confidentiality and inferences can be drawn from the Minister's response so as to lead the Court to form the view that his publication of the gist and conclusion of the legal advice(s) received, is in fact inconsistent with any continued reliance upon privilege.**

64. The issue that the Court must now address is whether any reliance or regard can be had to the Defendant's statement given the forum in which the Defendant's statement was made and the Court must therefore consider the doctrine of Parliamentary Privilege.

Parliamentary Privilege

65. It cannot be disputed that inherent to a parliamentary system of governance is the ability of the members of both houses to freely express themselves without fear of legal consequences. Statements made by a member in the Parliament can however be subject to the disciplinary processes as prescribed by the rules of Parliament and at all times their statements ought to be regulated by good sense, decorum and subject to the control of proceedings by the Speaker.

66. The privilege of the Trinidad and Tobago Parliament is enshrined in Section 55 of the Constitution which states as follows :

> *(2) "No civil or criminal proceedings may be instituted against any member of either House for words spoken before, or written in a report to, the House of which he is a member or on which he has a right to audience under section 62 or a committee thereof or any joint committee or meeting of the Senate and House of Representative or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise; or for the publication by or under the authority of either House of any report, paper, votes or proceedings.*
>
> *(3) In other respects, the powers, privileges and immunities of each House and of the members and the committees of each House, shall be such as may from time to time be prescribed by Parliament after the commencement of this Constitution and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution.*
>
> *(4) A person called to give any evidence before either House or any committee shall enjoy the same privileges and immunities as a member of either House."*

67. The Defendant's Attorneys submitted that when the statement was issued it was made in a circumstance where he was discharging his mandate under the Constitution as a member of the Senate by answering questions put to him by fellow member of the Senate and that he is therefore entitled under the Constitution to the corresponding privilege that

shields his words from being the subject of enquiry by the Court and that there is no basis for the conclusion that the privilege was waived.

68. In the *British American Tobacco* case, one of the acts alleged to constitute waiver was the tabling of the Government Response paper in the Senate which included aspects of the legal advice and was incorporated in full into the Hansard.

69. The argument in relation to the alleged waiver centered on Section 16 of the Australian Parliamentary Privileges Act which codified parliamentary privilege in that jurisdiction.

70. In the BAT case (supra) at paragraphs 48 and 49 their Lordships said,

> *"If one looks at this case issue in the round, rather than as one question in sequence of separate questions, one can see that the appellant is confronted by a dilemma. To avoid the threat presented by s 16(3) of the PP Act, the appellant is driven to say that it seeks to refer to the tabling of the Government Response in the Senate only to show that the words were published. However, if one does not go further and invite the inference that the reverence reveals an inconsistency in the position of the response in now seeking to maintain legal professional privilege, then there can be no basis for the conclusion that the privilege was waived. If the appellant seeks to show the inconsistency necessary to make good its waiver argument, it must be gored by s 16(3) of the PP Act.*
>
> *In our opinion, it is not possible to avoid the conclusion that the appellant does indeed seek to make use of the tabling of the Government Response to permit the drawing of an inference adverse to the government. Since inconsistency in maintaining the privilege is the point on which waiver turns, for the appellant to succeed it must persuade the Court that the conduct of the respondent in insisting upon the privilege is inconsistent with the publication of the Government Response by tabling it in the Senate. That is precisely the kind of reflection which may not be made upon the conduct of those whose published statements are within the protection of s 16(3) of the PP Act."*

71. The Defendant submitted that the Claimant is only able to state what the Honourable Minister said in the Senate on the 28th February 2012 but cannot invite the Court to conclude the Defendant waived the legal professional privilege, since to do so would infringe upon the doctrine of parliamentary privilege.

72. In the BAT case the Court considered section 16 of the Parliamentary Privileges Act which states:

> 16 Parliamentary privilege in court proceedings
>
> (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.
>
> (2) For the purposes of the provisions of article 9 of the Bill of Rights. 1688 as applying in relation to the Parliament, and for the purposes of this section, *proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
>
> a. The giving of evidence before a House or a committee, and evidence so given;
> b. The presentation or submission of a document to a House or a committee;
> c. The preparation of a document for purposes of or incidental of the transacting of any such business; and
> d. The formulation, making or publication of a document, including a report, by or pursuant to an order of a

House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

a. Questioning or relying on the truth, motive intention or good faith or anything forming part of those proceedings in Parliament;
b. Otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
c. Drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:

a. Require to be produce, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relation got such a document; or
b. Admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence;

Unless a House or a committed has published, or authorized the publication

(5) In relation to proceedings in a court or tribunal so far as they relate to:

a. A question arising under section 57 of the Constitution; or

b. The interpretation of an Act.

Neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution of an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act."

73. There is no equivalent to section 16(3) and section 16 (4) of the said Act in the Republican Constitution of Trinidad and Tobago or in any other enacted legislation in this jurisdiction. By virtue of section 55 of the Constitution members of either house are immune from civil or criminal proceedings in relation to statements made by them in either house.

74. The protection afforded under Sec. 55 of the Constitution insulates a member against the institution of civil and/or criminal proceedings with respect to statements made in either House. Section 55 however does not prevent proceedings in Parliament from being used or referred to in a broad and general sense or from being used in support of a civil or criminal action against a person.

75. The Defendant’s attorneys submitted that the effect of considering the Minister’s statement in the course of the determination of the instant application, would result in a breach of the provisions of section 55 (2) of the Constitution. This court notes that at the time the Constitution was enacted, the Freedom of Information Act was not in existence. The provision contemplates civil proceedings against members of the House in their personal capacity and the said proceedings must be based on a cause of action that relates to a statement that was made by the member while speaking in the house. It cannot be said that the instant application is against the defendant in his personal capacity nor is the cause of action premised upon the statement made by the Defendant in the Senate. The Act vests certain rights to requested information to members of the public and the Defendant’s statement in the Senate is considered to determine whether or not the privilege afforded by section 29(1) of the Act has been waived. The defendant is accountable in his capacity as an office holder who has taken a decision on behalf of the ministry which he heads and by extension the Government of Trinidad and Tobago, and no personal liability vests in him.

76. **Consequently this Court is of the view that the Defendant’s submission and reliance on the BAT case is ill founded. Consideration of and regard to the Defendant’s response in Parliament does not amount to a violation of section 55 (2) of the Constitution. Although the statement was made in Parliament, the Court can consider the effect and purport of the statement and draw inferences from same with a view of determining whether the privilege afforded by section 29(1) of the Act has been waived. When the Defendant issued his response, the information revealed by him became a matter of public record and his statement clearly communicated the position that the legal advice received and considered was to the effect that the Request for Proposal process adopted, did not have to conform with the requirements of the Central Tenders Board Act. Having clearly communicated this position in the Nation’s Parliament, the position that the document(s) containing the said advice can still be subject to legal professional privilege and that no reliance can be attached to the said statement because it is covered by Parliamentary Privilege, is untenable.**

77. The gist and nature of the legal advice was in fact revealed when the Minister's response was made and this amounted to conduct that is inconsistent with the stance that the said legal advice is exempt from being disclosed under the Act by virtue of section 29(1).

78. If the Court is incorrect with respect to its interpretation and application of the law in relation to what amounts to a waiver of privilege and its view that the statement made by the Defendant can be considered without infringing upon the doctrine of Parliamentary Privilege, the Court shall consider the final issue.

Whether pursuant to section 35 of the Act the information should be disclosed on the public interest.

79. In this case, the concern that precipitated the request for the said information, was whether the Request for Proposals for the intended development of Invader's Bay was a tender process which should have fallen under the provisions and purview of the Central Tenders Board Act. The Claimant's concern was mirrored by the Honourable Senator Armstrong who in fact posed the very same question to the Defendant.

80. **The issue of compliance with the provisions of the Central Tenders Board Act has been the subject of discussion on a national level for some time. The object and intent of the Act was to insulate the contract award process from the executive, thereby ensuring that there is no political interference with the process so as to give rise to an actual or perceived perception of misappropriation and/or mismanagement of the taxpayers' money or the assets that belong to all citizens.**

81. **In the case of *<u>Bland v. Canada (National Capital Commission) 1991 F.T.R. LEXIS 995</u>* Justice Muldoon held at paragraph 27 of the judgment that:-**

    "It is always in the public interest to dispel rumours of corruption or just plain mismanagement of the taxpayers' money and property. Naturally, if there has been negligence, somnolence or wrongdoing in the conduct of a government institution's operations it is, by virtual definition, in the public interest to disclose it and not to cover up in wraps of secrecy. In that case government

official arrogate to themselves, by their refusal to give requested information, the role of judges in their own case. In this free and democratic society nothing, apart from a direction from the responsible Minister, prevents the government institution from giving whatever explanations it judges appropriate, along with the requested information lawfully disclosed."

82. **Accountability by a Government for its decisions and actions must be cornerstone of the democratic process. The proposed development of Invader's Bay is of national concern and involves pristine and valuable real property which belong to the citizens of Trinidad and Tobago.**

83. **Notwithstanding the process as outlined under the Central Tenders Board Act, successive governments for many years have not necessarily availed themselves of the protection that the Central Tenders Board Act can afford. It is well entrenched within the public domain that several special interest companies, such as Urban Development Company of Trinidad and Tobago (UDECOTT) have been formed to undertake and develop projects that involve substantial financial expenditure. The issue as to whether this course of action has been pursued in pursuit of a desire to effect substantial and rapid infrastructural development so as to achieve developed world status or simply as a avenue to circumvent the provisions of the Central Tenders Board Act and avoid the accountability and the strict procedural guidelines that the Act imposes upon executive conduct and control over the tender process, is also an issue that has found itself on the agenda for national consideration and debate.**

84. **It must always be in the public interest to ensure that the activities and projects undertaken by Government are transparent and all attempts should be made so as to dispel any perception of the misappropriation of public funds and/or financial improprietary. Recently the issue of procurement legislation has engaged the attention of Parliament, much to the approval of the civil society. After 51 years of**

Independence, the society must demand transparency and legislative moves in that direction should be welcomed and applauded.

85. **The nature of the project in this case and the process adopted by the Defendant to pursue the Request for Proposals process without regard to the provisions of the Central Tenders Board act, requires disclosure of all the relevant information that was considered before the said decision was taken and the refusal to provide the requested information can create a perception that there may have been misfeasance in the process and any such perception can result in the loss of public confidence. Every effort therefore ought to be made to avoid such a circumstance and if there is a valid and legally sound rationale for the adoption of the Request for Proposals process, then it must be in the public interest to disclose it and the rationale behind the process adopted ought not to be cloaked by a veil of secrecy.**

86. **The public interest in having access to the requested information therefore is far more substantial than the Defendant's interest in attempting to maintain any perceived confidentiality in relation to the said information.**

87. **Accordingly the requested information should be released to the Claimant under Section 35 of the Freedom of Information Act.**

88. The Court therefore issues the following orders:

    a. The Court hereby declares that the Claimant is entitled to the information requested in the Freedom of Information Application dated 20th April 2012 and that the Defendant's continued decision to refuse to provide the said information is illegal, null, void and of no effect.

    b. The Defendant is hereby ordered and directed to provide to the Claimant the said requested information. The information to be provided shall not however include any reference or information with respect to any Cabinet Minute and the

appropriate redactions should be made by deleting any such reference in any of the documents that contain the requested information, in accordance with the provisions of section 16(2) of the Act.

c. The said information with the necessary redactions as aforesaid must be forwarded to the Claimants within 7 days of the expiration of the stay of execution of 28 days which is hereby granted.

d. The Defendant is to pay to the Claimant the cost of this action which is to be assessed by this Court in default of agreement.

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FRANK SEEPERSAD

JUDGE