TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

High Court Action No. 2005 of 2004.
Civil Appeal 51 of 2005.

IN THE MATTER OF AN APPLICATION OF MR. CHANDRESH SHARMA, MEMBER OF PARLIAMENT, FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PURSUANT TO SECTION 39 OF THE FREEDOM OF INFORMATION ACT 1999(AS AMENDED)

AND

IN THE MATTER OF THE ILLEGAL AND/OR UNALWFUL DECISION AND/OR REFUSAL BY THE INTEGRITY COMMISSION TO PROVIDE REQUESTED INFORMATION SOUGHT BY AN APPLICATION DATED THE 14TH DAY OF SEPTEMBER, 2004.

BETWEEN

CHANDRESH SHARMA

Applicant/Appellant

AND

THE INTEGRITY COMMISSION

Respondent/Respondent

PANEL: Kangaloo J. A.
Archie J. A.
Mendonca J. A.

APPEARANCES: Dr. F. Ramsahoye S.C. and Mr. A. Ramlogan for the Appellant
Mr. R. Martineau S.C. and Mrs. D. Peake for the Respondent

DATE OF DELIVERY: April 7th 2006.

I have read the judgments of Archie, J.A. and Mendonca, J.A. and agree with them.

W.N. Kangaloo
Justice of Appeal

JUDGMENT

Delivered by A. Mendonca J. A.

1. This is an appeal from the order of Jamadar J. refusing the Appellant his costs in judicial review proceedings.

2. On or about September 14, 2004 the Appellant submitted an application under the Freedom of Information Act, 1999 (FOIA) to the Integrity Commission (the Commission), the Respondent in this appeal, for the following documents:

(a) a list of all persons in public life who were required to file declarations of income, assets and liabilities and statements of registrable interests for the year 2003 by August 15, 2004 who have not yet done so; and

(b) a list of names of persons who have not complied as per above; who have been granted extensions of time to comply and the new deadline.

3. On October 13, 2004 the Registrar to the Commission replied to Appellant refusing the application for the documents. The Registrar stated that the "information requested is not disclosable by virtue of section 20 of the Integrity in Public Life Act No. 83 of 2000" (the Integrity Act).

4. Subsection (1) and (4) of section 20 are material and these provide as follows:

> "20 (1) Declarations filed with the Commission and the records of the Commission in respect of those declarations are secret and confidential and shall not be made public, except where a particular declaration or record is required to be produced for the purpose of or in connection with any court proceedings against, or enquiry in respect of a declarant under this Act, the Perjury Act, the Prevention of Corruption Act, the Exchange Control Act, or the Commissions of Inquiry Act.
>
> 20 (4) Every member of the Commission and every person performing any function in the service of, or as an employee of the Commission shall treat all declarations and records and information relating to such declarations as secret and confidential and shall make and subscribe to an oath of secrecy to that effect before a Justice of the Peace."

5. Following the Registrar's refusal to disclose the requested information, on November 4, 2004 the Appellant applied for and was granted leave to apply for judicial

review of the decision to refuse to supply the requested documents. Among the grounds contained in the statement filed in the judicial review proceedings pursuant to O.53 of the Rules of the Supreme Court 1975, the Appellant stated, inter alia, that section 20 of the Integrity Act does not prevent or forbid the disclosure of the requested information and that the Act does not regard or treat the requested information as secret.

6. The matter came on for hearing before Jamadar J. who had also granted the leave to apply for judicial review. Before the Judge, however, apart from raising the argument that the information could not be disclosed by virtue of section 20 of the Integrity Act, the Commission argued other grounds. The Commission contended that (a) it was not a public authority and (b) the application for access to the documents had to be made to the responsible Minister and not to the Commission. The Judge ruled against the Commission on all points. He held that the Commission was a public authority within the meaning of the FOIA, that the application for access to the documents was properly made by the Appellant to the Commission and that the requested information was not caught by section 20 of the Integrity Act.

7. On the section 20 point, the Judge held that what the section decrees secret and confidential are the declarations which are required to be filed under section 11 of the Integrity Act and the records of the Commission in respect of those declarations as well as records and information relating to such declarations. He was of the opinion that the information requested did not amount to records or information "in respect of" or "relating to" any declaration filed with the Commission. "On the contrary", he said, "the

request if anything referred to records and information unrelated to any declarations filed with [the Commission]".

8. The Judge however went on to consider whether the judicial review proceedings were an abuse of process for the reason that the Appellant did not disclose in his said statement filed pursuant to O.53 or otherwise that there was an alternative form of redress. The Judge held that the Appellant had available to him an alternative form of redress namely an application to the Ombudsman under section 38A of the FOIA. This section is as follows:

> "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.
>
> (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."

9. The Judge found that the Appellant should have disclosed this as an alternative form of redress at the time of the application for leave. Instead the Appellant indicated that there was no alternative form of redress open to him. The Judge stated:-

"No doubt, if this had been disclosed, a Court would have been put on notice and may have requested submissions from the Applicant; or may have convened an inter parties hearing for leave; or may have stayed the proceedings, or even refused leave ex-parte."

10. The Judge however did not deem the application for judicial review an abuse of process. He granted an order of certiorari quashing the decision of the Commission not to disclose the documents to the Appellant and ordered that the matter be remitted to the Commission for its reconsideration. He however held that the non-disclosure of the

alternative form of redress impacted on the question of costs. In those circumstances the Judge did not think that the Appellant was entitled to any costs from the Respondent and ordered that the parties bear their own costs. The Appellant now appeals from this order of the Judge as to the costs of the proceedings.

11. Before I deal with the issues on the Appeal there are two other aspects of the Judge's decision which the Appellant referred to in his written arguments, and these are (1) the decision of the Judge to strike out certain parts of the Appellant's affidavit on the application of the Respondent and the order as to costs made as a consequence thereof; and (2) the order of the Judge remitting the matter to the Commission for its reconsideration. Neither of these orders appear in the Notice of Appeal as parts of the decision of the Judge from which the Appellant appeals and no amendment was sought to the Notice of Appeal. They therefore do not strictly arise in this appeal. That apart, they are not matters of any real substance.

12. With respect to the striking out application the Commission applied before the Judge to strike out certain parts of the Appellant's affidavit used in the proceedings on the basis that they contained hearsay, opinion, argument or submission and sought to interpret the law. The Judge agreed with the Commission and struck out the parts of the affidavit which he held so offended and ordered the Appellant to pay to the Commission its costs of the application to strike out. In his written arguments, the Appellant, did not contend that the parts of his affidavit did not offend, as the Commission contended they

did, but says that there was no need for the application to strike out, when a submission that the matters complained of were immaterial to the issues was sufficient.

13. The fact of the matter however is that if parts of the Appellant's affidavit were objectionable as the Commission contended they were, and as I mentioned there is no contention by the Appellant that they were not, the Judge has a discretion to strike them out. He need not do so. He may say that he will not pay regard to them rather than strike them out particularly if they are not material to the issues in the proceedings and their striking out is not necessary for the purpose of enabling the matter to be properly dealt with. But the Judge has a discretion to strike them out and if he exercises his discretion in that way this Court cannot properly interfere with it. Nor can this Court take issue with the consequential order as to costs. In any event if the Judge had taken the position that he would not strike out the parts of the affidavit complained of, but would pay no regard to them, he was equally entitled in that case to make an order for the costs of the application against the Appellant.

14. On the question of the order of the Judge to remit the request for the documents for the reconsideration of the Commission, the Appellant argued in his written submissions that the Judge ought to have ordered that the Commission provide the documents. This Court was however informed that since the order of the Judge, the documents have been disclosed to the Appellant. The matter is therefore now of academic interest only and this Court does not think that it should give any attention to it.

15. The part of the Judge's decision that is the subject of this appeal is the order made by the Judge that the parties bear their own costs. It was not disputed that if the Judge was right in his conclusion that recourse to the Ombudsman is a form of redress that should have been disclosed and was not, that he had the discretion to do what he did. Costs may be refused an applicant even though successful who has failed to use an alternative remedy. Indeed an applicant may be denied relief where he has failed to have recourse to an alternative remedy. There are many examples of this. One which was referred to the Court by Counsel for the Commission is the case of ***R –v- Trafford Borough Council*** *Exparte* ***Colonel Foods Limited & Anor. [1990] C.O.D. 351 .*** In this case the court was of the opinion that the decision challenged by the applicant was made in breach of the rules of natural justice. But the court declined to grant the remedy. The court held that judicial review was an inappropriate remedy as there was an alternative procedure. Additionally costs were awarded against the applicant. This underlines the approach of the Courts that judicial review is a remedy of last resort and alternative remedies should be used where they are available save in exceptional circumstances ***(see R –v- Immigration Appeal Tribunal [2004] A.C.D. 339*** and ***R (on the Application of Burkett & anor.) –v- Hammersmith and Fulham L.B.C. [2002] 3 All ER 97).***

16. This approach finds expression at section 9 of the Judicial Review Act, 2000 (JRA) which provides:

> "The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to

question, review or appeal that decision, save in exceptional circumstances."

17. Therefore where there is an alternative procedure, unless there are exceptional circumstances, leave should not be granted. It is not possible to define "exceptional circumstances". The term by its very nature defies definition, but examples of exceptional circumstance may be given. In my judgment some examples of exceptional circumstances would include when the pursuit of the alternative procedure allows irreparable harm to occur during its pursuit, or where there is a great need for immediate judicial relief or the alternative procedure will serve no useful purpose. The party seeking leave bears the persuasive burden to show that the exception applies.

18. It is not exceptional if the alternative procedure does not fulfill all the functions of judicial review or even if the alternative procedure may not provide a binding decision ***(see R (Cowl) –v- Plymouth City Council [2002] 1 W.L.R. 803)*** so long as it is one that could question, appeal or review the decision in question.

19. Of course where leave has been granted and the alternative procedure was not disclosed or the Court is subsequently of the opinion that it should have been adopted, as I mentioned, the Court has a wide discretion.

20. At the time of the commencement of these proceedings, the Civil Proceedings Rules, 1998 (CPR) were not in force. The CPR were however implemented on

September 16, 2005 replacing the Rules of the Supreme Court, 1975 as the rules of Court. Under the 1975 rules alternative dispute resolution procedures did not really feature as part of the procedural landscape, but with the CPR they now do. The CPR seeks to introduce a change not only in the culture *of* litigation but in the culture *to* litigation as well. The CPR introduces a system that is more open and more co-operative in its approach to litigation and this approach begins even before litigation. Lord Wolf CJ in the Cowl case, *supra*, makes very pertinent statements with respect to looking outside the litigation process to attempt to resolve disputes. He noted that in the context of disputes between public authorities and members of the public, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible and lamented the over-judicialising of the processes which are involved. Alternative dispute resolution according to Lord Wolf, was generally capable of meeting the needs of the parties and the public and saved time, expense and stress.

21. These comments are relevant in this jurisdiction where there is often a rush to litigate. This is so, not only in the sphere of public law. Too often no attempt is made to resolve the dispute outside the litigation process. Under the CPR the Court is, however, now under a duty to encourage the parties to resolve the matter without the need for litigation.

22. Part 25.1(c) of the CPR provides that it is the Court's duty to further the overriding objective by actively managing cases which may include "encouraging the parties to use the most appropriate form of dispute resolution including, in particular,

mediation if the Court considers that appropriate and facilitating their use of such procedures". The Court therefore must take a proactive role in alternative dispute resolution. Ample powers exist under the CPR for the Court to hold on its own motion a hearing at which both sides could explain what steps they have taken to resolve the matter without the Court's involvement and if not satisfied with the explanation, the Court may in appropriate circumstances impose appropriate sanctions or stay the proceedings for such steps to be taken. In the context of an application for leave for judicial review, the Applicant should indicate what steps if any have been taken toward an alternative dispute resolution. In appropriate cases if no steps have been taken and no satisfactory explanation advanced as to why not, the Court would be justified in refusing leave or staying the proceedings for an alternative dispute resolution procedure to be followed. I would think that a Court would be inclined to grant an extension of time for applying for judicial review where the delay is attributable to the bona fide pursuit of alternative dispute resolution procedures.

23. In this appeal, Counsel for the Appellants submitted that the Judge was wrong to deprive the Appellant of his costs. Counsel submitted that sections 23(1)(d) and 39 of the FOIA created an independent right to apply for judicial review. Further the FOIA created an option. The Appellant could choose whether to go to the Ombudsman or to apply for judicial review. It is inconsistent with the right and option provided by the FOIA to say that an Applicant has to go to the Ombudsman. There was in this case not even an obligation to apply for leave. Although an application for leave was made, this was unnecessary.

24. I cannot agree with these submissions. Section 23(1)(d) and section 39 refer to the right to apply for judicial review. Section 23(1)(d) 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:
>
> (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."

And section 39 provides:

> "39(1) For the removal of doubt, a person aggrieved by a 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)."

Neither section purports to establish an independent regime for judicial review. Section 23(1)(d) states that the applicant is to be informed of his right to apply to the High Court for judicial review and section 39(1) is a section for the removal of doubt and states that a person aggrieved may apply to the High Court for judicial review. They do little more than serve to remind the applicant that his right to apply for judicial review subsists and do not detract from the position that the remedy of judicial review is one of last resort. The right to apply for judicial review is a right to do so in accordance with the established principles, practice and procedure. The JRA was passed after the FOIA and applies to all applications for judicial review of a decision of, among others, a public authority. Section 5(1) of the Act is as follows:

"An application for judicial review of a decision of an inferior court, tribunal, public body, public authority or a person acting in exercise of a public duty or function in

> accordance with any law shall be made to the Court in accordance with this Act and in such a manner as may be prescribed by rules of Court."

25. Section 6 of the JRA which speaks of applications for leave, and section 9 to which I have already referred and which deals with alternative procedures, apply to applications for judicial review under the FOIA. Also applicable to applications at the time under the FOIA was O.53 of the Rules of the Supreme Court, 1975 which dealt with applications for judicial review and which required that there be set out in the statement whether or not an alternative form of redress exists. The only difference in procedure applicable to applications under the FOIA is that these are to be heard in Chambers (see section 39(2) of the FOIA). As the Judge noted "no doubt this procedure is to facilitate the confidentiality, speed and in-expense contemplated by the FOIA".

26. There is nothing in the FOIA that excludes the well-established principles under which one applies for judicial review. In the circumstances there is nothing to exclude the well-established principle that judicial review is a remedy of last resort. If therefore there is an alternative procedure that was available to the Appellant that is relevant, it should have been disclosed.

27. Counsel for the Appellant further submitted that there was no alternative procedure available to the Appellant. He contended that the refusal of the Commission to provide the requested information on the ground that it was prohibited from so doing by

section 20 of the Integrity Act raised serious questions of law that could not have been determined by the Ombudsman. Further, the jurisdiction of the Ombudsman to only make recommendations was not an effective remedy. Counsel for the Commission, however, argued that there was an alternative procedure. The FOIA provided a complaint to the Ombudsman as an alternative procedure and that should have been disclosed. It was not relevant that it was not as effective as a court order as he could question the decision.

28. I agree with Counsel for the Respondent that the alternative procedure need not be as effective as a court order. As was stated by Lord Wolf in the Cowl case, supra, the alternative procedure may not cover exactly the same ground as judicial review. It need not also provide a binding decision. If a complaint to the Ombudsman under section 38A of the FOIA, in the circumstances of this case, existed as an alternative procedure it is one which could have questioned the decision of the Commission (see section 9 of the JRA) and should have been disclosed. I am however of the view that in this case section 38A did not provide an alternative procedure.

29. Section 91 of the Constitution establishes the office of the Ombudsman for Trinidad and Tobago. Section 93 sets out the functions of the Ombudsman and indicates the limits of his jurisdiction. In section 93(1) the primary function of the Ombudsman is said to be to investigate any decision, recommendation, advice, act or omission by any department of government or any other authority to which the section applies or by

officers of members of such a department or authority being action taken in the administrative functions of that department or authority.

30. Section 93(2) provides the circumstances in which the Ombudsman may investigate any such matter. This section is as follows:

> "93(2) The Ombudsman may investigate any such matter in any of the following circumstances:
>
> (a) where a complaint is duly made to the Ombudsman by any person alleging that the complainant has sustained an injustice as a result of a fault in administration;
>
> (b) where a member of the House of Representatives requests the Ombudsman to investigate the matter on the ground that a person or body of persons specified in the request has or may have sustained such injustice;
>
> (c) in any other circumstances in which the Ombudsman considers that he ought to investigate the matter on the ground that some person or body of persons has or may have sustained such injustice."

31. Thus, where a complaint is made by someone that he has suffered injustice as result of a "fault in administration" or a member of the House of Representatives requests

the Ombudsman to investigate a matter on the ground that a person or a body of persons may have sustained such injustice or the Ombudsman considers that he ought to investigate the matter on the ground that some person or body of persons has or may have sustained such injustice, the Ombudsman may investigate the matter. He may do so notwithstanding that the complainant has a remedy by way of proceedings in a court if satisfied that in the particular circumstances it is not reasonable to expect him to take such proceedings (see section 94(5)). In determining whether to initiate, continue or discontinue any investigation the Ombudsman acts in his discretion subject to sections 93 and 94 (see section 95). But the extent of his jurisdiction relates to matters where there is a "fault in administration".

32. What is meant by a "fault in administration" is not defined in the Constitution. Neither have these words been interpreted by any Court in this jurisdiction. In ***R –v- Local Commissioner for Administration for the North and East Area of England, Ex-parte Bradford Metropolitan City Council [1979] Q.B. 287,*** the English Court of Appeal had to consider the word "maladministration" in section 26 of the Local Government Act, 1974 which deals with the jurisdiction of the local Commissioner. Section 26(1) of that Act is as follows:

> "Subject to the provisions of this Act where a written complaint is made by or on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration in connection with action taken by or on behalf of an authority to which part this of this Act applies,

being action taken in the exercise of administrative functions of that authority, a local commissioner may investigate that complaint."

33. Lord Denning M.R. in considering the meaning of the word "maladministration" stated at p 311-312:

> "It [maladministration] will cover 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on.' It 'would be a long and interesting list' clearly open-ended, covering the manner in which a decision is reached or discretion is exercised; but excluding the merits of the decision itself or of the discretion itself. It follows that 'discretionary decision, properly exercised which the complainant dislikes but cannot fault the manner in which it was taken, is excluded,'…
>
> In other words if there is no 'maladministration', the ombudsman may not question any decision taken by the authorities. He must not go into the merits of it or intimate any view as to whether it was right or wrong."

34. The statement of Lord Denning M.R. I think is of some assistance. The jurisdiction of the Ombudsman would clearly include those matters relating to the manner in which the decision is made. But the Local Government Act contains a provision at section 34(3) which states that nothing in the Act authorises or requires the local

commissioner to question the merits of the decision taken without maladministration. The comments of Lord Denning were no doubt made with that provision in mind. I would therefore not wish to wholly adopt the passage and define the limits of the jurisdiction of the Ombudsman on the basis of manner versus merits. Logically, there is no reason that "fault in administration" should not also refer to decisions that are simply bad decisions. In this case however rather than attempt to define precisely the limits of the jurisdiction I propose to express a decision only in relation to the matter in dispute.

35. The Ombudsman may not embark on an investigation of a complaint, if the complainant has or has had a remedy by way of proceedings in a court unless he is satisfied that in the particular circumstances it is not reasonable to expect the complainant to take or to have taken such proceedings (see section 94(5)(a) of the Constitution). It may be argued that where judicial review proceedings are open to the complainant that as such proceedings are a remedy of last resort before embarking on them he should first complain to the Ombudsman. If he has not done so, this would be a proper enquiry to be made by the judge hearing an application for leave where a complaint to the Ombudsman may properly be made. But even where a complaint may be made, it does not follow that the Ombudsman will undertake an investigation. I do not think in this case that it was sufficient for the Judge in coming to his decision as to costs to say, as he did, that it is for the Ombudsman to make a decision "whether he/she will proceed to investigate". He should also have satisfied himself that in the circumstances of this case it would have been reasonable for the Ombudsman to have exercised his discretion to embark on an investigation of the complaint.

36. Before embarking on the investigation the Ombudsman would at least have to be satisfied that either the complainant has no remedy in court or if he has it is not reasonable in the particular circumstances to expect him to pursue it. In this case the Commission refused to supply the information to the Appellant on the basis that to do so was contrary to section 20 of the Integrity Act. This was based on the Commission's interpretation of that section. Indeed according to the Commission it had sought and obtained legal advice on the question. At the time of the commencement of these proceedings section 20 was the only ground on which the request for the documents was refused. It was therefore a question of statutory interpretation. In this case in my opinion there was no basis on which the Ombudsman could have been reasonably satisfied that the Appellants did not have a remedy in court or that it was not reasonable to expect him to pursue it. The appropriate course in my view, as the matter involved an issue only as to the proper interpretation of a statute, was for the Appellant, as he did, to pursue the matter in the courts. In the circumstances, I cannot agree that in this case section 38A provided an alternative procedure and in my judgment the Appellant cannot be faulted for not disclosing the section as an alternative procedure. For this reason I would allow the appeal, set aside the judge's order as to costs and substitute an order that the Respondent pay the Appellant's cost both here and in the court below. Before concluding however I would refer to a matter relating to section 38A which the Court raised in the course of argument.

37. In the course of argument the Court enquired of Counsel for the parties whether section 38A applies where what is contended, as was in this case, is that the document is not to be disclosed by virtue of section 20 of the Integrity Act. One could not expect in those circumstances that the Commission would disclose the document to the Ombudsman and since section 38A required the Ombudsman to make recommendations "after examining the document if it exists" he could not act under the section.

38. While section 38A (1) refers to the Ombudsman making recommendations after examining the document "if it exists", section 38A (2)(b) provides that in making recommendations the Ombudsman may do so in terms which neither confirm or deny the existence of the document. It is difficult to understand section 38A (2)(b) if the Ombudsman can only made recommendations after examining the document if it exists. This may point to the position that an interpretation other than a literal one is required of the section.

39. The FOIA treats as exempt documents, documents the disclosure of which a written law prohibits (see section 34). For the purposes of the FOIA therefore documents caught by section 20 of the Integrity Act are exempt documents. There are of course other documents that are exempt within the meaning of the FOIA (see Part IV of the FOIA). Section 35 makes specific provision for the circumstances in which a public authority may give access to exempt documents. None of them refer to disclosures to the Ombudsman in case of dispute.

40. In keeping with some of the objectives of the FOIA to facilitate and promote promptly and at the lowest reasonable cost the disclosure of information, I think that Parliament intended to provide, by way of complaint to the Ombudsman, an inexpensive and simple way of resolving disputes as to the disclosure of information. However, many refusals for access to a document are based on the grounds that the document is an exempt document. If section 38A (1) is to be construed as meaning that the Ombudsman may only make recommendations if he examines a documents if it exists this would limit the role of the Ombudsman to a minimal one notwithstanding section 5(2) of the Ombudsman Act Chap. 2:52 (see section 4 (3) of the Ombudsman Act). It will be possible in some cases to make recommendations as to the disclosure of a document, even one alleged to be an exempt document, without examining it. The FOIA should be approached with the object not to frustrate the intention of Parliament and in my judgment the words "after examining the document if it exists" in section 38A (1) are not to be construed as imposing a precondition to the Ombudsman acting under section 38A.

41. It seems to me that section 38A was introduced into the FOIA at a late stage in the legislative process and not much attention was paid as to how it might impact on the scheme of the legislation. This is evident from the discussion above. But I think no more is this apparent than from section 23(1)(e) of the FOIA. This section requires that where a public authority receives a request for access to a document and no such document exists or access is denied or deferred, the public authority shall cause the applicant to be given notice and the notice shall contain certain things outlined in section 23(1)(a)-(e) inclusive. Of relevance is paragraph (e) which provides:

> "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."

42. This cannot apply to section 38A (1) and there is no other provision requiring the notice under section 23 to refer to the Ombudsman in any other circumstances. I think there is clearly need to review the FOIA.

43. In the circumstances, as I mentioned, I would allow the appeal. I would set aside the Judge's order that the parties bear their own costs and order that the Respondent pay the costs of the appeal and the costs in the court below certified for two Counsel. As I indicated the order as to costs in favour of the Respondent on the application to strike out parts of the Appellant's affidavit shall stand.

Dated this 7th day of April 2006.

Allan Mendonca
Justice of Appeal