

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SAN FERNANDO**

CLAIM NO. CV2019-03928

**IN THE MATTER OF AN APPLICATION BY VERTECH GENERAL CONTRACTING
LIMITED FOR AN ADMINISTRATIVE ORDER UNDER PART 56 UNDER THE CIVIL
PROCEEDINGS RULES, 1998, AS AMENDED**

AND

**IN THE MATTER OF AN APPLICATION BY VERTECH GENERAL CONTRACTING
LIMITED UNDER THE FREEDOM OF INFORMATION ACT, CHAPTER 22:02**

BETWEEN

VERTECH GENERAL CONTRACTING LIMITED

Claimant

AND

SOUTH WEST REGIONAL HEALTH AUTHORITY

Defendant

Before the Honourable Madame Justice Quinlan-Williams

Appearances: Mr. Anand Ramlogan S.C. leads Mr. Alvin Shiva Pariagsingh
and Dr. Ché Nevin Dindial instructed by Mr. Vishaal
Siew saran for the Claimant
Ms. Marissa Ramsoondar for the Defendant.

Date of Delivery: 24th July 2020

JUDGMENT

1. This claim followed on from the court's grant of leave to the claimant to seek judicial review of a decision made by the defendant and to claim the reliefs listed in the statement of case. The nature of this claim is for judicial review of a decision made by the defendant, not to disclose certain information to the claimant under the Freedom of Information Act Chapter 22:02 (FOIA). The claimant's request for information was made by an official application to the defendant dated 5th April 2019. The defendant's decision was communicated in a letter to the claimant dated 28th May 2019.
2. From the list of items requested in the claimant's letter, the defendant failed to disclose items listed at ii. and iv. By the letter dated the 28th May 2019, the defendant's refusal was premised on their claimed to invoke the exemption provided at s 29(1) FOIA in relation to the items at ii. and iv. The letter stated that those items were "Documents affecting legal proceedings or subject to legal professional privilege."
3. The items listed at numbers ii. and iv. respectively are as follows:
 - a. ii. all documents on file including but not limited to the file notes, minutes sheets, internal memoranda, correspondence and reports relative to the request that led to the rental of a 750KVA 3 Phase Stand-By generator from VERTECH General Contracting Ltd during the period 3rd day of March, 2018 to the 6th day of April, 2018 and subsequent to such period
 - b. iv. copies of any and/or all internal documents relative to the oral contract for the rental of a 750KVA 3Phase Stand-By generator

from VERTECH General Contracting Ltd from the 3rd day of March, 2018 to the 6th day of April, 2018 including correspondence, file notes, memoranda, minute sheets whether prior to, during or subsequent to the said rental contract relative to the performance of the oral contract.

4. The claimant served the defendant with a pre-action protocol letter dated 21st June 2019. That letter to the defendant, inter alia, asserted that they, the defendant, had not considered the section 35 override to the exemptions they claimed under section 29 of the FOIA. The claimant repeated the request that the defendant reconsider the section 35 override in a further letter to the defendant dated the 26th August 2019.
5. The issues before the court are therefore limited to the items at paragraphs ii. and iv. which include:
 - a. Are the documents exempted documents within the meaning of section 29 of the FOIA;
 - b. Did the defendant consider the override to the exemptions; and
 - c. Considering the section 35 override, should the documents have been disclosed?

The Law

6. The public has a general right of access to information held by public bodies. Further to this general right to access, there is a bias towards disclosure of information. These objects of the FOIA are found at sections 3 and 11 of FOIA and confirmed and reiterated in the cases relied on by the claimant.

7. The public right of access and the bias towards disclosure are balanced by exceptions created under the FOIA.
8. The court is required, when interpreting and applying sections of the FOIA, including sections 29 and 35, to do so purposively while considering the policy, purpose and objective of the FOIA: *Caribbean Information Access Limited v The Minister of National Security* Civ. App No. 170 of 2008 at paragraph 8. There is no need for any applicant to show why the information is requested: *Re Mann and Australian Tax Office* 7 ALD 698 at page 700.
9. Where the public authority claims exemptions, they bear the burden of proving the exemption *Sankar v Public Service Commission* CV 2006-00037 pages 14-17. Where there is a claim of exemption by reason of public interest, there must be positive evidence showing the public interest: *Jugmohan v Teaching Service Commission* H.C.A. NO. 1055 of 2004.
10. Regarding section 35, in *The Joint Consultative Council for the Construction Industry v The Minister of Planning and Sustainable Development* Civ App No. P200 of 2014, Jamadar JA confirmed that there is also the need for a broad, purposive approach when interpreting and applying section 35 of FOIA.
11. When considering a claim for exemptions, the burden is on public authorities. The public authority must satisfy the court of the reasonableness of the exemption claimed under the FOIA: *Caribbean Information Access (Court of Appeal)* (supra), "The sufficiency of reasons will always be determined by the circumstances and context which

surround the particular request made and exemptions claimed...”¹ In *Joint consultative Council* (supra), Bereaux JA said about section 35 that it “...is expressed in mandatory language but it does confer a discretion. Of course public interest considerations are paramount. But where the pros and cons are evenly balanced, the presumption in favour of disclosure in section 3(2) will tip the balance; that is to say, the public authority is mandated to give access.”²

12. Where the exemption is for legal advice, the Court of Justice of the European Communities in *Kingdom of Sweden and another v Council of the European Union* analysed its decision by following a number of steps. Firstly, it must satisfy itself that the document or parts of it did indeed relate to legal advice. If yes, what parts? A heading saying legal advice was not determinative. Secondly, would disclosure of the documents in whole or parts, undermine the protection of the advice? The risk of undermining the receipt of frank, objective and comprehensive advice had to be reasonably foreseeable and not merely hypothetical. Thirdly, if disclosure would undermine the protection of legal advice, it had to consider whether there was nonetheless an overriding public interest in disclosure, balancing the particular interest in non-disclosure of the document against the public interest in accessibility.

13. Were a public interest immunity is raised, the mere assertion that access to the information is for the purpose of pursuing legal action will not allow access by the applicant. However, the applicant does not have to prove that gaining access will provide success in impending or proposed litigation: *Information Commissioner between Margaret Willsford and*

¹ Paragraph 19

² Paragraph 69

Brisbane City Council Decision No. 96017. It should be sufficient for the applicant to show loss or damage of some kind or wrong has been suffered or a remedy is available in law, the applicant does have a reasonable basis for seeking to pursue the remedy and disclosure would assist the applicant in pursuing the remedy.

14. In *JBA (formerly EBD) v The Minister of Justice* CV2014-00907, Justice Gobin commented on the minimalistic explanation for denying disclosure of the request in the affidavit that supported the defendant's defence. Justice Gobin provided examples of what should be expected in such affidavits. The examples included the provision of letters to the persons preparing for litigation. Those letters should say if the documents requested would be subject to future litigation and hence ought to be protected under legal professional privilege. Also the letters should say how the documents are to be protected and distinguish them from the categories of documents which would usually be disclosed in proceedings.

Evidence and Analysis

- Claimant's evidence

15. The claimant's evidence is in the affidavit sworn by Subash Seepersad. Mr Seepersad is a Director of the Claimant. According to the evidence, representatives of the defendant, submitted a quotation for one, three week rental of a 750KVA 3Phase Stand-By Generator (the generator). The defendant contacted the claimant and made a request for the quotation. The price quoted in the invoice bearing reference number PO00000143844 was \$165,375.00. Later, the defendant placed a purchase order dated 2nd

March 2018 quoting the same reference number from the claimant's quote.

16. The generator was installed on the 3rd March 2018 by personnel of the claimant. After installation, the claimant in the presence of personnel of the defendant tested the generator. The testing included that the connection to the existing buss bars was supplied with the correct voltage and phase rotation.
17. Work to the defendant's generators was expected to be completed during the three week rental of the claimant's generator. The defendant did not complete the repairs to their generators during the three weeks they rented the claimant's generator. It is not disputed that were two, one week extensions of the rental of the claimant's generator.
18. The extension ended on the 6th April 2018. Following the end of the rental agreement, the claimant went to "de-mobilize" their generator. This de-mobilisation exercise was done in the presence of the defendant's representative, Mr. Richard Francis.
19. During the claimant's de-mobilization of their generator, the claimant says that on request of the defendant's representative, the claimant reconnected the defendant's generator as a courtesy to the defendant. This courtesy was at no additional cost to the defendant.
20. The rental agreement having ended and the claimant after de-mobilization of their generator, expected to be paid by the defendant.
21. However, by an invoice dated 19th April 2018, the defendant requested the sum of \$244,900.00 from the claimant. This sum represented the costs

incurred by the defendant for damage done to the defendant's generator by "improper phase alignment of SWRHA Standby Generator on Friday 6/4/18." The defendant alleged that damage was done to the defendant's generator by improper phase alignment when the claimant claims to have provided the courtesy service.

22. This was followed by a letter dated 30th April 2018 addressed to the claimant's engineer from the defendant. That letter requested reimbursement of costs incurred due to damaged equipment as a result of the claimant's failure to "exercise care in conducting the electrical works." The sum claimed for reimbursement was revised by letter dated 30th April 2018 to \$257,900.00. This figure was again adjusted by the defendant in a letter to the claimant dated the 3rd October 2018. The final readjusted figure was \$242,455.00.

23. The claimant has refuted the defendant's claim that they are responsible for any damage done to the defendant's generator. The claimant also asserts that they are entitled to be paid for the service provided to the defendant.

- Defendant's evidence

24. The defendant case is presented in the evidence of Ms Allyson Cudjoe. Ms Cudjoe is a Senior Legal Officer with the defendant. Ms Cudjoe received the request from the claimant for information and documents and she responded to the request denying the items requested at ii and iv.

25. Ms Cudjoe's affidavit gives the history of the request and the response for the information and documents made by the claimant pursuant to the FOIA and the defendant's response thereto.

26. The specific details of the defendant's claim for exemption are in contained in paragraph 10 of Ms Cudjoe's affidavit. The defendant says that the only documents existing are documents created to advise the legal department "on the prospect of litigation by the Proposed Claimant and that the said information and/or documentation is subject to legal professional privilege... I verily believe that legal professional privilege protects confidential communication between Legal Officers of the SWRHA who are all Attorneys-at-Law and the various other Departments of the SWRHA made for the purpose of giving or receiving legal advice, or for use in actual or anticipated litigation."

27. The claimant submits that the defendant has not given any reason why the exempted documents ought to remain undisclosed under S29 FOIA; that the blanket statement approach is insufficient. They also say that the affidavit is devoid of section 35 considerations. The defendant has not provided any evidence that they considered the section 35 override considerations of public interest factors.

28. With respect to the section 29 exemption, the court finds that the explanation provided is a general explanation about what the law says legal professional privilege is. However, it does not relate the concept of legal professional privilege to any advice given in this matter. The defendant does not say that the legal officers requested advice on any specific issue relating to the re-installation of the defendant's generator and damage was said to be done during that exercise. It seems that the defendant has left that up to supposition because the officers named were legal officers. The nature of the document or documents were also not explained beyond. All alleged is that they were provided by legal officers of the defendant.

29. Legal professional privilege would apply if the defendant gave instructions and sought advice on the issue relating to the relationship between the claimant and defendant and if advice was rendered on the issues sought. The advice sought in nature of the professional relationship is protected. It does not have to be for the purpose of pursuing litigation, however if that was the purpose, the defendant should say so. If it is for advice purposes, then one would expect the defendant to say. Similarly, if it is for both purposes the defendant should say that.
30. There is insufficient information for the court to agree that the section 29 exemption should apply. What is before the court is the fact that legal professional privilege is a concept known to law. It is clear that the objectives of the FOIA has moved beyond such simplistic assertions being sufficient to qualify for a section 29 exemption.
31. Regarding the override provisions in section 35, the court is not satisfied that the defendant applied themselves to the section's considerations. The affidavit of Ms Cudjoe does not speak about to any matters which are a veil or an overt reference to section 35 considerations.
32. Ms Cudjoe filed a supplemental affidavit. The supplemental affidavit did not assist the court when considering the defendant's reliance on section 29 exemptions or the section 35 override of an applicable exemption.
33. The defendant's response to the claimant's request for disclosure and information dated 28th May 2019 addressed the exemption under section 29 of the FOIA. The response made no mention of section 35 considerations nor did it contain any information to suggest that the override was considered regarding the response to request at ii. and iv.

34. It is clear that the defendant did not consider whether the override should apply.
35. The FOIA require real and thoughtful consideration by a public authority when requests are made for disclosure of information and documents. Platitudes will not and cannot suffice or serve as substitutes for real and thoughtful consideration of request made.
36. The court has already decided that the section 29 exemption is not applicable based on the explanation provided. However, if it were applicable and the claimant was entitled to rely on the section 29 exemption the court is required to bear its own analysis of section 35 on the circumstances of this case.
37. The defendant submitted that a section 35 analysis was not required as there was no evidence of abuse of authority or neglect of duty. The defendant's submission ignores the fact that section 35 is made of two limbs. The first comprise four identified factors. The second limb is that a public authority shall give access to an exempt document in the circumstances 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 doing so."
38. The first limb is not applicable or relied on by the claimant.
39. The court has to consider, the second limb therefore, if giving access to an exempted document, assuming the legal documents were exempt, is justified in the public interest while performing a balancing act. If the scales are balanced after the analysis, then the presumption that disclosure should be made will sustain.

40. It could be said that overriding the exemption will cause disadvantage to the defendant's prospects of defending a legal claim against the claimant.
41. On the other hand, there may be benefits to the claimant and even to the defendant. The information and requested documents may be so compelling that the claimant is satisfied with the rationale and agree that they owe the defendant the sums claimed for the damage done to the defendant's generator.
42. Here the dispute is between the both parties only. There is nothing about the circumstances that could compromise the defendant in any contractual arrangements with the other service providers. The specific issue is applicable to the claimant only and it is non-transferrable or relevant to any other party so as to compromise the defendant's negotiating position or any other matter.
43. Further given the defendant's position of what appears to be a set off, it seems fair that the defendant should provide all the information to show that such action is justifiable, that includes any legal advice given to the defendant on the issue between the claimant and the defendant.
44. The court also considered whether it should remit the issue to the defendant to reconsider the issue of disclosure of the documents and information at ii. and iv. What was decisive is that the circumstances here are clearly defined and specific to the relationship between the claimant and the defendant. In those circumstances remittance for reconsideration is not appropriate nor will it serve any useful purpose. In the court's judgment the information and documents requested at ii. and iv., to which the defendant claimed an exemption pursuant to section 29, should be disclosed to the claimant.

Disposition

45. It is hereby ordered that:

- a. The court grants a declaration that the access decisions made and communicated in the letter dated 28th May 2019 are invalid, illegal and defective because there was no consideration of the Section 35 override of the FOIA;
- b. An order of certiorari to quash the decision of the defendant made and communicated in the letter dated 28th May 2019 on the ground that it was illegal, null, void and of no effect;
- c. A declaration that the decision of the defendant to refuse and/or deny the claimant access to the documents at ii. and iv. of the request made on 5th April 2019, pursuant to the FOIA, by the claimant, to documents listed at ii. and iv. is illegal and irrational and unfair; and
- d. Additionally, an order of mandamus directing the defendant to provide the claimant with the said documents listed at ii and v within seven days of 24th July 2020.

46. Regarding costs, the defendant is to pay the claimant’s cost. In default of agreement on the quantum, costs is to be assessed by the Registrar of the Supreme Court.

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Justice Avason Quinlan-Williams

JRC: Romela Ramberran