THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2007-03288

BETWEEN

DARREN BAPTISTE **Applicant**

AND

POLICE SERVICE COMMISSION **First Defendant**

AND

COMMISSIONER OF POLICE **Second Defendant**

Before the Honourable Justice P. Moosai

APPEARANCES:

Mr. Anand Ramlogan instructed by Ms. Cindy Bhagwandeen for the Applicant/Claimant

Mr. Russell Martineau SC leading Ms. Anoushka Ramsaran instructed by Ms. Lesley C. Gray for the Defendants

JUDGMENT

A: BACKGROUND

1. By letter dated 14th November, 2005 (D.B.1"), the Claimant was informed that he was omitted from the list of persons selected for promotion to the rank of Corporal and was invited to make representations to the Police Service Commission (the First Defendant) within 14 days.

2. By letter dated 5th December, 2005 ("D.B.1") the PSC acknowledged receipt of his representations. By further letter dated 17th May, 2006 ("D.B.1") the PSC further informed the Claimant that they had considered his representations and had requested the comments of the Commissioner of Police (the Second Defendant). They also notified him that since they were in the process of receiving the comments of the Second Defendant, they would consider his claim for promotion when next consideration was being given to recommendations for promotion to the rank of Corporal and that offices will not be filled until the First Defendant makes a final decision on his representations. By letter dated 7th June, 2006 ("D.B.1") the Claimant was informed that he had not achieved the score needed for promotion

3. By another letter dated 6th November, 2006 ("D.B.1"), further representations were submitted, this time on the Claimant's behalf from the Trinidad and Tobago Police Service Social and Welfare Association. These representations make a case for the Claimant to receive one (1) point under Academic Qualifications for either his training course at Roytec or his certificate in Bible and Theology studies thereby bring his total score to seventy-four (74) points which, in the opinion of the Welfare Association, would qualify the Claimant for promotion to the rank of Corporal.

4. The First Defendant responded to this letter on 16th May, 2007 saying that the Claimant still has not achieved the score needed for promotion.

5. The Claimant requested information under the Freedom of Information Act ("FOIA"), Chapter 22:02, as a precursor to determining whether he had been unfairly bypassed for promotion to the position of Police Corporal. The Claimant's request was made on June

4, 2007 via two FOIA request forms accompanied by covering letters dated June 5, 2007, all of which was sent to the First and Second-named Defendants by registered mail.

6. The Claimant requested access to:

   (i) Copies of any correspondence in connection with his claim for promotion to the rank of Police Corporal;

   (ii) Copies of academic qualifications, certificates and diplomas for Police Officers #14807 Junior Benjamin and #13468 Motilal Jury who, though junior to the Claimant, were successful in their respective applications for promotion;

   (iii) Copies of any letters of recommendation for promotion in respect of the two officers named in the foregoing paragraph.

7. By letters dated June 20 and June 22, 2007 the First Defendant acknowledged receipt of the application. However by an undated letter received by the Claimant on July 19, 2007, the First Defendant advised that the requests listed at (ii) and (iii) could not be entertained because to do so would involve the disclosure of personal information of other officers contrary to section 30(1) of the FOIA, and indicated that request (i) should be re-directed to the Second Defendant.

8. Currently, the request listed at (i) is no longer in issue because the Claimant has since enjoyed satisfaction of this particular request.

B. THE PRIMARY SUBMISSIONS OF THE CLAIMANT AND EVIDENCE IN SUPPORT THEREOF

9. By virtue of submissions filed on July 24, 2008 the Claimant claims an entitlement to full and complete copies of the requested information listed at (ii) and (iii) above. Further, the exemption invoked is neither relevant nor applicable because:

(A) Academic certification and letters of recommendations are not "personal information" within the meaning of section 30(1) of the FOIA.

The Claimant argues that the definition of "personal information" in the FOIA must be read in conjunction with the other sections of the Act in a purposive and narrow manner. Further, section 3(2) of the Act establishes a bias in favour of disclosure.

(B) Even if the requested information is "personal information" its disclosure in the circumstances would not be "unreasonable".

The foregoing can be appreciated when one notes that the Claimant scored a seventy-three while officers junior to him at the time were promoted to the rank of Corporal with a one point greater evaluation score. The Claimant asserts that, in these circumstances, disclosure will facilitate transparency and fairness, inspire public confidence in the fairness of the process and reduce suspicions, fears and perceptions of unfairness, favoritism and discrimination. On the other hand, non-disclosure would only fuel these very vices. The Claimant urges that the Court cannot give tacit support for the secretive and mysterious manner in which promotions in the public service are done.

(C) In any event, section 35 of the FOIA operates to override or "trump" the exemption invoked.

The Claimant seeks the particular information because he suspected that officers of inferior merit and ability may have been appointed as Police Corporals ahead of him and is therefore entitled to the said information to ascertain whether this is in fact so.

Moreover, there is no evidence to suggest that disclosure pursuant to section 35 would be contrary to the public interest or that there could be any damage that would have outweighed the benefit to be derived from disclosure. The Claimant asserts that the onus is on the Defendants in this regard.

C. THE PERTINENT SUBMISSIONS OF THE DEFENDANTS AND EVIDENCE IN SUPPORT THEREOF

10. By virtue of submissions filed on November 25, 2008, the Defendants assert that they denied the Claimant access to items (ii) and (iii) because they qualify as "personal information" under section 30 (1) of the Act and disclosure of same would be unreasonable.

Further, that reasonableness must be considered as if disclosure is to the world at large: section 11 of the Act gives the right of disclosure to "every person". So that the particular circumstances of the Claimant is not relevant. It cannot be reasonable to disclose the qualifications of and recommendations with respect to persons to the world at large because it would breach the private life constitutional rights of police officers Benjamin and Jury respectively.

Moreover, there is no reasonable evidence that significant injustice has or is likely to have occurred or that there is or is likely to be significant abuse of authority or neglect in the performance of official duty.

Additionally, the Claimant has not established that disclosure of information is in the public interest.

(The Claimant filed submission in response on December 17, 2008 which reinforced their earlier submissions.)

D. BROAD ISSUE

11. Whether the Claimant should be granted access to academic qualifications and letters of recommendation of the successful candidates?

SUB-ISSUES

(i) Whether the requested information constitutes "personal information" and is therefore exempt from disclosure under section 30(1) of the FOIA.

(ii) What is the meaning and effect of the term "personal information" in the context of the FOIA.

(iii) Whether it would be unreasonable to disclose the requested information.

(iv) Whether disclosure of the requested information is justified in the public interest pursuant to section 35 of the FOIA.

(v) Whether disclosure of the requested documents would result in a breach of privacy rights of the successful candidates.

(vi) Whether the Claimant should have employed the services of the Ombudsman owing to the fact that judicial review is a remedy of last resort.

E. LAW, REASONING & APPLICATION

(i) General

12. In ***Ashford Sankar v Public Service Commission***[1] I held that the FOIA must be construed in a way that promotes the policy and object of the Act. At pp 12-13 I stated:

> 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 the 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

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> preserving confidentiality where disclosure would be contrary to the public interest.
>
> 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 FOI 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.

13. Section 30 (1) of the FOIA states:

> A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information of any individual (including a deceased individual).

Interestingly, our section 30 (1) is strikingly similar to its Australian predecessor, in particular section 33 (1) of the Victorian FOIA in which only minor or immaterial differences can be observed. At section 33 (1) of the Victorian FOIA instead of the words "personal information" the phrase "personal affairs" is substituted. However, in relatively recent amendments to FOI legislation in Australia sightings of the term "personal information" can be made.

14. In the case of **Stewart and Department of Transport**[2] F.N. Albietz, the Information Commissioner for Queensland, Australia, advised on the approach to be taken when applying the foregoing section:

> The application of this provision calls for a two-step process: first, determine whether a document contains information relating to the personal affairs of any person; and if so, then determine whether disclosure of that information would be unreasonable.

[2] [1993]QICmr 6;[1993] 1 QAR 227 (9 December 1993)

I respectfully add that in answering the first question the logical staring point must be to determine the meaning and effect of the term "personal information" in the context of the relevant legislation. This is a precursor to a necessary juxtaposition of the meaning of the term alongside the features and characteristics of the information contained in any requested documents.

15. The current factual matrix reveals one broad issue for consideration, that is, whether the Claimant should be granted access to copies of:

(a) the academic qualifications, certificates and diplomas; and

(b) the letters of recommendation of the two successful candidates, namely Benjamin and Jury, who were promoted to the rank of Police Corporal ahead of him. This issue raises the question of whether access to the two categories of documents listed at (a) and (b) would involve the disclosure of "personal information" contrary to section 30 (1) reproduced above.

(ii) **The meaning and effect of the term *"personal information"* in the context of the FOIA – Trinidad and Tobago**.

16. Personal information is defined in section 4 of the FOIA and the subsections relevant to our purposes are reproduced hereunder:

> "Personal information" means information about an individual, including-
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of an individual or information relating to financial transactions in which the individual has been involved;
>
> (g) the views or opinions of another individual about the individual.

(iii) **-The Australian line of authorities-**

17. In the case of Re ***Williams and Registrar of the Federal Court of Australia***[3] the applicant applied to the Tribunal for a review of the decision refusing him access under the Commonwealth FOIA to documents that formed part of the selection papers relating to an employment position unsuccessfully sought by the applicant. Beaumont J held that there was no case for exemption there. He explained:

> Two questions arise in this connection. First, what is meant by the phrase personal affairs…? Second, can it be said, in the circumstances, that the disclosure is 'unreasonable'?
>
> In my opinion, the reference in the Act to personal affairs of a person was intended to have its ordinary dictionary meaning, that is to say, to refer to matters of private concern to an individual. It is not necessary to attempt an exhaustive definition of the phrase. It will suffice, for present purposes, to say that, ordinarily, information as to the work capacity and performance of a person is not private in that sense. It is something observed by others and commonly discussed by those involved in that work. Ordinarily, information as to a person's vocational competence is not something which is treated as confidential. Prima facie at least, it is not part of his or her personal affairs.

18. In the case of Re ***Bleicher and Australian Capital Territory Health***[4] Wilcox J summarized the very important observations and conclusions in the case of ***Department of Social Security v Dyrenfurth***[5]as follows:

> The members of the Full Court in ***Dyrenfurth*** plainly did not consider that they were overruling the view which Beaumont J had expressed in Re ***Williams*** and in ***Young v Wicks***. They accepted that, ordinarily, statements in documents which relate to person's work performance or capacity do not constitute information regarding that person's personal affairs. But they

[3] *(1985) 8 ALD 219 @ page 221-222 ; 1985 AATA 226 @ page 228-229*

[4] *(1990) 20 ALD 625 para 21*

[5] *(1988) 80 ALR 533*

> pointed out, upon some occasions, such may contain information of a personal nature, of which they gave examples. It was not possible to say that, because a document related to work performance and capacity, it was necessarily not a document containing information about somebody's personal affairs.

In ***Dyrenfurth*** "personal affairs" or information typically referred to:

- affairs relating to family and marital relationships;
- health or ill-health;
- relationships with and emotional ties with other real people;
- domestic responsibilities or financial obligations.

19. In **Stewart and Department of Transport**[6], F.N. Albietz commenting on his preferred definition of the term in question stated:

> For myself I prefer the view that 'personal affairs' of a person…connotes information which concerns or affects the person as an individual whether it is known to others or not. For example, a document may contain statements about a person's personal affairs'. Such a document would therefore prima facie answer the description of one which relates to the 'personal affairs' of a person…In my opinion personal affairs may be personal to him notwithstanding that they are not secret to him.

20. It appears that judicial officers desist from any rigid exclusionary interpretation of the term "personal affairs" or "personal information". It seems that ordinarily, matters relating to work performance, competence and capacity are not considered to be part of an individual's "personal affairs". There may be circumstances where such information may be deemed personal.

[6] [1993]QICmr 6;[1993] 1 QAR 227 (9 December 1993)

(iv) Conclusion

21. Based however on the Trinidad and Tobago legislation, information relating to the education or employment history of an individual is considered "personal information". However our Australian counterparts have provided useful guidance on what may be within and outwith the scope and ambit of the definition. Thus the more important consideration is whether the disclosure of same would be unreasonable in the circumstances.

(v) Unreasonable disclosure

(a) General

22. The leading authority on "personal information" in Australia is that of ***Colakovski v Australian Telecommunications Corporation***[7] in which Heerey J stated the following in respect of the test to determine whether disclosure was unreasonable:

> If the information disclosed were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed I would think the disclosure would be unreasonable.

23. In Re ***Williams***,[8] Beaumont J commented on reasonableness as follows:

> The question of reasonableness is to be determined by balancing several interests public and private involved. This requires a consideration of all circumstances including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned

[7] *(1991) 23 ALD1 at 123; 1991 WL 1120688 at 441*

[8] *(1985) 8 ALD 219; 1985 AATA 226 @ page 229*

> would not wish to have disclosed without consent and whether the information has any current relevance.

24. The question therefore is whether disclosure of (a) the academic qualifications, certificates and diplomas and (b) the letters of recommendation of the successful candidates, Benjamin and Jury, would be unreasonable.

(b) Disclosure of documents contained in category (a)

25. There are several authorities originating from Australian which are quite instructive on this particular subject of academic qualifications and supporting documentation. One such is the case of **Re Dyki and Federal Commission of Taxation**[9] in which Deputy Gerber of the Commonwealth Administrative Appeals Tribunal held at pp. 134 and 135:

> …The two successful candidates have since been appointed to the advertised positions and their new status has entered the public domain. I am satisfied that it is both in the public interest and reasonable that promotions must not only be just, but seen to be just. It follows that those applications, having achieved their aim, are opened up to scrutiny and their authors' claim to promotion is henceforth in the public domain. It follows that the applicants' claim to privacy must be deemed to have been abandoned, if only because it is public knowledge that they applied for promotions and were successful. Thus, the job applications for the two successful candidates have lost whatever entitlement to anonymity they had (subject to deletion of matters adjudged to be purely personal. …

26. In Trinidad and Tobago the position is even stronger as there are constitutional procedural safeguards ensuring fairness in the selection of the best candidates. The Police Service Commission Regulations prescribe principles of selection for promotion. Thus regulation 20 states:

[9] *(1990) 22 ALD 124*

(1) When considering officers for promotion, the Commission shall take into account the experience, the merit and ability, **the educational qualifications** and the relative efficiency of such officers.

(2) In the performance of its functions under subregulation (1), the Commission shall in respect of each police officer take into account –

(a) his general fitness;

(b) any special qualification that he possesses;

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

(d) the evaluation of his overall performance as reflected in his performance appraisal reports;

(e) any letters of commendation or special reports in respect of any special work done by him;

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

(g) any specific recommendation of the Commissioner for filling the particular office;

(h) any previous employment of his in the Service or otherwise;

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

(j) his devotion to duty;

(k) the date of his entry into the Service;

(l) the date of his appointment in his present office.

In ***Ashford Sankar***[10] I dealt with the analogue provision at page 57 and stated:

> 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

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> 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 matter to be considered.

27. Following on from Re ***Dyki***, in the case of ***Antony and Griffith University***[11] it was determined that the information of successful candidates was in the public domain and therefore not exempt as an unreasonable disclosure. The Applicant in this case sought review of the respondent's decision refusing him access, under the FOIA 1992 Queensland, Australia, to certain documents relating to a selection process for an academic appointment. The applicant was an unsuccessful candidate for a position as Lecturer in Environmental Economics in the School of Environmental Studies at Griffith University. The documents in issue were the curriculum vitae, statement addressing selection criteria and covering letter submitted by the successful candidate.

28. It appears that the position is different for **successful** and **unsuccessful** applicants. At paragraphs 25 and 26 Information Commissioner F.N. Albietz stated:

> I have consistently held that CV's and related material lodged by **unsuccessful** applicants for public sector employment ordinarily qualify for exemption under section 44 (1) of the FOIA: See Re ***Baldwin***; Re **Hawck**. There are sound reasons why privacy considerations should attach to information of that kind, and why there is ordinarily an expectation that the identity of an applicant for employment would not be disclosed unless and until he or she was appointed to the advertised vacancy, for example:
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> - unsuccessful applicants would frequently not want their current employers, or even other prospective employers, to know that they had applied for other positions, nor indeed that they applied unsuccessfully; and

[11] *[2001] QICmr 3 (30 March 2001)*

- the prospect of disclosure in such circumstances may inhibit people from applying, and hence reduce the calibre of the field available for selection.

29. However, these considerations cease to be relevant to **the successful applicant**, once his/ her appointment becomes information that is effectively in the public domain. At paragraph 32 Albietz further stated:

> If an applicant is successful and accepts an appointment to a position, the material which he or she submitted in support of his/ her application may be disclosed to the extent necessary to ensure transparency of the selection decision, effective and meaningful post-selection feedback to unsuccessful applicants, and accountability generally for adherence to merit and equity principles in job selection processes. I consider that disclosure of information recording the educational qualifications, training, and employment or business experience of successful candidates (plus relevant job-specific information, e.g., details of research and publications for an academic appointment), and their statements addressing selection criteria, would be in keeping with the implicit conditions/exceptions I have explained above.

(c) Conclusion

30. It seems abundantly clear from the authorities that successful applicants, like Benjamin and Jury, have entered the public domain and their qualifications and experience should not necessarily be kept confidential. Moreover one cannot ignore the particular facts of the case. In that regard the Claimant attained an evaluation score of 73 points, one point lower than that of Benjamin and Jury who were promoted. However the Claimant's contention all along, and which subsequently proved to be correct, was that he was entitled to an additional point [in fact he was subsequently awarded four points] by virtue of his academic qualifications. Had he obtained that additional point at the time he raised the issue, there is no dispute that he would have also been promoted to the rank of a corporal.

31. In that regard there is a public interest in the rights of individuals to have access to documents – not only documents that may relate more broadly to the affairs of

government, but also to documents that relate quite narrowly to the affairs of the individual who made the request: ***Cairns Port Authority and Department of Lands***[12]. In ***Re Eccleston*** and ***Department of Family Services and Aboriginal and Islander Affairs***,[13] at paras 55-56, the Information Commissioner stated:

> 55.While in general terms, a matter of public interest must be a matter that concerns the interests of the community generally, 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 627). 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.
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> 56. Such factors have been acknowledged and applied in several decisions of the Commonwealth AAT; for example in Re ***James and Others and Australian National University*** (1984) 6 ALD 687 at p.701, Deputy President Hall said:
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> "87 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:
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> "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 fit to confer upon every person a legally enforceable

[12] *1985 8 ALD 219 ; 1985 AATA 226 @ page 229*

[13] *[1993] QICmr2; (1993) 1 QAR 60*

> 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 relate more broadly to the affairs of government, but also to documents that relate quite narrowly to the affairs of the individual who made the request."

32. By reason of the foregoing the disclosure of documents in category (a) would be quite reasonable given their particular circumstances. Disclosure would facilitate transparency, accountability and fairness. As Mr. Ramlogan submits, such disclosure will inspire public confidence in the fairness of the selection process and reduce suspicions of unfairness, favouritism and discrimination. It must be emphasized that their status as successful candidates (rather than the mere fact that they had applied for the position in question) justifies the position adopted in respect of the reasonableness of disclosure.

33. Though not necessary to mention in this particular instance, it is noteworthy that there are in fact public interest considerations which favour disclosure in respect of matters of this kind as stated in the concluding paragraph of **Antony Griffith**:[14]

> …in cases involving selection for promotion from a pool of existing agency personnel, disclosure which permits unsuccessful candidates to assess (by comparison with successful candidates) how their education qualifications, work experience and work performance need to improve to be successful in obtaining future promotions, would arguably benefit the management by an agency of its personnel or would (on balance) be in the public interest having regard to considerations of the kind addressed in Re **Pemberton** at pp. 379-380, paragraphs 197-198.

[14] *[2001] QICmr 3 (30 March 2001)*

(vi) Disclosure of documents contained in category (b) (the letters of recommendation provided to the successful candidates).

(a) General

34. One of the primary concerns as it relates to referee reports is the possibility of a lack of candour and frankness in confidential reports which clearly would go to the issue of the appropriate weight to be attached to same. Simply put, there is an overwhelming concern about the effect or consequences of disclosure of such material. There may even be a refusal to write such reports for fear of potential repercussions such as the initiation of actions for breach of confidence. Information Commissioner Albietz, in the case of Re ***Pemberton and the University of Queensland*****,**[15] after careful analysis and examination of extensive evidence and authorities on the concerns surrounding the issue, resolved it in the following manner:

> No doubt many will continue to write honest assessments of candidates for promotion without regard to any consequences of disclosure. I do not consider, however, that it is reasonable to expect that the prospect of disclosure under the FOI Act will cause many to modify their approach to writing reports of the kind in issue. I consider that reports in future are more likely to be written in temperate and reasoned language, being careful to emphasize the strengths of an applicant for promotion, while drawing attention to any perceived weaknesses in a way which provides justification and substantiation for the points that are made. That is not only likely to benefit the selection process, but to benefit the management of personnel generally by providing considered "feedback"

35. As to the weight to be attached to such material, he said at p. 58:

> …the most reasonable guide to the worth of a referee report, whether confidential or not, is the extent to which the opinions and conclusions expressed in it appear to be balanced, well-reasoned and supported by

[15] *[1994] QICmr 32 (5 December 1994)*

particulars of the evidence which substantiates the opinions and conclusions reached, whether favourable or adverse.

36. According to statute, a letter of recommendation (which is essentially an individual's opinion of another) is regarded as "personal information". The question is whether it would be unreasonable to disclose same notwithstanding the prospect that candour and frankness in future recommendations may not be adversely affected.

37. Applying the criteria identified by Beaumont J in the case of Re ***Williams***,[16] who, it is worth remembering, emphasized that all relevant circumstances be considered:

(1) What is the nature of the information that would be disclosed?

The information takes the form of letters of recommendation of successful candidates for the position of corporal. Essentially, they represent the opinions of individuals about the successful candidates sought by the latter to substantiate their respective applications. Clearly the names of the authors of the said letters would be revealed.

(2) What are the circumstances in which the information was obtained?

I think I can take judicial notice of the fact that candidates for promotion are required to support their candidacy by providing letters of recommendation.

(3) What is the likelihood of the information being information that the person concerned would not wish to have disclosed without consent?

I think I can draw the inference that the authors of these letters of recommendation intended them to be given in confidence and that neither the authors nor the successful candidates would wish to have them disclosed.

(4) Whether the information has current relevance?

A letter of recommendation provided to a successful candidate is merely an opinion of one person in relation to another; a person's subjective perception of another. It is not scientific evidence to substantiate a theory or

[16] (1985) 8 ALD 219

belief and it is not necessarily grounded in fact. Even if the opinion has been influenced by fact, it necessitates the author's interpretation of the facts and is a reflection of the weight that he ascribes to the given facts. Moreover in these circumstances the disclosure of the letters of recommendation is not going to be instrumental in promoting an understanding of the integral parts of the selection process or criteria. Moreover, one can only speculate on the weight that a selection committee would place on same.

Additionally the Applicant's claim to unfair treatment centres around the failure to award him any points for his academic qualification/s. The disclosure of the letters of recommendations adds nothing to the basis of his claim for unfair treatment. In these circumstances therefore reasonableness must be considered as if disclosure was to the world at large.

(5) Additional Factors

Disclosure will also further the public interest in transparency and accountability of the Police Service Commission in discharging their constitutional mandate to promote the best candidate fairly. It is to be noted that the Defendants have provided no evidence as to whether the efficient functioning of the promotion process would be affected.

(b) Conclusion

38. Taking all the circumstances into consideration, I am of the view that disclosure of the letters of recommendation would be unreasonable.

***(vii) Disclosure in the public interest: the public interest override*.**

(a) General

39. The question is whether, pursuant to section 35 of the FOIA, disclosure may be justified in the public interest? Section 35 states:

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. [Emphasis Added]

(b) Conclusion

40. This is a public interest override provision mandating the granting of access to an exempt document in the circumstances set out in section 35. However it is clear that the public authority never addressed its mind to the section 35 provision. In the event I had to consider same with respect to the category (a) documents, I would have ordered disclosure of same as there is reasonable evidence that significant (i) neglect in the performance of official duty; or (ii) injustice to the Claimant, has or is likely to have occurred, or in the circumstances giving access to the documents is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.

41. In effect the Claimant had been clamouring since November 2005 that he possessed the academic qualifications to gain the additional points that would have entitled him to promotion there and then. Yet the Respondents did not treat the matter with the urgency that it deserved. He was given standard responses and told that they would consider his claim for promotion when next consideration was being given to recommendations for promotion to the rank of corporal: see letter of May 17, 2006.

42. By letters dated November 6, 2006 and May 17, 2007 the Claimant was again told that he had not yet achieved the score needed for promotion. **However under cover letter dated May 22, 2007 the Claimant was informed that he had been granted 4 additional points based on his Certificate of Theology which had been obtained by the Claimant since May 2002**. The Claimant thereby became eligible for promotion to the rank of Police Corporal.

43. In my view significant prejudice has occurred as officers junior to him have now bypassed him by some 18 months. However I would for the reasons given at para 37 (4) above decline to invoke section 35 in favour of disclosure of the letters of recommendation.

(viii) **The private life constitutional rights of Benjamin and Jury.**

44. My finding in favour of disclosure of documents contained in category (a) [copies of academic qualification, certificates and diplomas for Benjamin and Jury] necessitates a consideration of the Defendants' submission concerning breach of private life constitutional rights. The Defendants submitted that disclosure of any of the categories of documents would breach the private life constitutional rights of Benjamin and Jury.

45. Section 4 (c) of the Constitution states:

> "It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, color, religion or sex, the following fundamental human rights and freedoms, namely -
> …….
>
> (c) the right of the individual to respect for his private and family life;……."

Undoubtedly the Constitution recognizes the right to privacy as a fundamental right. However fundamental rights are ordinarily not absolute and there may be limitations attending same. It is for the courts to decide in a principled and rational manner how the various fundamental rights listed in section 4 of the Constitution are to be applied in

practice, how conflicts between them are to be resolved and what is the extent of the protection they afford: ***Panday v Gordon***[17] at paras 17-22 Lord Nicholls stated:

> **17** Mr Beloff submitted that the effect of section 4(e) of the Constitution is to recognise that all citizens of Trinidad and Tobago have an absolute, unqualified right to express political views. The discrete recognition of an unqualified "right to... express political views" in section 4(e) is unique in constitutional law. This right therefore requires discrete interpretation. Section 4(e) should be given a wider interpretation than it would have were it subsumed in section 4(i) as one aspect of the freedom of expression. Mr Panday's speech was within the protection of section 4(e) because it was an expression by him of a political view.
> **18** Their Lordships are unable to accept this submission on the effect of section 4(e) of the Constitution. Their Lordships consider this contention may be advanced to the Board despite not having been presented at the trial because the issue is solely one of interpretation of the Constitution, and failure to raise this issue of law did not affect the conduct of the trial. That said, their Lordships consider the submission is untenable.
> **19** The right to express political views is a right of fundamental importance in all democracies. That goes without saying. Clearly, the statement of this right as a separate right in the Constitution of Trinidad and Tobago underlines the special importance attached to it by those who framed the Constitution. This is self-evident.
> **20** This is confirmed by the drafting history. Unlike the constitutions of other Caribbean countries, this part of the Constitution of Trinidad and Tobago was modelled on the Canadian Bill of Rights 1960. The Canadian Bill of Rights did not contain any provision corresponding to section 4(e) of the Constitution of Trinidad and Tobago. Section 4(e), together with some other rights listed in section 4, was added to the draft constitution at an advanced stage in the course of the Trinidad independence conference held in London in May and June 1962, immediately before Trinidad and Tobago became independent on 1 August 1962. No doubt those who successfully sought to have the right to express political views included specifically in the Constitution thought this would provide added reassurance.
> **21** These factors, important though they are, do not point to the conclusion for which Mr Beloff contended. They do not suggest that the right to express

[17] *[2005] UKPC 36*.

political views was to have no bounds. They do not suggest this fundamental right was to be capable of being misused, and debased, by ****439*** permitting a politician's reputation to be destroyed at will: as would be the position if the gravest of factual allegations known by the maker to be false could be made with impunity and without the politician having any redress or means of establishing the truth.

22 Nor is this repellent conclusion supported by the apparently unqualified nature of the right as set out in section 4. The general format of section 4 is to list rights, such as "freedom of the press", briefly and without elaboration. Plainly the intention was that the courts should work out the practical detail. The content of the rights was a matter for the judges. Necessarily so, not least because some of the listed rights may sometimes be in conflict with each other. As noted by Cory J in the Supreme Court of Canada, publication of defamatory statements "constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity": ***Hill v Church of Scientology of Toronto*** (1995) 126 DLR (4th) 129, 164, para 121. Thus freedom of expression and the right to respect for private life, both of which are listed without qualification in section 4, may sometimes collide. The Constitution does not attempt to resolve problems of this kind. These are matters left to the judges. It is for the courts to decide, in a principled and rational way, how the fundamental rights and freedoms listed in the Constitution are to be applied in the multitude of different sets of circumstances which arise in practice. It is for the courts to decide what is the extent of the protection afforded by these constitutional guarantees.

46. However not every Act of Parliament which infringes in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Limitation of a fundamental right is permissible provided that the limitation pursues a legitimate aim and is proportionate to it: ***Surratt and others v AG*** [2008] 1 AC 655 [HL]. At para 58 Baroness Hale speaking for the majority stated:

> It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The

> courts may on occasion have to decide whether Parliament has achieved the right balance. But there can be little doubt that the balance which Parliament has struck in the EOA is justifiable and consistent with the Constitution. Section 7 does impinge upon freedom of expression but arguably goes no further in doing so than the existing law; if it does go further, by including gender as well as racial or religious hatred, it is merely bringing the law into conformity with all modern human rights instruments, which include sex or gender among the prohibited grounds of discrimination. Sections 17 and 18 do impinge upon freedom of contract but in ways which are now so common in the common law world that it can hardly be argued that they are not proportionate to the legitimate aim which they pursue. Finally, adding to the role of the Judicial and Legal Service Commission in exactly the way contemplated by section 111 is not inconsistent with the Constitution.

47. The declared object section 3 of the FOIA is to extend the right of members of the public to access to information in the possession of public authorities. This clearly recognizes that there was **an existing right** in the public to access such information and what the FOIA sought to do was to extend such right. In those circumstances the question arising for determination would be whether the disclosure of the academic qualification certificates and diplomas of Benjamin and Jury breaches their private life constitutional rights. In ***Ashford Sankar*** I dealt at pages 41-42 with the kind of balancing exercise undertaken by Parliament in enacting the FOIA:

> 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 recognised 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 categorization 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 the 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.)

48. The Australian Law Reform Commission has echoed similar sentiments in its **Unfair Publication Defamation and Privacy Report** (ALRC Report No. 11 Canberra 1979):

> The privacy claim is not an absolute one. We are individuals with individual personalities and needs, but we live in a community. Individuals interact; inevitably the interaction leads to the transmission of personal information. Both the individual and institutions, public and private, have a legitimate claim to receive at least on a restricted basis, a considerable amount of very personal information. Some matters are highly personal, raise issues of public concern. All members of the community have an interest to receive information on topics of public significance. The claim to privacy tends to conflict with the claim to public information. The dilemma has always been to strike a proper balance between these two interests.

49. More particularly with regard to section 30, Parliament has seen it fit to provide a qualified exemption, restricting disclosure of personal information, including personal information of third parties, where it would be unreasonable to do so. Moreover where third parties' interests are concerned, Parliament has stipulated (section 30 (3)) that where the public authority decides to grant access to the document, it shall, if practicable, notify the individual who is the subject of that information of the decision and of the right to apply to the High Court for judicial review of the decision. In my view this provides an acceptable and proportionate level of intrusion into the fundamental right to privacy in pursuance of the legitimate aim of the legislation.

(ix) Enlisting the assistance of the Ombudsman

50. The Defendant submitted that the Claimant should first have sought the assistance of the Ombudsman under section 38 of the Act. Moreover, judicial review is a remedy of last

resort. Furthermore, that the Act does not intend the expiration of the time prescribed for approaching the Ombudsman to be a bar to seeking assistance of said authority.

51. The Claimant however submitted that the Ombudsman is not an alternative remedy on the facts of this case as the jurisdiction of the Ombudsman under the FOIA is subject to a strict time limit. Further, that the Defendant's submissions are incorrect as section 15 of the FOIA does indeed stipulate a 30-day deadline for notifying the Applicant of the access decision.

52. Section s15, 23 (1) (a) (b) (c) (d), 38 and 39 of the FOIA states:

> 15. A public authority shall take reasonable steps to enable an applicant to be notified of the approval or refusal of his request as soon as practicable but in any case not later than thirty days after the day on which the request is duly made.
>
> 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 deleted;
>
> (d) inform the applicant of his right to apply to the High Court for judicial review of the decision and the time within which the application for review is required to be made
>
> 38A. (1) A person aggrieved by the refusal of the 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.

39. (1) For the removal of doubt, a person aggrieved by the decision of a public authority under this Act may apply to the High Court for judicial review of the decision.

(2) Notwithstanding any other law to the contrary, where an application for judicial review of a decision of a public authority under this Act is made to the High Court, that application shall be heard and determined by a Judge in Chambers, unless the Court, with the consent of the parties, directs otherwise.

(3) In this section, "decision of a public authority" includes the failure of a public authority to comply with section 15 or 16 (1).

53. Section 15 contemplates a determination and notification within 30 days of the request being duly made, a breach of which allows the Claimant under section 39 to apply for judicial review. On the facts I hold that the determination and notification did not meet the 30-day time limit, as the request was sent by registered post on June 5, 2007 and the First Defendant's undated letter of July 2007, only received by the Claimant on July 23, 2007. Additionally there was a breach of section 23 (d) in failing to inform the Claimant of his right to apply to the High Court for judicial review and the time with which the application was required to be made. Moreover there was a failure to apply the section 35 criteria. The Defendant/public authority cannot therefore act in default by non-compliance with time stipulations in the Act or fail to inform an applicant of his right to apply for judicial review, and then argue that the Claimant has prematurely applied for judicial review. In fact, the right to apply to the High Court for judicial review is preserved. It would result in an absurdity if the Claimant was precluded from seeking redress by virtue of the Defendants' said default.

54. Pemberton J's comments in the case of ***Celia Balroop v The Public Service Commission*** H.C.A. S-463 of 2005 are quite instructive on the issue and are reproduced hereunder:

(2) The Ombudsman is an alternative remedy available to an Applicant under the Act provided there is an active refusal by the Public Authority to satisfy the request for information and notice of that refusal is communicated in accordance with the Act. This is the conjoined effect of Section 23 (1) and 38 A of the Judicial Review Act.

(3) Judicial Review proceedings are not an abuse of process once the Ombudsman's jurisdiction cannot be invoked.

(4) Judicial Review proceedings may be invoked once section 39 is satisfied.

(x) DISPOSITION

55. By reason of the foregoing, the Claimant is entitled to access to copies of the academic qualifications, certificates and diplomas of the successful candidates but shall be denied access to the letters of recommendations requested.

56. Costs of the Claim are to be paid by the Defendants to the Claimant as assessed in accordance with the budgeted costs application, namely the sum of seventy-five thousand dollars ($75,000).

DATED this 6th day of November, 2009.

.....

PRAKASH MOOSAI

JUDGE