

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-04975

**IN THE MATTER OF AN APPLICATION BY DERRICK MUNDY FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW UNDER PART 56 OF THE
CIVIL PROCEEDINGS RULES 1998 [AS AMENDED] AND
THE JUDICIAL REVIEW ACT CHAPTER 7:08**

BETWEEN

DERRICK MUNDY

APPLICANT

AND

TEACHING SERVICE COMMISSION

RESPONDENT

Before the Honourable Mr Justice Robin N. Mohammed

Date of Delivery: Thursday 24th August, 2023

Appearances:

Mr. Navindra Ramnanan and Mr. Ricky Pandohee for the Applicant

Ms. Rachael Lyncia Jacobs instructed by Ms. Michelle Benjamin for the Respondent

**DECISION ON ROLLED-UP HEARING FOR LEAVE AND SUBSTANTIVE
APPLICATION FOR JUDICIAL REVIEW**

I. INTRODUCTION AND BACKGROUND

1. By Application dated July 18th 2019, the Applicant requested information and documents from the Teaching Service Commission, pursuant to **section 13 of the Freedom of Information Act, Chapter 22:02 (“FOIA”)**. The request was for the following:
 - a. The name of the person who made the report or allegation of indiscipline or misconduct against Derrick Mundy on the 20th day of January, 2016;
 - b. The report of the person who made the allegation of indiscipline or misconduct against Derrick Mundy on the 20th day of January 2016 and which said report was received by the permanent secretary, Ministry of Education; and
 - c. The investigation implemented by the permanent secretary and ensuing report to formulate the allegation of misconduct against Derrick Mundy in letter CPF: E: 2/14/2923 dated the 30th August 2018.
2. The Applicant engaged in pre-litigation correspondence in an attempt to obtain the requested information, but such efforts proved futile. On October 8th, 2019, through correspondence referenced as P: 121/5/6 XV Temp. 7, the Teaching Service Commission issued a determination wherein it refused Mr. Mundy's request, citing that the information and documents sought fell within the purview of exempted information in accordance with section 27 of the FOIA.
3. On the 5th day of December, 2019, the Applicant lodged an Ex Parte Application, seeking leave to initiate a judicial review concerning the decision of the Respondent to withhold the requested information pursuant to the FOIA or ("the Act"). The Application was made in accordance with **Rule 56.3 of the Civil Proceedings Rules 1998 ("the CPR")**, as amended, and **section 6 of the Judicial Review Act, Chapter 7:08**. The application sought the following relief:
 - i. An Order of certiorari to bring before the esteemed Court and nullify the decision made by the intended Defendant, as outlined in the letter dated the 8th of October, 2019, which refused the disclosure of requested documents and information by the intended Claimant under the Freedom of Information Act, pursuant to his application dated the 18th day of July, 2019;

- ii. An Order of Mandamus to compel the intended Defendant to furnish the intended Claimant with the documents and information sought in his FOIA application within a period of seven (7) days from the date of the Court's decision;
- iii. Alternatively, a Declaration that the decision of the intended Defendant, as communicated in the letter dated the 8th of October, 2019, to refuse and/or deny the intended Claimant access to the information/documents requested in his FOIA application dated the 18th day of July, 2019, is unlawful and constitutes a violation of the provisions of the FOIA and the public interest;
- iv. That the intended Defendant be ordered to bear the costs of this application, to be assessed in the absence of an agreement;
- v. Such further orders, directions, or writs as the Court deems just and as the circumstances of this case necessitate, pursuant to section 8(1)(d) of the Judicial Review Act Chap. 7:08.

4. The Application was accompanied by an extensive affidavit and relevant exhibits, duly filed on the 5th day of December 2019.
5. The Applicant asserted his claim for the disclosure of the requested information and documents, relying on **limb (ii) of section 35 of the FOIA**.
6. A hearing for the Application seeking Leave for Judicial Review took place on January 27th, 2020, before About J, the assigned judge. During the proceedings, the learned judge instructed the Respondent to file an Affidavit in Response, followed by an Affidavit in Reply by the Applicant. Although the application for leave to apply for judicial review was ex parte, the judge allowed submissions from both the Applicant's counsel and Respondent's Counsel in order to consider legal arguments from both sides.
7. On August 6th, 2020, the Respondent filed a single Affidavit in Response to the Applicant's principal affidavit, specifically the affidavit of Dale Brizan. Subsequently, on August 21st, 2020, the Applicant filed and served an Affidavit in Reply.
8. On account of About J being elevated to the Court of Appeal, this matter was then re-docketed to this Court and came up for hearing on February 4th 2021. The Respondent's attorneys not being present on that date, the matter was adjourned to April 14th 2021.

9. Pursuant to an Order made on April 14th 2021, this Court issued the following directions:
- (i) By mutual consent, this Application for leave to apply for Judicial Review is to be treated as a rolled-up hearing, meaning that, for the purpose of expediting this application, both the application for leave and the substantive claim shall be addressed together.
 - (ii) Both parties have agreed that no further affidavits or documents need to be filed.
 - (iii) The Applicant is directed to file their Fixed Date Claim on or before April 29th, 2021.
 - (iv) Leave is hereby granted to both parties to rely on the already filed affidavits without the need for further affidavits.
 - (v) Subsequently, the Claimant/Applicant shall file and serve their submissions, along with relevant authorities, on or before May 14th, 2021.
 - (vi) Response submissions shall be filed and served by the Respondent/Defendant on or before June 4th, 2021.
 - (vii) The Claimant's attorney is permitted to file and serve reply submissions solely addressing new matters raised, on or before June 18th, 2021.
 - (viii) The rolled-up hearing is scheduled for July 20th, 2021, at 11:30 am, in Courtroom POS 20.

II. APPLICANT'S CASE & SUBMISSIONS

10. Mr. Ricky Pandohee ("Applicant Counsel"), Counsel for the Applicant, contended that the Respondent's decision to deny the Applicant's request was solely based on the reasons stated in the official refusal letter. Applicant Counsel further argued that the subsequent reasons provided during the hearing before Aboud J on January 27th 2020 by Ms Linda Khan (counsel who appeared for the Respondent on that date), suggesting the non-existence of the requested documents, were not communicated to the Applicant by the Respondent.
11. Applicant's Counsel additionally submits that the Applicant has not been informed by the Respondent of any sufficient reasons or evidence supporting the refusal, which has resulted

in severe injustice. It is asserted that disciplinary proceedings under Regulation 90 have been initiated against Mr. Mundy due to an investigation into allegations of misconduct, the specifics of which have not been adequately disclosed to him.

12. Accordingly, Applicant Counsel contends that the present proceedings involving the Freedom of Information request aim to unveil the secrecy and facilitate comprehensive disclosure in favour of Mr. Mundy. It is argued that the oral evidence presented by Ms. Linda Khan, then counsel for the Respondent on January 27th 2020 before Aboud J, contradicts the contents of the letter refusing the Applicant's request, which relied on the exemption of the requested information and documents rather than the erroneous assertion by Ms. Khan that the said documents do not exist.

13. Applicant Counsel reminded the Court, in his submission, of the decision of Kokaram J emphasizing the significance of providing the Applicant with the following information before invoking Regulation 90 of the Public Service Commission Regulations and lodging allegations of misconduct against him:

- The identity of the person who made the report or allegation of indiscipline or misconduct against Derrick Mundy on the 20th day of January 2016.
- The report submitted by the person who made the allegation of indiscipline or misconduct against Derrick Mundy on the 20th day of January 2016, which was received by the Permanent Secretary, Ministry of Education.
- The investigation conducted by the Permanent Secretary and the subsequent report forming the Allegation of Misconduct against Derrick Mundy, as stated in the letter CPF: E: 2/14/2923 dated the 30th August 2018.

14. Citing the case of **In the Application of Krishna Rampersadsingh – HCA No Civ S 637 of 2004 (TT)**, Applicant Counsel referred to Jamadar J's reasoning that fundamental fairness necessitates informing the Applicant, with sufficient particularity, about the allegations made against him, the individuals making those allegations, and any conducted investigations. Applicant counsel submitted that the learned judge's contention is that failure to inform with sufficient particularity when a written request was made...constitutes a breach of the principles of fundamental fairness and natural justice and that such conduct...undermines public trust and confidence in Public Administration while demotivating and discouraging public servants [emphasis mine].

15. Applicant Counsel submitted that the principles governing the present proceedings are rooted not only in the public interest but also in the principles of fundamental fairness and natural justice.
16. Regarding the Affidavit supporting the Respondent's case, Applicant Counsel contends that Ms. Brizan's Affidavit is inconsistent and lacks corroboration with the Respondent's decision stated in its refusal letter dated the 8th day of October 2019.
17. Applicant Counsel raised several submissions concerning the aforementioned Affidavit as follows:
- i. If the requested information and documents did not exist, the Respondent Teaching Service Commission's decision to classify the "non-existent" documents and information as exempt is called into question.
 - ii. If the requested information and documents did not exist, the Respondent Teaching Service Commission's assertion that the "non-existent" documents and information were considered "internal working documents and exempted from disclosure" raises doubts.
 - iii. If the requested information and documents did not exist, the Respondent's determination that the "non-existent" documents and information were contrary to the public interest appears inconceivable, as the existence of such documents and information is a prerequisite for assessing the public interest.
 - iv. Moreover, if the requested information and documents do not exist, it is questionable whether the Respondent conducted the necessary evaluative exercise as mandated by section 35 of the Freedom of Information Act Chapter 22:02. Drawing the conclusion that the requested documents and information are exempt and not in the public interest without substantiation appears to contravene the provisions of the Freedom of Information Act and the judicial precedents in the Republic of Trinidad and Tobago.
18. Applicant Counsel argued that both Ms. Khan and Ms. Brizan (as stated in paragraph 10 of Ms. Dale Brizan's affidavit) were attempting to sway the Court by suggesting that the documents and information previously disclosed in the proceedings before Kokaram J (as he then was) on January 27th, 2020 had been provided to Mr. Mundy. Counsel supported this assertion by referring to the Certificate of Mrs. Donna Sackwah-Ramlal

filed on July 4th, 2019 in the High Court of Justice, which confirmed the absence of such documents being provided to the Applicant.

19. Furthermore, Applicant Counsel submitted that the aforementioned Certificate did not have any annexed documents. Since the Certificate signed by Ms. Donna Sackwah-Ramlal was not an affidavit, there was no exhibit marked "DSR1" and no documents marked and exhibited as "DSR1".
20. Applicant Counsel further contended that the averments in Ms. Brizan's affidavit, sworn on August 6th, 2020, were lacking in credibility and sought to mislead the Honourable Court in an attempt to manipulate judicial authorities into uncritically accepting their evidence.
21. In the same vein, Applicant Counsel argued that Ms. Brizan, in paragraph 10 of her affidavit, falsely stated that an affidavit had been filed by Donna Sackwah-Ramlal on June 21st, 2019, for the Ministry of Education. However, the Court's records verified that no such affidavit was filed by Mrs. Sackwah-Ramlal on that date.
22. Applicant Counsel relied on several legislative provisions to support the argument that the legislation itself demonstrated a clear bias in favour of providing access to information. The Freedom of Information Act (FOIA) aimed to promote accountability, transparency, and increased public participation in national development and policy-making by granting the general public a right of access to official documents held by public authorities. Counsel further asserted that the Act's purpose was to revolutionize the concept of participatory democracy by granting individual citizens the ability to access state and public authority information that had previously been inaccessible. The Act's implementation had marked a significant shift away from state secrecy toward transparent disclosure.
23. It was argued by Applicant Counsel that the FOIA explicitly outlined the limited circumstances under which deviations from the general principles could be permitted, specifically referring to exceptions and exemptions necessary for the protection of essential public interests. Considering the constitutional and socio-political context of democratic participation and the policy favouring disclosure, the lawfulness of the

Defendant's decision to deny access to the requested information and rely on cited exemptions needed to be reviewed.

24. Relying on various precedents, including **Caribbean Access Information Ltd v The Minister of National Security** and **Ashford Sankar v Public Service Commission**,

Applicant Counsel presented several significant arguments concerning the judgments:

- i. The historical context of the Freedom of Information Act (FOIA) underscores its foundation in the fundamental human right to access information. The FOIA is deeply rooted in the principles of openness, transparency, and accountability, and is considered an essential component of participatory democracy. It represents a ground-breaking legislative measure designed to expose the inner workings of government and administration to scrutiny. It is intended to benefit every citizen and promote the illumination of the activities and records of those in authority. The principle of free access to publicly held information aligns with a global trend.
- ii. The Act manifests a clear inclination towards the disclosure of documents and has given rise to a new category of the right to access information. It has brought about a paradigm shift in public administration.
- iii. It is incumbent upon the public authority to substantiate the exemption invoked as grounds for denying access. In particular, where it is contended that disclosure would be detrimental to the public interest, positive evidence is indispensable in discharging this evidential burden.
- iv. Section 35 of the FOIA introduces an overriding provision that allows for the disclosure of information that would otherwise be exempted. The burden of proof rests on the public authority asserting the exemption.
- v. The law unequivocally establishes that public bodies cannot merely rely on general statutory exemptions. They must provide sufficient justifications to support their reliance on exemptions stipulated in the FOIA. Consequently, the burden of proof lies with the defendant to satisfy the evidentiary burden necessary to justify an exemption. This burden is imposed on public authorities by the FOIA to prioritize disclosure and enhance transparency and accountability in their operations.
- vi. The concept of "public interest" encompasses a broad range of considerations, including the constitutional right of citizens to access information in a democratic

society. There is an undeniable public interest in ensuring accountability, fairness, transparency, and effective governance with active public participation and scrutiny. Equitable treatment of citizens and the pursuit of justice for aggrieved individuals are also relevant factors, particularly in cases involving the allocation or utilization of government funds.

- vii. The motive of the applicant is irrelevant, as there is no obligation on their part to demonstrate a special interest or need for the requested information.
- viii. It is evident that a public authority relying on exemptions to withhold disclosure must go beyond stating the reasons for such reliance and provide the evidence supporting those reasons.

25. Applicant Counsel asserted that the Defendant's reliance on exemptions has conspicuously disregarded the ramifications of section 35 of the FOIA. By citing *Jamadar JA* in the case of **Joint Consultative Council for the Construction Industry**, Applicant Counsel expounded on the obligatory nature of section 35, which mandates that the public authority assess and potentially override any initial determination of exemption. Counsel elucidated that it is imperative for the Respondent to undertake the requisite balancing exercise when invoking exemptions under the FOIA, as unequivocally mandated by section 35. Applicant Counsel also contended that it is evident that section 35 of the FOIA plays a significant role in rendering exempted documents subject to disclosure. It was expounded by the Applicant Counsel that the Act acknowledges the existence of circumstances wherein the public interest is so compelling that it necessitates the disclosure of documents that would typically be exempted. Furthermore, Applicant Counsel submitted that such circumstances are deliberated within the ambit of subsections (a) to (d) of section 35 of the FOIA, and the Act imposes upon the public body the burden of considering reasonable evidence pertaining to the elements that may warrant disclosure under section 35.

26. In conclusion, Applicant Counsel asserted that the Respondent has entirely disregarded and/or neglected the public interest override from the outset of this matter. The Respondent has failed to provide any substantiating evidence for withholding the relevant documents and information in light of section 35 of the FOIA. Furthermore, the Respondent has demonstrated no consideration of the aforementioned factors, despite their compelling and indisputable indication in favour of disclosure. Consequently, it is contended that the

Respondent's decision constitutes a violation of the FOIA, which mandates the obligatory consideration of the section 35 override.

27. During the summation, Applicant Counsel maintained that the Applicant is entitled to the requested information and/or documents as per the provisions of section 35 of the FOIA. The Applicant has presented substantial justifications for his vested interest in the documents, as their disclosure pertains to matters of public interest and recurring injustice concerning the Applicant's prospects for promotion within the Ministry of Education.
28. Moreover, it was emphasized that the false allegations of misconduct not only tarnish the Applicant's reputation but also impede his future career advancement opportunities. Additionally, the Applicant is hindered from receiving any future acting appointments in higher positions to which he may rightfully be entitled, and he is precluded from obtaining a fair assessment on his Performance Appraisal Report, thereby hindering his progression to the next incremental point on his salary grade and impeding salary increments.
29. In his closing submissions, Applicant Counsel invited the Court to examine the requested document/information prior to reaching a decision on the section 35 override in this matter, in order to determine whether disclosure is warranted.

RESPONDENT'S CASE & SUBMISSIONS

30. Ms Rachael Jacob ("Respondent Counsel"), counsel for the Respondent, on application of the legal principles established in **Dhelia Gabriel v The Ministry of Health**¹ and **Attorney General of Trinidad and Tobago v Ayers Caesar**² submitted that leave ought not to be granted to the Applicant to apply for judicial review because based on the totality of evidence adduced before the Court, there is absolutely no prospect of success in this matter *a fortiori* a realistic prospect of success.
31. Citing **Sharma v Browne-Antoine** [2006] UKPC 57, Respondent Counsel objected to the grant of leave on the basis that the Applicant lacks arguable grounds with a realistic prospect of success.

¹ CV 2018-03600

² [2019] UKPC 44 a

32. Respondent Counsel further contended that the reliefs of certiorari, mandamus, and declaration sought by the Applicant in paragraphs 1, 2, and 3 of the Application cannot be granted, as the requested documents/reports in the Applicant's FOIA request do not exist. It was argued that the reports containing allegations of misconduct against the Applicant were disclosed to him on June 21, 2019, when they were exhibited to the Respondent's affidavit in (CV2019-00228).
33. Respondent Counsel submitted that the Respondent's letter dated October 8, 2019, did not confirm the existence of the requested documents as suggested by the Applicant. It was asserted that the Respondent's affidavit filed on August 6, 2020, clearly indicated that a thorough search of the Commission's records was conducted, and the requested documents were not found.
34. The Respondent Counsel argued that the Respondent's evidence consistently maintained that the requested documents cannot be provided to the intended Claimant. It was contended that the present case lacks a realistic prospect of success and amounts to a mere "fishing expedition" by the intended Claimant for non-existent documents/reports. The Respondent Counsel emphasized that the State has been generous in disclosing reports that were not even requested by the Applicant but contain allegations of misconduct against him for negligent performance of his duties on January 20, 2016.
35. Respondent Counsel further submitted that the application for leave to apply for judicial review is based on speculation by the intended Claimant, who seeks to uncover the existence of the requested reports in the State's documents. It was argued that leave should not be granted based on a speculative basis, assuming the requested reports exist, with the hope that disclosure during the proceedings will strengthen the intended Claimant's case. This is particularly so considering the Respondent's explicit evidence that the requested documents/reports do not exist.
36. Additionally, Respondent Counsel argued that the assertions made by Applicant Counsel in paragraphs 18, 19, and 20 of his Submissions are speculative and lack legal basis. The citation of the case of **CV2017-04371 Andy Paul v DPA and TSC** to support those conclusions was deemed unmeritorious. It was emphasized that the issues raised by the

intended Claimant in those paragraphs are irrelevant and unsupported by the evidence before the court.

37. Respondent Counsel clarified the principles derived from the case of **Andy Paul v DPA and TSC**, stating that they are distinct and inapplicable to the present matter. The **Andy Paul** case involved a substantive application for judicial review of the TSC's decision to prefer disciplinary charges against the Claimant. The charges were subsequently quashed due to lack of legal foundation and non-compliance with the statutory definition of "misconduct." It was emphasized that this case is currently under appeal and has no bearing on the issues before the Court.
38. With regard to paragraphs 27 to 38 of Applicant Counsel's Submissions, Respondent Counsel argued that the pleadings and proceedings in the matter **CV2019-00228 Derrick Mundy v The Permanent Secretary, Ministry of Education** are a matter of record. It was reiterated that the Defendant in that matter filed an affidavit of Donnah Sackwah-Ramlal on June 21, 2019, which exhibited the relevant memorandum and reports/attachments. Thus, the issues raised in paragraphs 27 to 38 of the intended Claimant's Submissions were deemed untrue.
39. In relation to paragraph 39 of the intended Claimant's Submissions, the Respondent stated that the order dated March 11, 2019, in CV2019-00228 required the Defendant to either disclose the requested documents to the Claimant, confirm if they were in the custody of another body, or indicate their non-existence after a search. It was asserted that the Defendant complied with this order by filing an affidavit and a Certificate indicating that they were not aware if the requested documents were in the possession of another body. It was emphasized that the intended Claimant, being represented by counsel, should have been properly advised on the viability of making a FOIA request instead of acting under compulsion.
40. Respondent Counsel reiterated that the evidence of the intended Defendant, as stated in Dale Brizan's affidavit filed on August 6, 2020, clearly indicates that a thorough search of the records/documents was conducted, and the requested reports were not found. It was argued that the requested reports are not in the possession of the intended Defendant, rendering the section 35 FOIA inapplicable to this case.

41. In conclusion, Respondent Counsel summarized their submissions as follows: (i) The intended Defendant's evidence, as stated in the letter dated October 8, 2019, and Dale Brizan's affidavit, is coherent and consistent; (ii) The intended Claimant lacks arguable grounds for judicial review, and the case lacks a realistic prospect of success; (iii) The requested documents are not in the possession of the intended Defendant, thus excluding the application of section 35 FOIA; (iv) The reliefs sought by the intended Claimant cannot be granted since the requested documents were not found after a thorough search; and (v) The State has disclosed documents related to the allegation of misconduct against the intended Claimant, even when they were not requested under the FOIA.

IV. ISSUES

[1] Does the application for leave to apply for judicial review disclose an arguable ground which has a realistic prospect of success?

[2] In the event issue [1] is answered in the affirmative, whether based on section 27 (1) (a) and (b) of the FOIA, the requested information was indeed exempt and if so, whether a section 35 override should be applied to the exempted information requested?

V. LAW AND ANALYSIS

The legislative regime

42. The long title of the FOIA is:

“An Act to give members of the public a general right (with exceptions) of access to official documents of public authorities and for matters related thereto.”

43. The definition of “public authority” in **section 4** includes “a company incorporated under the laws of the Republic of Trinidad and Tobago which is owned or controlled by the state”.

It is common ground that TSC is a public authority for the purposes of the Act

44. The definition of “official document” in **section 4** is:

“a document held by a public authority in connection with its functions as such, whether or not it was created by that authority, and whether or not it was created before the commencement of this Act and, for the purposes of this definition, a document is held by a public authority if it is in its possession, custody or power.”

It is common ground that the reports of allegations in issue are official documents by TSC

45. **Section 3** provides: “(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.”
46. **Section 11(1)** provides: *“Notwithstanding any law to the contrary and subject to the provisions of this Act, it shall be the right of every person to obtain access to an official document.”*
47. **Section 13** deals with the process for making a request to obtain access to official documents.
48. **Section 11** establishes a right of general access to documents and information.
49. **Section 12** sets out the documents which the access procedure under the FOIA is not applicable. It provides:

“12. A person is not entitled to obtain, in accordance with the procedure provided for in this Part, access to --- (a) a document which contains information that is open to public access, as part of a public register or

otherwise, in accordance with another written law, where that access is subject to a fee or other charge; (b) a document which contains information that is available for purchase by the public in accordance with arrangements made by a public authority; (c) a document that is available for public inspection in a registry maintained by the Registrar General or other public authority; (d) a document which is stored for preservation or safe custody, being a document which is a duplicate of a document of a public authority.”

50. **Section 14** imposes a duty on public authorities to take reasonable steps to assist any person who exercises his right under the FOIA.

51. **Section 15** mandates the public authority to notify the Applicant of the approval or refusal as soon as practicable but in any case not later than 30 days after the date on which the FOIA request was made.

52. **Section 23** mandates the public authority to issue a written notice specifying the grounds upon which any deferment or denial of access is based.

53. **Section 27** states:

“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.”

54. **Section 39(1)** provides that a person aggrieved by a decision of a public authority under the FOIA may apply to the High Court for judicial review of the decision.

55. **Section 35** puts a public authority under a duty to disclose an exempt document in circumstances to which the section applies. It provides:

“Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant –

- (a) *abuse of authority or neglect 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.”*

Issue [1]: Does the application for leave to apply for judicial review disclose an arguable ground which has a realistic prospect of success?

56. **CPR 56.3(1) states:** "(1) No application for judicial review may be made unless the court gives leave."

57. **Section 5(1) of the Judicial Review Act Chap. 7:08 (“the JRA”)** states:

“An application for judicial review of a decision of an inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall be made to the Court in accordance with this Act and in such manner as may be prescribed by Rules of Court.”

58. **Section 6 of the JRA** dictates that applications for judicial review cannot be made unless leave of the Court is obtained. In order for leave to be granted the Applicant must satisfy the Court at the very minimum that he/she has an arguable ground for judicial review which has a reasonable prospect of success and is not subject to a discretionary bar such as delay or an alternative remedy.³

(It is undisputed that the Respondent is a public body to which the Act and the JRA apply. The Applicant is therefore entitled to bring his claim under judicial review proceedings.)

59. In embarking upon the assessment of an application under **section 13 of the FOIA**, it is essential to bear in mind the overarching policy enshrined in the legislation, as expressly articulated in **section 3 of the Act**, which states:

³Sharma v Browne-Antoine [2006] UKPC 57 and section 9 of the JRA

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.

60. The Court must adhere to the established test commonly employed in assessing the grant of leave for judicial review. It is worth noting that the threshold for granting leave to commence judicial review proceedings is deliberately set at a relatively low level. In this context, the Court's primary concern is to carefully examine whether the Respondent presents an arguable ground for judicial review that exhibits a realistic and reasonable prospect of success. This principle, derived from authoritative precedents such as the **Attorney General of Trinidad and Tobago v Ayers-Caesar**, with specific reference to governing principle (4) elucidated in **Sharma v Browne-Antoine**, underscores the importance of employing a robust analytical framework when evaluating applications for leave to seek judicial review.

61. The Learned judge in **Sharma v Brown Antoine** explained that, “*the ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject*

to a discretionary bar such as delay or an alternative remedy.”⁴ However, the assessment of arguability cannot be made in isolation; it necessitates a careful examination of the nature and gravity of the issue at hand. The test of arguability is inherently adaptable, allowing for a nuanced evaluation that takes into account the specific circumstances and complexities inherent in the matter.

62. **Clive Lewis, Judicial Remedies in Public Law**⁵ stated the following: “*The claimant must demonstrate that there is an arguable case that a ground for seeking judicial review exists. The Court of Appeal has indicated that permission should be granted where a point exists which merits investigation on a full hearing with both parties represented and with all the relevant evidence and arguments on the law.*”

63. The English Court of Appeal explained with reference to the civil standard of proof in **R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62**, in a passage applicable *mutatis mutandis* to arguability:.

“... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.” (Emphasis Added).

64. Hence, the assessment of arguability necessitates consideration of the inherent characteristics and significance of the issue to be contested. This evaluative criterion exhibits a degree of adaptability in its application, accommodating the particular circumstances of each case.

65. Indeed, in the Court of Appeal case of **Ferguson & Another v The Attorney General of Trinidad and Tobago**, Kangaloo JA espoused the view that the Court should refrain

⁴ R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426.

⁵ 4th Edition (2009) at paragraph 9-046

from employing a rigid and rigorous application of the aforementioned test. The learned judge expressed the proposition that -

“4. It would be a travesty if the words of their Lordships were taken to mean that the test of arguability lends itself to stringent application. To adopt such an approach would be to erode the very protection that is offered by the remedy of judicial review. The purpose of judicial review is to keep the executive in check and to prevent the citizen from arbitrary, unwarranted and unlawful executive action. Such protections are part of the wider concept of the rule of law which lies at the foundation of any democratic society. In this regard, the observations of Lord Phillips of Worth Matravers are worthy of note: “The rule of law is the bedrock of a democratic society. It is the only basis upon which individuals, Private Corporation, public bodies and the executive can order their lives and activities The rule of law will not fully prevail unless the domestic law of a country permits judges to review the legitimacy of executive action. This is increasingly becoming the single most important function of the judge in the field of civil law, at least in jurisdiction.”

66. In accordance with the reasoning of the aforementioned judgment, the primary objective of the permission stage in judicial review proceedings remains the exclusion of frivolous applications initiated by applicants who are no more than vexatious intermeddlers, a goal that is especially advantageous in the present era characterized by a proliferation of civil litigation burdening our judicial system.
67. The learned judge provided additional clarification that, in carrying out its duty as the custodian of democracy and the rule of law, which are inherently interconnected principles, the Court should exercise caution when considering the refusal of permission to a litigant seeking to pursue judicial review. Such discretion should be exercised only in cases that are completely devoid of merit and unequivocally lacking in arguability, except in circumstances involving issues of delay and alternative remedies.
68. Consequently, this Court is of the firm view that the Respondent has inadequately addressed the crucial matter of arguability and has not satisfactorily demonstrated

whether the Applicant has met the required threshold. Mere assertion that the Applicant's application lacks arguable grounds falls short of the necessary standard. Further, repeating that the Respondent cannot provide the requested information due to difficulty in accessing the information and the broad nature of the request, does not convince the Court.

69. Consequently, the Court dismisses the Respondent's argument that there is no realistic prospect of success solely based on the Respondent's belated assertion of no longer possessing the requested information, which is purportedly under its custody. The Respondent has failed to present any evidence elucidating the circumstances surrounding the disappearance of the documents. Such a stance appears highly untenable for a public entity entrusted with the significant responsibility with which it has been bestowed - namely, the ultimate determination of an investigation bearing grave ramifications for the Applicant.
70. The Court agrees with the submission of the Respondent Counsel that it thus raises the question as to what specific document or information has served as the foundation for the "advice, recommendation, opinion" upon which the Commission will deliberate in its disciplinary proceedings - the very rationale provided in the Respondent's refusal letter asserting the exemption of the document or information in question. In order to carry out such disciplinary proceedings, it is only reasonable to conclude that the Respondent bears a duty to maintain records and dispose of them only once the disciplinary proceedings are concluded. Any alternative course of action would contradict and render devoid of meaning any decision reached by the Commission, rendering it irrational, unfounded, arbitrary, and undoubtedly unlawful.
71. It is at this juncture it becomes necessary to remind the Respondent that within our jurisdiction, the Court has consistently upheld and developed the well-established right to freedom of information, recognizing its paramount importance. Public authorities bear a duty to operate in accordance with the law and respect this fundamental right. It is evident from the landmark judgment and the provisions outlined in section 3 of the FOIA that a presumption in favour of disclosure exists. In light of the statutory mandate and the overarching principles of statutory interpretation, any claimed exemptions, as presented in this case, must undergo rigorous scrutiny and be subjected to a strict

construction of the exemption provisions. It is incumbent upon the public authority asserting the exemption to precisely specify the relevant provision and provide compelling evidence demonstrating its applicability to the specific request.

72. Notwithstanding the aforementioned considerations, this Court holds the firm conviction that the Applicant has indeed met the required test, establishing an arguable claim for judicial review that carries a realistic prospect of success concerning the decision of the Respondent to withhold the requested information/documents.

73. This conclusion is based on a thorough examination of the evidence and legal principles governing the matter. The Court finds that the Applicant has presented compelling grounds and substantial arguments demonstrating the potential unlawfulness or impropriety of the Respondent's refusal to disclose the information/documents.

74. Firstly, it is evident that the Respondent's decision to withhold the requested information/documents raises significant concerns regarding the exercise of its statutory powers and obligations, particularly in light of the prevailing legal framework and the principles of transparency and accountability enshrined therein. The Applicant's submissions, supported by relevant legal authorities and statutory provisions, assert that the Respondent's refusal contravenes the statutory mandate and objectives, which emphasize the presumption in favour of disclosure.

75. Furthermore, the Court notes the insufficiency of the Respondent's justifications for denying access to the information/documents. The mere assertion of difficulty in accessing or the purportedly broad nature of the request fails to provide a compelling rationale for withholding crucial information that is of public interest and relevance to the proceedings at hand. The Respondent's failure to substantiate its claims with concrete evidence weakens its position and strengthens the Applicant's argument for review.

76. Moreover, it is essential to highlight the broader implications of the Respondent's decision on the principles of good governance, democratic values, and the rule of law. The Court recognizes that the disclosure of the requested information/documents is fundamental to ensuring transparency, accountability, and informed decision-making, particularly in matters of public importance such as the present case. The potential impact

of the Respondent's refusal on the fairness, integrity, and legitimacy of the process cannot be overlooked.

77. In light of the foregoing, the Court concludes that the Applicant has successfully established an arguable claim for judicial review with a realistic prospect of success concerning the Respondent's refusal to disclose the requested information/documents. The grounds presented by the Applicant, coupled with the legal principles and objectives at stake, strongly support the need for a thorough review of the Respondent's decision. It is incumbent upon the Court to safeguard the principles of justice, uphold the rule of law, and ensure the proper exercise of statutory powers by public authorities.

Issue [2]: Whether, in accordance with the provisions set out in section 27(1)(a) and (b) of the FOIA, the information sought by the Applicant falls within the scope of exemption and, if so, whether the application of a section 35 override is warranted for the exempted information as requested?

78. Section 3 of the FOIA enunciates the legislative objective, which aims to confer upon members of the public the entitlement to access information held by public authorities. This provision is set out earlier in full at paragraph 59 above.

79. The Respondent, invoking section 27 of the FOIA, asserted that the documents sought by the Applicant fall within the purview of "internal working documents" and consequently qualify for exemption from disclosure as provided under the aforementioned provision. Additionally, the Respondent contended that the release of such information would be "contrary to public interest," citing the grounds enumerated therein. However, the Respondent's decision fails to demonstrate an adequate understanding of the Act's underlying principle, which establishes an individual's right to access information. It is noteworthy that the Act does not establish blanket exceptions for "internal working documents." In the present context, wherein allegations have been made against the Applicant, it is incumbent upon the court to consider the unreasonableness of classifying as "internal working documents" a request made by the individual implicated in the allegations, particularly when seeking information pertaining to the identity of the accuser and the contents of the report containing said allegations.

80. The Respondent has advanced the argument that the denial of the request is justified on the basis that the "documents/information sought" pertain to materials that contain opinions, advice, or recommendations intended for utilization in the "deliberative processes involved as it relates to the disciplinary function of the commission." The Court is confronted with substantial difficulty in discerning how this rationale presented by the Respondent can legitimately serve as the underlying justification for its decision to refuse access. It may be prudent to deconstruct this rationale and provide a contextual analysis to ascertain its rationality, or lack thereof.
81. Primarily, the Respondent contends that the non-disclosure of the requested information is warranted due to the nature of the allegations, as it pertains to the disclosure of an "opinion, advice, or recommendation" that will be utilized by the commission in its deliberative process for the disciplinary function. However, it is noteworthy that the initial request for information made by the Applicant pertains to the identification of the individual responsible for lodging the report or allegation. The Court fails to discern how the mere disclosure of the informant's identity can be categorized as an "opinion, advice, or recommendation" that would impede the commission's ability to impartially deliberate upon disciplinary measures concerning Mr. Mundy, assuming such proceedings are initiated against him.
82. Furthermore, the Court finds it imperative to expound upon the reasoning behind the conclusion that the requested information, namely the identity of the individual who lodged the report or allegation, does not fall within the purview of "opinion, advice, or recommendation" that would impede the commission's ability to make informed deliberations regarding potential disciplinary action against the Applicant.
83. Firstly, the disclosure of the informant's identity does not inherently convey any subjective assessment, counsel, or guidance provided by the informant. It merely serves as factual information regarding the source of the report or allegation, which is crucial for ensuring transparency and accountability in the disciplinary process. Such information allows the commission to consider any potential bias, motive, or credibility concerns that may arise from the identity of the informant, thereby ensuring a fair and impartial evaluation of the allegations.
84. Secondly, the disclosure of the informant's identity does not intrinsically constitute a recommendation or opinion regarding the disciplinary action to be taken against the

Applicant. Rather, it serves as a fundamental component of due process, enabling the Applicant to properly respond to the allegations and exercise his rights to challenge the veracity or credibility of the report or allegation. In this regard, the requested information fosters the principle of natural justice and affords the Applicant an opportunity to provide a robust defence and present relevant evidence in his favour.

85. Considering these aspects, in the Court' view, it becomes evident that the requested information does not possess the characteristics of "opinion, advice, or recommendation" as asserted by the Respondent. Its disclosure would not prejudice the commission's ability to objectively deliberate on disciplinary action but rather contribute to a fair and well-informed decision-making process. Therefore, the refusal to disclose the identity of the informant based on the claimed exemption is unwarranted and lacks rationality in light of the statutory objectives and principles governing the right to access information.
86. Accordingly, the Court concurs with the submissions made by the Counsel for the Applicant that it is a more reasonable stance to maintain that when grave allegations are levelled against an individual, that person should be duly informed with sufficient particularity regarding the reasons for the accusation or investigation. This is particularly crucial when the allegations of misconduct carry severe repercussions for the reputation and livelihood of the Accused, who is an educator.
87. The Court aligns itself with the reasoning put forth by the Counsel for the Applicant, emphasizing that the denial of such information strikes at the core of fundamental rights pertaining to fairness and natural justice. Upon a fundamental examination of the Accused's rights and freedoms, it becomes evident that a public body cannot, in good conscience, make a decision to deprive an individual of the right to be apprised of the nature of the allegations and the identity of the complainant. Such information, sought by the Accused through the report that the Respondent purportedly holds, is of paramount importance.
88. The Court underscores the significance of being informed with sufficient particularity as a foundational tenet of principles governing natural justice and procedural fairness. It is through such informed knowledge that the Accused can effectively respond to the allegations, prepare a robust defence, and exercise the right to challenge the veracity, basis, or motivation behind the allegations. Without this crucial information, the Accused's

ability to participate meaningfully in the disciplinary proceedings and safeguard their rights is severely compromised.

89. In light of these considerations, the Court firmly holds that the denial of the requested information, specifically the nature of the allegations through the report and the identity of the complainant, is in direct conflict with the bedrock principles of fundamental rights, natural justice, and procedural fairness. Such information is vital for the Applicant/Accused to comprehend the case against him, ensure a fair opportunity to contest the allegations, and protect his reputation and livelihood.
90. The Court recognizes a parallel reasoning that resonates with the framers of the constitution, who enshrined the fundamental rights of due process. These rights bestow upon an accused individual the entitlement to be apprised of the reasons for their arrest and other related matters. Similarly, the Court discerns the presence of this same principle of due process running as a common thread throughout the Rules of the Civil Procedure (CPR). Under the CPR, a defendant must be accurately be identified in a claim form, and a concise statement with specific particulars of the claim must be included: see **CPR 8.5, 8.6, 8.9 and 8.10**.
91. These requirements of due process are reflected in the CPR's provisions concerning disclosure. Other related obligations bear the same rationale which undergirds the constitutional safeguards of due process that permeate the rules of civil procedure. The purpose of these requirements, therefore, whether in criminal or civil proceedings, is to ensure a fair and just process and to furnish the accused or defendant with sufficient particularity regarding the claim or allegation brought against them.
92. By upholding these principles of due process and procedural fairness, the Court safeguards the fundamental rights of the accused or defendant. It acknowledges that the provision of adequate information and particulars is not a mere formality, but a vital aspect of affording individuals the opportunity to comprehend and respond effectively to the allegations against them. Such information serves as the cornerstone for a fair and meaningful engagement in the legal process, enabling the accused or defendant to challenge the claim, present a strong defence, and safeguard their rights and interests. In other words, the ultimate objective of this complex constitutional and legislative framework was the protection of individuals from any type of penalty/judgment/consequences improperly imposed.

93. While the Court duly acknowledges the paramount importance of maintaining 'confidentiality' in certain respects to prevent any prejudice or distortion in the course of an investigation, it is unequivocally unable to discern how, in the present context, it can be deemed reasonable to assert that the disclosure of the information sought would result in such adverse consequences. Nonetheless, the Court deems it unnecessary to embark upon a further examination of whether the requested information/documents truly constitute an opinion, recommendation, and/or advice from which the Respondent would draw in its deliberative process for initiating disciplinary proceedings. The Court is of the firm belief that it has adequately dissected this issue, provided substantial guidance, and offered its comprehensive perspective thereupon. To put it succinctly, the Court firmly asserts that the intricate dissection of the requested information and its correlation to the deliberative process of the disciplinary proceedings is neither obligatory nor germane in determining whether the information, if indeed falling within the purview of section 27 of the Act, should be overridden by the considerations under section 35. It suffices to affirm that investigative reports and evidence, although appropriately classified as internal working documents under section 27(1) of the Act and thereby "exempt," must still withstand additional scrutiny and may be deemed disclosable, hence requiring disclosure.
94. Indeed, any further indulgence of this Honourable Court into the question of whether the requested information by the Applicant falls within the ambit of advice, opinions, and/or recommendations, would only serve to undermine the proper exercise of the Respondent's powers and duties in making such determinations. However, while it may not be within the purview of this Court to engage in such determinations, it is unquestionably the Court's duty to employ rationality as the measuring rod and proportionality as the yardstick when assessing the denial of a FOIA request, as exemplified in the decision made by the Respondent. In doing so, the Court seeks solely to discharge its duty to ascertain whether a document held by a public authority is genuinely exempt, and if so, whether it is rational to maintain the exemption and withhold the document in its entirety. Based on the foregoing, this Court unequivocally holds that the Respondent's decision to refuse the requested information, on thorough examination, lacks both rationality and proportionality.
95. Secondly, the Respondent, in its decision letter, articulated that an additional reason for its refusal is the ongoing consideration by the commission to initiate disciplinary

proceedings against the Applicant [paraphrased]. While the Court acknowledges that this may indeed be the case, it is imperative to recognize that the Parliament of Trinidad and Tobago has established a right of access to information, subject to well-defined exceptions. This very purpose underlies the Freedom of Information Act. A public authority is not entitled to invoke a blanket denial based solely on the fact that the requested information is presently being employed for internal operations of the public body. In fact, such reasoning suggests that if not for the document's current utilization by the commission for "deliberation" purposes, it would otherwise be disclosable and that all that the Respondent necessitated was "additional time" to effectuate such disclosure. However, neither this rationale nor the corresponding spirit underpinning the refusal was presented by the Respondent. What the Court finds particularly disconcerting is the written demeanour exhibited by the Respondent in the refusal letter. It is as though the Respondent failed to grasp that the information sought is not subject to discretionary disclosure but rather arises from a legal duty imposed by virtue of the FOIA.

96. The central matter to be determined, with regard to the reasons for refusal presented by the Respondent, pertains to the section 35 override of the classification of the information requested by the Applicant as exempt under section 27 of the FOIA. Section 35 provides:

“Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant— (a) abuse of authority or neglect 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.”

97. It is undisputed that section 35 encompasses two separate aspects. A public authority is obligated to grant access to an exempt document (i) when there exists reasonable evidence of one or more of the situations specified in the sub-paragraphs, or (ii) when, considering the circumstances, providing access to the document is justified in the public interest, taking into account the potential benefit and damage associated with such disclosure.

98. The Respondent's reply unequivocally outlined the precise exemption provisions upon which it relied and expounded upon the underlying rationale. The response is reproduced in its entirety as follows:



SERVICE COMMISSIONS DEPARTMENT
Cipriani Plaza
59-61, Cipriani Boulevard, Port of Spain
Mailing Address: 52-58 Woodford Street, Newtown, P.O.S.
Phone: (868) 623-2997 / Fax 623-5972
Email: scd@gov.tt Website: www.scd.org.tt

P: 121/5/6 XV Temp. 7
CB/am

84 October, 2019

Mr. Ricky Pandohee
Attorney-at-Law
Griffin Court
No. 34 Edward Street
Port-of-Spain

Dear Sir,

**Re: Mr. Derrick Mundy – Request for Information under the
Freedom of Information Act, Chap. 22:02**



Reference is made to the subject matter at caption and to your letter dated 19th July, 2019 wherein a request was made for access to information under the Freedom of Information Act, Chap. 22:02 (the FOIA). The following information was requested on behalf of your client, **Mr. Derrick Mundy** namely:-

1. **The name of the person who made the report or allegation of indiscipline or misconduct against Derrick Mundy on the 20th January, 2016;**
2. **The report of the person who made the allegation of indiscipline or misconduct against Derrick Mundy on the 20th January, 2016 and which said report was received by the Permanent Secretary, Ministry of Education; and**
3. **The investigation implemented by the Permanent Secretary and ensuing report to formulate the Allegation of Misconduct against Derrick Mundy in letter CPF: E: 2/14/2923 dated the 30th August, 2018.**

The Teaching Service Commission (the Commission) has considered your request for access to information as per item Nos. 1-3 listed above and wishes to indicate that the information requested cannot be provided to your client.

The Commission wishes to advise that the documents/information requested are considered to be internal working documents and are exempt from disclosure in accordance with Section 27 of the FOIA. Further, the information requested at item Nos. 1-3 relate to documents/information which disclose opinion, advice or recommendation to be utilized for the deliberative processes involved as it relates to the disciplinary function of the Commission.

Additionally, the Commission is of the view that the disclosure of the information requested would be contrary to the public interest having regard to the following, namely:-

- i. The nature of the allegations made; and
- ii. The allegations of misconduct against your client are currently engaging the attention of the Commission since and investigation was commenced which may possibly lead to the initiation of disciplinary proceedings against him.

If your client is aggrieved by the refusal of the Commission to grant access to the information requested, then he is advised to seek a review by the Ombudsman in accordance with Section 38A of the FOIA. Thereafter, he may commence judicial review proceedings in accordance with Section 39 of the FOIA.

Please be guided accordingly.

Yours respectfully,

/s/ Director of Personnel Administration (sg)

99. The Court deems it necessary to offer certain overarching remarks concerning the aforementioned content. Evident upon scrutiny of the Respondent's response is an incongruity that gives rise to a manifest query regarding the rationality of the decision. The Respondent has neglected to adequately identify the "public interest considerations" upon which the decision is grounded, as mandated by **section 27(3)**. With regard to the purported considerations presented, the Court perceives them to be misguided and devoid of validity.
100. The Respondent, acting in accordance with its legislative mandate under the FOIA, is obligated to explicitly showcase due consideration of section 35 of the Act, specifically pertaining to the potential override of the assessment, analysis, and decision made by this public authority (TSC) to withhold the requested documents. Regrettably, the letter of refusal exhibits a notable absence of such consideration regarding a potential public interest override. Furthermore, it fails to substantiate, through reference to supporting evidence, the foundation upon which the Respondent's assessment of the public interest rests, particularly as it pertains to the specific matter within the Applicant's case that invokes and addresses concerns regarding the "public interest." Superficially alluding to the "nature of the allegations" against the Applicant and the ongoing attention of the commission in relation to prospective disciplinary proceedings is insufficient to satisfy the requirement for a thorough consideration of the public interest.
101. As evidenced by established case law, a critical matter at hand pertains to the appropriate legal approach for judicial review of a decision made by a public authority to withhold an exempt document under limb (ii) of section 35. Is such a decision subject to review solely based on a standard of simple rationality, or does the Court possess a primary decision-making role in determining how the public interest factors favouring and opposing the disclosure of said document are to be weighed and balanced? If the latter holds true, the Court would be required to independently reach a decision after being presented with evidentiary support from the public authority regarding the potential damage to the public interest associated with the disclosure of the document, and duly considering the weight of such evidence. Subsequently, the Court would need to carefully assess and reconcile these concerns with any potential benefits to the public interest arising from such disclosure.

102. If the Respondent deemed it appropriate to defer the disclosure on the grounds that, as stated, *“items 1 to 3 comprised information that disclosed opinions, advice, or recommendations to be utilized within the deliberative processes related to the disciplinary function of the commission”*, then it follows that the Respondent must demonstrate a deliberate and purposeful application of section 35 in its decision-making process of refusal. This entails a thorough evaluation of whether the non-disclosure of the exempted information would result in an injustice to the individual in question (the Accused-Mr. Derrick Mundy), and subsequently balancing this consideration against any potential benefits or damages that may arise for the public if such nature of disclosure were to occur.
103. The Court duly observes that the Respondent's refusal letter failed to indicate the performance of any section 35 balancing exercise by it. Consequently, the Court determines that it is now incumbent upon the Court itself to adjudicate upon the public interest considerations under limb (ii) of section 35. Reference is made to the **Council for the Construction Industry case**, wherein an application for disclosure of legal advice provided to the Minister was at issue. Notwithstanding the exempt status of the relevant documents, the Court of Appeal, by a majority, held that disclosure should be granted in accordance with limb (ii) of section 35. In the case, Bereaux JA highlighted that the FOIA's intention to make information about the operations of public authorities available represented a radical departure from the prevailing culture of secrecy and confidentiality within the public service at the time of the Act's enactment (para 69). Bereaux JA further noted that, in that particular case, there was no discernible indication of the Minister having conducted any section 35 balancing exercise (para 71). It was on this basis that Bereaux JA concluded that it was the responsibility of the Court to determine the public interest issues under limb (ii) of section 35 (para 75).
104. Following a meticulous evaluation of the relevant balancing exercise, Bereaux JA reached the determination that the disclosure of the legal advice under consideration should be effected (para 84). Although Bereaux JA appears to acknowledge that the Minister's failure to consider the balance between the benefit and damage to the public interest paved the way for the Court's consideration of said balance, he did not propose a remittance of the decision to the Minister, as might have been expected if he deemed the Minister to be the primary decision-maker subject to judicial review solely on the grounds of rationality.

105. Jamadar JA explicitly stated in paragraph 40 of his judgment that when engaging in the evaluative exercise mandated by section 35 of the FOIA, both the public authority (initially) and the reviewing court (subsequently) are obligated to undertake the requisite balancing exercise within the context of the statutory and constitutional framework and values. In other words, while the public authority must initially perform the necessary balancing exercise for the purposes of limb (ii) of section 35, the court possesses an independent role in conducting its own balancing exercise to determine whether the decision of the public authority infringes upon an individual's right to access information held by said authority. After meticulously performing such a balancing exercise in the present case, Jamadar JA, in concurrence with Bereaux JA, concluded that the legal advice in question should be disclosed (para 47). Jamadar JA's statement in paragraph 40 of his judgment was cited by Rampersad J as pertinent guidance concerning the application of section 35, as reflected in paragraph 27.13 of his judgment in **Maharaj v Port Authority of Trinidad and Tobago**.⁶

106. In the present proceedings, the Court finds that the Respondent has failed to apply a proper consideration under section 35 to the Applicant's case, irrespective of whether it chose to adopt a normal rationality approach or a hybrid approach as suggested by Bereaux JA in the **Council for the Construction Industry case**, or an approach wherein the court itself conducts the relevant balancing exercise as indicated by Jamadar JA in said case. This is because, under the first two approaches, it can be argued that the "Decision Letter" issued by the Respondent neglected to take into account any aspect of the public interest that favoured the disclosure of the statements and the identity of the individuals responsible for the alleged misconduct. Thus, akin to the **Council for the Construction Industry case**, the Respondent failed to carry out the necessary balancing exercise as mandated by section 35.

107. If the appropriate approach to limb (ii) of section 35 aligns with the one indicated by Jamadar JA, the Court further asserts that Mr. Mundy has a valid claim for judicial review of the Decision Letter. This conclusion stems from the Court's own assessment, through conducting the relevant balancing exercise, that the disclosure of the sought-after documents/information is imperative in the public interest pursuant to the

⁶ 22 January 2019 (Claim No CV2018-01817)

aforementioned provision. Based on such a determination, it is conceivable for the Court to contend that the Decision Letter contravenes the law, fails to comply with the requisite legal conditions, conflicts with the policy of the FOIA, relies on a legal error, or constitutes a breach of duty or omission to perform a duty, as contemplated by one or more subparagraphs in **section 5(3) of the Judicial Review Act**.

108. Regarding the aforementioned balancing exercise, the Court acknowledges the unquestionable public interest in maintaining the confidentiality of disciplinary proceedings to ensure their effectiveness and to allow the Respondent to employ internal disciplinary measures for the betterment of education and in the proper administration of same. However, in the present context, the weight assigned to the requirement of confidentiality is considerably diminished and definitely not absolute. The significance of confidentiality for non-disclosure is arguably weakened in this case due to the fact that the sought-after document/information solely pertains to details regarding the Applicant and his alleged misconduct, regardless of whether arbitration proceedings are underway or not. The Applicant has a clear vested interest in comprehending the developments and conclusions regarding the investigation into the allegations made against him, independent of any disciplinary proceedings, particularly in assessing any potential claims against him.
109. Moreover, it is worth noting that a notable feature of these proceedings is the fortuitous situation wherein the Respondent simultaneously holds the sought-after information and asserts, without adequate evidential substantiation, that the pertinent information regarding its investigation into Mr. Mundy's misconduct, as documented in the investigation reports prepared for the disciplinary proceedings, does not exist. This circumstance significantly impedes the possibility of obtaining the required information/documents from the Respondent, thereby frustrating even a mere possibility of attaining any actual relief sought by the Applicant in this ongoing court proceedings.
110. Moreover, it is arguable that, in the greater interest of the public, the weight of the Respondent's assertion that the Applicant's case must be dismissed on the sole ground of the purported non-existence of the document may potentially grant other public entities a license to withhold information in analogous circumstances, thereby overriding the legal obligation to furnish eligible citizens with access to requested information and knowledge of its whereabouts. There is grave peril posed to the public interest when

affording a public authority the unfettered liberty to shield vital documents from disclosure by means of a mere proclamation of non-existence, devoid of substantiating evidence. This pernicious trend, if left unchecked, engenders a distressing precedent that could embolden other public bodies to adopt a similar approach, thereby impeding the transparency and accountability that lie at the very core of the legal framework governing the right of access to information.

111. The ramifications of such an unchecked practice are far-reaching, as it would undermine the statutory duty incumbent upon public authorities to facilitate the citizenry's legitimate entitlement to acquire and comprehend sought-after information. By permitting public entities to evade their obligations through the mere invocation of document non-existence, the fabric of democratic governance risks being eroded, depriving citizens of their fundamental right to be informed about matters of public concern.
112. It is imperative to recognize that the principles enshrined within the legal framework, particularly the Freedom of Information Act, serve as the bedrock for fostering a culture of transparency, accountability, and good governance. Allowing a public authority to invoke the convenient shield of document non-existence without the requisite evidentiary support threatens to corrode the very foundation upon which the rule of law and the public's trust in government institutions are predicated.
113. The implications of such a pernicious practice extend beyond the immediate case at hand. By permitting public authorities to evade their disclosure obligations through unfounded claims of non-existence, a dangerous precedent is set that empowers public bodies to thwart legitimate inquiries and investigations. This, in turn, undermines the public's confidence in the effectiveness of the legal framework and compromises the ability of citizens to exercise their democratic rights to access information vital to informed decision-making.
114. It is essential to underscore the paramount importance of striking a delicate balance between preserving the confidentiality and integrity of certain proceedings while upholding the principles of transparency and accountability. While there may be legitimate concerns surrounding the disclosure of sensitive information, it is incumbent upon public authorities to substantiate their claims of non-existence with robust and verifiable evidence, safeguarding against the potential for abuse and fostering public trust in the administration of justice.

115. Therefore, it is incumbent upon this Court to heed the clarion call of safeguarding the public interest by ensuring that public authorities are held accountable for their assertions of document non-existence. Only by upholding the rigorous standards of evidence and the principles of transparency can the integrity of the legal system and the cherished values of justice and democratic governance be preserved in the face of potential abuses that threaten to undermine the very fabric of our society.

116. Nevertheless, that is not to say that the Court did not accord due consideration to the Respondent's admonition, that urged a judicious examination of the implications that may arise from discrediting assertions of document non-existence which potentially precipitates an inundation of conjectural inquiries and unguided explorations akin to "fishing expeditions." However, in the case at bar, the reasoning adopted by the Court of the foregoing is primarily based on the paucity of compelling evidentiary substantiation of the belated non-existence of the document.

117. With regard to the potential advantages that disclosure of the requested information/document may entail for the public interest, the Court discerns substantial merits in fostering transparency and accountability in various dimensions pertinent to relevant determinations. Without purporting to exhaust the catalogue of such benefits, the Court enumerates the following conceivable public interest advantages arising from disclosure:

i. Facilitating the public's comprehension of and, if deemed appropriate, censure of the decisions made by the Respondent that have proved to be potentially onerous and prejudicial to the interests of the Applicant;

ii. Ensuring that other members of the educational community (the public) within the school are fully apprised of the accuracy and validity of the allegations levelled against the Applicant, as well as his involvement therein, thereby affording the relevant governing bodies an opportunity to critique or oppose his appointment to senior positions within the school/educational system pertaining to such matters;

iii. Empowering the public to grasp and, if warranted, critique the determinations surrounding the initiation and subsequent abandonment of the claim against the Applicant, shedding light on the likelihood of the allegation or claim against him being forsaken, as well as the cursory and tentative

assessment accorded to the merits of the claim in the aforementioned allegation report;

iv. Lastly, and not insignificantly, enabling the Applicant's legal representative to allay any concerns through the presentation of evidence in response to the claim against the Applicant, in preparation for potential future proceedings or disciplinary actions instituted against him.

118. However, if the Respondent is granted unrestricted authority to assert non-disclosure, the public interest in obtaining access to similar reports or statements of allegations, essential for promoting transparency and ensuring the accountability of governmental and public authorities, is susceptible to erosion and neglect.

119. In light of the aforementioned considerations, the Court accords the Applicant the relief sought in the review of the decision to refuse disclosure, particularly with regard to limb (ii) of section 35. Following a comprehensive examination of the substantive issues under review, the Decision Letter must be annulled, and an order is hereby issued for a subsequent search and disclosure of the requested information to be provided to the Applicant.

120. In conclusion the Court acknowledges the well-founded and diligently researched submissions presented by the Applicant's Counsel. Nevertheless, it would be remiss of the Court not to emphasize the use of disparaging language employed by the Applicant's Counsel. The propagation of legal challenges impugning the character of a fellow judicial officer, through the artful construction of aspersions and arguments that cast doubt upon the credibility and integrity of said officer in written submissions, is to be discouraged. Not only does such conduct contravene the code of ethics and standards of camaraderie within our esteemed legal community, but it also obstructs and frustrates the prospects of achieving the overarching objective aimed at amicable resolution and effective legal representation.

VI. DISPOSITION

[1] Having considered the rationales, analyses, and findings expounded above, the Court issues the following Order:

ORDER:

1. Leave to apply for judicial review be and is hereby granted to the Applicant in accordance with the relief sought in the Ex parte Application filed on the 5th December, 2019.
2. On the substantive claim for judicial review, an Order of Certiorari is hereby granted removing into this Honourable Court and quashing the decision of the Respondent/Defendant, as conveyed in the letter dated the 8th day of October 2019, which denied the disclosure of the requested documents/information made by the Applicant/Claimant under the purview of the Freedom of Information Act, Chapter 22:02.
3. An Order of Mandamus is hereby granted compelling the Respondent/Defendant to diligently search for and furnish the Applicant/Claimant, within twenty-eight (28) days from the date of this order, with the documents and information requested in the application dated the 18th day of July, 2019, pursuant to the provisions enshrined in the Freedom of Information Act, Chapter 22:02.
4. In the event that the documents, upon completion of the search, are no longer in the possession of the Respondent/Defendant, it is hereby ordered that the Respondent do pay the Applicant damages, the assessment of which shall be carried out by a Master of the High Court of Justice.
5. The Respondent/Defendant shall also pay to the Applicant/Claimant costs of these proceedings, which shall be assessed by the Registrar of the Supreme Court, in default of agreement.

Robin N Mohammed
Judge