THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2006 – 00037

BETWEEN

ASHFORD SANKAR **Applicant**

AND

PUBLIC SERVICE COMMISSION **Defendant**

Before the Honourable Justice P. Moosai

APPEARANCES:
Mr. Anand Ramlogan and Mr. Sheldon Ramnanan for the Applicant
Mr. Russell Martineau S.C. and Ms. Karen Fournillier
for the Defendant

JUDGMENT

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1. INTRODUCTION

The Applicant is at present an Acting Deputy Permanent Secretary. On 15th November, 2005 the Applicant, pursuant to the provisions of the Freedom of Information Act ("FOI Act"), applied for certain documents from the Public Services Commission ("PSC") which were used to assess his suitability for promotion to the post of Deputy Permanent Secretary, namely:

1. The results of the screening interview/assessment conducted by Symcom Systems Management Consultants Limited on behalf of the PSC in 1997 for the filling of the office of Deputy Permanent Secretary.
2. The names of all public officers whose names were retained for future reference arising from the exercise by Symcom Systems Management in 1997 as above at (1).
3. His position in the overall ranking of the Assessment Exercise conducted by the Personnel Psychology Centre ("PPC") of Canada for the office of Deputy Permanent Secretary.
4. Recommendations/staff reports made on his behalf since 1997 for the offices of Deputy Permanent Secretary by the Permanent Secretary.
5. Public advertisements for the filling of the offices of Deputy Permanent Secretary and Permanent Secretary with effect from January 1997 by the PSC.
6. Minutes of the meetings of the PSC at which the issue(s) of appointment/promotion to the office of Deputy Permanent Secretary and/or Permanent Secretary were discussed/determined relative to the appointments made in October 2005.
7. The score sheets or other documents of all public officers who were assessed or evaluated by the PPC of Canada for

appointments/promotion relative to the appointments made in October 2005.

8. Agreement between the PPC of Canada and the PSC (or whichever party) with respect to the Assessment Centre Exercise for, the filling of the post of Deputy Permanent Secretary and/or Permanent Secretary which appointments were made in October 2005.

On November 19, 2005, Ms. Leslyn Ellis, Human Resource Adviser Π in the Service Commissions Department, in a telephone conversation with the Applicant, orally confirmed receipt of the application (para. 7 of her affidavit.)

By letter dated November 29, 2005, the PSC acknowledged receipt of the application and informed the Applicant that the matter was receiving attention and that the Applicant would be informed as soon as possible.

By letter dated December 16, 2005 and hand delivered on the said date, the Applicant informed the Defendant that the statutory time frame for providing the information requested had elapsed, and agreed without prejudice to an extension until January 5, 2006.

By letter dated December 22, 2005 the Applicant's Attorney wrote to the Designated Officer in the Freedom of Information Unit, Service Commissions Department, enquiring about the application and giving notice of judicial review proceedings if the information was not provided within seven (7) days of the date of the letter.

On January 6, 2006, the Applicant commenced proceedings for judicial review seeking inter alia:

1. An order of mandamus to compel the Respondent to provide the Applicant with the information requested on November 15, 2005 in his application under the FOI Act.
2. A declaration that the Applicant is entitled to the information.
3. An order directing the Respondents to provide the Applicant with the requested information free of charge within seven (7) days hereof.
4. Alternatively, an order directing the Respondent to forthwith prepare and supply notice in accordance with section 23 of FOI Act.
5. A declaration that there has been unreasonable delay on the part of the Respondent in making a decision on the Applicant's request under FOI Act.

Some of the documents and/or information were supplied before trial.
The Applicant did not pursue Request 7, namely the score sheets or other documents of all public officers who were assessed or evaluated by the PPC of Canada for appointments/promotion to the offices of Permanent Secretary or, Deputy Permanent Secretary. PSC had contended that the disclosure of this information would infringe on section 30 of the FOI Act since it would involve the disclosure of information relating to other public officers.

As it stands now, the only remaining documents in dispute, are those relating to Requests Nos. 1, 2 and 6. The Respondent is saying that those documents relating to Requests Nos. 1 and 2 cannot be found, but that searches are continuing for same. With respect to Request No. 6, namely minutes of the meetings of the PSC at which the issue(s) of appointment/promotion to the office of Deputy Permanent Secretary and/or Permanent Secretary were discussed/determined relative to the appointments made in October 2005, the PSC is contending that the minutes are exempt under section 27 of FOI Act.

2. SUBMISSIONS OF ATTORNEYS

A) Applicant's Arguments

With respect to section 27, Mr Ramlogan submitted that the onus is on the PSC to provide the court with positive evidence that disclosure would be contrary to the public interest, but they have failed to do so as their written response was simply that the minutes are internal working documents. That amounts to a breach of section 23 under which they are supposed to provide reasons. Moreover the office involved was a high-level one so that the public had a right to know that there was transparency in such appointments.

With respect to frankness and candour, Mr Ramlogan contended that that could not carry any real weight in this jurisdiction as the public interest requires greater openness and transparency in a society divided by ethnic politics, cries of discrimination and an avalanche of successful judgments against discrimination.

Mr Ramlogan cited **Re Antonia Scrivanich and Public Service Board Administrative Appeals Tribunal No.S. 83/96**, and submitted that there is a clear public interest in ensuring that promotions are made fairly, and that the only way that the Applicant could challenge the PSC's refusal to promote him was by the disclosure of the minutes.

Mr Ramlogan cautioned against equating an application under the FOI Act with an application for discovery at common law. An application under the FOI Act must be looked at through purposive lens. The question has to be asked what would be in the interests of transparency and accountability.

With respect to the unavailability of results of the screening interview/assessment conducted by Symcom Systems Management on behalf of the PSC in 1997, Mr Ramlogan submitted that the importance of same to the Applicant was that the Applicant wanted to show that he came first in that exercise.

B) Respondent's Arguments

Mr. Martineau in his skeleton arguments submitted that the minutes are exempt under s.27 of the FOI Act, as they are a record of consultation and deliberation that has taken place between officers of the PSC to assist in their decision-making process. He further submitted that the public interest is against disclosure of such minutes as being confidential and that disclosure would inhibit frankness and candour in future discussions, thereby leading to confusion and unnecessary debate. He classified the deliberations as being between high office holders on sensitive issues and referred the court to the following authorities:

(i) **Tunchon v COP** (2000) WL 124330; [2000] NSWADT 73.

(ii) **Mc Intosh v DNRE** (2000) VCAT 2503;

(iii) **Toomer and Department of Agriculture** (2003) AATA 1301;

(iv) **Perton v Department of Education** (2004) VCAT 1143

In his oral address, Mr. Martineau expanded on his skeleton arguments. Mr. Martineau emphasized that it was important to bear in mind that not only are we dealing with the minutes of one of the independent commissions (PSC) established under the Constitution, but that we are dealing with the minutes of PSC in the context of officers in the very highest echelons of the public service, namely, Permanent Secretaries and Deputy Permanent Secretaries.

Mr. Martineau also went on to highlight that the information being sought was not confined to the Applicant alone, but also included information relating to other persons who were appointed in October 2005.

Mr. Martineau referred to **Conway v Rimmer (1968) A.C. 910** and the reference to "reasonably high level personnel." In the instant case we are dealing with the highest level. Even if the Court were to say that **Conway v Rimmer** decided 38 years ago is not as weighty now, the reasonably high level personnel is still a factor.

Mr. Martineau went on to argue that even though **Conway v Rimmer** talked about the frankness and candour argument, there is the other public interest factor, that is, when you are dealing with high level personnel, public interest dictates that you can't have this kind of disclosure if it would be inimical to the proper functioning of the public service.

Mr. Martineau submitted that one is dealing with the highest level of personnel and that they comprise a small group. Because of their constitutional position and their high level, a Court must proceed cautiously as nothing should be done that would cause the public to lose confidence in the public service.

Mr. Martineau cautioned against looking at minutes as a class, and saying because they are minutes, they are exempt.

In determining what comprises the public interest, Mr. Martineau invited the Court to consider to some extent what was said by others, bearing in mind the context of our own legislation, our own society and the shortcomings thereof, our structure, our law, what Parliament has done from time to time, the mores of our society. Mr. Martineau submitted that the right to know can be a relevant public interest factor.

Mr. Martineau submitted that it was not fair, as Mr. Ramlogan contended, that there was no evidence before the court. The matters raised in his address are matters of law, or evidence flowing from law.

3. INTRODUCTION TO FREEDOM OF INFORMATION LEGISLATION

As far back as 1946, the United Nations General Assembly stated that "Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated." Since then there has been an emerging global trend to promote **a culture of openness, transparency, accountability and wider access to information.** In some countries, such as South Africa (see section 36 of the South African Constitution), the right to access information that is held by another person and is required for the protection of his rights has become enshrined in the written constitution. The Caribbean Human Rights Treaty 2000 also has the right to access to information as a human right.

At the proceedings of **the seminars on "e-Governance and Democracy in the Millennium: Challenges and Opportunities"** held in Chennai, India on December 11-12, 2000, **Ventcat Iyer** in an informative address "***Freedom of Information: Principles for Legislation,"*** considered the right to freedom of information as being rooted in the concepts of **openness**, **transparency** and **accountability** and was a necessary adjunct to **participatory democracy** the world over. He said:

> "The right to freedom of information (FOI) is being increasingly accepted as a necessary adjunct to **participatory democracy** the world over. Currently, it is estimated that as many as 40 countries provide a right of access to state-held information either through discrete legislation or Codes of Practice on the subject.
>
> The rationale for this right is rooted simply in the concept of **open and transparent government**. Freedom of information has been seen as capable of advancing a number of desirable objectives in any society. In the first place, it helps to make the government more accountable to the people being governed. Secondly, by facilitating the acquisition of knowledge, it encourages self-fulfilment. Thirdly, it acts as a weapon in

> the fight against corruption and abuse of power by State functionaries. Fourthly it contributes to improving the quality of official decision-making. Fifthly it enhances the participatory nature of democracy. Sixthly, it goes some way in readdressing the inherent balance in power between the citizen and the State, and strengthens the hand of the individual in his dealings with government. It needs to be stated, however, that freedom of information is not by any means an unmixed blessing, much less a panacea for all the ills of modern democracy. Indeed an ill-drafted 'right to know' statute, or a maladroit use of that concept, can often result in impairing, rather than improving, the quality of government. As with all such mechanisms, the key to success lies as much in the sagacity with which a FOI regime is worked in practice as in the regime's theoretical elegance."[**Emphasis added.**]

The Trinidad and Tobago FOI Act is a novel piece of legislation that purports to lift the veil of secrecy which had been ingrained in the country's public service and other institutions in the country. It is but one of several pieces of public interest legislation enacted to ensure that in our quest to become a developed nation, our citizens could participate not only to the fullest extent possible, but also with a high degree of confidence, in the democratic process. Indeed an important justification for FOI legislation is that a well-functioning democracy requires an informed electorate and properly informed political debate.

This assumes greater significance in the light of what is happening around us both locally and globally, where more and more governments are able to utilize significant State resources, resources which in fact belong to the people, to influence and shape public opinion about their governance. Countervailing public interest considerations are therefore required to strike an appropriate balance.

At the Second Reading of the FOI Bill on April 30, 1999, the then Attorney General of Trinidad and Tobago, Mr. Ramesh Lawrence Maharaj, stated:

> "The rationale for this kind of legislation has been to make government more accountable by making it more open to public scrutiny. It is also to improve the quality of decision-making by Government, to enable groups and individuals to be kept informed of the functioning of the decision-making process as it affects them, and to know the kinds of criteria that will be applied by government agencies in making those decisions, to enable individuals, except in very limited and exceptional circumstances, to have access to information about them held on Government files so that they may know the basis on which decisions that can fundamentally affect their lives are made and, have the opportunity of correcting information that is incorrect or misleading. Also, it is to increase the level of public participation in the process of policy-making and the Government……"

In Sheedy v The Information Commissioner et al [2005] IESC 35, the Irish Supreme Court commented on the enactment of similar legislation. Mr. Justice Fennelly's remarks apply with equal force to our jurisdiction:

> "The passing of the Freedom of Information Act constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers. The principle of free access to publicly held information is part of a worldwide trend. The general assumption is that it originated in the Scandinavian countries. The Treaty of Amsterdam adopted a new Article 255 of the EC Treaty providing that every citizen of the European Union should have

access to the documents of the European Parliament, Council and Commission."

A) GENERAL

Since the sole object of statutory interpretation is to determine the legislative intention, it may be of assistance to look at the legislative framework of the FOI Act. In a departure from the norm, the FOI Act has a detailed object clause **(section 3)**, which expressly declares the legislative intention of the Act.

The declared object of the FOI Act is to extend the right of members of the public to access to information in the possession of public authorities by (a) inter alia, making available to the public information about the operations of public authorities; and (b) creating 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. **[See sections 3 (1) and 11.]** The legislation seems designed to strike a proper balance between competing interests in secrecy and openness subject only to the limitations imposed by the Act. [**Re Eccleston v Department of Family Services and Aboriginal and Islander Affairs (1995) 1 QAR 60 para. 40**] The conferral of a legal right to information, the most important provision in the FOI Act, strikes this balance between extending people's access to official information and preserving confidentially where disclosure would be contrary to the public service.

Section 3 (2) then provides the Court with guidance in construing the statute by providing that the provisions of the Act shall be interpreted so as to further the object set out in subsection (1), and any discretion conferred by the 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. Clearly therefore the FO1 Act must be construed in a way that promotes the policy and object of the Act. That would ensure that the Act is construed in such a manner as "to further rather than hinder free access to information" in the

possession of public authorities: **Victoria Public Service Board v. Wright** (1986) 160 CLR 145 at 153.

In Part III of the Act headed **"RIGHT OF ACCESS TO INFORMATION,"** Section 11 creates the substantive right of access by providing that 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. Generally therefore, the citizens of the Republic of Trinidad and Tobago can be said to have a legally enforceable right to access government-held information. It should also be noted here that an applicant need not provide any reasons for seeking access.

Section 11(2) expressly authorizes a public authority to grant access to documents or information to which the applicant would not otherwise be entitled.

In that regard, after the creation of the substantive right in s.11 (1), s.11 (2) sets out, inter alia, this **discretionary disclosure** in the following manner:

> 11.2 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."

B) EXEMPTIONS

Part 1V of the FOI Act categorizes exempt documents. Some categories enjoy an exemption without the imposition of a public interest test, whilst others enjoy a qualified exemption subject to a public interest test. However all categories of exempt documents seem designed to protect essential public interests or other private and business affairs of persons in respect of whom information is collected and held by public authorities.

These exempt documents include:

a. Cabinet documents less than 10 yeas old (s.24);
b. Defence and security documents (s.25);
c. International relations documents (s.26);
d. Internal working documents (s.27);
e. Law enforcement documents (s.28);
f. Documents subject to legal professional privilege (s.29);
g. Documents affecting personal privacy (s.30);
h. Documents relating to Trade secrets (s.31);
i. Documents containing material obtained in confidence (s.32);
j. Documents the premature disclosure of which would be contrary to the public interest by reason of the substantial adverse effect on the country's economy, and certain other documents affecting commercial or financial interests of the public authority (s.33);
k. Documents to which secrecy provisions apply (s.34).

C) ONUS OF PROOF

The FOI Act is silent on the question of the onus of proof. However it is trite law that a party who is relying on an exemption bears the burden of proof of establishing same. In ***Nimmo v Alexander Couran and Sons Ltd.*** [1968] A.C. 107 at 130 Lord Wilberforce stated:

> "the orthodox principle (common to both the criminal and the civil law) that exceptions etc., are to be set up by those who rely on them."

Having regard to the statutory scheme established by the FOI Act, with its declared object of establishing a right to access to information in the possession of public authorities and with Parliament's legislative mandate of construction in a manner that promotes access to same, it seems to me that exceptions to that right of access must be

construed and applied strictly: ***Hautala v Council of the European Union*** [2002] 1 W.L.R. 1930; [2001] ECR I – 9565.

In ***Hautala v Council of the European Union*** the Applicant, a member of the European Parliament, was refused access to a report on criteria for conventional arms exports drawn up by a working committee of the European Council's Political Committee. The European Court of Justice held that on an application for access, the Council was obliged to consider whether partial access to the information should be granted. The court also had occasion to construe provisions in the council's Code of Conduct which included, inter alia, the following general principle, namely: "The public will have the widest possible access to documents held by the Committee and the Council."
In the said Code, access to Council documents could be refused where its disclosure would undermine the protection of the public interest. The Court was of the view that where a general principle was established and exceptions to that general principle were then laid down, the exceptions should be construed and applied strictly. At paras. 24 - 26 the Court stated:

> "**24**. Next, as the Court of First instance observed in paragraph 82 of the contested judgment, at p.2514, the Court of Justice stressed in paragraph 35 of its judgment in **Kingdom of the Netherlands v Council of the European Union** (Case C-58/94) [1996] ECR I-2169, 2197, the importance of the public's right of access to documents held by public authorities and noted that Declaration No. 17 links that right with the democratic nature of the institutions.
>
> **25**. The aim pursued by Division 93/731, as well as being to ensure the internal operation of the Council in conformity with the interests of good administration (***Netherlands v Council***, paragraph 37) is to provide the public with the widest possible access to documents held by the Council, so that any exception to that right of access must be interpreted and applied strictly: see to that effect, with reference to commission Decision 94/90/ ESC, EC, Euratom of 8 February 1994 on public access to

Commission documents (OJ 1994 L46, p.58), **Kingdom of the *Netherlands v Commission of the European Communities*** (Joined Cases C-174 and 189/98P) [2000] ECR I-1, 64, para. 27.

26.The interpretation put forward by the Council and the Spanish Government would have the effect of frustrating, without the slightest justification, the public's right of access to the items of information contained in a document which are not covered by one of the exceptions listed in article 4 (1) of Decision 93/731. The effectiveness of that right would thereby be substantially reduced."

In **Tunchon v Commissioner of Police [2000] NSWADT 73** at para. 18, it was stated:

> "The general tendency of the FOI Act to promote openness is given effect by recognizing that disclosure will follow where a positive satisfaction is reached that secrecy of the document is in the public interest, and that the agency has the onus to lead evidence persuading me to this conclusion."

The author, **Philip Coppel, Information Rights (2004)** at pages 375 and 376 examined the Canadian and New Zealand jurisdictions on this issue:

> "In Canada, the view taken is that since the basic principle of the statute is to codify the right of public access to government information two things follow: first, that such public access ought not to be frustrated by the Courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; secondly, the burden of persuasion must rest upon the party resisting disclosure whether it be a private corporation, citizen or the Government: ***Maislin Industries Ltd v Minister for Industry, Trade and Commerce***
> [1984] 1 F.C. 939; ***Rubin v Canada (Canada Mortgage and Housing Corporation)*** [1989] 1 F.C. 265, CA ("the general rule is disclosure, the

exception is exemption and the onus of proving the entitlement to the benefit of the exception rests upon those who claim it.")

In the analogous regime in New Zealand, the courts have held that the ombudsman, to whom an appeal against an agency's decision lies, has no pre-determined starting point and that the agency withholding the information is under no obligation to establish affirmatively each element of the exemption.
Nevertheless, despite avoiding use of terms such as "onus," the courts there have held that the withholding agency bears an obligation:

> 'to justify its refusal to disclose…… with sufficient particularity for the ombudsman to make his or her decision and recommendation.'"

D) PUBLIC INTEREST OVERRIDE

Embedded in Part 1V the "Exempt Documents" provisions, is section 35, which is the last section in Part 1V. It is a most extraordinary provision, an overriding provision, mandating the granting of access to an exempt document where there is reasonable evidence that, broadly speaking, significant prejudice has or is likely to have occurred, or in the circumstances [referring to the circumstances set out in s.35 (a) (b) (c)(d)] 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. Section 35 provides:

"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) unauthorized 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."

The public interest override was not an inadvertent inclusion, even though it might have been more appropriate to limit the exercise of the powers to the Ombudsman or a Court of law. But section 35 contains no such limitation. And, as I indicated, its inclusion was deliberate. In the FOI Bill's Second Reading in the House of Representatives, the then Attorney-General, after referring to section 35, stated:

"[We] have gone further than some countries have gone in relation to exempt information. We have gone that route because we believe that you can have a blockage in that there can be a situation where, because the information is strictly exempt, the public authority may not want to disclose it. And, therefore, we want to make it quite clear to the public authority who would have to exercise the principles of law contained in the Bill, and even though it falls under an exempt category, where there is reasonable evidence to show there is an abuse of authority, or neglect in the performance of official duty, or injustice to an individual, or danger to the health or safety of an individual or the public, or unauthorized use of public funds, that the public authority can disclose the information …… the public authority has a duty to address its mind to that and decide whether to disclose it or not."

It would therefore seem that pursuant to s.35, a public authority has an additional statutory function to perform. Where a public authority has come to the conclusion that a document is an exempt document, the public authority is given a public interest override

power to review its own decision by taking into consideration the matters set out in section 35.

Moreover, Act No. 92 of 2000 amended section 35. Section 35 originally required the provisions to be read conjunctively by providing that "[N] otwithstanding any law to the contrary, a public authority shall give access to an exempt document where there is reasonable evidence that significant etc. has or is likely to have occurred **and** 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.]

By the amendment the provisions must be considered disjunctively by providing"……. has or is likely to have occurred **or** in the circumstances giving access to the document is justified in the public interest….." [Emphasis added.] Once again the Attorney General is on record at the second reading of the Bill to amend the legislation as remarking that the amendment was intended to give greater flexibility to the Act.

In my view the exercise of such a power of review, 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 or is 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. In that regard s.38A of the FOI Act provides for a review by the Ombudsman of the refusal of a public authority to grant access to an official document. Section 38 A provides:

> "38A. (1) A person aggrieved by the refusal of a public authority to grant access to an official document, may, within twenty-one days of receiving notice of the refusal under section 23 (1), complain in writing to the Ombudsman and the Ombudsman shall, after examining the document if it exists, make such

recommendations with respect to the granting of access to the document as he thinks fit within 30 days or as soon as practicable thereof.

(2) In recommendations under subsection (1), the Ombudsman-

(a) is not required to include any matter that is of such a nature that its inclusion in a document of a public authority would cause that document to be an exempt document;

(b) may state the recommendations in terms which neither confirm or deny the existence of any document, if the recommendations relate to a request for access to a document which is an exempt document under section 24, 25 or 28 or which, if it existed, would be an exempt document under section 24, 25 or 28.

(3) A public authority is required to consider the recommendations of the Ombudsman and, to such extent as it thinks fit, exercise its discretion in giving effect to the recommendations."

E) REVIEW MECHANISMS

It would seem, broadly speaking, and subject to what is otherwise expressly stated, that there is a process of internal review by the public authority itself. Even if a public authority considers the document to be exempt, it retains discretion under s.11 whether to disclose. Where a public authority has come to the conclusion that a document is exempt, it is vested with a public interest override power to review its own decision by the application of the section 35 criteria. Thereafter there is a process of external review. A person aggrieved may then complain to the Ombudsman under s.38 A. If the Ombudsman recommends disclosure then the public authority considers the recommendation and, to such extent as it thinks fit, exercise its discretion in giving effect to the recommendations.

The power of the Ombudsman to examine the document, if it exists, **and to make such recommendations with respect to the granting of access to the documents as he thinks fit**, would clearly include the power to review the decision of a public authority on its merits. However, the Ombudsman does not have the power to compel disclosure. Pursuant to section 38A (3), a public authority is required to consider the recommendations of the Ombudsman and, **to such extent as it thinks fit**, exercise its discretion in giving effect to the recommendations. However it may be that if in the exercise of its discretion under s38A (3) a public authority acts unreasonably in the ***Wednesbury*** sense, it may open itself up to challenge in judicial review proceedings pursuant to s.39 of the FOI Act. Pursuant to section 39 a person aggrieved by a decision of a public authority may apply to the High Court for judicial review of the decision.

It should also be noted that pursuant to s.23 (1) (d), Parliament seems to have contemplated the intervention of the Ombudsman where the decision **is to the effect** that the documents does not exist or cannot, after a thorough and diligent search, be located. The Ombudsman would be able to make such enquiries as he considers appropriate in determining whether the document does not exist or cannot, after a thorough and diligent search, be located.

In that regard it may be more appropriate to have recourse to the Ombudsman before, making an application for judicial review pursuant to s.23 (1) (d).

F) INSPECTION

In an appropriate case under the FO1 Act, it would be necessary for a Court to inspect the documents to determine whether the decision to exempt same is lawful. This accords with the procedure adopted at common law. In **Science Research Council v Nasse** [1979] 3 All E.R. 673 [H.L.] the House of Lords held that the ultimate test for ordering discovery was whether discovery was necessary

for disposing fairly of the proceedings and, in order to decide whether it is necessary, a tribunal should inspect the documents.

Moreover it accords with the power granted to the Ombudsman on review under section 38A of the Act to examine the document if it exists and make such recommendations with respect to the granting of access to the document as he thinks fit. If the Ombudsman has such a power, then a fortiori, a court may, for the purpose of making a determination under the Act, examine the documents in question.

In the instant case, I was of the view that in all the circumstances of the case this was an appropriate case for inspection by the Court of the minutes.

4. ANALYSIS OF THE LAW

Since there is little case law learning from our jurisdiction on the Freedom of Information legislation, I have sought in my judgment to make some general pronouncements while analysing the Act, with the assistance of cases from other Commonwealth jurisdictions that have similar legislation. As indicated earlier, there are only three items in dispute:

(i) the results of the screening interview/assessment conducted by Symcom Systems Management on behalf of the Public Service Commission in 1997 for the filling of the Office of Deputy Permanent Secretary;

(ii) the names of all public officers whose names were retained for future reference arising from the exercise conducted by Symcom Systems Management.

(iii) the minutes of the meetings of the Public Service Commission at which the issue(s) of appointment/promotion to the office of Deputy Permanent Secretary and/or Permanent Secretary were

discussed/determined relative to the appointments made in October 2005.

With respect to the first two items, the Public Service Commission is contending that searches continue to be conducted for same, but at this point in time they cannot be located. With respect to the third item, the Public Service Commission is contending that the minutes of the Public Service Commission are internal working documents and are therefore exempt under section 27 of the FOI Act.

A) <u>THE MINUTES</u>

It would be helpful to set out the material parts of section 27. The marginal note compendiously refers to the documents referred to therein as internal working documents:

> "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.
>
> …….
>
> (3) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of

this section, **the notice under section 23 shall state the public interest considerations on which the decision is based**.

(4) Sub-section (1) shall cease to apply to a document brought into existence on or after the commencement of this Act when a period of ten (10) years has elapsed since the last day of the year in which the document came into existence." **[Emphasis Added.]**

As is immediately apparent, the requirements of section 27 (1) are twofold, so that a document falling within the definition of s-27 (1) (a) must also be shown to be such that its disclosure would be contrary to the public interest: s.27 (1) (b).

The definition of "deliberative processes involved in the functions of a public authority" was considered by the Administrative Appeals Tribunal in ***Re Waterford (No. 2)*** [1984 1 AAR 1.

The Adelaide provisions s.36 (1) (a) and (b) are on all fours with our section 27 (1) (a) and (b). The Tribunal stated at pages 27 and 28:

"**58** As a matter of ordinary English the expression "deliberative processes" appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. 'Deliberation' means 'The action of deliberating: careful consideration with a view to decision' (see **The shorter Oxford English Dictionary**). The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or consideration that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example upon the wisdom and expediency of a proposal, a particular

decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s-36 (1) (a) come into play.

59. It by no means follows, therefore, that every document on a departmental file will fall into this category. Section 36 (5) provides that the section does not apply to a document by reason only of purely factual material contained in the document (see, in this regard, the Full Court decision in **Harris** [50 ALR 551.] See also s.36 (6) relating to reports and the like. Furthermore, however imprecise the dividing line may first appear to be in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with purely procedural or administrative processes involved in the functions of an agency. A document which, for example, discloses no more than a step in the procedures by which an agency handles a request under the FO1 Act is not a document to which s.36 (1) (a) applies. …….

61 In order to test the application of s.36 (1) (a) to particular documents, it is helpful, in our view, to endeavour what are the 'deliberative processes' involved in the functions of the particular agency or the Minister or the Government of the Commonwealth to which the requested documents are said to relate. In the present case, Mr. Roberts identified the 'deliberative processes' involved in the functions of Treasury as the ongoing deliberative processes involved in dealing with Mr. Waterford's request for access. This submission was not challenged by Mr. Waterford and in the circumstances, given the very limited argument on the point, we think that we should accept it. Accordingly, in the present case, **any document which would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that took place, in the course of or for the purposes**

of those deliberative processes is within the ambit of s.36 (1) (a)." **[Emphasis Added.]**

In the Irish case of **Eithne Fitzgerald and the Department of the Taoiseach**, Case 98127, the Information Commissioner considered whether the Background Paper was part of the deliberative processes of the Department of the Taoiseach and stated at page **7:**

> "Deliberative processes involved the consideration of various matters with a view to making a decision on a particular matter. In this case, the Department of the Taoiseach, as part of a Group comprising a number of other Departments and agencies, is considering various options in relation to tackling unemployment. While I do not accept the Department's contention that the interpretation of "public body" should be read as wider than the Department itself, I accept that the Background Paper contains matter relating to the deliberative process in that the Department considered the paper for the purpose of deciding on its input into policy and strategy in relation to unemployment. I also accept that this process is ongoing and that final decisions as a result of these deliberations have not yet been made."

The parties in this case do not dispute that the minutes are a record of consultation or deliberation that has taken place between officers, namely, members of the Public Service Commission to assist in their decision-making process, thereby satisfying the requirements of section 27 (1) (a). The really contentious issue is whether the disclosure of the said minutes would be contrary to the public interest under s.27 (1) (b).

B) THE PUBLIC INTEREST

Notions of the public interest constitute the basic rationale for the enactment of, as well as the unifying thread running through the provisions of, the FOI Act: **Re Eccleston and Department of Family Services** [1993] 1 QAR 60 at para.39. Public interest is not defined in the FO1 Act, but the concept must certainly be flexible enough to adapt to changing social conditions in our plural society. "The question of what constitutes the public interest is not a static or circumscribed notion." per Beezley J in **Australian Doctors' Fund Ltd v. Commonwealth of Australia** (1994) 49 FCR 478 at para. 34. Moreover the matters must be of legitimate concern to the public. In **TV3 Network Series v. B.S.A** (1995) 2 NZLR 720 at 733, a privacy case, Eichelbaum CJ stated:

> "It is necessary to draw attention to the distinction between matters properly within the public interest, in the sense of being of legitimate concern to the public, and those which are merely interesting to the public on a human level- between what is interesting to the public and what is in the public interest to be made known."

The public interest has been described as a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.

It is for the courts of Trinidad and Tobago to determine what is in our country's public interest. In coming to that conclusion, a court can consider what other judges in other jurisdictions have said, always bearing in mind the context of our own legislation, our own society and the shortcomings thereof, the mores of our society, and our laws and legal system. This list is not exhaustive. Further, in

considering the relevant facets of the public interest to determine whether, in all the circumstances, disclosure would be contrary to the public interest, the Court must remind itself that the Act has to be construed in a manner that would further, rather than hinder, free access to information in the possession of public authorities: **Victoria Public Service Board v. Wright** (1986) 160 CLR 145 at 153.

Against that background it might be helpful consider the test propounded at common law with respect to the disclosure of documents and the claim for public interest immunity, to determine whether there could be a harmonious development of the law. As Lord Diplock stated in **Erven Warnink Besloten Vennootschap v J Townend and Sons (Hull) Ltd.** [1979] A.C. 731 at 743:

> "Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course."

In **Sankey v. Whitlam** [1978] 142 C.L.R 1 the common law formulation of public interest immunity was said to be that "the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it." per Gibbs A.C.J. at page 38.

In **Conway v. Rimmer** [1968] A.C. 910 [H L], where Crown privilege was claimed for a document on the ground that it belonged to a class of documents the production of which would be contrary to the public interest, Lord Reid considered that the fundamental problem was one of balancing or reconciling the two kinds of public interest which may collide. Firstly the public interest that harm should not be done to the nation or the public service by the disclosure of certain documents. And secondly the public interest that the

administration of justice should not be frustrated by the withholding of documents which must be produced if justice is to be done. As Lord Reid stated at page 940:

> "It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by the disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases, it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the state in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interest involved. I do not believe that Lord Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of justice."

Given the multiplicity of circumstances in which a public authority can refuse disclosure on public interest grounds under the FOI Act, it seems to me that no useful purpose would be served in trying to formulate a public interest test of such precision as to be applicable to every circumstance. Everything must depend on nature of the information sought, the context of its creation, the nature and relative weight of the conflicting interests which are identifiable as relevant, and all the circumstances of the case. It would therefore be necessary to consider each case on a case-by-case basis. The fundamental question to be answered is whether in all the circumstances, disclosure would be contrary to the public interest.

For a public interest consideration to be relevant in the application of a public interest test, there must be a direct link between disclosure of the particular document/s in issue and the advancement of, or prejudice to, the public interest.

See:(i) **Macdonald and Jones**, **The Law of Freedom of Information**, paras. 2-07 et seq and 9-111 et seq;

(ii) **Philip Coppel**, **Information Rights**, para 15-001;

(iii) **Mckinnon v Department Treasury** [2006] 80 ALJR 1549; [2006] HCA 45, para. 19.

(iv) **Re Eccleston** [1993] 1 Q AR 60 para. 54.

(v) **Office of the Information Commissioner Queensland,** page 2 **.**

It may be appropriate at this juncture to examine the reasons advanced by the Defendant to justify non-disclosure of the minutes. Section 23 (1) of the FOI Act provides:

> "23. (1) Where in relation to a request for access to a document of a public authority, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred or that no such document exists, the public authority shall cause the applicant to be given notice in writing of the decision, and the notice shall:-
>
> (a) state the findings on any material question of fact, referring to the material on which those findings were based, and the reasons for the decision;
> (b) where the decision relates to a public authority, state the name and designation of the person giving the decision;
> (c) where the decision does not relate to a request for access to a document which if it existed, would be an exempt document but access is given to a document in accordance with section

16 (2), state that the document is a copy of a document from which exempt information has been detailed;

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

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

In the instant case the reasons advanced by the Respondent, in response to the Applicant's request, fall woefully short of what is contemplated by the FOI Act. For example the Respondent has failed to advise the Applicant of his right to, and the time within which the Applicant should, apply to the High Court for judicial review of the decision. Additionally the public authority has not stated the public interest considerations on which the decision was based: See section 27 (3). Nor has the public authority subjected the decision to the public interest override provision set out in section 35. Further, in response to the request for the minutes the Respondent merely recites:

> "The Minutes of the Public Service Commission are internal working documents and are exempt under Section 27 of the Act."

To merely parrot the material part of s.27 (1) as the basis for refusing disclosure without considering all the relevant circumstances would have the effect of converting the exemption into an absolute exemption. As **Philip Coppel, Information Rights**, at para. 15-005 remarked:

> "It will never be enough for a public authority simply to rely upon the public interest against disclosure that is inherent in the particular qualified exemption that applies to the information sought without a consideration of the particular circumstances relating to the

information. To allow this would effectively be to elevate a qualified exemption into an absolute exemption."

However s.27 does not confer an absolute exemption, but subjects disclosure to a test which is twofold. It is therefore incumbent on the Respondent to go on and set out the public interest considerations on which the decision to refuse disclosure was based: section 27 (3). That would ensure compliance with the FOI Act and at the same time have the salutary effect of indicating that mature consideration was brought to bear on the matter in issue. In those circumstances an applicant would be better positioned to make an informed judgment as to whether to pursue the matter further. See also **Vishnu Jugmohan v Teaching Service Commission** H.C.A. No. 1055 of 2004 at page 5, para. 2.2, per Kokaram J.

Notwithstanding that the Respondent relied on the bare fact that the minutes were internal working documents and therefore exempt under s.27 of the FO1 Act, I am of the view that, in the circumstances of this case, where one is dealing with the issue of promotion to one of the highest positions in the public service, and where there are constitutional provisions which provide some guidance as to the criteria to be used in appointments and promotions, and where I have examined the very documents, it is open to the courts to draw certain inferences. The Court can do so in exceptional cases, but it must clearly be understood that Parliament's intention was for reasons, including the public interest considerations on which the decision was based, to be provided: ss 23 and 27.

C) PUBLIC INTEREST FACTORS

The following public interest factors have been provided in order to assist the court, but they are in no way prescriptive or exhaustive. It is important that decision-makers consider the particular circumstances of the request and those factors which are specific to the facts at hand, as the relevant public interest factors will vary from case to case. It is important to remember that the categories of public interest are not closed.

i. Creation of a right of access.

In determining whether disclosure would be contrary to the public interest, s.27 (2) of the FOI Act must be applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the legislation. The Act is premised on the creation of a right of every person to obtain access to official documents, thereby ensuring that only 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 are protected from disclosure. (See Re **Eccleston** ibid. para. 75**; Mc Kinnon v Department of Treasury** [2006] 80 A LJR 1540; [2006] HCA45**; ss. 3 and 11 FOI Act**.) It is in that context that the Australian High court has sounded a note of caution when considering the weighing of the public interest considerations, frowning on the reference to "balancing". In **McKinnon v Department of Treasury** ibid. at para. 19 (the joint judgment of Gleeson CJ and Kirby J), it was stated:

> "We have avoided reference to "balancing". This is a concept that assumes prominence in a different context, in which courts are required to deal with claims of public interest immunity advanced in opposition to the production of documents, for example, under subpoena, in civil or criminal litigation. There, it is the public interest in the administration of justice, and considerations of fairness to litigants, that may need to be weighed against aspects of the public interest put at risk by disclosure of documents. The image of the scales of justice is pervasive in legal thinking, and it is natural to talk of taking account of competing considerations in those terms. Under the FOI Act, however, the matter of disclosure or non-disclosure is not approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on one side or the other. There is a "general right of access to information …… limited only by exceptions and exemptions necessary for the protection of essential public interests [and other matters not presently material]" (s.3

(1) (b)). That is the context in which a Minister makes a decision under s.36 (3), and in which such a decision is reviewed under s.58 (5). References to "balancing" create a danger of losing sight of that context. That is the context in which the question of reasonableness raised by s. 58 (5) is to be addressed. To lose sight of that would be to lose sight of the principal object of the FOI Act."

ii. Accountability and public participation.

Moreover and as I have indicated earlier, the right to freedom of information is being increasingly accepted as a necessary adjunct to participatory democracy and is rooted in the concepts of openness, transparency and accountability. There are, therefore, in a constitutional democracy such as ours, undeniable public interests in the accountability of government and in the public participation in government. With accountability, the disclosure of information about how government functions are conducted can serve to enhance the accountability of government agencies and individual officers for the performance of their official functions. With public participation, the disclosure of information about issues currently being considered by a government agency or Minister can lead to more informed debate about the issues.

In **Re Eccleston** ibid., the Queensland Information Commissioner at paras. 58-59 stated:

"**58**. The democratic rationale for the enactment of freedom of information legislation, the cornerstone of which is the conferral of a legally enforceable right to access government-held information, is encapsulated in the notions of accountability and public participation. With the object of assisting to secure a more healthy functioning of the democratic aspects of our system of government responsive to the public it serves, the FOI Act is intended to:

(a). enable interested members of he public to discover what the government has done and why something was done, so that the public can make more informed judgments of the performance of the government, and if need be bring the government to account through the democratic process, and

(b). enable interested members of the public to discover what the government proposes to do, and obtain relevant information which will assist the more effective exercise of the democratic right of any citizen to seek to participate in and influence the decision-making or policy-forming processes of government.

59 The public participation rationale for freedom of information legislation is inherently democratic in that it affords a systemic check and balance to any tendency of the small elite group which ultimately manages and controls the processes of high level government policy formulation and decision-making, to seek participation and input only from selected individuals or groups, who can thereby be accorded a privileged position of influence in government processes."

iii. Fair treatment in accordance with the law.

In the instant case the Applicant is seeking access to minutes at which the issue(s) of appointment/promotion to the office of Deputy Permanent Secretary and/or Permanent Secretary were discussed/determined relative to the appointments made by the Public Service Commission in October 2005.The Applicant had initially advanced his claim for the minutes on the basis that it was essential for the judicial review challenge he had mounted after being bypassed for promotion. However that is no longer tenable as that matter has been concluded before Gobin J. without the Applicant seeking any form of disclosure. But it is not essential for an applicant to establish any particular motive for information under the FOI Act.

At this juncture it may be useful to consider the powers given to the Public Service Commission by the framers of the Constitution. The Public Service Commission is one of the independent service commissions established under the Constitution with "power to appoint persons to hold or act in offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices ….": (**Section 121 of the Constitution of Trinidad and Tobago**). For the purposes of the FO1 Act the Public Service Commission is a public authority: s.4 (j).

Lord Diplock in **Thomas v A.G of Trinidad and Tobago** [1982] A.C. 113 at 124 emphasised the degree of autonomy enjoyed by these commissions and their provenance:

> "The whole purpose of Chapter V111 of the Constitution which bears the rubric "The Public Service" is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous commissions, although public authorities are excluded by section 105 (4) (c) from forming part of the service of the Crown. Subject to the approval of the Prime Minister they may delegate any of their powers to any of their members or to a person holding some public office (limited in the case of the Police Service Commission to an officer of the police force); but the right to delegate, though its exercise requires the approval of the Prime Minister, is theirs alone and any power to delegate is exercised under the control of the commission on its own behalf and not on behalf of the Crown or of any other person or authority."

The Public Service Commission Regulations provide inter alia, for appointments to be made by competition within the public service (reg.14), and for the principles of selection to be applied when considering the eligibility of officers for promotion (reg.18). Again these are constitutional procedural safeguards designed to ensure fairness in the selection process thereby resulting in the best candidate being chosen.

> "14 Whenever in the opinion of the Commission it is possible to do so and it is in the best interest of the particular service within the public service, appointments shall be made from within the particular service by competition, subject to any regulations limiting the number of appointments that may be made to any specified office in the particular service.
>
> 18. (1) In considering the eligibility of officers for promotion, the Commission shall take into account the seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such officers, and in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy.
>
> (2) The Commission, in considering the eligibility of officers under sub-regulation (1) for an appointment on promotion, shall attach greater weight to-
>
> (a) seniority, where promotion is to an office that involves work of a routine nature, or
>
> (b) merit and ability where promotion is to an office that involves work of progressively greater and higher responsibility and initiative than is required for an office specified in paragraph (a).
>
> (3) In the performance of its functions under sub-regulations (1) and (2) the Commission shall take into account as respects each officer-
>
> (a) his general fitness;

(b) the position of his name on the seniority list;

(c) any special qualifications;

(d) any special courses of training that he may have undergone (whether at the expense of Government or otherwise);

(e) the evaluation of his overall performance as reflected in annual staff reports by any Permanent Secretary, Head of Department or other senior officer under whom the officer worked during his service;

(f) any letters of commendation or special reports in respect of any special work done by the officer;

(g) the duties of which he has had knowledge;

(h) the duties of the office for which he is a candidate;

(i) any specific recommendation of the Permanent Secretary for filling the particular office;

(j) any previous employment of his in the public service, or otherwise;

(k) any special reports for which the Commission may call;

(l) his devotion to duty.

(4) In addition to the requirements prescribed in sub-regulation (1), (2) and (3), the Commission shall consider any specifications that may be required from time to time for appointments to the particular office." [Emphasis added.]

Generally a matter of public interest is one that concerns the interests of the community generally. However the courts have recognised that "the public interest necessarily comprehends an element of justice to the individual": per Mason CJ in **Attorney-General (NSW) v Quin** (1990) 64 ALJR 327. "Thus, there is a public interest in individuals receiving fair treatment in accordance with the law in their dealings with government, as this is an interest common to all members of the community. Similarly, the fact that individuals and corporations have, and are entitled to pursue, legitimate private rights and interests can be given recognition as a public interest consideration

worthy of protection depending on the circumstances of any particular case." **Re Eccleston ibid., para. 55.**

In an appropriate case therefore, an applicant may be granted access to documents that will enable him to assess whether or not he has been treated fairly and, if not, to pursue any available means of redress, including any available legal remedy: **Pemberton and the University of Queeenland** (1994) QICmr 32, para.180. In **Re Dyki and Commisioner of Taxation** (1990) 22 ALD 124 at p. 132, Deputy President Gerber of the Commonwealth AAT stated:

> 'There is an element of public interest involved in ensuring that promotions are not only made fairly, but seen to be made fairly."

iv. Need to know.

As I indicated earlier, it is not essential for an applicant to establish any particular motive. However, in an appropriate case, there may be a legitimate public interest in favour of an applicant having access to information which affects or concerns the applicant to such a degree as to give rise to a "need to know." This is a public interest consideration which is closely related to, but is potentially wider in scope, than the public interest in individuals receiving fair treatment in accordance with the law in their dealings with the government: **Re Pemberton ibid.para 190.** In that regard there may be a degree of overlap.

In **Re James and Others and Australian National University** (1984) 6 ALD 687 at 701, Deputy President Hall stated:

> "In [**Re Burns and Australian National University** (1984) 6 ALD 193] my colleague Deputy President Todd concluded that, for the purposes of the Freedom of Information Act, the concept of public interest should be seen as embodying public concern for the rights of an individual. Referring to a decision of Morling J,

sitting as the former Document Review Tribunal (**Re Peters and Department of Prime Minister and Cabinet (No. 2)** (1983) 5 ALN No. 218) Deputy President Todd said:

> "But what is important is that his Honour clearly considered that there was a public interest in a citizen having such access in an appropriate case, so that if the citizen's 'need to know' should in a particular case be large, the public interest in his being permitted to know would be commensurately enlarged." (at 197)
>
> I respectfully agree with Mr. Todd's conclusion… The fact that parliament has seen it fit to confer upon every person a legally enforceable right to obtain access to a document of an agency or an official document of a Minister, except where those documents are exempt documents, is to my mind a recognition by Parliament that there is a public interest in the rights of individuals to have access to documents - not only documents that may broadly relate to the affairs of government, **but also to documents that relate quite narrowly to the affairs of individual who made the request**." [Emphasis added.]

Similarly in **Re Pemberton** ibid., at paras. 171 and 172, the Information Commissioner stated:

> "**171**. A further consequence which tells against rigid adherence to what I have described above as the orthodox approach to the application of exemption provisions which turn on the prejudicial effects of disclosure, is that it would mean that a person who could demonstrate a particular interest or concern in respect of particular documents (perhaps amounting to a justifiable "need to know" that was more compelling than for other members of the public) would have no greater right to obtain access than anyone else. The need to take account of such circumstances probably

explains the development by tribunals of the principle outlined in paragraph 164 above [recognition of a public interest in a particular applicant having access to particular documents]. Such an approach is justifiable in conceptual terms, having regard to the objects of freedom of information legislation, and seems to me to be a necessary and justifiable response by courts and tribunals to the need for a degree of flexibility to do justice according to the circumstances of an individual applicant, in an appropriate case……..

172. A public interest in the disclosure of particular documents to a particular applicant, is capable of being a public interest consideration of determinative weight (depending on the relative weight of competing public interest considerations favouring non-disclosure). This means that if it is to overcome the weight of a public interest consideration favouring non-disclosure which is inherent in the satisfaction of a test for *prima facie* exemption (where the "orthodox approach" described above has been applied) there must be some implicit judgment that the public interest in the particular applicant obtaining access is strong enough to outweigh any potential prejudicial effects of any wider dissemination by the particular applicant of the documents in issue."

v. Effective and efficient conduct of government business.

a) Generally

Openness is fundamental to the political health and maturity of our democracy. The FOI Act marks a watershed in the relationship between the government and the people of Trinidad and Tobago, with Parliament conferring a legal right to information to the citizenry. However, Parliament has recognized that the very concept of a parliamentary democracy would require a degree of confidentiality for government in the conduct of its affairs. Thus there is a legitimate public interest in the effective and efficient conduct of government business. Within this broad categorisation, there may be many factors of varying degrees of importance depending on the contents of the document and the

relevant issues. The FOI Act has sought to achieve that balance between the competing interests of openness and secrecy by creating a legal right to information 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. ***(See sections 3 and 11).*** The FOI Act therefore embodies Parliament's assessment of the interests which require, or may require, protection to an extent justifying an exception to the general right of access to information. In that regard there are matters such as national security, defence and personal privacy where information has to be protected. Government itself needs some level of protection for its internal deliberations. (**See Part IV of the FOI Act**.)

In **Re Eccleston** ibid paras 40 - 42 general pronouncements were made on the Queensland FOI Act which contain provisions similar to ours:

> "**40**. Subsections 5 (2) and (3) of the FOI Act, however, also recognize that both secrecy and openness with respect to government held information are relative, not absolute values; and that the FOI Act is intended to strike a balance between competing interests in secrecy and openness for the sake of preventing prejudicial effects to essential public interests, or to the private or business affairs of members of the community, in respect of whom information is collected and held by government.
>
> **41**. Part 3 of the FOI Act embodies Parliament's assessment of the interests which require, or may require protection to an extent which justifies an exception to the general right of access to government-held information conferred by s.21 of the FOI Act. As explained at paragraph 17 above, some exemption provisions (s.36 and s.37) reflect a public interest considered to be worthy of protection by according secrecy to any documents falling within a defined class, irrespective of whether prejudicial effects will follow from the disclosure of the actual contents of particular documents in that class. Most of the exemption provisions, however, operate according to whether a judgment

can properly be made that disclosure of matter in a document will have certain prejudicial effects which Parliament has adjudged to be injurious to essential public interests or to the private or business affairs of members of the community in respect of whom information is collected and held by government. Some of these provisions, like s.45 (1) (a) and (b), are not further qualified by the possibility that countervailing public interest considerations may outweigh the prejudicial effects of disclosure stipulated in the first part of the exemption provision (such that on balance disclosure would be in the public interest). Most of the exemption provisions in Part 3, however, (as noted above in paragraph 19) do contain this public interest balancing test. Thus, where apparently legitimate interests conflict, as will frequently arise when competing interests of individuals, of government in the conduct of its affairs, and of the public generally (or a substantial segment thereof) are sought to be protected or furthered in disputes over access to information, it is the balance of public interest which determines the particular interest(s) which it will be appropriate to protect, and whether by openness or secrecy. It is inherent in the process of balancing competing interests that one or more interests, whether public, individual or government interests, will in fact suffer some prejudice, but that that prejudice will be justified in the overall public interest.

42. Because government is constitutionally obliged to act in the public interest, the protection which government can claim for its own interests cannot exceed that which is necessary to prevent possible injury to the public interest. The common law has long recognised, however, that important public interests are secured by the proper and effective conduct of government itself, so that there are likely to be many situations in which the interests of government can for practical purposes be equated with the public interest: for instance, the High Court of Australia has recently re-affirmed in **Commonwealth of Australia v Northernland Council and Another** (1993) 67 ALJR 405, that the interest of government in the maintenance of the secrecy

of deliberations within Cabinet constitutes a public interest that will be accorded protection by the courts in all but exceptional cases."

b) High-level correspondence.

The offices of Permanent Secretary and Deputy Permanent Secretary concern officers in the very highest echelons of the public service. The importance and sensitivity of their said offices, and the critical role they play in the administrative operations of any Ministry are such that the Prime Minister must be consulted and is given a power of veto under the Constitution over the appointment of a person to the office of Permanent Secretary or Deputy Permanent Secretary. Undoubtedly that is because the executive must have the highest confidence in these officers. Thus section 121 (3) and (4) of the Constitution of Trinidad and Tobago provides:

"**121**

(3) Before the Public Service Commission makes any appointment to which this subsection applies, it shall consult the Prime Minister.

(4) A person shall not be appointed to an office to which subsection (3) applies if the Prime Minister signifies to the Public Service Commission his objection to the appointment of that person to that office."

Mr. Martineau submitted that the minutes in issue concern deliberations between high office holders on sensitive issues, and that the public interest is against disclosure of such minutes as being confidential, and that disclosure of same would inhibit frankness and candour in future discussions, thereby leading to confusion and unnecessary debate.

The first point to be made is that Parliament has seen it fit to confer an absolute exemption on certain classes of documents, such as Cabinet documents less than 10 years old: s.24. However documents falling within the broad definition of high-level

documents on sensitive issues, have not been so categorised. It would therefore be necessary to consider carefully the characteristics of each document on a case-by-case basis to determine whether disclosure would be contrary to the public interest. Everything must therefore depend on the nature of the information sought, the context of its creation, the nature and relative weight of the conflicting interests which are identifiable as relevant, and all the circumstances of the case.

In **Re Rae and Department of Prime Minister and Cabinet** (1986) 12 ALD 589 at 603, Deputy President Todd made the following observations on high-level correspondence under similar provisions of the FOI Act.

> "I do not consider that because the documents are 'high-level' correspondence their disclosure is necessarily contrary to the public interest. It may be that high-level correspondence is more likely than lower-level material to have characteristics which make its disclosure contrary to the public interest. If so, it is those characteristics, and not the mere fact of it being high-level, which makes its disclosure contrary to the public interest. Once again this can readily be seen by reference to ss.3 and 11 (stating the object of the Act and giving the basic right of access) which treat all the documents of an agency and official documents of a Minister on an equal basis. I do not regard any of the cases cited by Mr. Gardiner as suggesting otherwise. In each case where the disclosure was considered to be contrary to the public interest, careful regard was had to the character of the document."

Similarly, in **Re Eccleston** ibid. at para.150, the point was made "that the fact of documents being "high-level" correspondence is irrelevant in itself as an indicator that disclosure of the documents may be contrary to the public interest. It is best an indicator to alert one to the possibility that these documents may require more careful scrutiny for factors that may point to tangible harm which would follow from disclosure of the actual contents of the documents (which factors, if

identified, may therefore have to be weighed in the public interest balancing process against other relevant factors)."

c) Candour and Frankness

In **Conway v Rimmer** ibid at page 993, Lord Upjohn subscribed to the view that certain classes of documents, for example, high level inter-departmental communications should be protected from disclosure, but frowned on the "candour and frankness" argument. It should be noted that these cases dealt with Crown privilege and public interest immunity, and not with FOI legislation.

> **"**Secondly the "class" cases. Here it is to be noted, and I think it is important, that the emphasis in Lord Simon's speech [in **Duncan v Cammell, Laird and Company Ltd**] changes, for the public interest is here identified with 'the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.' These were the words seized upon by the executive to make good their broad claims that I have already mentioned.
>
> No doubt there are many cases in which document by their very nature fall in a class which require protection such as, only by way of example, Cabinet papers, Foreign Office dispatches, the security of the State, **high level inter-departmental minutes and correspondence** and documents pertaining to the general administration of the naval, military and air force services. Nearly always such documents would be the subject of privilege by reason of their contents but by their "class" in any event they qualify for privilege. So too high-level inter-departmental communications, to take, only as an example upon establishment matters, the promotion of reasonably high level personnel in the service of the Crown. But no catalogue can reasonably be compiled. The reason for this privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high level

> communications, however innocent of prejudice to the state the actual contents of any particular document might be; that is obvious. But it has nothing whatever to do with candour or uninhibited freedom of expression. I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day. His worse fear might be libel and there he has the defence of qualified privilege like everyone else in every walk of professional, industrial and commercial life who every day has to express views on topics indistinguishable in substance from those of the servants of the Crown.**"** **[Emphasis added**.]

Courts have generally treated the "frankness and candour" argument with a certain degree of scepticism. In **Burmah Oil Co. Ltd v Bank of England** [1980] A.C. 1090 at 1133 Lord Keith poured scorn on the argument:

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

That may very well be the position in the United Kingdom where the perception is that high-level individuals ought to be mature enough to deal with all types of criticism,

constructive or otherwise. However in Trinidad and Tobago, I am of the view that the situation is not as ideal, and that some public servants involved in the formulation of government policy would be legitimately inhibited in expressing their views or giving advice were it apprehended that those views or that advice might be disclosed. That is not a condemnation of our public servants, but rather an appreciation of the realities of our society. In **Sankey v Whitlam** ibid., Gibbs ACJ at page 40 considered that the "frankness and candour" argument may in some circumstances be a factor to be taken into account:

> "One reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least, communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure. For instance, not all Crown servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned. However, this consideration does not justify the grant of a complete immunity from disclosure to documents of this kind."

It is also important to remember that the possibility of future publicity is also capable of acting as a deterrent against advice which is specious or expedient or otherwise inappropriate, especially where individuals who prepare such advice are increasingly operating in an environment in our society in which there are annual performance

appraisal reports, in which executive decisions are regularly subject to judicial scrutiny, and in which there is now in place a FOI Act facilitating and promoting the disclosure of information. This would benefit the public interest by ensuring that future reports contain only the honest opinions of those participating in the deliberative processes.

The "frankness and candour" argument may therefore be a relevant factor to be taken into consideration in determining whether disclosure would be contrary to the public interest, but it should, save in an exceptional case, be disregarded unless a very factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative processes of a like kind, and that tangible harm to the public interest will result from that inhibition.

In **Re Eccleston** ibid at paras. 132 to 135 Information Commissioner Albietz dealt with the "frankness and candour" argument, and expressed the view that even if there was some diminution in frankness and candour, the real issue was whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary is contrary to the public interest:

> "**132**. I consider that the approach which should be adopted in Queensland to claims ….. that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibited in future communications of a similar kind…. should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second **Fewster** case….: they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition.
>
> **133** I respectfully agree with the opinion expressed by Mason J. in **Sankey v. Whitlam** that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise

inappropriate. It could be argued in fact that the possibility of disclosure under the FOI Act is, in that respect, just as likely to favour the public interest.

134 Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.

135 I leave open the possibility that circumstances could occur in which it could be demonstrated by evidence that the public interest is likely to be injured by disclosure of deliberative process advice that would inhibit the candour and frankness of future communications of a like kind. An example of such a possibility is given at p.216 of the "Report on the Freedom of Information Bill 1978" by the Senate Standing Committee on Constitutional and Legal Affairs (1979). The example relates to a public servant who is responsible for advising the Minister in a particular area, and who needs to be acceptable to a number of parties who have competing interests -- preservation of confidentiality of the official's views may be the only way of preserving the relationship of frankness between the official and all parties. The remark is made that this consideration is particularly important in areas where Government exercises a regulatory function."

D) SEARCH FOR DOCUMENTS: REQUESTS 1 AND 2

The Claimant's application for information under the FOI Act is dated November 15, 2005. Some 4 days later, on November 19, 2005, the Claimant received a telephone call from Leslyn Ellis, a public officer employed as the Human Resource Adviser II in the Service Commission's Department, acknowledging receipt of the application and indicating that the information would be provided in due course. As it stands now, the evidence of the Public Service Commission is that the documents relating to requests 1 and 2 cannot be found, but that searches are continuing for same. Requests 1 and 2 deal with:

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

(2) The names of all public officers whose names were retained for future reference arising from the exercise by the said consultants in 1997.

Mr Ramlogan submitted that the documents are of importance in that they would show that the Applicant came first in that assessment exercise.

There was a minor issue as to whether or not the Applicant received the letter of December 21, 2005. I accept the Applicant's version, but hasten to add that there was no evidence that the Defendant's employees were trying to mislead the Applicant.

The first point to be noted is that the Applicant is seeking documents which are some nine (9) years old. Even so, regulation 7 of the Public Service Commission Regulations places an onus on the Director of Personnel Administration to ensure that minutes of all

meetings of the Commission are duly recorded and kept, and that the same be presented for confirmation by the Commission as soon as practicable.

> "7. (1) The Director shall ensure that Minutes of all meetings of the Commission and of all decisions arrived at under regulation 6, shall be duly recorded and kept and that the same be presented for confirmation by the Commission as soon as practicable at a subsequent meeting.

Section 42 (1) of the FOI Act imposes a similar duty on the Public Service Commission to maintain and preserve records and copies of all official documents, and makes the wilful destruction of or damage to same a criminal offence punishable on summary conviction to a fine and imprisonment.

> "42. (1) A public authority shall maintain and preserve records in relation to its functions and a copy of all official documents which are created by it or which may come at any time into its possession, custody or power.
>
> (2) A person who wilfully destroys or damages a record or document required to be maintained and preserved under subsection (1), commits an offence and is liable on summary conviction to a fine of five thousand dollars and imprisonment for six months.
>
> (3) A person who knowingly destroys or damages a record or document which is required to be maintained and preserved under subsection (1) while a request for access to the document or record is pending commits an offence and is liable on summary conviction to a fine of ten thousand dollars and imprisonment for two years."

Interestingly "official document" is defined in section 4, and includes a document that was created before the commencement of the FOI Act (FOI Act assented to on November 4, 1999), and a document **in the possession, custody or power** of a public authority in connection with its functions.

"4. In this Act --

.....

"official document" means 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;"

The evidence of the Public Service Commission in support of its contention that the documents cannot at present be located is contained in its letter of December 21, 2005, and simply asserts:

"With respect to requests 1 and 2 for the assessment conducted by Symcom Systems Management Consultants Ltd for the filling of the Office of Deputy Permanent Secretary, please be advised that searches continue to be conducted by the Service Commission's Department for the documents relevant to that Consultancy."

The Respondent has filed no affidavits as to what steps, if any, have been taken to locate the said documents. Assuming that the Respondent has misplaced the documents, it is possible that copies of the same may be in the possession of Symcom Systems Management Consultants Ltd., the consultants employed by the Respondent. The Public Service Commission would no doubt have the authority to requests copies of same from the consultants. The definition of "official document" ("a document is held by a public authority if it is in its possession, custody or power") is wide enough to include documents of such a nature in the possession of the consultants. In **DPP v Brooks** [1974] AC 862, Lord Diplock stated:

"In the ordinary use of the word “possession,” one has in one’s possession whatever is, to one’s knowledge, physically in one’s custody or under one’s physical control.”

In interpreting somewhat narrower provisions under the Australian Commonwealth FOI Act 1982 ("or power" not included), which defined "document of an agency" in section 4 (1) as " a document in the possession of an agency, or in the possession of the agency concerned, as the case requires, whether created in the agency or received in the agency," it was held in **Beesley v Australian Federal Police** [2001] WL 168417 FCA; [2001] FCA 836, that possession embraces actual or constructive possession, that is, **a right and power to deal with the document in question** and that it was not confined to actual or physical possession.

(i) A thorough and diligent search

Section 23 (1) of the FOI Act provides that where in relation to a request for access to a document of a public authority, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request, or that provision of access to the document be deferred, or that no such document exists, the public authority shall, inter alia, cause the applicant to be given notice in writing of the decision, and the notice shall -

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

.....

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

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

Parliament in its wisdom has prescribed the type of search ("a thorough and diligent search") that is required to be carried out by a public authority before arriving at its decision that documents cannot be located. In that regard section 23 (1) (e) provides that "where the decision is to the effect that the document does not exist or cannot, after a thorough and diligent search, be located inform the applicant of his right to complain to the Ombudsman." As noted earlier, I have absolutely no evidence before me as to the type of search conducted by the Public Service Commission pursuant to the Applicant's request some 16 months earlier (November 25, 2005). Moreover the Public Service Commission has failed to comply with the requirements of section 23 of the FOI Act, by not informing the Applicant of his right to complain to the Ombudsman. It would seem, in the absence of an Information Commissioner, that the legislature has by virtue of section 38A clothed the Ombudsman with the authority to review the decision of the public authority on the merits, and "make such recommendations with respect to the granting of access to the document as he thinks fit within 30 days or as soon as practicable thereof." By not informing the Applicant of his right to complain to the Ombudsman, it is arguable that the High Court in those circumstances might have the implicit right as well to review the decision of the public authority on the merits, since to hold otherwise might result in a public authority being immune from external review, or might allow the objects of the FOI Act to be frustrated, for example by deliberate inactivity. (See **Re Anti-Fluoridation Association of Victoria** V 84/281 FOI.). However it seems to me that since Parliament contemplated the intervention of the Ombudsman **where the decision is to the effect** that the document could not be located, it would be more appropriate to remit the matter to the Ombudsman, together with a copy of this judgment, for the Ombudsman to consider the matter according to law. The Ombudsman would be best placed to make such investigations as considered appropriate in determining whether the documents cannot, after a thorough and diligent search, be

located. (See for example, **Re Hezky and Health Department of Victoria** (1987) 1 VAR 387.)

Having regard to the specialised nature of the functions require to be performed under the FOI Act and the narrow time-limits within which to perform same, it may be necessary, at some point in time, for consideration to be given to the appointment of an Information Commissioner.

5. CONCLUSION

The minutes sought by the Applicant were the minutes of the meetings of the Public Service Commission at which the issue (s) of appointment/promotion to the office of Deputy Permanent Secretary and/or Permanent Secretary were discussed/determined relative to the appointments made in October 2005. These minutes concern matters in the nature of consultation or deliberation that has taken place between officers of the Public Service Commission in the course of, or for the purpose of, the deliberative processes involved in the functions of the Public Service Commission. That much has been conceded by both sides.

I have examined the contents of the minutes in issue and therefore have the added advantage of being able to draw certain inferences, having regard to the submissions of Attorneys, the contents of the minutes and the relevant legislation, including the legislation governing the Public Service Commission.

The Public Service Commission is one of the independent service commissions established under the Constitution with "power to appoint persons to hold or act in offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices…." (Chapter 9, **section 121** of the Constitution.) The clear purpose of Chapter 9 of the Constitution was to insulate

members of the civil service, the teaching service and the public service from political influence.

In that regard the Public Service Commission comprises a chairman, a Deputy Chairman and not less than two, nor more than four members: s.120 (1) of the Constitution. However, in an effort to escape as far as possible the clutches of politicians, the members of the Public Service Commission are appointed by the President, after consultation with the Prime Minister and the leader of the Opposition: s.120 (2) ibid.

The Public Service Commission Regulations provide, inter alia, for appointments to be made by competition within the public service (reg.14), and for the principles of selection to be applied when considering the eligibility of officers for promotion (reg.18) These are constitutional procedural safeguards designed to ensure fairness in the selection process and to ensure that the best candidate is chosen. Indeed pursuant to reg.18 (2), the Public Service Commission, in considering the eligibility of officers under sub-regulation (1) for an appointment on promotion, has to attach greater weight to merit and ability where promotion is to an office of the type contemplated in the instant case. Moreover regulation 18 (4) stipulates that in addition to the requirements prescribed in sub-regulation (1), (2) and (3), the Public Service Commission has to "consider any specifications that may be required from time to time for appointments to the particular office." It would seem that Parliament considered the issue of appointment on promotion within the public service important enough to provide comprehensive guidelines as to the matters to be considered.

The offices of Permanent Secretary and Deputy Permanent Secretary concern officers in the very highest echelons of the public service. The importance and sensitivity of their said offices are such that the Prime Minister must be consulted, and is given a power of veto, under the Constitution over the appointment of a person to the office of Permanent Secretary or Deputy Permanent Secretary.

As I indicated earlier, it may be that high-level correspondence is more likely than lower-level material to have characteristics which make its disclosure contrary to the public interest. It would therefore be necessary for me to go on and examine the contents of the documents themselves to determine whether the public authority has established that there are factors that may point to specific and tangible harm which would follow from disclosure of the actual contents of the documents: **Re Eccleston** ibid., paras. 140,150.

I am of the view that in the instant case the Public Service Commission ought to be afforded a degree of confidentiality in its deliberative processes when it comes to determining whether such high-level public servants, the highest in fact, ought to be appointed/promoted. This is because this constitutionally-appointed body has been entrusted with the responsibility of appointment/promotion based on certain regulatory criteria and has, to a large degree, fulfilled its constitutional purpose by maintaining its independence. The importance and sensitivity of the offices in issue are such that the public service and the wider general public generally must have a degree of confidence in appointments being made at such high-level by the Public Service Commission, without necessarily knowing the intimate details. Were it otherwise, it is likely that, at the very least, high-level public servants in this case would become aware of particular confidential comments made by members of the Public Service Commission, by their fellow public servants of equal or almost equal rank, and by others who had been asked for their comments in the formulation of policy, namely, the criteria to be applied in the appointment/promotion of Permanent Secretaries and/or Deputy Permanent Secretaries. Moreover it is likely that the revelation of the contents would engender, at the very least, a certain amount of disappointment or bitterness such as to adversely affect the harmonious relationship among persons who can be regarded as the chief accounting officers of the public service. Taking all matters into consideration, it is my view that the Public Service Commission has established that disclosure of the minutes would cause specific and tangible harm of such a nature that it would be inimical to the proper functioning of the public service. This would have a substantial adverse effect on the effective and efficient conduct of government business and is of sufficient weight as to

lead me to conclude that the minutes in issue ought not to be disclosed as disclosure would be contrary to the public interest.

But the matter does not end there. Under section 16 (2) of the FOI Act, I have the discretion to order partial access to the minutes.

"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."

Some support for such an approach is to be found in **Hautala v Council for the European Union** [2002] WLR 1930, where it was held that in the case of a document which included some items of information whose disclosure would endanger one of the interests protected by article 4, but also others that were non-sensitive, a refusal to grant partial access, covering the information not coming within the article 4 exception, would be contrary to the principle of proportionality; that on an application of access the Council was therefore obliged to consider whether partial access to the information sought should be granted, and that accordingly, since in the instant case the Council had not made such an examination, the Court at First Instance had correctly annulled its decision.

On examining the minutes, it is clear that after the deliberative processes were over, the Public Service Commission arrived at the criteria to be applied or the policy to be adopted in the appointment/promotion of Permanent Secretaries and Deputy Permanent Secretaries. In coming to its the final decision, the Public Service Commission, as its advertisement clearly stated, made its selection "from candidates short-listed using the

Assessment Centre type methodology." In my view it is in the public interest where a constitutional framework was set out for appointment/promotions to be made, for the Applicant to have access to the criteria applied or the policy adopted by the Public Service Commission, thereby enabling the Applicant (and other candidates) to know whether the constitutional criteria or any part thereof were followed, or whether other criteria were applied when considering the suitability of candidates for appointment/promotion. That ought to reveal to the Applicant what impact, if any, the Assessment Centre exercise had on the selection process. This would further the public interest in accountability of the Public Service Commission for the proper discharge of its constitutional duties. Further I am of the view that the public interest in the Applicant's (and other candidates') right to know and fair treatment favour disclosure, so that the Applicant (and other candidates) would be able to satisfy themselves that the appointments/promotions have not proceeded on a fundamentally erroneous basis, or if they have, to pursue any available means of redress, including any legal remedy. (**See Re Pemberton** ibid. para.188; **Ainsworth and Criminal Justice Commission et al.** [1999] QICmr. paras. 138-144.) Additionally it would be beneficial to the public interest by fostering informed debate on the effects of government policy.

I think it is important for me to make the observation at this stage that on my examination of the minutes, and to the credit of the Public Service Commission, nothing but mature consideration as contemplated by the Constitution was brought to bear on the issues that were to be determined by the Public Service Commission.

For the foregoing reasons I make the following orders:

(1) With respect to the minutes, that the Defendant do provide to the Applicant within ten (10) days from the date hereof the criteria applied or the policy adopted in the appointment/promotion of Deputy Permanent Secretaries including what impact, if any, the Assessment Centre Exercise had on the selection process.

(2) With respect to requests 1 and 2, namely, the documents that cannot be found and where searches are continuing for same, that the matter be remitted to the Ombudsman, together with a copy of this judgment, for the Ombudsman to consider the matter according to law.

(3) That the Defendant do pay to the Applicant the costs of this application.

DATED this 2nd day of April, 2007.

……

PRAKASH MOOSAI

JUDGE

P.S.: On 2nd April, 2007, after hearing arguments from both sides on the issue of the quantum of costs, I assessed costs in the sum of Forty-five Thousand Dollars ($45,000.00).

……

PRAKASH MOOSAI

JUDGE