

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
San Fernando**

Claim No. CV2019-04571

BETWEEN

DEVANT MAHARAJ

Claimant

AND

HERITAGE PETROLEUM COMPANY LIMITED

Defendant

Before the Honourable Mme. Justice Jacqueline Wilson QC

Date of Delivery: December 8, 2020

APPEARANCES:

Mr. Anand Ramlogan SC leads Ms. Jayanti Lutchmedial and Mr. Alvin Pariagsingh instructed by Mr. Ché Dindial Attorneys at law for the Claimant

Mr. Stephen Singh instructed by Ms. Amanda Adimoolah Attorneys at law for the Defendant

JUDGMENT

1. The claimant seeks an order of certiorari to quash the defendant's refusal of a request under the Freedom of Information Act (the FOI Act) to provide the names and remuneration packages of all of its employees. The claimant also seeks a declaration that the defendant's refusal of the request was made without a proper consideration of sections 30(1) and 35 of FOI Act and is illegal, irrational and unfair.

THE FOI REQUEST

2. The claimant is a former Minister of the Government of Trinidad and Tobago and a former Senator. He states that in or around November 2018 there was widespread public scrutiny

surrounding the closure of the Petrotrin refinery and the contemporaneous establishment of the defendant. He states that the defendant engaged a recruitment firm, HRC and Associates, to recruit persons on its behalf and that other recruitment firms were not similarly approached or made aware of the process by which HRC and Associates had been selected.

3. By FOI request dated 14 November 2018 and served on the defendant (HPCL) on 23 November 2018 the claimant sought the following information:

- i. a copy of the contract or agreement with HRC and Associates for the advertising and recruitment of human resources for HPCL in 2018;*
- ii. a list of all the companies, agencies or other entities that tendered for the contract to recruit human resources for HPCL in 2018;*
- iii. the Minutes of the Board Meeting where HRC and Associates was approved to recruit human resources for HPCL in 2018;*
- iv. the policy, practice, procedure and criteria for inviting tenders from human resource recruitment agencies to recruit for HPCL;*
- v. all documents and information pertaining to the hiring of HRC and Associates for human resources recruitment for HPCL in 2018;*
- vi. a list of all other advertising or recruitment agencies/companies that HPCL has engaged with in 2018;*
- vii. The members of the Board of Directors and their remuneration package;*
- viii. A copy of the organizational chart for HPCL;*
- ix. The names and remuneration packages of all employees of HPCL since its incorporation to present;*
- x. A complete list of all fees paid to any external consultant/advisers inclusive of legal and financial services. The list should include, but not limited to, the name of the external services, the date the fees were paid, the amount paid and the type of service rendered;*
- xi. A list of all monies paid/payments made by HPCL in excess of TT\$100,000.00 to date.*

4. In correspondence that followed, there was discussion and disagreement between the parties concerning the timeframe prescribed by the FOI Act for the defendant to provide the requested information. By pre-action protocol letter dated 24 December 2018, the claimant gave a deadline of twenty-one days for the defendant to provide a response to the request, failing which legal proceedings were threatened. Upon the defendant's failure to respond by the given deadline, on 22 March 2019, the claimant filed an application for leave to apply for judicial review (the first application).
5. Among other things, the first application sought a declaration that the defendant had breached its duty to notify the claimant of the approval or refusal of the request and an order to compel the defendant to respond to the request within seven days.
6. The first application came on for hearing, ex-parte, before Mme. Justice Quinlan-Williams when directions were given for service of the application on the defendant. At a subsequent hearing on 21 May 2019, when both parties were present, the court encouraged the defendant to comply with the request. The defendant sought until 11 June 2019 to do so, as a result of which the hearing was adjourned.
7. By letter dated 23 May 2019, the defendant provided its first response to the request. The letter stated that a response to items (i) to (viii) would be provided by the given deadline and that the disclosure of the items sought at (ix) to (xi) was denied. The material terms of the refusal are set out below:
 - Item 9: Disclosure is refused on the basis of Section 30(1) of the Act – “a document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information of any individual.”
 - Items 10-11: “We are unable to make an informed assessment of the nature of the request and applicability of information for disclosure under the FOIA.

As a result this request is denied as it lacks specificity. Kindly re-formulate your request so that we may assess same.”

8. By letter dated 11 June 2019, the defendant provided a response to each of the items of the request. In response to item (ix) the defendant stated as follows:
 - Item 9: “We refer to our stated position as indicated in letter of May 23. Please note that overtures have been made to the Office of the Attorney General for guidance on this aspect based on recent public developments. We will advise in due course as to any change of circumstances.”
9. By letter dated 14 June 2019, the claimant responded to the defendant’s letters of 23 May and 11 June 2019. Save for the organizational chart that was provided by the defendant pursuant to item (viii) of the request, the claimant expressed dissatisfaction with the defendant’s response. Among other things, the claimant asserted that the disclosure of the requested information was not unreasonable; that the disclosure of the salaries and remuneration packages of public offices was uncontroversial; and that the disclosure of the remuneration packages of the defendant’s employees was in the public interest as the funds were paid by taxpayers.
10. By letter dated 17 June 2019, the defendant responded to the claimant’s letter of 14 June 2019. The defendant maintained the position that was taken in its letter of 11 June 2019 in response to items (i),(iii), (v) and (vi), (x) and (xi) of the request. In response to item (iv) which sought *the policy, practice, procedure and criteria for inviting tenders from human resource recruitment agencies to recruit for HPCL*, the defendant provided an online link to the State Enterprise Performance Monitoring Manual, which it identified as the document that it used in the procurement of services. The defendant provided further information in response to the request for the membership of the defendant’s board of directors and their remuneration packages. In response to the request for the names and

remuneration packages of the defendant's employees sought at item (ix), the defendant stated as follows:

- *Item 9: This request was denied in our letter of May 23 on the basis of section 30(1) of the Act. The provision is self-explanatory as to the reason for claiming the exemption which we detail for completeness "a document is an exempt document if its disclosure under the Act would involve the unreasonable disclosure of personal information of any individual." We maintain our position as stated from inception regarding this particular request. We have considered your position on public interest and state that it is inapplicable and without merit. Respectfully, there is no overriding interest to disclose personal information in the context of this FOIA request. The disclosure will do no more than excite or satisfy the curiosity of the requestor. **This request has been answered.***

11. At a hearing on 18 July 2019 Mme. Justice Quinlan-Williams granted permission to the claimant to withdraw the first application.
12. Thereafter, on 23 September 2019, the claimant wrote to the defendant in response to its letter of 17 June 2019. The claimant sought a reconsideration of the response to item (ix), asserting that the disclosure of the names and remuneration packages of the defendant's employees was not unreasonable; that the salaries and remuneration packages for public offices should not be exempt from disclosure; and that disclosure of the information sought was required in the interest of transparency. The claimant threatened the institution of legal proceedings should the defendant fail to comply with its request.
13. By letter dated 4 October 2019, the defendant indicated that it was in the process of obtaining instructions and documentation with a view to providing a full response to the request within two weeks.
14. On 4 November 2019, the defendant provided the following response:

“We write further to our letter of 4th October in response to yours of 23rd September. Please accept our apologies for the delay in response.

As it relates to your follow up on item 9 of your previous FOIA request, we maintain our reasons for objecting to the request as phrased. The reasons for refusal have been already articulated in our letters of 23rd May and 17th June respectively. With that being said, our Client can provide further assistance which goes to the essence of your request and disclose the attached document. Please see attached a copy of our client’s **Annual Company Base Salary List**. We can provide no further assistance in this regard and thank you for your follow up.”

15. On 6 November 2019, the claimant filed an application for permission to apply for judicial review of the defendant’s refusal to provide the requested information. The defendant opposed the application on the ground of delay and I gave directions for the filing of written submissions by the parties.
16. On 10 July 2020, I granted permission to the claimant to apply for judicial review.

THE FREEDOM OF INFORMATION ACT

17. For the purposes of this case, the relevant provisions of the FOI Act are as follows:

4. In this Act -

"personal information" means information about an individual, including –

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex or marital or family status of the individual;

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to

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

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

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

(3) Where a request by a person other than a person referred to in subsection (2) is made to a public authority for access to a document containing personal information of any individual (including a deceased individual) and the public authority decides to grant access to the document, the public authority shall, if practicable, notify the individual who is the subject of that information (or in the case of a deceased individual, that individual's next-of-kin) of the decision and of the right to apply to the High Court for judicial review of the decision and the time within which the application for review is required to be made.

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

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

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.

DISCUSSION

18. The legal principles that apply to the grant of information pursuant to the FOI Act are well established.

19. The FOI Act provides a general right of access to information held by public authorities. Its objective is to give effect to principles of transparency and accountability.¹ The general right of access is subject to exemptions and exceptions that are necessary to protect essential public interests and to safeguard private rights and legitimate commercial interests.² Where an exemption is invoked by a public authority, it must carry out a balancing exercise in which the public interest in maintaining the exemption is weighed against the public interest in disclosing the information, with the scales tipping in favour of disclosure where the considerations are evenly balanced or where the public interest so requires.³ Where a public authority refuses a request for information, it must provide reasons for its decision⁴ and the details of the public interest evaluation exercise that was carried out.⁵

20. As indicated earlier, on 23 November 2018, the claimant made a request to the defendant for the names and remuneration packages of all of its employees. In its letters in response dated 23 May 2019, 11 June 2019 and 17 June 2019, the defendant maintained that the information sought was exempt from disclosure under section 30(1) of the FOI Act as it

¹ Section 3(1)(a)

² Section 3(1)(b) and Part IV

³ Section 35

⁴ Section 23

⁵ Sections 35

involved the unreasonable disclosure of personal information. Subsequent to the claimant's withdrawal of the first application and in response to its request for a reconsideration of the defendant's decision, the defendant provided its Annual Company Base Salary List to the claimant. There is no evidence of further engagement between the parties on the defendant's response before the claimant filed the present proceedings.

21. There can be no dispute that the names and remuneration packages of the defendant's employees fall within the category of "personal information" under section 4 of the FOI Act. Such information relates both to the employment history of an individual and to financial transactions in which an individual is involved. Therefore, the claimant's general entitlement to such information is circumscribed by the requirements of sections 30(1) and 35 of the FOI Act.
22. Section 35 required the defendant to consider whether the public interest in disclosing the requested information outweighed by the public interest in maintaining the exemption against the unreasonable disclosure of personal information that section 30(1) provides. However, as Counsel for the claimant correctly observes, there is nothing in the defendant's letters of 23 May 2019, 11 June 2019 and 17 June 2019 to indicate the public interest considerations on which the decision to refuse access was based.
23. Section 30(1) exempts the unreasonable disclosure of personal information. What is "reasonable" must clearly involve a consideration of the outcome of the balancing exercise that section 35 requires. Where the considerations for and against disclosure are evenly balanced, the question of "reasonableness" may also operate in a residual sense in favour of disclosure having regard to the underlying objectives of the FOI Act.
24. The requirement for a public authority to conduct a public interest assessment and to give sufficient reasons for the refusal of a request has been the subject of judicial discussion and analysis by the Court of Appeal in several cases: *Caribbean Information*

Access Ltd v The Honourable Minister of National Security Civil Appeal No. 170 of 2008; Ashford Sankar v Public Service Commission C.A. No. 58 of 2007; Minister of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry C.A. No. P 200 of 2014.

25. In *Caribbean Information Access Ltd v The Honourable Minister of National Security*, Justice of Appeal Jamadar (as he then was) held that:

“48. The Respondent was and is obliged to make the section 35 assessment, analysis and determination and to indicate this in its reasons to the Appellant. This has not been done.

49. ...In my opinion, fairness and justice require that in these judicial review proceedings and in the interest of good public administration, that these requests be remitted to the Respondent for its reconsideration in light of section 35 and the opinion of the court. The Respondent is therefore ordered to give the Appellant reasons in writing, as to whether the mandate in section 35 to grant access to an exempt document applies (or does not) in relation to the stated requests and why this may be so.”

26. In *Minister of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry* Jamadar JA elaborated on the requirements of section 35 as follows:

“40. Thus when one comes to the evaluative exercise demanded by section 35 of the FOIA, in so far as denial of access to information is justified, both a public authority (initially) and a court of review (subsequently) are obliged to carry out the required balancing exercise in the context of the above-stated statutory and constitutional framework and values. It is critical to

note, that in the carrying out of this evaluative exercise it is for the public authority to demonstrate that denial of access is justified because it is necessary for the protection of essential public interests. As already explained 'essential' qualifies both the type or public interests, as well as the degree of circumstances that justify denial of the section 35 public interest override mandate."

27. In *Ashford Sankar v Public Service Commission*, the Public Service Commission refused access to its minutes of meetings on the ground that the minutes were internal working documents that were exempt from disclosure under section 27 of the Act. Justice of Appeal Narine (as he then was) held that the failure to give reasons for the refusal was a breach of sections 23(1) and 27(3):

"19. The phrase 'internal working document' is a marginal note that appears next to section 27(1) of the Act. There is a reference to section 27 of the Act. However, the letter does not set out the public interest considerations on which access was refused as required by section 27(3). Accordingly, the letter, which embodies the notice of refusal (as required by section 23) does not comply with the requirements of section 27(3). In fact the letter makes no reference whatsoever to the public interest. Further, there is no compliance with section 23(1), in that apart from the reference to internal working documents and section 27, no reasons were provided for the refusal, nor was the appellant advised of the right to apply for judicial review of the decision to refuse access.

28. The authorities make it clear that in denying access to documents on the ground that they are exempt from disclosure, a public authority is required not merely to recite the provisions of the statutory exemption on which it relies but to state the reasons for which

the exemption is invoked and the public interest considerations on which the decision is based: *CV2018-01210 Kavita Ramkissoon Ragoo v the Ministry of Health* .

29. No adequate reasons were given by the defendant for its failure to disclose the names and remuneration packages of its employees to the claimant nor was the required public interest evaluation exercise conducted. The defendant's disapproval of the claimant's motives for seeking the information is manifested in its statement that the disclosure of the requested information would do no more than to excite or satisfy the curiosity of the claimant. However, the motivating factor for the claimant, whatever it may be, does not relieve the defendant of its duty to carry out a balancing exercise with a view to determining whether the disclosure of the requested information is in the public interest. The defendant's failure to do so in its letters of 23 May 2019, 11 June 2019 and 17 June 2019 was, therefore, unreasonable and unlawful.
30. This notwithstanding, on 4 November 2019 the defendant ultimately provided its Annual Company Base Salary List to the claimant in response to its request. There was no further statement by the claimant that it considered the information provided by the defendant to be an inadequate response. Any such indication would have been surprising having regard to the claimant's position taken in its letter of 23 September 2019 that the salaries and remuneration packages for public offices should not be exempt from disclosure. In providing the salary range for each office within its establishment, the defendant's Annual Company Base Salary List falls squarely within these parameters.
31. Under section 39(1) of the FOI Act, a person aggrieved by the decision of a public authority may apply to the High Court for judicial review of the decision. Under section 39(3), the decisions that are subject to challenge include the failure to notify an applicant of the approval or refusal of a request within thirty days and the failure to provide the requested information forthwith where a request has been approved and the prescribed payments have been made.

32. While the defendant's response letters of 23 May 2019, 11 June 2019 and 17 June 2019 fell short of its obligations under the FOI Act there is no allegation by the claimant the letter of 4 November 2019 is similarly tainted. Neither is there evidence on which such an inference may reasonably be drawn.

33. Counsel for the claimant relies on the provisions of section 16(2) of the FOI Act which state that:

(2) Where—

(a) a decision is made not to grant a request for access to a document on the ground that it is an exempt document;

(b) it is practicable for the public authority to grant access to a copy of the document with such deletions as to make the copy not an exempt document; and

(c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy the public authority shall give the applicant access to such a copy of the document."

34. Counsel for the claimant submits that, pursuant to section 16(2), the defendant may have granted access to the requested information with such deletions as were necessary to ensure that the document was not an exempt document. Counsel submits further that, on a purposive construction of the Act, the defendant was obliged to assist the claimant by providing the requested information in a form and manner that would satisfy or answer the underlying reason for the claimant's quest for information.

35. In my view, the Annual Company Base Salary List provides a response to the claimant's request that is consistent with the requirements of section 16(2) and the overall objectives of

the Act. As Counsel for the defendant correctly observes, no direct challenge has been made by the claimant to the response that was so provided. For the reasons given above, any such challenge was, in any event, bound to fail.

36. The claimant's claim therefore fails and is hereby dismissed.
37. The claimant shall pay the defendant's costs to be assessed by the Registrar in default of agreement.

Jacqueline Wilson QC

Judge