

**REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

San Fernando

CV2017-00494

BETWEEN

**KALAWATIE GODEK**

**also referred to as**

**“Jenny Godek”**

CLAIMANT

AND

**THE CHIEF FIRE OFFICER**

**(HEAD OF THE TRINIDAD AND TOBAGO FIRE SERVICE)**

DEFENDANT

**Before the Honourable Mr. Justice R. Rahim**

**Appearances:**

Ms. J. Lutchmedial and Mr. D Bayley instructed by Ms. A. Mootoo for the Claimant

Ms. L. Gopee-Khan instructed by Ms. M. Benjamin for the Defendant

## Judgment

1. This is a decision on an application for judicial review. On the 17<sup>th</sup> day of October 2014, fire destroyed a restaurant at the Grand Bazaar shopping mall. The restaurant was located immediately above a store owned by the claimant. As a consequence, the claimant's store and goods sustained damages. With the intention of instituting a claim against the owners of the restaurant, the claimant made an application for copies of all documents or correspondence related to the fire and a copy of the fire report from the Trinidad and Tobago Fire Services. This application was made on the 14<sup>th</sup> Day of September 2016, some two years after the occurrence of the fire.
2. In response to the application the defendant has adopted the position that the required documents will be made available upon payment of a fee of 0.05% of the insured value of the claimant's building. It is however the claimant's position that the fee to be paid is that prescribed in the **Freedom of Information Act** Chap 22:02 (FIOA) and not the fees set out in **Fire Service Act** Chap 35:50 (FSA) as relied on by the defendant.
3. To the date of filing, the information has not been provided to the claimant despite the claimant's compliance with the pre-action protocols. As a consequence the claimant submits that the attempt to levy a fee is illegal and ultra vires the relevant provisions of the FIOA.

### RELEVANT LEGISLATION

4. Sections 11, 12, 15, 16 and 17 of the FIOA provide;

*11. (1) 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.*

*(2) Nothing in this Act shall prevent a public authority from (a) giving access to documents or information; (b) amending documents,*

*other than as required by this Act where it has the discretion to do so or where it is required to do so by any written law or order of a Court.*

*12. A person is not entitled to obtain, in accordance with the Access 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.*

*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.*

*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.*

*17 (1) No fee shall be charged by a public authority for the making of a request for access to an official document.*

*(2) Where access to an official document is to be given in the form of printed copies, or copies in some other form, such as on tape, disc, film or other material, the applicant shall pay the prescribed fee.*

*(3) Notwithstanding subsection (2), where a public authority fails to comply with section 15, any access to official documents to which the applicant is entitled pursuant to his request shall be provided free of charge.*

*(4) Notwithstanding subsection (2), where a public authority fails to give an applicant access to an official document within seven working days of the payment of the relevant fee pursuant to section 16(1)(c), the applicant shall, in addition to access to the official document requested, be entitled to a refund of the fee paid.*

*(5) The fees payable by the applicant shall be commensurate with the cost incurred in making documents available.*

5. Section **58** of the **FSA** provides for fees to be charged in respect of services set out in the seventh schedule of the Act. Item 15 on the list set out in the seventh schedule (as amended by Act number 3 of 1994) is that of “requests for fire investigation reports from insurance companies”. The prescribed fee is that of 0.05% of the insured value of the building.

#### Issues for determination

6. There are two issues. Firstly, whether the defendant has acted illegally or ultra vires the provisions of the FIOA by applying the provisions of the FSA in seeking to charge the fee prescribed under that Act. Secondly, should the court find that the defendant did so act, whether by virtue of the conjoint provisions of sections 15 and 17(3) FIOA, the applicant is entitled to the information free of charge. The resolution of the second issue is dependent on an issue of fact to be determined upon the evidence set out in the affidavits of both parties.

## The approach to the FIOA

7. The claimant has set out the approach that the court should adopt when considering the provisions under the FIOA and the court agrees that the position articulated by the claimant represents the law as it stands. The court therefore reminds itself of the dicta of Justice of Appeal Narine in *Asford Sankar v Public Service Commission* Civil Appeal No.58 of 2007 at paragraphs 17, 22 and 25, that there is a presumption that the public is entitled to access the information requested unless the public authority can justify the refusal of access under one of the prescribed exemptions.
8. Further, at paragraph 8 of *Caribbean Information Access Ltd v The Minister of National Security* Civil Appeal No. 170 of 2008, Jamadar JA, in delivering the decision of the court highlighted the ameliorated approach that must be applied by the courts when interpreting the provisions of the FIOA. His Lordship stated;

*“There is no dispute that “the policy, purpose and object of the FOIA are to create a general right of access to information in the possession of public authorities, ‘limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities’.”<sup>1</sup> There can also be no dispute that the court in both interpreting and applying the provisions of the FOIA is mandated to do so purposively, so as to further the policy, purpose and object stated above.<sup>2</sup> The FOIA provides for a statutory right to information held by public authorities, and its effect is to broaden and deepen the democratic values of accountability, transparency and the sharing of and access to information about the operations of public authorities.”*

## **The first issue**

9. It is the submission of the defendant that the claimant is not entitled to access to the fire investigation report via the route of the FIOA but can only lawfully do so under the provisions of the FSA which provisions prescribe a fee. It is also the submission of the defendant that the fire investigation report falls squarely within the category of documents referred to in section **12 (a)** FIOA in that it is a document that contains information that is open to public access, as part of a public register or otherwise in accordance with another written law, where access is subject to a fee or other charge. In short, the report is compiled pursuant to a duty under the FSA and a fee is chargeable under the FSA. Therefore the claimant cannot rely on the provisions of the FIOA to access the report.
10. The court is of the view that the submissions of the defendant in this regard is unsustainable. In that regard, even if the court accepts that the report is prepared as part of a public duty pursuant to the duties of the Fire Service set out in the FSA, there is no evidence before this court that the fire investigation report is a document to which the public has access as defined under section 12(a) FIOA. In fact, the evidence appears by inference to be to the contrary in that item number 15 to the seventh schedule of the FSA appears to specifically restrict access to the fire investigation report to insurance companies, who are required to pay a fee. In no other manner does the FSA treat with access to the said report by any other member of the public. It also appears that prior to the amendment of the schedule in 1994, which brought the fee for the report into being, there was no prescribed duty on the defendant to provide such a report to the public or to insurance companies. The provision of such a report may have been as a matter of courtesy. It is reasonable to infer that at some point, in a recognition that insurance companies were being provided with such reports free of charge in the course of their profit making business a fee ought to have been charged, hence the amendment to the schedule. What is pellucid however, is that the schedule applies only to applications from insurance companies and not to the members of the public generally. It is therefore the finding of the court that the fire investigation report is not open to public access for the payment of a fee under the provisions of the FSA. It is however open to access by insurance companies for the payment of a fee under the FSA.

11. It is therefore the finding of the court that the said report does not fall within the category of documents set out in section 12(a) FIOA. There is in the court's view good reason for this. Insurance companies are in the business of providing compensation for loss. This compensation is payable based on a contract between the insurer and the insured, a contract which is entered into for valuable consideration. In essence it is a profit-making venture for the insurance company. In such circumstances, it is not unreasonable to conclude that the FSA recognizes that in principle the insurer ought to pay a fee for a report which they wish to obtain for use in the course of their business. The position of a private citizen whose wishes to obtain information via the report in an effort to approach the courts to obtain redress for a wrong allegedly committed against her carries with it different considerations. As a consequence the seventh schedule fee does not apply to such an individual. Should it have been applicable, a clear indication would no doubt have been set out in the schedule that the category of persons entitled to pay for and obtain the report is not restricted to insurance companies.

12. Further, the fee chargeable appears to be calculable with reference to a formula tied to the insured value of the building and not otherwise. This in the court's view is a clear indication that the fee chargeable is meant to be applicable only to insurance companies investigating the cause of a fire in order to determine whether to compensate an insured or third party depending on the circumstances of the contract of insurance. There is also a strong argument that to charge such a fee calculated with reference to insurable value of the building to a member of the public who is not an insurer would be unreasonable, unfair and disproportionate. For all of these reasons it is more likely than not that the prescribed fee set out in the FSA only applies to insurers.

13. It follows that the provisions of the FIOA are applicable to the claimant's request for access to the report and not the provisions of the FSA and the court so finds.

**Did the defendant act or purport to act pursuant to the provisions of the FSA or the FIOA**

14. Two affidavits were filed by the defendant, that of Fire Sub Officer Terrance Jack (the Jack affidavit) and Fire Sub Officer Michael John (the John affidavit). Whether the defendant purported to act pursuant to the FSA or would have merely considered the 0.05% fee when determining the fee to be charged under the FIOA was not treated with in the John affidavit. However at paragraph 3 of the Jack affidavit, the deponent deposes that in his some twenty years as a member of the Fire Service and more particularly in the last four years at the Fire Prevention Unit, he is aware that a person requesting a fire investigation report is required to pay a fee of 0.05% of the insured value of the building. He also refers to same as a purchase of the fire report.
15. By use of the words “purchase” of the report, the deponent appeared at first blush to be placing the report into the category of the documents set out at section **12(b)** FIOA, namely documents which contain information that is available for purchase by the public in accordance with arrangements made by a public authority but a closer inspection of the evidence reveals the shortfall in this contention. Firstly, there is no evidence from the defendant that arrangements were made by the public authority for the sale to the public at large of fire investigation reports. No such fee structure or arrangement has been presented to this court to demonstrate the taking of such a decision by the public authority. Secondly, the evidence of the witness Jack contradicts the very inference or assertion made in that the fee of which he speaks specifically relates solely to insurers companies and insured value of the building as is evident from lines six to nine of paragraph three of the Jack affidavit.
16. It follows therefore that the inference to be drawn is that when charging the fee, the defendant was acting pursuant to the provisions of the FSA and not the FIOA. It also means that if the evidence of Jack is to be accepted, the FSA has been applying the provisions of the seventh schedule of the FSA (which is only applicable to insurers) to every member of the public wishing to obtain a fire investigation report contrary to the provisions of the seventh schedule of the FSA.



## Unlawful and Illegal

17. It follows that the imposition of a fee to be paid by persons other than insurers pursuant to the provisions of FSA in these circumstances was outside the lawful parameters of fees prescribed by the said act and so would have been ultra vires the provisions of the Act. Further, the imposition of such a fee was in breach of the process and provisions set out in the FIOA and was therefore illegal.

### **The second issue**

18. Section 15 FIOA mandates that the public authority 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. The claimant submits that on the facts as set out in the evidence, not only did the defendant possess the required information so that a response ought to have been forthcoming shortly after the request was made but she also submits that in any event the outer limit of thirty days in fact elapsed before a response was given by the defendant. The defendant has submitted that it was well within the timeline set out in section 15 and relies on its evidence in support of its submission.

19. The evidence on this issue is to be found within the walls of the affidavit of the claimant of the 8<sup>th</sup> February 2017 (filed in support of the application for leave to institute a judicial review claim) and the Jack affidavit. The evidence demonstrates that the claimant's application was made pursuant to section 13 FIOA and is dated the 14<sup>th</sup> day of September 2016. It is the evidence of the claimant that the application and cover letter from her attorneys were hand delivered on the 22<sup>nd</sup> September 2016 and endorsed by Fire Officer B. Lewis #8435 as having been received on that day. A copy of the cover letter together with what appears to be that of the endorsement by Officer Lewis is exhibited to the said affidavit.

20. At paragraph 7 of the said affidavit the claimant deposed that on the 11<sup>th</sup> November 2016, Officer Jack telephoned her attorneys and indicated that the report and relevant documents requested would be made available upon payment of a fee of 0.05% of the insured value of the claim. (see also paragraph 5 of the affidavit of the claimant filed in support of the fixed date claim form on the 14<sup>th</sup> February 2017).
21. Fire Officer Jack sets out in his affidavit that although the cover letter accompanying the request for information pursuant to the FIOA is dated the 14<sup>th</sup> September 2016, the said letter and application was only received at the defendant's office in Port of Spain on the 30<sup>th</sup> September 2016. The letter was then stamped and forwarded to the Fire Prevention Administration Unit (FPAU) to be dealt with. The FPAU received the letter almost one month thereafter on the 27<sup>th</sup> October 2016. Attorney for the defendant has submitted that the material date for ascertaining whether there was compliance with section 15 FIOA is that of the date of receipt of the request. There is quite frankly no valid support for this contention as the words of section 15 when given their natural and ordinary meaning are pellucid. The material date for the purpose of reckoning is that of the date on which the request is duly made. The court notes that the legislation does not speak of the date upon which the request is made, but the Act speaks additionally of the request being "duly" made.
22. According to the English Oxford Dictionary, the word "duly" means "In accordance with what is required or appropriate; following proper procedure or arrangement." The court must therefore ascertain the proper procedure for making the request pursuant to the FIOA. Section 13(1) FIOA provides that the request is to be made in the form set out in the schedule (proper form), which is not an issue in this case, and that it must be made to the public authority (proper person). In the circumstances of this case, it cannot be successfully argued that the public authority is in fact the FPAU. The defendant is the office holder and is therefore the head of the public authority. It follows that service on the office of the defendant is good service and that the request was duly served by such service. That being said, less the court is misunderstood it must be made clear that the finding of the court is not that the only place of lawful service is that of the office of the defendant as he is free

to delegate the authority to accept service to which ever department he chooses. In the circumstances of this however, the finding of the court is that the defendant cannot rely on the fact that the request was not served on the FPAU for the purpose of reckoning the date of response when in fact service on his office was good service.

23. It is therefore the finding of the court that service on the office of the defendant on the 22<sup>nd</sup> September 2016, as the endorsement thereon demonstrates was good service, the request having been duly served on that day in keeping with section 13(1) of the FIOA. The submission of the defendant that the time only began to run from the date of receipt by the FPAU on the 27<sup>th</sup> October 2016 therefore is devoid of factual and legal merit.

24. It also follows that the request being duly made on the 22<sup>nd</sup> September 2016, the first response from the defendant being delivered orally on the 11<sup>th</sup> November 2016, that response was outside the period of thirty days provided for by section 15 FIOA. Even if the court is wrong and the material date on which the request was duly delivered is that of the 30<sup>th</sup> September 2016, (the admitted date of receipt for the defendant's office by paragraph 5 of the Jack affidavit), the response would have nonetheless been outside the period of thirty days. The court therefore finds that the defendant breached the provisions of section 15 FIOA.

25. In the result, the claimant is therefore entitled to access to the said documents free of charge pursuant to section 17(3) FIOA.

26. The court will therefore make the following order;

- a. It is declared that the decision of the defendant to impose a fee of 0.05% of the insured value of the building which was damaged by fire for the provision of the relevant Fire Investigation Report and other related documents set out in the claimant's request of the 14<sup>th</sup> September 2016 (the "decision") is ultra vires the provisions of the Freedom of Information Act Chap 22:02.

- b. An order of certiorari is granted, the decision is moved into the High Court of Justice and is quashed.
- c. It is declared that the claimant is entitled to the Fire Investigation Report and other related documents set out in the claimant's request of the 14<sup>th</sup> September 2016 pursuant to section 17(3) of the Freedom of Information Act Chap 22:02.
- d. An order of Mandamus is granted directed to the defendant who shall provide the Fire Investigation Report and other related documents set out in the claimant's request of the 14<sup>th</sup> September 2016 to the claimant free of charge within seven days of the date of this order.
- e. The defendant is to pay to the claimant the costs of the claim to be assessed by a Registrar in default of agreement.

Dated the 22<sup>nd</sup> day of September, 2017

Ricky Rahim

Judge