

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**San Fernando**

**Claim No. CV2017-03640**

**BETWEEN**

**JWALA RAMBARRAN**

**Claimant**

**AND**

**THE MINISTER OF FINANCE**

**Defendant**

**Before the Honourable Mr. Justice Frank Seepersad**

**Date of Delivery:** May 23, 2019.

**Appearances:**

1. Anand Ramlogan SC leading Gerald Ramdeen and Douglas Bayley instructed by Jared Jagroo of Freedom Law Chambers for the Claimant.
2. Russell Martineau SC leading Jason Mootoo instructed by Romney Thomas of Hobsons for the Defendant.

## Decision

### INTRODUCTION

1. By application filed on October 16, 2017, supported by an affidavit, the Claimant sought leave to apply for judicial review pursuant to Part 56, Rule 3 of the Civil Proceedings Rules 1998 (as amended) with respect to the Defendant's refusal to disclose requested information. This court granted leave and the Claimant filed a claim for judicial review against the Defendant seeking the following reliefs:

a. An order of certiorari to remove into this Honourable Court and quash the decision of the Defendant dated July 17, 2017 to refuse disclosure of the documents requested by the Applicant/Claimant under the Freedom of Information Act ("FOIA") by Application dated March 13, 2017;

b. An order of mandamus to compel the Defendant to provide the Claimant with the documents which were requested in his application made under the provisions of the FOIA dated March 13, 2017 within seven (7) days;

c. Alternatively, and/or additionally, a declaration that the decision of the Defendant to refuse and/or deny the Claimant's access to the documents requested in his application made under the FOIA dated March 13, 2017 is illegal and amounts to a breach of the provisions of the FOIA;

d. Costs.

2. The Defendant filed an affidavit on January 31, 2018 and the Claimant filed an affidavit in response on February 28, 2018.

**Summary of the Claimant's case**

3. The Claimant was appointed Governor of the Central Bank on July 17, 2012 but his appointment was subsequently revoked by the Acting President, upon the advice of Cabinet, on December 23, 2015.

4. Subsequent to the termination of his appointment the Claimant stated that:

- i. He made various attempts to secure alternative employment, including applying in April 2016 for the position of Senior Advisor to the G-24, an international organisation of states established in 1971;
- ii. He was interviewed in July 2016 for the position of Senior Advisor by officials of the G-24 and others; and
- iii. He asserted that he was offered the position of Senior Advisor at the G-24 but the offer was withdrawn after the G-24 received information from the Defendant.

5. The Claimant thereafter submitted a request pursuant to The Freedom of Information Act Chap 22:02 ("FOIA" or "the Act") as he wanted inter alia to access documents which the Defendant sent to the G-24.

6. The Claimant's attorneys issued a pre-action protocol letter to the Defendant on May 12, 2017 threatening judicial review proceedings in the event that the requested documents were not disclosed and subsequently issued proceedings

against the Defendant. Those proceedings were eventually withdrawn on July 18, 2017, following receipt of a letter dated July 17, 2017 issued by the Defendant.

7. By that letter dated July 17, 2017, the Defendant declined to provide the requested documents. His decision was premised on the belief that disclosure of the requested documents would: (i) prejudice relations between the Government (GORTT) and the G-24, being an international organization of states; (ii) divulge information communicated in confidence by or on behalf of the G-24 to GORTT through him; and (iii) not be justified in the public interest as disclosure would be reasonably likely to impair his ability, as Minister of Finance of the Republic of Trinidad and Tobago (representing the member state of Trinidad and Tobago), to obtain information from the G-24 concerning information relative to candidates the G-24 might be considering, from time to time, to fill any vacant posts which might arise in that organisation.
  
8. In arriving at his decision, it was submitted that the Defendant considered the facts and matters contained in paragraphs 11 to 26 of his affidavit filed on January 31, 2018 and the requirements contained in section 35 of the FOIA and thereafter he concluded that there was no reasonable evidence that significant abuse of authority, neglect in the performance of official duty, injustice to an individual, danger to the health or safety of an individual or of the public or unauthorised use of public funds, had or was likely to have occurred. The Defendant also stated that he considered the public interest in disclosing the requested information and the interest in the Claimant receiving same, and was satisfied that in assessing the balance, the public interest favoured non-disclosure.

## ISSUES

9. The primary issues which the court had to determine are as follows:
- i. Whether any and/or all of the requested documents constitute documents that are exempt from disclosure having regard to sections 26 (b) and 26 (d) of the FOIA;
  - ii. Whether the requested documents are exempt from disclosure by virtue of section 32 (1) (b) of the FOIA; and
  - iii. If the exemptions are applicable, whether the facts of the instant case require that the exemptions should be overridden in accordance with section 35 of the FOIA.

## LAW AND ANALYSIS

### **The purpose and rationale behind the FOIA.**

10. The Act was revolutionary and fundamentally changed the relationship between the State and citizens by enabling them to gain access to information which was previously denied on the ground of confidentiality.
11. The Act inherently recognised that the right to non-exempt information was premised upon the concept of truth, openness, transparency and accountability which are fundamental pillars in a democratic society.
12. The Court of Appeal clarified the purpose, policy and object of the Act in **Caribbean Information Access v The Honourable Minister of National Security**

**Civil Appeal No. 170 of 2008** where Jamadar JA at paragraph 8 stated as follows:

“There is no dispute that the policy, purpose and object of the FOIA are to create a general right of access to information in the possession of public authorities, ‘limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities.” There can also be no dispute that the court in both interpreting and applying the provisions of the FOIA is mandated to do so purposively, so as to further the policy, purpose and object stated above. The FOIA provides for a statutory right to information held by public authorities, and its effect is to broaden and deepen the democratic values of accountability, transparency and the sharing of and access to information about the operations of public authorities.”

13. Similar sentiments were echoed by Narine JA in **Ashford Sankar v the Public Service Commission Civil Appeal No. 58 of 2007** where His Lordship at paragraph 17 stated:

“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”

14. The Act favours the grant of access to information, presumably in recognition of the need for accountability, transparency and increased public participation in the development of national policy. It inherently acknowledges that access to official documents should be extended to members of the public as a general right in furtherance of the goal of public participation. Consequently, the Act’s implementation occasioned a demonstrable shift away from State secrecy towards transparency. With the lifting of the veil of secrecy, citizens were afforded the opportunity to proactively and confidently participate in the democratic process by becoming seized of information which could be used to hold officials to account for decisions effected in the name of citizens.

15. In **The Minister of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry Civil Appeal No. P 200 of 2014**, the Court of Appeal considered, inter alia, the public interest override at Section 35 of the Act and confirmed the need for a broad, purposive approach. Jamadar JA considered the constitutional implications and democratic value of the FOIA in an erudite discussion at paragraphs 29-39 entitled “Constitutional Warrant: Active Participation in Public Affairs”. At paragraph 39 His Lordship stated as follows:

“In my opinion therefore, the core constitutional value of public participation in the ‘institutions of the national life’ so as to ‘develop and maintain due respect for lawfully constituted authority’ (stated at clause (c) of the Preamble), bolstered by the constitutional commitment to

‘freedom ... founded on respect for ... the rule of law’ (stated at clause (d) of the Preamble), is a legitimate constitutional lens through which the issues before this court should be viewed and analysed.”

16. His Lordship also opined that Section 3(2) of the FOIA gave rise to a general presumption in favour of disclosure and he analysed the right of access conferred by the FOIA against the backdrop of the Constitution and stated at paragraph 22 as follows:

“This objective of a presumptive general right of information, is to be “limited only by exemptions and exemptions necessary for the protection of essential public interests.”

17. In relation to the issues which fell to be resolved by the court, their determination inherently involved consideration of the established constitutional and socio-political background of democratic participation and the existent policy which favours disclosure measured against the reasonableness and/or justification of the Defendant’s decision to deny access to the requested information.

#### **The burden of proof under the Act**

18. Having regard to the liberal policy position which favours disclosure, the burden of proof rests on the shoulders of the public authority who seeks to rely on an exemption, to justify the reasonableness of such a position. In **Caribbean Information Access** (supra) Jamadar, J.A. stated:

“18. In my opinion, 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 law mandates that public bodies are tasked with the burden to articulate and advance cogent reasons and evidence so as to justify its reliance on FOIA exemptions. The burden of proof consequently lies with the Defendant to satisfy this court that on the evidence that his reliance on the stated exemptions are reasonable.

20. The Claimant submitted that the Defendant provided a paucity of evidence and failed to discharge the burden of proof. It was further submitted that the explanation advanced for denying disclosure of the Claimant’s requests as contained in the Defendant’s decision letter dated July 17, 2017 fell short and that the reasons merely reiterated the exemptions under the Act.

#### **Approach to evidence**

21. The law recognises that in the absence of cross-examination, the evidence of the public authority should be preferred. In the instant matter the parties elected not to cross examine any of the deponents but the court noted that the Defendant apparently conflated his opinion with the facts in the case. Certain material facts are not in dispute but, the opinions advanced by each party vis-a-vis the exemptions, are strikingly divergent and the court had to distinguish

between evidence and opinion and had to determine the appropriate weight to be assigned to the opinions proffered.

22. The Defendant asserted that the court should accept his evidence over that of the Claimant and in his affidavit filed on January 31, 2018, the Defendant attached several exhibits which included:

- i. C.I. 1 - the Claimant's FOIA form
- ii. C.I. 2 - the Defendant's access decision letter
- iii. C.I. 3 - Ministry of Finance Press releases dated April 19 and 23, 2012 of Ministers leaving to attend G-24 meetings
- iv. C.I. 4 - letters from the Defendant to the Claimant dated November 30 and December 4, 2015 regarding the change to polymer notes for currency
- v. C.I. 5 - the Claimant's address at the Fifth Monetary Policy Forum
- vi. C.I. 6 - media release of TTCIC and various newspaper articles
- vii. C.I. 7 - letters of complaint to the Defendant by various entities after the Claimant's address at the Monetary Policy Forum
- viii. C.I. 8 - Central Bank Press release dated December 8, 2015
- ix. C.I. 9- December 11, 2015 Newspaper ad by Central Bank addressing allegations of breach of confidentiality
- x. C.I. 10 - Newspaper articles dated December 10, 2015.

23. The attached documents contributed little to the determination as to whether the Defendant's reliance on the stated exemptions was reasonable and/or justified. The exhibits did not support or validate the Defendant's assertion that provision of the requested information would negatively impact future correspondence with G-24 or that incalculable damage would be occasioned to Trinidad and Tobago's reputation and the court noted that most of the

information placed before it with respect to the issues for determination, was in the nature of rival opinions.

## **RESOLUTION OF THE ISSUES**

### **ISSUE I**

24. The Defendant submitted that the public interest element of section 26 (b) of the Act is readily satisfied and it is, to an extent, informed or affected by questions of prejudice which itself is a separate element for consideration within the context of the said subsection. The Defendant argued that there is an inescapable overlap between these two elements having regard to the factual matrix before the court.
25. In addressing the question of public interest, the Defendant in his affidavit stated that disclosure of the requested documents would impact upon the willingness of the G-24 and its individual member states to communicate freely with Trinidad and Tobago, through the Defendant on matters relative to the G-24 or otherwise and that disclosure would:
- a. Engender a climate of uncertainty as to the confidentiality of the G-24's communications with Trinidad and Tobago and result in a measure of caution or restraint being exercised by the G-24 in its sharing of information with Trinidad and Tobago thereby jeopardising the enjoyment of the full benefits of membership in the G-24 by Trinidad and Tobago;
  - b. Lay bare the internal affairs of the G-24 for scrutiny in circumstances where the G-24 is not subject to the jurisdiction of this court and where no allegation of wrongdoing has been levelled against it; and
  - c. Cause incalculable reputational damage to Trinidad and Tobago.

26. Further, it was submitted that there is an obvious public interest in the Government to be seen as a reliable recipient of confidential information by International Organisations.

27. It was also submitted that serious reputational harm can be occasioned to Trinidad and Tobago in the event of disclosure and that the unrestricted access to information which this Republic now enjoys within the G-24 would in all likelihood, be impaired or stymied. It was advocated that such a circumstance would impact adversely upon the Government's ability to maintain what has previously been an excellent and special relationship with the G-24, as exemplified in part by the fact that the Central Bank of Trinidad and Tobago serves as banker for the G-24 and Trinidad and Tobago has been a member of the G-24 since its inception. Such an outcome, it was advanced, would clearly not be in the public interest as disclosure would adversely prejudice relations between the Government and the G-24.

28. The Defendant relied upon **Re Maher and Attorney General's Department (1985) 7 ALD 731**, a case in which the tribunal found that reputational harm although intangible is nonetheless a form of damage which is both real and substantial. Davies J, the President of the Tribunal, upheld an exemption on the basis of reputational damage.

29. As to the question of prejudice, the Defendant pointed out that in **Campaign against the Arms Trade v IC and Ministry of Defence, IT, 26 August 2008 EA/2007/0040** the tribunal, after considering section 27(1) of that Act which provided that information was exempt information, if its disclosure under the Act would or would be likely to prejudice, inter alia, relations between the United Kingdom and any other State, stated that:

“[81] However, we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage.”

30. The Claimant in his reply affidavit filed on February 28, 2018, joined issue with the Defendant’s assessment of the nature and impact of disclosure of the requested information.

31. The Defendant also asserted that he is substantially more qualified than the Claimant to assess the impact of disclosure upon Trinidad and Tobago’s relationship with the G-24 and its several member countries. He also opined that the Claimant, as Governor of the Central Bank, interacted with the G-24 for limited purposes over a short 2 year period and that he, unlike the Claimant, is a part of the governing body of the G-24, has extensive experience dealing with foreign states and international organisations and is well familiar with the conventions and standards of conduct applicable when dealing with such states and organisations. He argued that his experience has been amassed over a 25-year period serving, among other things as, acting Prime Minister of Trinidad and Tobago, Minister of Works and Transport, Minister of Health and Minister of Science, Technology and Tertiary Education.

32. Separate and apart from the question of preferring the evidence of the Defendant over that of the Claimant, it was submitted that the court should give deference to the views of the Defendant when:

- (i) Assessing the impact of disclosure for public interest purposes and;

(ii) Considering the question of prejudice.

33. In this regard, the court was directed to **All Party Parliamentary Group on Extraordinary Rendition v IC and Ministry of Defence [2011] UKUT 153**, where questions, inter alia, arose as to whether the disclosure of certain information would be likely to prejudice international relations. The Upper Tribunal (Administrative Appeals Chamber) of the United Kingdom, accepted that the views of the Executive were highly relevant and that the court ought to give appropriate weight to those views because the Executive was far better placed than it to make an assessment as to the impact of disclosure.

#### **The Section 26 (d) Exemption**

34. Insofar as the section 26(d) exemption is concerned, the Defendant submitted that the public interest element of this exemption has been satisfied and that the only remaining question to be addressed for the purpose of this exemption is: whether disclosure of the requested documents would divulge any information communicated in confidence by or on behalf of the G-24 to Government, through the Defendant or to a person receiving a communication on behalf of the G-24.

35. The Defendant submitted that an application of the position articulated in **Re Maher** to the facts of this case would lead to a conclusion that any and/or all correspondence sent by or on behalf of the G-24 to Government, through the Defendant, in relation to the Claimant's potential employment at the G-24 is plainly caught by section 26 (d), as is any communication sent by the Defendant to any person receiving same on behalf of the G-24.

36. In his affidavit, the Defendant stated that in his experience, communications surrounding the internal employment practices and procedures of the G-24, decisions taken or expressed by high level staff of the G-24 with respect to the

Claimant, and the Claimant's suitability for the position of Senior Advisor at the G-24 Secretariat, are matters which would routinely be treated as confidential and privileged matters both in the realm of international affairs and in the modern world of work. Apart from the Defendant's assertions as outlined, no evidence was adduced to support and/or reinforce his stated position.

37. The court recognised that prospective employers would routinely seek information about potential employees and such enquires would often involve enquiries directed to the previous employer so as to ascertain the suitability of a particular candidate. Candid views may be solicited, and concerns may be communicated by the former employer about the former employee in relation to a range of matters which may reasonably require clarification or an explanation. The Defendant invited the court to hold that such an exchange between a prospective employer and a former employer about a candidate may not always be expected to be anodyne and therefore confidentiality in relation to those communications clearly ought to be inferred.

38. The Claimant argued that no inference of confidentiality ought to attach to the communications from the G-24 to Government through the Defendant or from the Defendant to a person at the G-24 and the Claimant stated that his request does "not touch and concern any of the substantive issues regarding the G-24 but rather is administrative in nature".

39. The Claimant opined that "it is unlikely that the G-24 Secretariat would have treated any administrative correspondence with a member state as confidential". This statement must be viewed against the contrary statement of the Defendant and as previously stated, the Defendant submitted that the court ought to accept his evidence over the Claimant's. The court found that the Defendant's view in relation to the Claimant's experience was grossly

understated and the court remained acutely aware that considerable caution had to be adopted when analysing the evidence especially as significant sectors of the matters placed before it revolved upon sweeping generalisations which are primarily premised on the players' "say so".

40. The Defendant argued that confidentiality should also be inferred in relation to the requested information because, notwithstanding the G-24's open and frank communication with the Claimant on certain matters, it did not provide the Claimant with any correspondence passing between it (or anyone acting on its behalf) and the Defendant. This inferential assertion was however not viewed by the court as an indicator that the G-24 positively considered and treated the correspondence passing between it and the Government and/or the Defendant, as being characterised by a confidential status and the court noted that the requested documents emanated not from the G-24 but from the Defendant.

41. The court found the Defendant's view that the court should infer that the G-24 would not be supportive of disclosure, was not supported by documentation. Consequently, the court was not inclined to draw an inference that the G-24 was not in favour of disclosure.

42. The Claimant relied upon cited paragraphs from **The Law of Freedom of Information by John Macdonald QC and Clive Jones (2003)** to suggest that the Defendant, in order to successfully rely on the exemptions contained in section 26 (d) or 32 (1) (b) of the FOIA (which relate to information communicated in confidence), must show an actionable breach of confidence but the Defendant suggested that such reliance was entirely misplaced. A careful reading of the extracts from the abovementioned text reveals that the authors considered the



provisions of section 41 of UK Freedom of Information Act 2000. The Act in this jurisdiction however contains no similar provision.

43. The court considered section 27(1) of UK Freedom of Information Act and noted that the relevant test is whether disclosure “would or would be likely to prejudice”. Section 26 of the Act in this jurisdiction states that “a document is an exempt document if disclosure under the Act would be contrary to the public interest and disclosure...” Unlike the UK, under the Act, there is no absolute exemption as all exemptions are subject to the public interest override.

44. In this jurisdiction, it must be shown that disclosure would be contrary to essential public interests. The exemption threshold in the UK is evidently lower as their Act is more lenient towards successful reliance on the stated exemptions.

45. Section 26 of the Act has two material components (1) the contrary to the public interest component and (2) the relevant subsection to be applied component. The first part of the exemption is a free-standing component and it must be shown that disclosure would be contrary to the public interest. If the threshold is not met, then the exemption is not applicable. The Defendant sought to expand on the various subsections of the exemption but failed to satisfy this first part evidentially. Many hypotheses were put forward by the Defendant as to why disclosure would be contrary to the public interest, but they were at the end of the day, simply hypotheses.

46. In the arguments advanced under section 26 of the Act, the Defendant referenced subsection (d) which states:

“(d) would divulge any information communicated in confidence by or on behalf of an international organisation of States or a body thereof to the

Government of the Republic of Trinidad and Tobago or to a person receiving a communication on behalf of that international organisation or body.”

47. It is evident and abundantly clear that the requested information is not information which emanated from the G-24 but involves information which was provided by the Defendant.

48. Section 26(d) applies to information that is communicated to the State. Where information is so received, disclosure of same will necessarily involve the imparting of information which was given either by or on behalf of the G-24 or by a person who received communication on behalf of the G-24.

49. The court formed the view that section 26(d) must be read so that the two options will be apparent and so the section should be read as follows:

“S 26. A document is an exempt document if disclosure under the Act would be contrary to the public interest and disclosure would divulge any information communicated in confidence:

(i) by or on behalf of an international organisation of States or a body thereof to the Government of the Republic of Trinidad and Tobago; or

(ii) to a person receiving a communication on behalf of that international organisation or body.”

50. Trinidad and Tobago’s legislation is unique in that there is no Information Commissioner or Information Tribunal and the only recourse is via Judicial Review, where an applicant is aggrieved by a respondent’s decision not to

disclose requested information. Consequently, courts in this jurisdiction should be particularly cautious in relying upon foreign FOIA decisions.

51. The court was disinclined to accept the Defendant's submission that the case of **Re Maher** (supra) should guide its approach. **Maher** involved the disclosure of information produced by a foreign Government which was sent to the domestic Government. The case before this court involves the disclosure of information produced by the Minister of Finance which was sent to a foreign international organisation.

52. **Re Maher** involved antitrust laws between Governments and the flow of information to work together to stop massive antitrust cartels. The instant case involves the Claimant's request for information regarding the Defendant's communication with a potential employer, communication which may have affected his chances of getting the job. The two reasons are strikingly different and the public interest factors as well as the likelihood of prejudice in relation to future communication are also evidently distinguishable.

53. In addition, the applicant in **Re Maher** did not raise any issue for consideration under the public interest element in Australia's FOIA.

54. The Defendant also relied on the case of **Campaign against the Arms trade v IC and the Ministry of Defence, IT, 26 August 2008**. That case dealt with national security and arms trade and is clearly distinguishable from the instant case.

55. This court noted that no evidence was adduced from the Minister of Foreign Affairs and formed the view that information from this Minister may have been appropriate so as to assist the court in its determination as to the

reasonableness and applicability of a section 26 exemption. The Minister of Foreign Affairs may have provided the appropriate evidence as to the concerns of international affairs and confidential communications.

56. The Defendant, notwithstanding his decades of public service, cannot be so bold as to think that he can usurp this court's function and be the judge and jury of his own credibility and expertise or that deference should be afforded in relation to his opinion because he is who he is. It is and shall remain within this court's remit to determine what material amounts to relevant evidence and the weight and credibility of same.

57. The issue as to candour and full and frank disclosure was addressed in **Ashford Sankar v Public Service Commission C.A. No. 58 of 2007** and the court made it abundantly clear that frankness and candour are enhanced by disclosure of documentations from public authorities especially given the historical backdrop of the political and bureaucratic secrecy which existed prior to the Act. The Defendant's assertion that disclosure would hamper frank future correspondence with international bodies, was not supported by the evidence adduced.

58. In its resolution of the issues and in particular the issue as to confidentiality, the court had to properly determine the ambit and purport of section 26. In this case, the Claimant seeks disclosure of information which is of paramount concern to him and the information is not commercially sensitive, nor is there any evidence which suggests that any detriment will befall the Defendant if the information is disclosed. There is no information before this court other than the very general statements advanced by the Defendant which demonstrate that any imputed or implied confidentiality exists.

59. The court also considered whether disclosure of the requested information would result in an actionable breach of confidence. The determination of this question was heavily dependent upon the terms of the correspondence between the Defendant and G-24. The Defendant however failed to adduce any evidence to establish that the correspondence was confidential or that it was intended to be so.

60. The evidential burden which the Defendant must discharge so as to successfully rely on the exemptions under the Act is heightened and the Defendant's unilateral assertion that the correspondence is 'confidential' without evidence of same or sound rationale which justifies the confidentiality, must be viewed with caution as it would be very easy for every correspondence which a public authority wishes to keep a secret, to be unilaterally assigned with a label of confidentiality in an attempt to keep it exempt.

61. The Defendant failed to demonstrate that the 'confidentiality' of the correspondence is such that disclosure would be highly offensive to a reasonable person of ordinary sensibilities or that the information is not trivial.

62. There are two aspects of confidential correspondence as between international organisations, courts and Governments; [1] the temporal aspect of the information and [2] the domestic aspect of information. The correspondence requested by the Claimant is information generated by the domestic party i.e. the Defendant and the information requested is no longer pertinent to the prospects of the Claimant's job at the G-24 Secretariat given that the position of Senior Advisor has since been filled.

63. In this case, the Claimant has not sought the requested information from the international organisation. Had he done so, the G-24 may have been under an

obligation to maintain the confidence of the communication, if it did not have the permission from the Defendant to disclose same.

64. This court readily acknowledges that there will arise situations where diplomacy between international states and organisations would warrant exemptions, where for example the requested documents involve, inter alia, information which impacts upon national security, involves weapons and arms trade or issues of diplomacy and State secrets. Such factual matrices are however evidently distinguishable from the instant case which involves the employment of the Claimant by G-24 Secretariat and the Defendant's correspondence in relation to same. Ultimately, the public interest has to be viewed as being pertinent in the determination of the approach to be adopted, when dealing with the Government, international organisations and confidential information. Consequently, the court must consider whether disclosure of the information sought would be likely to prejudice international relations with the G-24.

65. In the absence of cogent evidence to suggest that the G-24 would have strong concerns about the disclosure of such information, this court cannot conclude that prejudice to international relations would be occasioned.

66. Exemptions under the Act must be construed narrowly and strictly against those that seek to rely upon them. This court is of the view that the contention that the disclosure sought, which essentially seeks to ascertain what the Defendant said about the Claimant, a private citizen of Trinidad Tobago, in the context of the Claimant's application for a role in the G-24 Secretariat (i.e. the non-political wing of the G-24) could have a negative impact on Trinidad and Tobago's relationship with the G-24, is fundamentally flawed and not premised upon any factual foundation. There is before the court no evidence to suggest that disclosure of the requested information would result in Trinidad and

Tobago ceasing to be a member of the G-24 (of which it is a founding member) or that the country's reputation would be tarnished.

67. The relationship between the Government of Trinidad and Tobago and the G-24 is a political one and is premised upon the collective interests of the entire G-24 membership with respect to international monetary and developmental finance matters. Consequently, it is unlikely that disclosure of the requested information relating to the Claimant's application for a role in the Secretariat and the Defendant's response in relation to same, would be viewed as a circumstance which would have a negative and/or debilitating impact upon the international relations between the Government of Trinidad and Tobago and the G-24.

68. As outlined, the parameters of section 26 are narrowly drafted and defined. The evidential obligation, when the exemption is invoked, is heightened and the Defendant must demonstrate that disclosure "would" prejudice relations. The Defendant has not met the evidential threshold.

69. The Defendant failed to establish that the requested information is confidential in quality or that it was imparted in circumstances whereby an obligation of confidentiality could be imported or that the disclosure of same could occasion detriment to the Government of Trinidad and Tobago.

70. The possibility that the disclosure may expose the Defendant to public discussion or criticism is not a matter which crosses the threshold of the requested degree of detriment.

71. In a democratic society, disclosure should not be restrained because of a fear that the information, if disclosed, may enable the public to reference, discuss and/or critique the Defendant's response which was issued to the G-24 in relation to the Claimant, who, as a citizen of this Republic enjoyed the

entrenched right to be treated with equality and equity. Neither a causal link nor a real and significant risk of prejudice or detriment has been established in this case and the Defendant's reliance upon Section 26(b) and 26(d) of the Act is devoid of merit.

## **ISSUE II**

### **Expectation under Section 32 (1) b of FOIA**

72. The Defendant, in refusing disclosure of the requested documents to the Claimant also relied upon section 32(1) (b) of the FOIA. The section provides as follows:

“32. (1) A document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a Government to a public authority, and—

(a) .....; or

(b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of a public authority to obtain similar information in the future.”

73. The Defendant submitted that the correspondence issued by the G-24 Director, on behalf of the G-24, in relation to the Claimant's potential employment at the G-24 amounted “to information or a matter communicated in confidence by or on behalf of a person to a public authority” within the meaning of section 32 (1) (b).

74. The Defendant also submitted that under section 32(1) (b), disclosure of correspondence issued by or on behalf of the G-24 to him in relation to the



Claimant's potential employment at the G-24 would be contrary to the public interest, as such disclosure would likely impair his ability to obtain similar information in the future.

75. There is before this court no evidence that disclosure would or is likely to impair the Defendant's ability or that of any public authority to obtain similar information in the future. The Defendant's affidavit of January 31, 2018 failed to outline the type of information that the G-24 would not potentially be willing to provide in future, nor was any cogent evidence provided to establish why the G-24 would be concerned about information relating to the recruitment of a private individual to its secretariat, or why such a course would likely impair the ability of the Government of Trinidad and Tobago to obtain such information in the future.

76. The evidential burden rests with the decision maker to show a link or nexus between the potential disclosure and the prejudice claimed. The court, on the evidence, was unable to form the view that there exists a real and/or significant risk that prejudice would be occasioned and a hypothetical or remote possibility that same would occur cannot suffice.

### **ISSUE III**

*If the exemptions are applicable, whether the facts of the instant case require that the exemptions should be overridden in accordance with section 35 of the FOIA.*

77. In the event that the court's resolution of the two aforementioned issues is proved to be erroneous and the information is exempt either under section 26(b) or 26(d) or 32 (1) (b) of the Act, the court proceeded to consider the section 35 override. Section 35 of the FOIA provides as follows:

“35. 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.”

78. The section comprises of two limbs. The first limb requires that access to an exempt document should be granted by a public authority where there is reasonable evidence that the factors referenced section 35(a), (b), (c) and (d) has or is likely to have occurred. The second limb calls for access to an exempt document to be provided where giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from so doing.

79. In the present case, the Defendant contends that he properly considered whether there should have been a section 35 public interest override in favour of disclosure and ultimately decided against disclosure. His decision was communicated to the Claimant’s attorneys at law by letter dated July 17, 2017.

80. The said letter further advised that the Defendant had considered whether giving access to the information and documents was justified in the public interest having regard to any benefit and/or damage that might arise from so doing, in accordance with section 35 of the FOIA, and concluded that such disclosure was not justified. The letter reasoned that Trinidad and Tobago was heavily reliant on its good relationship and confidential dealings with the G-24 which plays a significant part in its economic development and the Defendant felt that it was imperative for such a relationship to be maintained. It was suggested that it was likely that disclosure would also cause other international organisations to be wary about their communications with Trinidad and Tobago.

81. At the time the Defendant made his decision, the material before him was limited to the Claimant's freedom of information request and a covering letter from the Claimant's attorneys at law. This letter mentioned the Claimant's previous stint as Governor of the Central Bank, that he had sought employment as Senior Advisor with the G-24, that he had "accepted" an "offer of employment from the G-24" and that he had engaged in various correspondence with representatives of the G-24 in order to complete the formalities, such as the final terms and conditions of employment and his visa application. The letter went on to state that thereafter "things began hitting a snag". The Claimant enquired and was informed that "the G-24 was still awaiting approvals" but was subsequently given a "run-around" and he was eventually informed that the G-24 decided not to go ahead with closing on the offer. Significantly, the letter also noted that it was not clear whether the Defendant had contacted the G-24 or whether he provided a reference or opinion to the body in relation to the Claimant.

82. The Defendant submitted that there was nothing which the Claimant placed before him which appeared to engage the first limb of section 35 and that he

correctly concluded that there was no reasonable evidence, that, significant abuse of authority, neglect in the performance of official duty, injustice to an individual, danger to the health or safety of an individual or of the public or unauthorised use of public funds, had or was likely to have occurred.

83. The Defendant further submitted that even if one were to consider the first limb of section 35 on the basis of the affidavit evidence before the court, that there is no reasonable evidence of significant abuse of authority or neglect in the performance of official duty, injustice to an individual, danger to the health or safety of an individual or of the public, or unauthorised use of public funds, or that the same has or is likely to have occurred. The Defendant's position is that he was entitled to communicate with the G-24 and acted within his authority. Further, it was suggested that there is no reasonable evidence that his communication to the G-24 was the cause or likely cause of any injustice to the Claimant.

84. In relation to the second limb of section 35, the court was invited to bear in mind the guidance given by Breaux JA in **The Minister of Planning and Sustainable Development v The Joint Consultative Council, Civ App. No. P 200 of 2014** where His Lordship observed, inter alia: (i) that although section 35 is expressed in mandatory language it does confer a discretion; (ii) that public interest considerations are paramount; and (iii) that where the pros and cons are evenly balanced, the presumption in favour of disclosure in section 3(2) of the FOIA will tip the balance and require the public authority to give access.

85. The Defendant articulated that there is a real and substantial public interest in maintaining the confidentiality of the requested documents and he repeated that there is a real and substantial public interest in maintaining the confidence of international organisations of states by ensuring that the confidentiality of communications of the nature involved in this case is preserved. The Defendant

also argued that it is pivotal to ensure that member states of the G-24 enjoy frank and candid communications within the operational arm of the G-24 concerning the engagement of prospective employees of the G-24. The Defendant opined that disclosure will not only have adverse reputational repercussions for Trinidad and Tobago within the context of its relationship with the G-24, but its relationships on the international stage will also be exposed to damage with the consequent risk that access to international partners will be stymied. Further, it was argued that disclosure will negatively affect the willingness of the G-24 and its individual member states to communicate freely with Trinidad and Tobago and this is a material public interest consideration given Trinidad and Tobago's status as a small state and its obvious need for economic growth and investment from external sources.

86. The court as it did in relation to the issues determined above, formed the view that no evidence in support of the Defendant's assertions, was adduced. This court does not live in the fringes of the society and the ventilated matters which led to the termination of the Claimant's appointment as Governor of the Central Bank and the plethora of statements which were issued both in and out of Parliament were not lost on the court. The court formed the view that the said statements and the sequence of events which unfolded in relation to the Claimant's tenure as the Central Bank Governor and the subsequent termination of his appointment, collectively has the potential to lead a reasonable person to conclude that the Defendant may have had an entrenched bias against the Claimant. Against that backdrop, a reasonable person could possibly conclude that any correspondence issued by the Defendant in relation to the Claimant may have been less than complementary.

87. The High Court in **Sankar** (supra), outlined that there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings

with the Government. Consequently, there is merit in the argument that the Claimant may only be able to measure whether he was subjected to fair treatment if he is provided with the requested documentation.

88. The Court of Appeal in **Sankar** (supra) suggested that there is a public interest in having the deliberations of those who had an input into recruitment processes to be made public. This is particularly important in the instant case where there may be plausible concern that prejudicial and/or inaccurate information may have been provided by the Defendant to the G-24.

89. In this society, the conduct of many elected functionaries, has been less than stellar. Public trust and confidence in the various arms of state has sustained consistent assault and for many it is difficult to extend any presumption of candour with respect to the representations and actions of many decision makers. There exists an entrenched perception that quite undisclosed conversations uttered in the shadows often have a material impact on the award of contracts, appointments or upon employment offers and those who are ultimately favoured may not have necessarily been the most qualified, suitable or merited choice. Citizens should have confidence, that, information provided about them by or on behalf of the State, especially if the said information may impact upon an individual's potential employment, would always be objective, rational, factually accurate and impartial.

90. The facts of this case are as exceptional as they are disturbing. The G-24 signalled an interest in the Claimant's application, yet after the Defendant's intervention, the interest was curtailed, and no offer of engagement was effected. It is highly unlikely that G-24 will be upset or react adversely if the Defendant's correspondence is disclosed and no evidence was adduced to suggest that disclosure would prejudice relations with the Government of the Republic of Trinidad and Tobago.

91. Additionally, the court considered that the G-24 is based in the USA, which has a robust approach to freedom of information and a wealth of jurisprudence that favours disclosure. This circumstance militates against the possibility of such an extreme reaction as contended by the Defendant, as the G-24 would be familiar with the revolution in relation to disclosure which the Act catalysed.
92. The court carefully considered the risk of prejudice viz a viz the Defendant and the G-24 and ultimately felt that it is unlikely that an international organisation with such stature and respect for the rule of law, would object or react adversely to the disclosure of a letter which may have influenced or impacted its decision not to engage the Claimant as G-24 Secretariat's Senior Advisor.
93. Evidently, under the Act the burden of proving that disclosure is not in the public interest rests solely upon the Defendant and this evidential threshold has not been discharged.
94. The court formulated the view that the disclosure is in the public interest as it may enable a determination as to whether the Defendant complied with his self-stated and accepted duty to act honestly and fairly, in all of the attendant circumstances.
95. In the discharge of its discretion and during its determination as to whether disclosure would be in the public interest, the court carefully considered whether injury, harm, damage or detriment was likely, and it was unable to conclude that it was. In the absence of detriment, the court cannot prevent the provision of information on the premise that it has the potential to cast a shadow upon the Defendant, if his response to the G-24 was not factually sound and/or the opinion proffered by him was less than measured or was coloured and/or characterised by improper motives and/or misinformation.

96. There exists no evidence before this court upon which the court could reasonably conclude that the requested disclosure could negatively impact upon foreign relations, undermine national security or occasion prejudice to the Government and on the factual matrix the court did not find that the conflicting considerations or the scales were evenly balanced.

97. In fact, there is an overwhelming slant towards disclosure in the public interest. In the discharge of public functions, there can be no room for bias, partisanship or malfeasance. Public figures must always account for their actions and the assertions which they advance in their public capacity. In this society all office holders must be held to a high standard which recognises that personal prejudices should never prevail over objectivity. The contents of the requested documentation may or may not occasion embarrassment to the Defendant but any such embarrassment, if it were to arise, cannot justify the suppression of same.

## **CONCLUSION**

98. Having regard to the liberal policy position which favours disclosure and given that the burden of proof rests on the shoulders of the public authority who seeks to rely on an exemption, to justify the reasonableness of such a position, the court has found that neither a causal link nor a real and significant risk of prejudice or detriment has been established and the Defendant's reliance upon Section 26(b) and 26(d) of the Act is devoid of merit. The evidential obligation, when the exemption is invoked, is heightened and the Defendant failed to demonstrate that disclosure "would" prejudice relations with the G24.

99. As it relates to section 31 (1) (b) of the Act, the evidential burden also rests with the decision maker to show a link or nexus between the potential



disclosure and the prejudice claimed. The court, on the evidence, was unable to form the view that there exists a real and/or significant risk that prejudice would be occasioned and a hypothetical or remote possibility that same would occur cannot suffice. Accordingly the Defendant is unable to rely upon this limb.

100. Under the Act the burden of proving that disclosure is not in the public interest rests solely upon the Defendant and this evidential threshold has not been discharged. In the discharge of its discretion and during its determination as to whether disclosure would be in the public interest, the court carefully considered whether injury, harm, damage or detriment was likely, and it was unable to conclude that it was. There exists no evidence before this court upon which the court could reasonably conclude that the requested disclosure could negatively impact upon foreign relations, undermine national security or occasion prejudice to the Government and on the factual matrix the court did not find that the conflicting considerations or the scales were evenly balanced.

#### **ORDER**

101. For the reasons which have been articulated the court hereby declares and orders as follows:

- i. That the Defendant's decision not to release the requested documents contravenes the provisions of the Act and the public interest.
- ii. An order of certiorari is hereby granted to quash the said decision of the Defendant dated July 17, 2017 to refuse disclosure of the documents requested by the Claimant under the Act by virtue of his Application dated March 13, 2017.
- iii. An order of mandamus is hereby issued so as to compel the Defendant to furnish the Claimant with the documents which were requested in his

application made under the provisions of the Act, within seven (7) days of the date of this judgement.

- iv. The Defendant shall pay to the Claimant the costs of this action certified fit for Senior Counsel to be assessed by the Registrar in default of agreement.

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**FRANK SEEPERSAD**

**JUDGE**