THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Claim No. CV2006-00037
C.A. No. 58 of 2007

BETWEEN

ASHFORD SANKAR **Appellant**

AND

PUBLIC SERVICE COMMISSION **Respondent**

****

Panel:

A. Mendonca J.A.

P. Jamadar J.A.

R. Narine J.A.

Appearances: Mr. Ramlogan Ms. C. Baggan Dean, Ms. M. Ramsundar appeared for the Appellant

Mr. R. Martineau, S.C. Ms. P. Soverall, Ms. K. Foster appeared on behalf of the Respondent

DATE DELIVERED: 28th April, 2014.

I have read the judgment of Narine J.A. and agree with it.

A. Mendonca
Justice of Appeal.

I too, agree.

P. Jamadar.
Justice of Appeal.

JUDGMENT

Delivered by R. Narine J.A.

1. This is an appeal from the High Court on an application of the appellant to review the decision of the respondent to refuse to provide certain documents requested by the appellant under the Freedom of Information Act (the Act). The undisputed facts appear below.

2. The appellant held the position of acting Deputy Permanent Secretary in the public service. On 15th November 2005 he requested certain information from the respondent (PSC) under the Act. The documents requested were in relation to his career and the reasons for him being bypassed for promotion. The documents requested were:

(i) His position in the overall ranking of the Assessment Exercise (PPC of Canada) for the office of Deputy/Permanent Secretary.

(ii) Recommendations/staff reports made on his behalf since 1997 for the offices of Deputy Permanent Secretary – by the Permanent Secretary.

(iii) Public advertisements for the filling of the Offices of Deputy Permanent Secretary and Permanent Secretary with effect from January 1997.

(iv) Minutes of the Meetings of the Public Service Commission (PSC) at which the issue(s) of appointment/promotion to the Office of Deputy Permanent Secretary and/or Permanent Secretary were discussed/determined relative to the appointments made in October 2005.

(v) The score sheets or other documents of all public officers who were assessed or evaluated by the Personnel Psychology Centre of Canada for appointments/promotion to the offices of Deputy/Permanent Secretary.

(vi) The results of the screening interview/assessment conducted by Symcon Systems Management Consultants Ltd on behalf of the Public Service Commission in 1997 for the filling of the office of Deputy Permanent Secretary.

(vii) The names of all public officers whose names were retained for future reference arising from the exercise by Symcon Systems Management Consultants Ltd in 1997 as above at (1).

(viii) *Agreement between the Personnel Psychological Centre (PPC) of Canada and the Public Service Commission of Trinidad and*

Tobago (or whichever party) with respect to the Assessment Centre Exercise for the . . . . . .

3. By letter dated 22nd December 2005, attorney-at-law for the appellant wrote to the PSC, indicating that the time for the provision of the documents under the Act had expired, and called upon the PSC to provide the requested documents within seven days, failing which proceedings for judicial review would follow.

4. Not having received a response to his request the appellant filed an application for judicial review on 6th January 2006, claiming the following reliefs:

1. *An order of mandamus to compel the Respondent to provide the Applicant with the information requested in his application made under the provisions of the Freedom of Information Act dated the 15th day of November, 2005;*

2. *A declaration that the Applicant is entitled to the information set out in the said application;*

3. *An Order directing the Respondent to provide the Applicant with the requested information free of charge within 7 days hereof;*

4. *Alternatively, an order directing the Respondent to forthwith prepare and supply notice in accordance with section 23 of the said Act;*

5. *A declaration that there has been unreasonable delay on the part of the Respondent in making a decision on the Applicant's request under the Freedom of Information Act;*
6. *Costs;*

7. Pursuant to section 8 of the Act, such further orders, directions or writs as the Court considers just and as the circumstances warrant.

5. The PSC filed affidavits in opposition to the application exhibiting, inter alia, a letter dated 21st December 2005, which the appellant denied receiving. In the letter, the PSC responded to the appellant's request. The PSC provided the information requested in (i), (ii) and (iii) of paragraph 2 above. However, it refused to provide the minutes of the meeting of the PSC requested at (iv) and the agreement requested at (viii) on the ground that they were "internal working documents" and are exempt under section 27 of the Act. The score sheets requested at item (v) were refused pursuant to section 30 of the Act since they would involve disclosure of information relating to public officers. With respect to the information requested at (vi) and (vii), the PSC advised that it was still searching for the documents requested.

6. As it turned out the trial before the judge was focussed on the provision of the minutes of the meetings of the PSC at which the issue(s) of appointment/promotion to the office of Deputy Permanent Secretary and or Permanent Secretary were discussed or determined relative to the appointments made in October 2005.

7. The trial judge found that the reasons advanced by the respondent for refusing to provide the minutes fell woefully short of what is contemplated by the Act. He further found that the respondent had not stated the public interest considerations on which the decision was based. However, having himself examined the minutes, the trial judge was of the view that it was open to him to draw certain inferences. The judge went on to consider whether the respondent was entitled to refuse disclosure of the minutes on the basis that public officers may in the future be inhibited in expressing their views in meetings in which they are formulating government policy, if the court sets the precedent of making such minutes available.

8. The trial judge considered the cases of **Conway v. Rimmer** [1968] A.C. 910 and **Burmah Oil Co. Ltd. v. Bank of England** [1980] A.C. 1090 in which the court considered the "frankness and candour" argument as a ground for refusing disclosure. The trial judge noted that the English courts have tended to regard the argument with a certain degree of scepticism. However, the judge went on to express the view that in

the local setting “some public servants involved in the formulation of government policy would be legitimately inhibited in expressing their views or giving advice where it (sic) apprehended that those views or that advice might be disclosed”.

9. In the instant case, the trial judge noted that the matter involved appointments and promotion of high level public officials and concluded that disclosure of confidential comments made by members of the Commission, by fellow public servants of equal or almost equal rank, and by others whose views were sought by the Commission, “is likely to engender at the very least, a certain amount of disappointment and bitterness such as to adversely affect the harmonious relationship among persons who can be regarded as the chief accounting officers of the public service”. Accordingly, the judge found that disclosure of the minutes would cause “specific and tangible harm of such a nature that it would be inimical to the proper functioning of the public service” and would have “a substantial adverse effect on the effective and efficient conduct of government business”. The judge concluded that the minutes in issue ought not to be disclosed as disclosure would be contrary to the public interest.

10. Although the trial judge refused to order disclosure of the minutes, he ordered the Commission to provide to the appellants within ten days, the criteria applied or the policy adopted in the appointment/promotion of Deputy Permanent Secretaries including what impact, if any, the Assessment Centre Exercise had on the selection process. He further ordered that the issue of the missing documents be referred to the Ombudsman, and that the respondent should pay the appellant’s costs in the sum of $45,000.00.

GROUNDS OF APPEAL:

11. The appellant filed five grounds of appeal.

    1. *The court erred in law in holding that the PSC had established that disclosure of the minutes would cause specific and tangible harm of such a nature that it would be inimical to the proper functioning of the public service and that disclosure would be contrary to the public interest.*

2. *There was no evidence that disclosure of the minutes would cause such harm and would therefore be contrary to the public interest and it was wrong for the judge to speculate about same in the absence of positive evidence as the Respondent bore the onus of proof in this regard.*

3. *The Appellant had a statutory right of access to the requested information unless the Respondent was able to deny access by the proper invocation of one of the exemptions in the FOIA. The exemption invoked viz, that disclosure would be contrary to the public interest (section 27(1)(b)) was never made out and the judge erred in making an order for partial access only in the circumstances.*

4. *The judge erred in finding that disclosure of the minutes would unduly inhibit the candour and frankness and cause "disappointment or bitterness such as to adversely affect the harmonious relationship" among public officers. The court ought to have held that the "mature consideration" of the issue of promotion by the PSC which the minutes revealed would inspire confidence in the decisions arrived at in relation to promotions and hence avoid conflict and resentment among public officers.*

5. *Having accepted the novelty and importance of the FOIA and the extensive research conducted by the parties, the assessment of the Appellant's costs in the sum of $45,000.00 for the trial amounted to an unreasonable and/or perverse exercise of the court's discretion and the assessment was too low. The court ought to have awarded a higher figure for the appellant's costs because of the complexity, novelty and importance of the case and the obvious amount of work that was required. The Appellant was justified in retaining two Counsel and was entitled to a higher assessment of his costs.*

SUBMISSIONS OF COUNSEL:

12. Both parties filed written submissions and made oral submissions at the hearing. In his written submissions the appellant focussed on the issue of whether or not the respondent was entitled to rely on the "frankness and candour argument" as a basis for refusing to provide the minutes, and whether the trial judge was correct in finding that disclosure of the minutes would engender disappointment and bitterness in public officials such as to adversely affect their relationships. In his oral submissions, Mr. Ramlogan further developed his arguments that the Commission had not made out any legitimate ground for refusing to provide the minutes in writing in response to the request made under the Act, and was not entitled ex post facto to raise public interest considerations or the "frankness and candour" arguments.

13. In its submissions, the respondent argued that the trial judge was correct in holding that the Commission ought to be afforded a degree of confidentiality in its deliberation processes and was correct in exercising his discretion in ordering partial access to the minutes.

THE ISSUES:

14. The issues that arise for determination in this appeal are:

(i) Whether the Commission has complied with the provisions of the Act in setting out its reasons for denying access pursuant to the request of the applicant.

(ii) Assuming that the Commission failed to put forward a legitimate reason for refusing access to the minutes, was it entitled to raise the issue of public interest before the trial judge.

(iii) Whether the trial judge was correct in making his findings that some public servants would be inhibited in expressing their views, and that disclosure may result in disappointment and bitterness among senior public officers, resulting in disharmony in relationships among them and ultimately having an adverse effect on the efficient functioning of the public service.

(iv) Whether the trial judge exercised his discretion correctly in awarding costs in the sum of $45,000.00 in favour of the appellant.

THE FREEDOM OF INFORMATION ACT:

15. For the purposes of this appeal the relevant provisions of the Act are as follows:

SECTION 3

> ***3. (1) The object of this Act is to extend the right of members of the public to access to information in the possession of public authorities by—***
>
> ***(a) making available to the public information about the operations of public authorities and, in particular, ensuring that the authorisations, policies, rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those authorisations, policies, rules and practices; and***
>
> ***(b) creating a general right of access to information in documentary form in the possession of public authorities limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities.***
>
> ***(2) The provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.***

SECTION 13

13. (1) A person who wishes to obtain access to an official document shall make a request in the form set out in the Schedule, to the relevant public authority for access to the document.

(2) A request shall identify the official document, or provide sufficient information to enable the designated officer of the public authority, or an employee of the public authority who is familiar with the relevant documents, to identify the document with reasonable effort.

(3) A request may specify in which of the forms described in section 18 the applicant wishes to be given access.

(4) Subject to section 21, a request under this section may be made for access to all records of a particular description or all records relating to a particular subject.

(5) An application for access to an official document held by a public authority referred to in section 4(k)(i) or (iii) shall be made to the responsible Minister.

SECTION 14

14. (1) A public authority shall take reasonable steps to assist any person who—

(a) wishes to make a request under section 13; or

(b) has made a request which does not comply with the requirements of section 13(2), to make a request in a manner which complies with that section.

(2) Where a request in writing is made to a public authority for access to an official document, the public authority shall not refuse the request on the ground that the request does not comply with section 13(2), without first giving the applicant a reasonable opportunity of consultation with the public authority

with a view to the making of a request in a form that does comply with that section.

(3) Without prejudice to section 21, a public authority shall take reasonable steps to assist any person in the exercise of any other right under this Act.

SECTION 15

15. A public authority shall take reasonable steps to enable an applicant to be notified of the approval or refusal of his request as soon as practicable but in any case not later than thirty days after the day on which the request is duly made.

SECTION 16

16. (1) Subject to this Act, where—

(a) a request is duly made by an applicant to a public authority for access to an official document;

(b) the request is approved by the public authority; and

(c) any fee prescribed under section 17 that is required to be paid before access is granted has been paid,

the public authority shall forthwith give the applicant access to the official document.

SECTION 23

23. (1) Where in relation to a request for access to a document of a public authority, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred or that no such document exists, the public authority shall cause the applicant to be given notice in writing of the decision, and the notice shall—

(a) state the findings on any material question of fact, referring to the material on which those findings were based, and the reasons for the decision;

(b) where the decision relates to a public authority, state the name and designation of the person giving the decision;

(c) where the decision does not relate to a request for access to a document which if it existed, would be an exempt document but access is given to a documents in accordance with section 16(2), state that the document is a copy of a document from which exempt information has been deleted;

(d) inform the applicant of his right to apply to the High Court for judicial review of the decision and the time within which the application for review is required to be made;

(e)where the decision is to the effect that the document does not exist or cannot, after a thorough and diligent search, be located, inform the applicant of his right to complain to the Ombudsman.

<u>SECTION 27</u>

27.(1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—

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

(b) would be contrary to the public interest.

(2) In the case of a document of the kind referred to in section 8(1), the matter referred to in subsection (1)(a) does not include—

(a) matter that is provided for the use or guidance of, or is used or may be used for, the purpose of making decisions or recommendations, or enforcing written laws or schemes, referred to in section 8(1); . . . . . (3) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 23 shall state the public interest considerations on which the decision is based.

<u>SECTION 35</u>

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 personal information. Broadcasting materials. Protection against action for defamation.

(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.

16. **<u>The First Issue</u>** – Compliance with section 27 of The Act.

Section 3(1) of the Act makes it clear that the object of the Act is to extend the right of the public to access information in the possession of public authorities. Section 3(2) provides that the provisions of the Act shall be interpreted in such a way as to

further the object of providing access to information, and any discretion conferred by the Act must be exercised so as to facilitate and promote the disclosure of information in a prompt and cost-effective manner.

17. Clearly the intention of the framers of the Act was to promote disclosure of information held by public authorities to the public, as opposed to suppressing or refusing access to information. The presumption is that the public is entitled to access the information requested unless the public authority can justify refusal of access under one of the prescribed exemptions specified under sections 24 to 34 of the Act. Even so, under section 35, although the information requested falls within one of the specified exemptions, the public authority is mandated to provide access where there is reasonable evidence that abuse of authority or neglect in the performance of official duty or injustice to an individual, danger to the health or safety of the public, or unauthorised use of public funds, has, or is likely to have occurred, and disclosure of the information is justified in the public interest.

18. In this case by letter dated 21st December, 2005 the PSC refused access to the minutes of the meetings of the PSC on the sole ground that the minutes are "internal working documents and are exempt under section 27."

19. The phase "internal working documents" 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 his right to apply for judicial review of the decision to refuse access.

20. In his judgment the trial judge expressly found that the reasons provided "fall woefully short of what is contemplated" by the Act. Clearly what is required by section 27(3) and section 23 (1), is that the applicant be provided with reasons for the decision, and informed of his right to challenge the decision by way of judicial review. Clearly this

was not done in this case, and accordingly, the PSC was in breach of sections 27(3) and section 23 of the Act.

21. **The Second Issue** – Was it permissible for the respondent to seek to introduce public interest considerations at the trial?

In its written submissions before the trial judge, the respondent attempted to augment its reason for refusal, by adding that the minutes were a record of consultation and deliberations between members of the PSC to assist in their decision making process. The respondent further submitted that the minutes were confidential and the public interest was against disclosure, which will inhibit frankness and candour in future discussions. Further the deliberations were between high office holders on sensitive issues. The respondent expanded on these submissions in its oral submissions before the trial judge.

22. It seems to me that having regard to the object of the Act as expressed in section 3 and the obvious bias in favour of providing access to information, there is an onus on a public authority which is refusing access to a document on the ground of public interest to comply strictly with the requirements of sections 23 and 27(3). The respondent failed to comply with the clear provisions of the Act to provide proper reasons for its refusal, so as to enable the appellant to make an informed decision as to whether or not he would challenge the refusal by way of judicial review. In these circumstances it is clearly undesirable that the respondent should be permitted to provide new reasons, or to add to, or augment vague or insufficient reasons originally advanced for refusal of access. In my view, do so will ultimately frustrate the clear purpose of the Act, which is to permit the public to access information unless refusal of access can be brought within one of the exemptions specifically set out in the Act, and adequate and intelligible reasons are provided for such refusal.

23. The courts have been increasingly reluctant to receive evidence to supplement inadequate reasons, where there is a statutory duty to provide reasons for a decision. The case law has been usefully summarised by Michael Fordham in his **Judicial Review Handbook** 4th ed. at p. 1079 under the rubric “Resistance to later reasons: Examples: **R v. Croydon London Borough Council**, ex p Graham (1993) 26 HLR 286, 292 (Steyn LJ: “the idea that material gaps in the reasons can always be supplemented

ex post facto by affidavit or otherwise ought not to be encouraged"); **R (Metropolitan Borough of Wirral) v. Chief Schools Adjudicator** [2001] ELR 574 at [58] (where "specific statutory duty ... to give an adjudication with reasons ... a subsequent witness statement is not permissible to give guidance as to what was in the adjudicator's mind"); **R v. Tynedale District Council**, ex p Shield (1987) 22 HLR 144 (court should not go behind decision letter because one purpose of statutory requirement of reasons was to allow decision to be challenged); **R v. Lambeth London Borough Council Housing Benefit Review Board, ex p Harrington** The Times 10th December 1996 (applying **Ermakov** to Housing Benefit Review Boards: there being grossly deficient reasons, impermissible to invite the Court to look at supplementary written evidence); **R v. Doncaster Metropolitan Borough Council**, **ex p Nortrop** (1996) 28 HLR 862, 874 (Brooke J, declining to look at supplementary affidavit reasons in the context of a statutory duty to give reasons: "in a case where the challenge is made as to the adequacy of reasons and as to whether a decision should be upheld because the decision-maker appears not to have given weight to relevant considerations in the judgment, the authorities makes it plain that except in exceptional circumstances the courts should not look at evidence of this kind").

24. In this case, no affidavit evidence was filed with a view to supplementing the reasons for refusal provided by the respondent in its letter dated 21st December, 2005. The supplementary reasons arose in the respondent's written submissions filed before the trial judge. There is no evidence that disclosure of the minutes requested will inhibit frankness and candour in future discussions. In its oral submissions before this court the respondent contended that the submission is sustainable having regard to the nature and character of the request and the minutes themselves, which were before the trial judge.

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

26. **The Third Issue** – Whether the trial judge was correct in his findings on the "frankness and candour" issue.

The trial judge expressly found that the PSC fell woefully short in failing to provide reasons for refusal of access, and in failing to set out the public interest considerations on which its decision was based. There was no appeal from this finding. However, the trial judge went on to observe that the court was entitled to draw certain inferences in exceptional cases from the circumstances of the case (which involves the issue of promotion to one of the highest positions in the public service), from constitutional provisions which provide guidelines for appointments and promotions, and from the documents themselves. Unfortunately, the trial judge did not go on to specify what were the exceptional circumstances in this case, which permitted the court to draw certain inferences, and on what specific evidence the inferences were to be drawn.

27. The trial judge went on to consider the issue of frankness and candour raised for the first time in the respondent's written submissions before him. The judge referred extensively to the judgment of Lord Upjohn in **Conway v. Rimmer** [1968] AC 910 at 993 in which Lord Upjohn observed that the real reason for the privilege attaching to high-level inter-departmental communications was that it would be inimical to the proper functioning of the public service. Lord Upjohn went on to say:

> ***"But it has nothing whatever to do with candour or uninhibited freedom of expression. I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day."***

28. Similar sentiments were expressed by Lord Keith in **Burmah Oil Co. Ltd. v. Bank of England** [1980] AC 1090 at 1133:

> ***"The notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings***

by consideration of the off-chance that they might have to be produced in a litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so. Nowadays the state in multifarious manifestations impinges closely upon the lives and activities of individual citizens. Where this has involved a citizen in litigation with the state or one of its agencies, the candour argument is an utterly insubstantial ground for denying him access to relevant documents."

29. Having noted that the English courts have tended to regard the candour and frankness argument with a certain degree of scepticism the trial judge made the following observation:

"That may very well be the position in the United Kingdom where the perception is that high-level individuals ought to be mature enough to deal with all types of criticism, constructive or otherwise. However in Trinidad and Tobago, I am of the view that the situation is not as ideal, and that some public servants involved in the formulation of government policy would be legitimately inhibited in expressing their views or giving advice were it apprehended that those views or that advice might be disclosed. That is not a condemnation of our public servants, but rather an appreciation of the realities of our society."

30. Unfortunately, the trial judge does not refer to any evidential basis on which he based this conclusion. Curiously, the trial judge noted that the frankness and candour argument may be a relevant factor in considering whether disclosure would be contrary to the public interest, but it should be disregarded, save in an exceptional case, where "a very factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative processes of a like kind, and that tangible harm to the

public interest will result from that inhibition:" These sentiments were in fact expressed in **Re: Eccleston** [1933] 1 QAR 60at paras. 132 and 134.

31. There was in fact no such factual basis in this case. Accordingly, there was no evidence to support the trial judge's finding that public servants in Trinidad and Tobago do not possess the same level of maturity as their counterparts in the United Kingdom which will equip them to handle criticism, and this will cause them to be inhibited in their views if they apprehend that their views may be disclosed. It follows that this finding of the trial judge cannot stand.

32. In his judgment, the judge referred to the minutes themselves as being one basis on which the court is entitled to draw certain inferences in exceptional circumstances. Like the judge, this court has had the opportunity to peruse the minutes requested. The minutes themselves do not provide an evidential basis on which the frankness and candour argument can be supported. The is nothing in the minutes which provides a basis for saying that high level public servants lack the self-confidence or maturity to handle criticism or will be inhibited in expressing them. There is nothing in the minutes which provide a basis for the fear that disclosure of the minutes is likely to engender disappointment or bitterness such as to adversely affect the harmonious working relationship among senior public servants, and so cause specific and tangible harm to the proper functioning of the public service.

33. Interestingly, the trial judge noted that the possibility of future disclosure is capable of acting as a deterrent against advice which is "specious or expedient or otherwise inappropriate," in an environment in which annual performance appraisals reports and executive decisions are regularly subjected to judicial scrutiny. In the judge's view the possibility of future disclosure may in fact benefit the public interest by ensuring that such reports or advice contain only the honest opinions of those participating in the deliberative processes. These sentiments are entirely consistent with the main object of the Act which is to provide freedom of information to the public, so as to ensure transparency and accountability in executive decisions.

34. As noted earlier in this judgment, the object of the Act is to make information freely accessible to the public with a view to promoting transparency and accountability in the decision-making of public authorities. It is an important piece of legislation in a

post-colonial society in which bureaucrats have historically been reluctant to expose their decisions to the glare of public scrutiny. Freedom of access to information is also important in a society that is politically polarized along ethnic lines, and in which appointment to public office, and decisions involving the allocation of state resources are often the subject of speculation and mistrust. Against this historical and social background, the right to access information from public authorities must be jealously guarded, and must not be allowed to be whittled down. Information requested must be provided unless refusal of access to information is expressly permitted by the Act, and the public authority provides adequate and intelligible reasons for refusal.

35. In this case, having perused the minutes requested, apart from certain legal advice for which the respondent may have claimed legal professional privilege (if it decided to) under section 29 of the Act, there appears to be no legal basis on which access could have been refused.

36. Accordingly, I hold that the trial judge was wrong in granting partial access to the minutes requested. Of course, this case is decided on its particular facts. It may well be that in future cases, the material contained in the minutes of meetings of service commissions, may contain material which falls into one of the specific exemptions as provided under the Act. In such a case provided that there is compliance with sections 23 and 27(3), disclosure may be legitimately refused.

37. **The Fourth Issue** – The order for costs.

The trial judge awarded costs in the sum of $45,000.00 to the appellant.

38. The appellant complains that this sum is grossly inadequate and unreasonable having regard to the novelty and complexity of the issues raised and the absence of local jurisprudence on the Act. The appellant submitted that costs should have been allowed for two counsel.

39. The respondent noted that costs are always at the discretion of the judge, and that the filed documents disclosed that there was one filing attorney and one advocate attorney.

40. In his written ruling on costs, the trial judge considered the relevant factors for assessing costs pursuant to CPR 67.2 including the time reasonably spent on the case, and the novelty, weight and complexity of the case. The trial judge then awarded the

global sum of $45,000.00. He estimated that a reasonably competent attorney at law would have spent approximately 25 hours on the case.

41. It is trite law that the award of costs is discretionary. However, the discretion must be exercised in such a manner so as to provide a lucid and reasonable basis, which can be examined by an appellate court.

42. In this case while the trial judge expressly referred to the relevant principles, he does not provide an examinable basis as to how he arrived at the global figure. He estimates 25 hours of work by a reasonably competent attorney, but does not state the seniority of the attorney for the purpose of assessing an hourly rate. In addition, he does not state whether he has awarded costs for two attorneys. The record reflects that two attorneys appeared at the trial. It is to be assumed that the trial judge awarded costs for one attorney only.

43. Not having provided a breakdown of the global sum of $45,000.00 the figure appears to be somewhat arbitrary. In addition, I agree that this matter did contain novel and complex issues, and would have required considerable research. Accordingly, there is justification for an award of costs certified for two attorneys.

44. Having regard to all of the circumstances, I consider that the order for costs should be set aside and the appellant should be awarded costs in the court below certified fit for two advocate attorneys. Such costs are to be assessed by the Registrar in default of agreement.

DISPOSITION

45. It follows that this appeal is allowed. The order of the court is:

(i) The respondent is ordered to provide the minutes of meetings of the PSC at which the issue of appointment or promotion to the office of Deputy Permanent Secretary and/or Permanent Secretary were disclosed or determined relative to the appointments made in October 2005.

(ii) The respondent is ordered to pay the appellant's costs in the court below certified fit for two counsel. Such costs are to be assessed by the Registrar in default of agreement.

(iii) The respondent shall also pay the appellant's costs of the appeal determined in the amount of two thirds of the costs in the court below as are assessed by the Registrar pursuant to paragraph (ii) above.

46. In closing we wish to express our regret for the delay in delivering this judgment. This was caused by the resignation of a member of the panel that heard the appeal. It was subsequently agreed by the parties that the panel could be reconstituted by the substitution of a new judge, and that the new panel could proceed to deliver judgment on the basis of the written submissions filed and the record of the hearing of the appeal without embarking on a rehearing of the appeal.

Dated the 28th day of April, 2014.

R. Narine
Justice of Appeal.