

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-01817

Between

DEVANT MAHARAJ

Claimant

And

THE PORT AUTHORITY OF TRINIDAD AND TOBAGO

Defendant

Appearances:

Claimant: Anand Ramlogan SC leading Gerald Ramdeen and Ché Dindial
instructed by Jared Jagroo

Defendant: Christopher Sieuchand instructed by Shivangelie Ramoutar

Before The Honourable Mr. Justice Devindra Rampersad

Date of delivery: January 22, 2019

JUDGMENT

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Introduction

1. By his application for judicial review the claimant seeks disclosure of certain documents from the defendant pursuant to the Freedom of Information Act Chap. 22:02 (the FOIA). These documents relate to the procurement exercise for inter-island ferries in 2017 by the defendant. By correspondence dated 11 April 2018 the defendant denied the claimant's request in relation to those documents and asserted that they were exempt from disclosure pursuant to sections 24, 31 and 33 of the FOIA. It is that decision that formed the basis of the claimant's application. The claimant has contended that the exemptions raised and relied upon by the defendant under the FOIA are illegal, null and void.
2. Having regard to the positions of both parties the court was required to embark upon a balancing exercise taking into consideration (i) what was being requested; (ii) if the requested information fell within one of the exemptions provided for by the FOIA and (iii) even if it fell into any of the categories exempt from disclosure, whether it ought to be disclosed in the interest of the public having regard to the reasons for which disclosure was being sought.
3. After considering all of the evidence, documents and submissions presented, the court has decided to accede to the claim made for the reasons set out below.

Background

4. At paragraph 6 and 7 of the claimant's affidavit in support of the claim filed on 21 May 2018, he described himself as, inter alia, a prominent social and political activist who serves on the Transparency Committee of the

opposition party, United National Congress. The claimant's unchallenged evidence is that the Committee is responsible for monitoring the public state sector to ensure transparency, fairness and equity and the prevention of corruption in public life. The claimant is specifically tasked with the responsibility of monitoring state agencies and corporations to ensure they are functioning in a transparent and accountable manner in compliance with the principles of good governance.

5. It is not disputed that the defendant is a public authority within the meaning of the FOIA. The defendant is a statutory body which was established by the Port Authority Act Chap. 51:01 and is responsible for overseeing, coordinating, managing and maintaining harbour facilities and port services in Trinidad and Tobago.
6. In his affidavit in support the claimant referenced over 100 newspaper articles that raised concerns over the inefficiencies of the inter-island ferry service to the sea bridge between Trinidad and Tobago and documented the fact that citizens were rendered without a reliable ferry service to travel between the islands for months on end. More specifically the claimant suggested that they raised what he saw as justified concerns about mismanagement, inefficiency, incompetence and lack of transparency in the procurement process for inter-island ferries. It was for that reason that the claimant submitted an application under the FOIA and dated 6 December 2017 requesting the following:
 - i. *The number and names of agents, operators of vessels, companies, and/or organisations that submitted bids and/or expressed interest pursuant to the advertisement published in the various newspapers in Trinidad and Tobago in August/September 2017 to provide ferry service between Trinidad and Tobago;*

- ii. *The names and qualifications of the Committee established by the Port Authority of Trinidad & Tobago to evaluate the submissions for the advertised tender;*
- iii. *The basis upon which the decision was taken and the Board Minute of the meeting at which such decision was taken to appoint the Committee to evaluate the submissions for the advertised tender;*
- iv. *The Report of the Tender Committee to the Port Authority of Trinidad & Tobago in relation to its review of the submitted tenders;*
- v. *Any and/or all correspondence and/or recommendations between the Ministry of Works and Transport and the Port Authority of Trinidad & Tobago, and vice versa, regarding the Report of the Tender Committee and/or any Board Minutes related to such correspondence and/or recommendations;*
- vi. *The process by which, and under whose authority, was the directive given by the Port Authority of Trinidad & Tobago to the Cabinet of Trinidad and Tobago to procure an inter-island ferry for use between Trinidad and Tobago, and any and/or or all correspondence related thereto;*
- vii. *The process by which, and under whose authority, was the directive given by the Port Authority of Trinidad & Tobago to the National Infrastructure Development Company Limited (NIDCO) to procure an inter-island ferry for use between Trinidad and Tobago, and any and/or all correspondence related thereto.*

7. The request was received by the defendant on 13 December 2017. On 12 January 2018 the claimant was provided with the information requested at (i), (ii), (vi) and (vii) above. The claimant was further informed that his requests at (iii), (iv) and (v) above were exempted from disclosure pursuant to sections 24, 27 and 33(b) to (d) of the FOIA.
8. The defendant's refusal to disclose the identified documents was challenged by pre-action protocol letter issued by the claimant and dated 2 February 2018. That letter was received by the defendant on or about 16 February 2018 and indicated that the exemptions claimed by the defendant were misplaced and erroneous. In that regard, the defendant's attention was drawn to sections 3 and 35 of the FOIA.
9. By email dated 16 March 2018 Ms. Daffodil Maxwell, Senior Legal Officer for the defendant requested an extension to respond to the pre-action protocol letter and was granted an extension to 9 April 2018. By emails dated 19 and 20 March 2018, the defendant sought from the claimant's attorneys-at-law confirmation that, in relation to item (iv) of the request, the claimant was seeking the Report of the Evaluation Committee that considered the submissions for the advertised tender specifically referred to in the request, being that published in August/September 2017. That confirmation was received on 20 March 2018.
10. By letter dated 9 April 2018 and emailed to the claimant on 11 April 2018 the defendant, after further deliberations and legal consultations, disclosed two bundle of documents which included two redacted letters of in relation to the requests itemized at (iii) and (v). The letters were redacted allegedly in accordance with section 16(2) of the FOIA and the defendant relied upon the exemption at section 24 (1) (e) of the FOIA to justify its refusal to disclose the redacted portions.

11. In relation to the claimant's request itemised as (iv), the defendant did not disclose the Report of the Evaluation Committee in reliance upon exemptions under sections 31(4), 33(1) (b) and (d) of the FOIA.
12. Consequently, the following documents remains outstanding in relation to the claimant's request:
 - 12.1. The Report of the Evaluation Committee that considered the advertised tenders in August/September 2017;
 - 12.2. The redacted portions of letters of correspondence dated 3 October 2017 and 7 November 2017.
13. In relation to the redacted portions of the letters, the defendant claims an exemption on the basis that, pursuant to section 24(1)(e) of the FOIA, the information contained in those portions involves the disclosure of a deliberation or decision of Cabinet, other than a document by which a decision of Cabinet was officially published.
14. In relation to the report of the evaluation committee that considered the submissions for the advertised tender, the defendant claimed an exemption on the basis of sections 31(4), 33(1)(b) and 33(1)(d) of the FOIA given that:

"...disclosure of the information in the Report of the Evaluation Committee would prejudice [the Defendant] by disclosing details of the evaluation procedure for tenders. It will reduce [the Defendant]'s ability to negotiate or compete in a commercial environment. Further, disclosure would reveal the pricing mechanism and recommended pricing mechanism and procedure to be applied in negotiating contracts for a ferry to service the sea bridge to the detriment of [the Defendant]. This will give an unreasonable advantage to any person or party in relation to a

contract which that person or party is seeking to enter into with [the Defendant] or the Ministry. The person and/or competitor will be able to tailor its tender specifically to cater to the manner in which the cost proposals are evaluated thereby exploiting this for its own profit or gain. Disclosure of this document is exempt as disclosure may hamper the negotiations and/or negotiating power of [the Defendant] to secure contracts at reasonable costs.”¹

15. Thereafter on 21 May 2018 the claimant filed for leave to apply for judicial review. Leave was granted on 25 June 2018. The claimant caused the fixed date claim form to be filed on 4 July 2018 and relied on his affidavit filed on 21 May 2018 in support of the fixed date claim form.
16. An affidavit in response sworn to by Ms. Maxwell was filed on 29 August 2018 and maintained that the undisclosed documents requested were exempt from disclosure. This conclusion was drawn based on the legal advice received from external counsel and her consideration of section 35 of the FOIA. Further, in response to the claimant’s suggestions that the Report of the Evaluation Committee was not exempt, Ms. Maxwell noted that the newspaper articles referred to by the claimant pre-date the subject of the request and referred to the procurement of other vessels that did not form the basis of the request. The request instead referred to matters concerning the procurement process for a passenger vessel which took place in August/September 2017 and to which there were no allegations of impropriety. Furthermore, the documents disclosed to the claimant indicated that that procurement process ended prematurely.

¹ Pg 2 of the letter dated 9 April 2018 from Daffodil Maxwell, on behalf of the defendant, to Douglas Bayley, Attorney at Law for the claimant

17. Ms. Maxwell went on to state that she did not have before her, during her consideration of the request, any reasonable evidence of any occurrence or likelihood of the factors identified at section 35 of the FOIA in relation to the procurement process specifically referred to by the claimant in his request. She further stated at paragraph 16(g) of her affidavit:

“g. It is my view that the risks associated with the disclosure of the report of the evaluation committee that considered the submissions for the advertised tender are significant and that there are no reasons or evidence before me which outweigh those risks such as to justify disclosure of that report in accordance with sections 11(2) or 35 of the Act or in a redacted form in accordance with section 16(2) of the Act given the volume of sensitive commercial information contained therein.”

18. Ms. Maxwell then indicated that she was prepared to disclose the report to the court to have the court determine the sensitivity of the information contained therein.
19. The claimant filed a supplemental affidavit on 8 October 2018 annexing for the court’s attention the Joint Select Committee on Land and Physical Infrastructure’s Report concerning the defendant’s procurement process. That report highlighted various concerns and deficiencies in the procurement of various ferries/vessels by the defendant but none concerned the advertisement for tenders in August/September 2017 and the procurement process which followed that was subsequently terminated.
20. A supplemental affidavit was also filed by Ms. Maxwell on 12 November 2018 wherein she explained that the reference in the defendant’s response, to the claimant’s request, on 11 April 2018, to section 33(1)(d) of the FOIA was erroneous and instead the defendant intended to rely on

section 33(1)(e) of the FOIA. In that way it was now being contested that the report of the evaluation committee was exempt pursuant to sections 31(4), 33(1)(b) and 33(1)(e), not 33(1)(d) as previously indicated in its reply to the claimant. According Ms. Maxwell, the error was patent when one had regard to the grounds set out for the non-disclosure. She noted that the claimant's fixed date claim form did not refer to the confidentiality issue of section 33(1)(d) but instead referred to the substance of 33(1)(e).

21. The claimant has objected to the defendant's belated attempt to rely on section 33(1)(e) of the FOIA in support of its non-disclosure as it was not communicated to the claimant in the defendant's responses to its request nor was Ms. Maxwell's affidavit filed with any permission from the court despite the fact that it was so filed after directions had been given for submissions, thereby denoting the close of pleadings, and after the claimant had already filed and served the first salvo of ordered submissions on 9 November 2018.

The Law

22. It is helpful to set out the relevant legislative framework which governs a public authority's duty to disclose information pursuant to the FOIA. Section 11 of the FOIA creates a general right of a person to obtain access to an official document subject to the provisions of the FOIA and provides:

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.

23. Section 3 provides background for this general right and 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.”

24. The general right is limited by the FOIA and such limitations include those identified at sections 12, 20, 21 and those documents considered to be exempt pursuant to Part IV of the FOIA. Documents considered to be exempt include:

24. (1) A document is an exempt document if it is—

(a) the official record of any deliberation or decision of Cabinet;

(b) a document that has been prepared by a Minister of Government or on his behalf or by a public authority for the purpose of submission for consideration by Cabinet or a document which has been considered by Cabinet and which is related to issues that are or have been before Cabinet;

(c) a document prepared for the purpose of briefing a Minister of Government in relation to issues to be considered by Cabinet;

(d) a document that is a copy or draft of, or contains extracts from, a document referred to in paragraph (a), (b) or (c); or

(e) a document the disclosure of which would involve the disclosure of any deliberation or decision of Cabinet, other than a document by which a decision of Cabinet was officially published.

.....

31. (1) A document is an exempt document if its disclosure under this Act would disclose information acquired by a public authority from a business, commercial or financial undertaking, and—

(a) the information relates to trade secrets or other matters of a business, commercial or financial nature; or

(b) the disclosure of the information under this Act would be likely to expose the undertaking to disadvantage.

(2) In deciding whether disclosure of information would expose an undertaking to disadvantage, for the purposes of paragraph (b) of subsection (1), a public authority may take account of any of the following considerations:

(a) whether the information is generally available to competitors of the undertaking;

(b) whether the information would be exempt information if it were generated by a public authority;

(c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and

(d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of regulation by a public authority of corporate practices or environmental controls, and of any consideration or considerations which in the opinion of the public authority is or are relevant.

(3) Prior to making a determination under subsection (1) as to whether the disclosure of information would expose an undertaking to disadvantage, a public authority shall notify the undertaking which has supplied the relevant document or documents that the public authority has received a request for access to the document and shall—

(a) seek the undertaking's view as to whether disclosure should occur; and

(b) notify the undertaking where the public authority after consultation has decided to disclose the document and in such a case notify the undertaking of the right to apply to the High Court for judicial review of the decision and the time within which the application for review is required to be made.

(4) A document is an exempt document if—

(a) it contains—

(i) a trade secret of a public authority; or

(ii) in the case of a public authority engaged in trade or commerce, information of a business, commercial or financial, nature, that would if disclosed under this Act be likely to expose the public authority to disadvantage;

(b) it contains the results of scientific or technical research undertaken by a public authority, and—

(i) the research could lead to a patentable invention;

(ii) the disclosure of the results in an incomplete state under this Act would be reasonably likely to expose a business, commercial or financial undertaking unreasonably to disadvantage;

(iii) the disclosure of the results before the completion of the research would be reasonably likely to expose the public authority unreasonably to disadvantage; or

(c) it is an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or similar document and the use or uses for which the document was prepared have not been completed.

.....

33. (1) A document is an exempt document if—

.....

(b) its disclosure under this Act would be contrary to the financial interests of the public authority by giving an unreasonable advantage to any person in relation to a contract which that person is seeking to enter into with the public authority for the acquisition or disposal of property or the supply of goods or services;

.....

(d) subject to subsection (4), it contains information obtained by a public authority from a third party who has consistently treated it as confidential and the disclosure of that information to a competitor of a third party, would be likely to prejudice the lawful commercial or professional activities of the third party;

.....

25. Even where parts of a document may be considered exempt, the disclosing party may provide copies of the documents with deletions/redacted as necessary pursuant to section 16(2) of the FOIA.

16. (2) Where—

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

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

(c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy,

the public authority shall give the applicant access to such a copy of the document.

26. Documents defined in Part IV of the FOIA as exempt documents are only exempt if there is an absence of reasonable evidence of the conditions set out in section 35 of the FOIA, that is, provided the public interest does not outweigh the benefit of upholding those exemptions:

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

(a) abuse of authority or neglect in the performance of official duty; or

(b) injustice to an individual; or

(c) danger to the health or safety of an individual or of the public; or

(d) unauthorised use of public funds,

has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.” [Emphasis added]

27. The defendant did not dispute the general principles applicable to a consideration of a judicial review challenge to a decision not to disclose documents pursuant to a FOIA request and which can be summarized as follows:

- 27.1. The court in interpreting and applying the provisions of the FOIA is mandated to do so purposively, so as to further the policy, purpose and objectives of the Act;²
- 27.2. There appears to be a presumption in favor of disclosure as the FOIA is considered to be a revolutionary Act designed to open up the workings of government and administration to scrutiny for the benefit of every citizen representing a paradigm shift in public administration.³ However it has previously been observed by Jamadar JA in the case of ***Caribbean Information Access Limited v The Minister of National Security*** Civil Appeal No. 170 of 2008 at paragraph 27:

“The FOIA has provided a statutory right to information from public authorities subject to exceptions and exemptions. It is always for the public authority to show that it is entitled reasonably to rely on an exemption claimed and to not grant access to the documents requested. The exemptions provided for in section 28 are quite specific and limited. Thus, given the statutory right to access; the duty to assist in facilitating disclosure; the mandate to disclose even exempt documents where on a balance it is in the public interest to do so; the mandate to redact exempt documents in order to render them non-exempt so to facilitate disclosure; and the duty to interpret and apply the

² ***Caribbean Information Access Limited v The Minister of National Security*** Civil Appeal No. 170 of 2008 per Jamadar JA at paragraph 8; s.3(2) FOIA

³ ***Sheedy v Information Commission et al*** (Unreported) [2003] NO. 20 MCA and [2005] IESC 35 cited with approval at page 11 of ***Ashford Sankar v Public Service Commission*** CV2006–00037; ***John Deely v The Information Commissioner*** [2001] 3 I.R. 439; ***Vishnu Jugmohan v Teaching Service Commission*** H.C.A. NO. 1055 OF 2004

*provisions of the FOIA (including the exemption provisions) in such a way so as to ‘facilitate and promote ... the disclosure of information’; **there is no presumption in favour of exemption from disclosure of or access to documents held by public authorities.**”*

27.3. The general right to disclosure is *‘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.’*⁴

27.4. It is for the public authority to prove the exemption invoked to deny access;⁵

27.5. The sufficiency of reasons will always be determined by the circumstances and context which surround the particular request made and exemptions claimed;⁶

27.6. The court is permitted to inspect the documents for which an exemption is claimed to permit it to make its own finding;⁷

27.7. There is no need for the applicant to demonstrate why the document and/or information is requested *save where a question of public interest arises and an applicant is able to demonstrate that his personal involvement in the matter may cause an element of public interest in his “need to know” to arise to demonstrate some special interest in the documents sought;*⁸

⁴ Ibid at para 8

⁵ See **Sankar v PSC** at p.14-17

⁶ See **Caribbean Information Access Limited**

⁷ See **Jugmohan v TSC**

⁸ See **Re Mann and Australian Tax Office** (1985) 7 ALD 698 as cited in **Jugmohan v TSC**

- 27.8. Section 35 of the FOIA creates an override that allows disclosure of otherwise exempt information;
- 27.9. Recent case law now establishes that it is generally for the public authority to establish that there was no overriding Section 35 interest which would allow access to an exempt document;⁹
- 27.10. Where the public authority has claimed exemptions they are required to conduct a section 35 analysis and where it has not been done the court can revert the matter to them to conduct it;¹⁰
- 27.11. The term, "public interest" embraces a wide range of considerations, including the citizen's right to access information in a constitutional democracy, fair treatment of citizens and the need for justice to be done particularly in cases concerning promotion or disbursement of government funds;
- 27.12. The justification for this public interest evaluation and override, even where documents are considered exempt, has both specific and general statutory underpinnings, as well as a constitutional warrant and as such, where there is a legitimate need for disclosure intended to uphold constitutional provisions, disclosure would be encouraged;¹¹
- 27.13.** The public interest in favour of release has to be balanced against the public interest in protecting the release of information. Jamadar JA at paragraph 40 in the case of ***The Minister of Planning***

⁹ Per Smith JA in the case of ***Ravi Doodnath Jaipaul v PSC*** Civil Appeal No 162 of 2011

¹⁰ See ***Nicholas Cumberbatch v The Minister of National Security*** CV 2014 – 03041; ***Carlton Dennie v the Minister of National Security*** CV2016-04139

¹¹ See ***The Joint Consultative Council for the Construction Industry v The Minister of Planning and Sustainable Development*** C.A.CIV.P.200/2014

and Sustainable Development v The Joint Consultative Council for the Construction Industry C.A.CIV.P.200/2014 stated:

“40. Thus when one comes to the evaluative exercise demanded by section 35 of the FOIA, in so far as denial of access to information is justified, both a public authority (initially) and a court of review (subsequently) are obliged to carry out the required balancing exercise in the context of the above-stated statutory and constitutional framework and values. It is critical to note, that in the carrying out of this evaluative exercise it is for the public authority to demonstrate that denial of access is justified because it is necessary for the protection of essential public interests. As already explained, ‘essential’ qualifies both the type of public interests, as well as the degree of circumstances that justify denial of the section 35 public interest override mandate.”

The Issues:

28. The two main issues are
 - 28.1. Whether the Report of the Evaluation Committee that considered the submissions for the advertised tender in August/September 2017 is exempt from disclosure; and
 - 28.2. Whether the two redacted portions of letters dated 3 October 2017 and 7 November 2017 are exempt from disclosure.
29. In answering both questions the court must adopt a balancing exercise as indicated above and, in the event of a finding of exemption, consider whether the section 35 override is applicable.

The Report of the Evaluation Committee

30. This is a committee appointed by the defendant to review tenders and award the procurement contract for the inter-island ferries. The defendant, in submissions, relied predominantly on sections 33(1)(d) and 33(1)(e) to the FOIA to substantiate the exemption as claimed. According to the defendant, the claimant seeks information of a competitive process related to procuring a vessel to service the inter-island sea-bridge, which is a commercial undertaking given that the inter-island ferry vessel is operated at a cost to its users. It was further submitted that:

“It must be remembered that the procurement process in respect of which the Report was prepared was cancelled. The disclosure of such information, therefore, put in the hands of a person interested in subsequently bidding, would result in their having knowledge of (1) their prospective competitors’ pricing and strategies, as set out in the PAP Response, and also (2) the process used by the Defendant in evaluating those tenders, which its competitors will not have. The risk of prospective “tailor-made” tenders was therefore very much a live one. We remind this Honourable Court that while there is no apparent interest in the Claimant or anyone associated with him entering into a prospective tender, the Defendant is obliged to assume that disclosure to the Claimant effectively means disclosure to all.¹²”

31. The claimant raised an objection to the defendant’s reliance on section 33(1)(e) in support of the exemption claimed having regard to the fact that it was only raised on 9 November 2018, the date specified for the parties

¹² See *Merlin Samlalsingh v. The Ministry of Planning, Housing and the Environment* CV 2009-03711 Dean-Armorer J at para. 25

to file submissions. It was submitted that the claimant was prejudiced as by that date it ought to have been assumed that the defendant was in fact relying on the sections referenced in its response to the claimant and the affidavit sworn to in response to the claim.

32. In the case of ***The Minister of Planning and Sustainable Development v The Joint Consultative Council for the Construction Industry*** the respondent also raised at trial a new reason for the exemption which was claimed after the application for judicial review had been filed. In considering the trial judge's refusal to consider the new reason Jamadar JA quoted from the case of ***Caribbean Information Access Limited v The Minister of National Security*** as cited above and stated:

"In my opinion therefore, a public authority is not prohibited from relying on 'new reasons', but to do so the authority must satisfy a court, in the exercise of its judicial discretion, that to grant permission will enable the court to deal with the matter justly (and all that that concept incorporates in the current jurisprudence of Trinidad and Tobago). To hold otherwise would be to practically render otiose the purposes intended by sections 15 and 23(1) (a),(d) and (e) of the FOIA."

33. The court then is permitted to consider the new reason provided it assists the court with the balancing exercise in which it must engage upon the court being satisfied in the exercise of its judicial discretion that to grant permission will enable the court to deal with the matter justly. It must be noted, however, that the defendant did not make any application to introduce this further affidavit.
34. The claimant suggested that the fact that the procurement process was abandoned was of no consequence. Instead, relying on the numerous newspaper extracts, the JSC Reports and numerous complaints from

members of the public, it was submitted that the information requested is necessary to ascertain what went wrong. Such an analysis, it was contended, would assess how the systems and procedures can be improved in the public interest.

35. The claimant suggested that learning from the Australian Information Commissioner, by Timothy Pilgrim in **'NO' and National Library of Australia**¹³ can provide guidance. The National Library of Australia (NLA) sought to warrant a document exempt under s.47(1)(b) of that country's FOIA which deals with commercially sensitive information. The guidance provided was as follows:

*"The exempted document was an invoice issued to the NLA by the Attorney General Sector in May 2016 in relation to work undertaken by the Attorney General. For a document to be exempt under s 47(1)(b), it would need to be shown that the document contains commercially valuable information, and that value would be destroyed or diminished by disclosure. This is the guidance offered by the **Australian FOI Guidelines**¹⁴ which states:*

5.203** It is a question of fact whether information has commercial value, and whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved. The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property. **The

¹³ (Freedom of information) [2018] AICmr2 (8 January 2018)

¹⁴ [5.202]-[5.206]

following factors may assist in deciding in a particular case whether information has commercial value:

- *whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value*
- *whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors*
- *whether a genuine ‘arm’s-length’ buyer would be prepared to pay to obtain that information*
- *whether the information is still current or out of date (out of date information may no longer have any value)*
- *whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.*

36. The claimant has submitted that the bare statements of the defendant does not provide the court with the information needed to make the required assessment in circumstances where it bears the burden to prove that the exemptions relied on are valid.

Discussion

37. The court is mindful of the fact that it ought not to unnecessarily analyze or become bogged down in nitpicking through the evidence produced. However, in this case, the responses for the defendant emanate from its

senior legal counsel in-house backed by external legal advice obtained from Lex Caribbean, in respect of the first response sent out by letter dated 12 January 2018, and MG Daly and Partners, in respect of the second response sent out by letter dated 9 April 2018.

38. Firstly, the court has to consider from whom this information is coming in relation to the defendant. The responses to the claimant's attorney at law and the affidavit in response in these proceedings were all penned by the defendant's senior legal officer, Daffodil Dvore Maxwell. Ms. Maxwell was designated by the defendant on 9 January 2018 as the officer responsible for treating with requests for access to official documents made pursuant to the FOIA. This was a mere three months before her final refusal penned on 9 April 2018. She does not describe herself as a specialist in any particular area of law, nor does she say how long she has been in practice or what her experience in this area of law is. She has not described herself as an expert in procurement matters involving or including the preparation of bids or other tender documents or the evaluation of the same or any familiarity with the processes involved in such arrangements or matters such as pricing, bid evaluation, etc. Therefore, the court has no evidence of this witness's expertise, whether academically or through experience, or ability to speak of matters which involve conclusions in respect of the reading or interpretation of bid or tender documents or the analysis of the Report of the Evaluation Committee to ascertain how it is to be interpreted vis-à-vis trends, pricing information, applicability of the information set out therein to commercial market scenarios, including the applicability of the information therein to possible advantages or disadvantages to prospective bid tenderers.
39. Further, the court does not have the opinions received from Lex Caribbean or MG Daly and Partners, and no privilege has been claimed in respect of

the same, for the court to come to any conclusion as to whether these matters in relation to the contents of the Report of the Evaluation Committee were considered by any specialist attorney or expert in the field in order to reach conclusions in relation to its content and its possible effect on the defendant's commercial activities or prospective tenderers. In any event, no bases for these instructions were detailed to this court so that the court has no idea what was asked of these external unnamed counsels or what opinion was rendered and how it related to the questions that this court has to determine.

40. Therefore, the state of the evidence before this court is that, by letter dated 9 April 2018, Ms. Maxwell opined and concluded in the manner quoted at paragraph 14 above. The reasoning is reproduced once again for ease of reference and is discussed:

"...disclosure of the information in the Report of the Evaluation Committee would prejudice [the Defendant] by disclosing details of the evaluation procedure for tenders."

Ms. Maxwell stated that disclosing details of the evaluation procedure can cause the defendant prejudice. Obviously, therefore, the inference is that the report goes into the details of the evaluation procedure and those details would, in some manner, cause the defendant prejudice. However, the nature of the manner in which it would allegedly cause prejudice has not been discussed nor have the facts in relation to such a conclusion been produced. Therefore, the court has no information whatsoever as to what Ms. Maxwell is speaking of or that she is qualified to make such a conclusion.

"It will reduce [the Defendant]'s ability to negotiate or compete in a commercial environment."

Once again, the conclusion reached by Ms. Maxwell is not grounded in any factual matrix. If it is in fact related to the disclosure of details of the evaluation procedure, she has failed to explain how disclosing those details would lead one to such a conclusion i.e. that it would reduce the defendant's ability to negotiate or compete in a commercial environment. One wonders that if this information is available to all across the board, then all applicants/tenderers would be on an equal playing field so that there would be no advantage to anyone in particular. With respect to the evaluation of those tenders, one would also expect that there would be uniformity in a clearly defined and transparent evaluation process without any arbitrariness or the blatant exercise of unhinged discretion without any proper evaluative basis being allowed to creep in. The court does not have that information, however.

“Further, disclosure would reveal the pricing mechanism and recommended pricing mechanism and procedure to be applied in negotiating contracts for a ferry to service the sea bridge to the detriment of [the Defendant]. This will give an unreasonable advantage to any person or party in relation to a contract which that person or party is seeking to enter into with [the Defendant] or the Ministry. The person and/or competitor will be able to tailor its tender specifically to cater to the manner in which the cost proposals are evaluated thereby exploiting this for its own profit or gain.”

Again, the nature of the unreasonable advantage was not explained especially in a case where all of the bidders/tenderers are aware of the procedures involved and exercised in the evaluation process which ought to be transparent. Ms. Maxwell's failure to explain the factual matrix

against the background of this existing report left the court without valuable evidence or information in relation to her conclusion.

“Disclosure of this document is exempt as disclosure may hamper the negotiations and/or negotiating power of [the Defendant] to secure contracts at reasonable costs.”

This last conclusion is a summary of that which has gone before – all of which went unexplained and unfounded.

41. From this analysis, it is clear that the court was not given any factual information by Ms. Maxwell to allow it to come to its own conclusion but, rather, the information she gave amounted to an imposition of her own unsubstantiated conclusions.
42. Respectfully, this is not the way that such an exercise has to be conducted by this court. As the authorities have cited over and over, the burden is on the defendant to establish the factual basis for the exemptions and that establishment calls for cogent and credible evidence on the facts, not for conclusions. Therefore, without more, this court cannot come to the conclusion that the report is exempt for any of the reasons mentioned above.

The late affidavit filed by the defendant

43. The court deprecates the action taken by the defendant to file and serve a supplemental affidavit without this court’s permission on 9 November 2018. This court gave clear directions at the case management conference stage and, notwithstanding the eminent words of esteemed Justice of Appeal Jamadar referred to above, the court also bears in mind the ethos of the Civil Proceedings Rules expressed in the overriding objective. To my mind, it is reprehensible for a state agency represented by eminent

counsel to try to “sneak in” a document without any permission and then seek to rely on the omnibus “administration of justice” argument whether by inference or expressly. That is not the way that a court operates or ought to operate especially when the deponent is an attorney at law and is represented by eminent counsel, both of whom are sworn to uphold the due process of law and, by inference, the rules of court. However well-intentioned the attempt was to allegedly correct an error allegedly made previously, the court bears in mind that this was the first time that such an allegation was being made i.e. reliance on the wrong subsection of the Act, and the duties of counsel appearing for the defendant as imposed by the provisions of the Legal Profession Act do not include an attempt to bypass the established procedure for the filing and service of documents and the progress of proceedings in such a manner.

44. In this case where the court had already drawn a line in the sand with respect to the evidence to be considered and given directions for submissions based on that evidence, it is wholly wrong to approach the court by means of a backdoor attempt to introduce new evidence without first approaching the court for permission to do so.
45. As has been canvassed over and over again, the novelty of this Act and the imposition of its duties and responsibilities and burdens of proof demands strict compliance with the provisions of the Act and the legal authorities which guide and bind this court. Therefore, the court will not turn a blind eye to this attempt to steal a march and will disregard the supplemental affidavit filed on 9 November 2018 in its totality.

The Redacted Letters

46. By email dated 18 January 2019 the court accepted the claimant's invitation to review the original, un-redacted letters. Having viewed the same, the court is of the respectful view that both letters contain information, as redacted, which involve, prima facie, a decision of Cabinet and the letters are not documents by which that decision is officially published.
47. Even where it can be said to fall within the definition claimed, Boodoosingh J in ***Nicholas Cumberbatch v The Minister of National Security*** at paragraph 36 where His Lordship said:
- "It would also seem to me odd and undesirable that a public authority, body or committee could escape their responsibility to account for the spending of public funds simply by the device of laying a report for the consideration of Cabinet and then saying it is exempt because Cabinet considered the report. Hence the need to go further to show a proper section 35 evaluation took place."*
48. There still therefore needs to be a consideration of the section 35 override.

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The Section 35 Override

49. Ms. Maxwell, in her affidavit filed on 29 August 2018, made the following startling declaration¹⁵:

*“f. Neither I nor the Defendant am/is able to commit time or resources to **investigating in any material way** any allegation of the matters set out in section 35 of the Act without any specific context or supporting material save and except where I am directly aware of such circumstances, which is not the case in relation to the facts and matters relating to the FOI request;”*

[Emphasis added]

50. The consideration of the section 35 factors is a mandatory statutorily imposed duty entrusted upon a statutory authority and one can view this statement as suggesting that time and resource constraints negatively impacted upon the exercise or performance of the same. The court can see merit in the argument that Ms. Maxwell was indirectly suggesting that the burden of creating context or collating supporting material for the exercise of that statutory duty falls upon the applicant, especially against the background of the resources available to the state authority and, by extension, the state as opposed to the lay person/applicant making an application for information.
51. Therefore, by her own admission, Ms. Maxwell has not investigated the application of section 35 of the Act in any material way and, therefore, it is clear that Ms. Maxwell has failed to displace the burden which is required in any consideration of an FOIA request.

¹⁵ Paragraph 16 (f) of her affidavit filed on 29 August 2018

52. Ms. Maxwell went on in her affidavit in opposition to state¹⁶:

“It is my view that the risks associated with the disclosure of the report of the evaluation committee that considered the submissions for the advertised tender are significant and that there are no reasons or evidence before me which outweigh those risks such as to justify disclosure of that report in accordance with sections 11 (2) or 35 of the Act or in a redacted form in accordance with section 16 (2) of the Act given the volume of sensitive commercial information contained therein. “

53. Obviously, the court cannot put much weight on this statement having regard to her admission of having failed to properly investigate the applicability of section 35 of the Act.

54. Moosai J, as he then was in **Sankar**, postulated the position¹⁷ that the exercise of the power of review under section 35, *“on the highly complex grounds stated therein, ought properly to be reserved to independent, impartial bodies with legal or judicial experience competent to address their minds to the issue of the existence of reasonable evidence that, broadly speaking, significant prejudice has was likely to have occurred, or in the circumstances giving access to the document is justified in the public interest. In the absence of an Information Commissioner, the statute is eminently workable if such a power of review is vested in the Ombudsman and/or the courts. “*.

55. This comment was not discussed by the Court of Appeal and so remains untested. However, the court attaches weight to the comments since the decision-making that is required are quasi-judicial in balancing the law

¹⁶ Ibid, at Paragraph 16 (g)

¹⁷ At page 19

against reasonable evidence in relation to abuse of authority, neglect, injustice to an individual, danger to the health or safety of an individual or of the public or the unauthorized use of public funds. It is difficult for the court to consider a realistic circumstance where a public authority in the politically polarized Republic of Trinidad and Tobago would readily admit any of these facts especially in light of the type of society that exists where such admissions seem very few and far between. In any event, a section 35 consideration, of sorts, was done by Ms. Maxwell and was dismissed.

56. Therefore, notwithstanding the comments made by other courts of similar jurisdiction in relation to remitting the consideration to the state authority, this court finds favour with the invitation extended by attorney at law for the claimant that the court should consider the section 35 public interest override of its own accord based on the evidence before it especially since the evidence is that it was already done by the defendant, albeit not in a thorough manner.
57. At paragraphs 20 to 25 of the claimant's principal affidavit he identified the reasons for seeking disclosure of the withheld documents and stated:

"20. The requested information is of critical importance to me and by extension the people of the Republic of Trinidad and Tobago as I am a social and political activist who takes a keen interest in issues of national importance, particularly those related to good governance and the rule of law. Further, as part of my duties I am required to conduct research and to provide advice to the Opposition Party on issues affecting Trinidad and Tobago, especially in relation to the important issue of transparency and good governance in the public interest.

21. As part of the Opposition watchdog Transparency Committee I utilise my position to provide valuable information

and assistance to not only members of the Opposition party but also to benefit the nation as a whole so that the media and public can hold the Government accountable and responsible for its actions. I therefore require the information requested as part of my research which invariably is being done in the public interest.

22. *Further, there has been a myriad of complaints from members of the public about the current "ferry fiasco" which have been adversely affecting the citizens of Trinidad and Tobago. As such I am of the opinion that it is necessary to analyse the procedure which was adopted by the Port to ascertain what went wrong and how the systems and procedures can be improved in the public interest.*

23. *I am of the view that the Authority is not making an effective contribution to alleviate the problems arising from the present inter island ferry fiasco and the citizens of Trinidad and Tobago are the ones facing the brunt of this.*

24. *I am also desirous of making proposals to the Opposition party, on measures and policies that can be implemented to assist in solving the present transportation problems between Trinidad and Tobago. I am willing, as a patriotic citizen, to assist in any way possible. It is therefore my view that should I obtain the requested documents it would go a long way in fulfilling my mandate by better understanding where deficiencies exist in the procurement process regarding the inter-island ferry between Trinidad and Tobago and the usage of same.*

25. *The requested documents relate directly to the performance of the Authority. As a public authority PATT is funded directly by taxpayers' dollars and the public has a right to know if it is operating*

in an inefficient and/ or corrupt manner and if the PATT is being mismanaged and run in an incompetent manner by those in authority/charge. The requested documents/information would assist immeasurably in the evaluation, research and analysis of whether citizens are getting value for money out of the Authority and a determination can be made as to the Authority's overall efficiency and effectiveness.”

58. In response to the rationale for the need for disclosure it was noted by the defendant that the procurement process had since been terminated. Further, none of the articles referenced by the claimant made any allegations of impropriety in relation to that specific procurement process. Hence, it was submitted that there was no discernable public interest to be served by having the documents disclosed.
59. In reply the defendant submitted that given that the procurement process has ended, the disclosure of the requested documents should not be an issue at all. It was suggested that it is unlikely that future procurement would contain the same criteria used in the cancelled tendering, or, as relates the redacted letters, the commercial venture has passed and the information the claimant seeks should no longer have much commercial value or need to keep undisclosed.
60. Taking all of the circumstances into account, the court is of the respectful view that giving access to the un-redacted letters is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so. The process has come to an end so that any possible damage may very well be minimized as against the converse position. The public interest in the proper and efficient analysis of the tender process which was employed, against the background of the newspaper reported deficiencies in the past, deficiencies which led to the Honourable Prime

Minister going so far as to apologize to the people of Tobago, suggests that there is a need for a proper analysis to be conducted through the consideration of the relevant documents surrounding this particular process. To my mind, it would help to identify the possible deficiencies and bottlenecks in the system to avoid a repeat of the previous mistakes made, if any. The need for transparency in this very important public issue relating to the employment of public funds for the public purpose of providing a safe and reliable ferry to service the sea-bridge between Trinidad and Tobago is one that also lends itself to full disclosure to ensure the proper tweaking of the system to provide greater efficiency and accountability.

61. Accordingly, the court will apply the section 35 override and allow the provision of the un-redacted letters.

Order

62. Without there having been evidence to permit the court to come to a finding that the Report of the Evaluation Committee is exempted the court must find in favor of disclosure. Further, the public interest in understanding the procurement process and the expenditure of public funds on what was a process that was prematurely terminated after funds were already expended on same weigh in favor of disclosure.
63. The court will thus grant the following relief:
 - 63.1. A declaration that the access decision contained in letters dated the 12 January 2018 and 9 April 2018 is invalid, illegal and defective and there was no proper consideration of the Section 35 override of the FOIA;

- 63.2. An order of certiorari to remove into this Honourable Court and quash the decision of the defendant contained in letters dated the 12 January 2018 and 9 April 2018 on the ground that it was illegal, null, void and of no effect;
- 63.3. An order of mandamus to compel the defendant to provide the claimant with the Report of the Tender [Evaluation] Committee to the Port Authority of Trinidad & Tobago in relation to its review of the submitted tenders which was requested in his application made under the provisions of the FOIA dated 6 December 2017 within twenty one (21) days;
- 63.4. A declaration that the claimant is entitled to the unedited letters dated 3 October 2017 in relation to request (iii) and 7 November 2017 in relation to request (v) made under the FOIA application dated 6 December 2018 in accordance with the provisions of the FOIA;
- 63.5. An order of mandamus directing the defendant to provide the claimant with the unedited letters dated the 3 October and 7 November 2017 within twenty one (21) days.
64. It is further ordered that the defendant pay the claimant's costs certified fit for Senior and Junior Counsel to be quantified by the Assistant Registrar in Chambers on a date to be fixed pursuant to Part 67.12 of the CPR.

/s/ D. Rampersad J.

Assisted by Charlene Williams
Judicial Research Counsel
Attorney at Law