REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2007-01082

BETWEEN

BERNARD MOHAMDALLY

Claimant

AND

THE MEDICAL BOARD OF TRINIDAD AND TOBAGO

Defendant

AND

THE MINISTER OF HEALTH

Interested Party

BEFORE THE HONOURABLE MADAME JUSTICE DEAN-ARMORER

APPEARANCES:

Mr. A. Ramlogan instructed by Ms. C. Bhagwandeen for the Claimant.
Mr. F. Hosein, S.C., instructed by Ms. Alfonso for the Defendant.
Ms. Monica Smith and Ms. Keisha Prosper instructed by Ms. Savi Ramhit for the Interested Party

JUDGMENT

Introduction

In this application for judicial review the Claimant approaches the Court under the *Freedom of Information Act.* No. 26 of 1999 for production of documents held by the Medical Board of Trinidad and Tobago.

The Defendant, the Medical Board of Trinidad and Tobago while admitting that the documents were in their custody, have resisted the Claim on the ground that the Medical Board is not a public body for the purpose of the *Freedom of Information Act.*

Facts

1. On the 13th day of October 2003, the Claimant's wife, Narissa Mohamdally underwent surgery, which was performed by Obstetrician /Gynecologist, Dr. Godfrey Rajkumar at the

Auzonville Medical Centre. Immediately following the procedure, Mrs. Mohamdally developed complications and on the 15th October 2003, she was admitted to the St. Augustine Private Hospital. On that day, on the basis of the contents of a referral letter by Dr. Rajkumar, a laparotomy was performed on the Applicant's wife by one Dr. Conrad Ariyanayagam. Mrs. Mohamdally's condition continued to deteriorate following that procedure and on the 17th October 2003, she was admitted to the Intensive Care Unit (ICU) at the Port of Spain General Hospital. She passed away on the 10th November 2003.

2. Following the death of Mrs. Mohamdally, Consultant Histopathologist, Dr. Shaheeba Barrow, lodged a complaint with the Medical Board against Dr. Rajkumar with respect to certain matters regarding Mrs. Mohamdally's medical certificate. The Applicant also lodged a formal complaint against Dr. Rajkumar with the Medical Board. A hearing, based on the complaint made by Dr. Barrow, was conducted by the Disciplinary Tribunal of the Council and on the 16th February 2005, Dr. Rajkumar was found guilty of "*infamous or disgraceful conduct in a professional respect"*. He was erased from the register of medical practitioners.

3. On the 10th day of May 2005, the Applicant commenced High Court Action No. 853 of 2005, against Dr. Godfrey Rajkumar and Dr. Conrad Ariyanayagam for damages for negligence following the death of his wife.

4. On the 15th day of February 2007, the Applicant made a request pursuant to Section 13 of the *Freedom of Information Act,* 1999*,* to the Medical Board of Trinidad and Tobago for "*copies of all statements, notes of evidence, reports, findings and rulings made by the Board in relation to the complaint made by the Applicant against Dr. Godfrey Rajkumar,*

because of the treatment of the late Narissa Mohamdally". The Applicant requested this information for the specific purpose of placing them before the Court in the High Court Action No. 853 of 2005, against Dr. Rajkumar and Dr. Ariyanayagam.

4. By letter dated 21st February 2007, Attorney-at-Law Nyree Alfonso acting on behalf of the Medical Board, acknowledged receipt of the Applicant's request pursuant to the *Freedom of Information Act* and informed the Applicant that the Medical Board "*will meet shortly for the purpose of determining the application made by Mr. Mohamdally"* and that he would be advised of the Council's decision. Further to the 21st February correspondence, on the 2nd March 2007, Ms. Alphonso wrote to the Applicant advising him that she could not come to a conclusion as a matter of law whether the Medical Board was a "*Public Authority"* for the purposes of the *Freedom of Information Act* and advised the Applicant that the Council had deferred their determination of his application until his Attorney provide legal authorities that suggest that the Medical Board is a 'public authority'.

5. The Applicant's Attorney at Law responded by sending a pre-action protocol letter dated 5th March 2007, which forewarned the Defendant of the Applicant's intention to commence Judicial Review proceedings.

6. By letter dated 12th March 2007, Ms. Alphonso informed the Applicant that the Council had again deferred their determination of his application since he did not provide them with legal authorities that suggest that the Medical Board is a 'public authority'.

7. The Applicant's Attorney at Law responded by letter dated 16th March 2007, outlining a number of reasons why the Medical Board was a 'public authority' for the purposes of the

FOIA and advised the Medical Board that unless the Applicant was granted access to the requested documents within ten (10) days of the letter, that he would file Judicial Review proceedings against the Medical Board. The Defendant refused to supply the requested documents.

8. By letter dated 28th March 2007, the Defendant, through its Attorney at Law, Ms. Alphonso, informed the Applicant that the question whether the Medical Board of Trinidad and Tobago was a 'public authority' should be referred to the High Court.

Procedural History

1. Following the refusal of the Defendant to supply the requested information, the Applicant sought the Court's leave to apply for Judicial Review on the 3rd day of April 2007.

2. On the 5th April 2007, the Court granted the Applicant leave to apply for the following relief:

    1. "*A declaration that the Medical Board of Trinidad and Tobago (MBTT) is a public authority within the meaning of the* ***Freedom of Information Act*** *(FOIA) and is subject to the provisions of the* Act*"*

    2. "*An application of mandamus to compel the Respondent to provide the Applicant with the information requested in his application made under the* ***Freedom of Information Act.****"*

3. *"A declaration that the Applicant is entitled to the information set out in the said application"*

4. *"An order directing the Respondent … to forthwith prepare and supply notice in accordance with S. 23"*.

5. "*A declaration that there has been unreasonable delay on the part of the Respondent in making a decision."*

Evidence

1. The Applicant relied on his affidavit of the 3rd day of April 2007, in which he deposed that in May 2005, he filed a High Court Action on behalf of his late wife for damages for medical negligence.

2. The Applicant set out a chronology of events leading to the death of his wife, Narissa Mohamdally, the expulsion of Dr. Godfrey Rajkumar from the register of medical practitioners and to his eventual request for specific documents from the Medical Board of Trinidad and Tobago on the 15th day of February 2007. The documents sought by the Applicant were:

> "*.. statements, notes of evidence, reports, findings or rulings made by the Medical Board of Trinidad and Tobago in relation to the complaint against Dr. Godfrey Rajkumar…"*

Affidavit of the Defendant

1. The Defendant relied on an affidavit filed on the 31st day of July 2007, by Dr. Steve Smith, as President of the Council of the Medical Board of Trinidad and Tobago. In his affidavit, Dr. Smith set out the chronology of events which led to the erasure of Dr. Rajkumar's name from the register of Medical Practitioners. Dr. Smith's version accorded with that set out by the Applicant in his supporting affidavit.

2. Dr. Smith also provided evidence concerning the composition of the Medical Council and the names of persons, who, at the time of his affidavit had been elected to serve on the Council of the Medical Board.

3. At para 3 of his affidavit, Dr. Smith addressed the manner in which the activities of the Medical Board were forwarded:

> *"The operations of the Medical Board are financed solely from the registration and other fees…charged for keeping a medical practitioners membership on the Medical register current."*

4. Dr. Smith deposed further that attempts to procure funding from the Minister of Health have been unsuccessful.

5. Dr. Smith testified that the Council of the Medical Board is self-regulating, not taking directions from the Minister of Health or other officials. In support of his view that the Council has traditionally been independent of government influence,

Dr. Smith recounted that ruling government had unsuccessfully tried to order the Council to register foreign doctors.

Affidavit of the Interested Party

1. The Interested Party, the Minister of Health, relied on the affidavit of Sandra Jones, Acting Permanent Secretary in the Ministry of Health.

2. Ms. Jones expressed the view that the Medical Board being a body corporate is considered to be a public authority. Although this was a statement of opinion to be determined by the Court, no one applied for it to be struck out.

3. Ms. Jones confirmed however, that the Medical Board is not supported directly or indirectly by government funds.

Law – Relevant Statutes

1. ***Freedom of Information Act No. 26 of 1999***

- *S. 3 (1). The object of this Act is to extend the right of members of the public to access to information in the possession of public authorities by:*

  (a) making available to the public information about the operations of public authorities and in particular ensuring that the authorities, policies, rules and practices affecting members of the public in their

dealings with public authorities are readily available to persons affected by those authorities, policies, rules and practices; and

(b) creating a general right of access to information in documentary form in the possession of public authorities limited only by exemptions and exemptions necessary for the protection of essential public interest and the private and business affairs of persons in respect of whom information is collected and held by public authorities.

2. *The provisions of this Act shall be interpreted so as to further the object set out in sub-section (1) and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote promptly and at the lowest reasonable cost, the disclosure of information.*

- Section 4 - the interpretation section, provides definitions of *"official document"* and *"public authority",* in this way*:*

"*…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…"*

- Section 4 provides a definition of a *"public authority"* which includes eleven (11) different public entities.

It is common ground in this case that the only subsections which could pertain to the Medical Board are those provided at (h) and (k):

> "*public authority" means -*
>
> … … … … … … … …
>
> (h) *a statutory body, responsibility for which is assigned to a Minister of Government……*
>
> (k) *a body corporate or unincorporated entity -*
>
> *(i) in relation to any function which it exercises on behalf of the State.*
>
> …….
>
> *(iii) which is supported directly or indirectly by Government funds and over which Government is in a position to exercise control."*

- Part III of the *Freedom of Information Act* contains provisions on the *"Right of Access to Information…."*

- Section 11, which appears under Part III provides:
  (i) "*Notwithstanding any law to the contrary and subject to the provisions of this Act, it shall be the right of every person to obtain access to an official document."*

2. ***The Medical Board Act*** Ch.29:50

"The Act"

- The Medical Board is established as a body corporate by S. 3 of the Act:

  "*The Medical Board of Trinidad and Tobago established by the Medical Ordinance 1887 and continued under the former Ordinance shall from the commencement of this Act bear the name of "The Medical Board of Trinidad and Tobago" and by such name shall continue to be a body corporate…."*

- By S. 4, the Board is constituted by all persons registered as members of the "*Board"*.

- Section 6 of the Act institutes the Council of the Board and provides that the Council should consist of :

  (a) a President

  (b) a Vice President

  (c) a Secretary/Treasurer;

  (d) four other members of the Board to be elected as below provided….

- By section 6(2) the Council is authorized " *to appoint such committees as it thinks fit for the proper carrying out its functions…*"

- Section 7, 8 and 9 provides for the life of the Council and for the renewal of its life by tri-ennial elections.

- At Section 10 of the Act, the Council is mandated to keep a "*Register of Medical Practitioners"*. Section 10 (4) provides in mandatory terms:

  "*The Register shall at all reasonable times be and subject to inspection by any person."*

- By s. 12 of the Act (as amended by Act 22 of 2003) confers an entitlement on persons to be registered medical practitioners, on the condition that they hold the requisite Diploma. and that they are of good character and a fit and proper person to practice medicine.

- Section 13 empowers the Council to issue temporary licenses. Section 13 also empowers the Minister of Health to request "*the Panel"* to consider the issue of special temporary licenses when "*there is a shortage of persons available to practice medicine in the health sector…"*.

- By section 14 a person who is being admitted to registration is required to pay a fee prescribed. The person who seeks registration is also required to provide evidence of his qualifications and of his identity.

- By s. 19, the Secretary-Treasurer is required to publish in the Gazette the names of all registered practitioners. A similar duty is placed upon the Permanent Secretary, Ministry of Health in respect of the holders of special temporary licenses.

- Sections 20 to 35 confer powers on the Council. Section 20 invests in the Council rule and regulations making power.

- Section 24 empowers the Council to discipline registered medical practitioners. Section 24 (1) provides:

  "where any member of the Board … is guilty of infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to be dealt with in the manner hereinafter provided."

- Section 24 (2) invests in the Council the power to conduct an enquiry where an application is made by any four members of the Board.

- Section 24(2) also prescribes the punishment that may be imposed on a medical practitioner on proof of infamous or disgraceful conduct. The possible penalties are set out in order of the gravity with which they affect the practitioner's practice as a medical practitioner:

  (a) censure or reprimand the medical practitioner concerned;

  (b) suspend the medical practitioner concerned for a period not exceeding two years; or

  (c) cause the name of such practitioner to be erased from the register.

- The Council is not given an unbridled discretion in imposing punishment. Section 24 provides exceptions in respect of a practitioner:

  "… adopting or refraining from adopting the practice of any particular theory of medicine research…"

- A practitioner cannot be liable under s. 24 on account of a conviction for a political office outside the Commonwealth.

- Section 24(5) provides instances of "*… infamous or disgraceful conduct…"* This subsection however preserves the generality of the earlier subsections.

- Section 34 provides for dues to be remitted for the use of the Board: "*Any sum or sums of money arising from convictions and recovery of penalties imposed by this Act… shall pay the amount recovered to the Secretary-Treasurer for the use of the Board"*.

- Section 35 addressed the use of funds collected by the Board: *"The funds or moneys belonging or payable to and collected by the Board under or by virtue of this Act may be applied towards the payment of all expenses incurred in carrying out the provisions of this Act"*.

Amendments to the Medical Board Act

Since 2006, the date of publication of the revised Laws of Trinidad and Tobago, there have been two Amendments to the *Medical Board Act:*

- Act No. 31 of 2007
- Act No. 7 of 2009

Act No. 31 of 2007

- The *2007 Act* completely alters the composition of the Medical Board. By virtue of the *2007 Act,* the Council is appointed by the Minister of Health rather than by tri-ennial elections by the membership of the Medical Profession. The Council under the *2007 Act*, now consists of eleven appointed members, only four of whom are to be elected by the Board.

- Under the *2007 Act*, the offices of President, Vice President, Secretary and Treasurer are elected from the Council, rather from the wider catchment of the body of registered medical practitioners.

- The 2007 Act provides as well for the institution of a Specialist Medical Register, recording the particulars of specialist practitioners.

Act No. 7 of 2009

- The 2009 Act establishes a *"Panel for the issue of special temporary licenses"*.

  The functions of the Panel would be set out at s.9 (b) of the Amended Act and include considering applications for the issue of special temporary licenses, at the request of the Minister of Health.

- By s. 7 of the 2009 Amendment, the Act is amended to include s.13(a) which requires the Permanent Secretary in the Ministry of Health to keep a book of Special Temporary Licenses. This *"Book"* is required to record particulars of holders of special temporary licences.

Authorities for the Claimant

Chandresh Sharma v The Integrity Commission HCA No. Cv 2005 of 2004

The Applicant in this case made a request pursuant to Section 13 of the FOIA, to the Integrity Commission for certain information. The Commission refused the request on the basis that the information requested was not disclosable. One of the issues that Justice Jamadar (as he then was) had to decide was whether or not the Integrity Commission was a Public Authority. The Judge found that the Integrity Commission was a public authority falling, within the definition under Section 4(k)(i) of the FOIA. According to Justice Jamadar, any interpretation of 'public authority' as defined in section 4 of the FOIA must begin with an understanding of the purpose and intention of the Act and that, the correct approach to determining what is a public authority for the purposes of the FOIA is a permissive and not a restrictive one. At page 5 of his Judgment, the learned Judge had this to say:

> *"In my opinion, any interpretation of 'public authority' as defined in section 4 of the FOIA must begin with an understanding of the purpose and intention of the Act itself. Sections 3 and 11 of the FOIA extend a right to access to members of the public to information in the possession of public authorities, subject to the provisions of the FOIA itself…. Section 3(2) of the FOIA prescribes the interpretative lens through which all the provisions of the FOIA must be viewed and construed….*

In my opinion, given the object and intention of the FOIA and the interpretative lens prescribed by it, and given non-applications and exemptions also specifically provided for by it, the correct approach to determining what is a public authority for the purposes of the FOIA is a permissive and not a restrictive one."

Barney Sheedy v The Information Commissioner and Minister for Education and Science and The Irish Times (Unreported) [2003] No. 20 MCA

This is a case from the High Court of Ireland. The appellant is a principal of a school. An inspection of the school was carried out by an inspector appointed by the Department of Education. At the end of the inspection, a report was produced, which contained a considerable amount of information about the school.

The Irish Times applied to the Department of Education under the provisions of the Freedom of Information Act, 1997 for access to the reports for a number of schools including the appellant's school. The department refused access on the basis that they were prohibited under Section 53 of the Education Act 1998. Section 53 provides that access may be refused to any information which would enable the compilation of so called school league tables.

The Irish Times appealed to the Commissioner who ruled that with the exception of parts that contained personal information, that the reports should be released to the Irish Times. This decision was subsequently set aside by the Commissioner who directed that access be given to redacted versions of the report. The Commissioner's decision was appealed to the High Court by Mr. Sheedy. The High Court upheld the Commissioner's decision.

Mr. Justice Gilligan in delivering the judgment of the High Court said at page 18:

> *"It is clear that the intent of the Freedom of Information Act, 1997, is to enable members of the public to obtain access "to the greatest extent possible consistent with the public interest and the right to privacy" to information in the possession of public bodies."*

Mr. Sheedy subsequently appealed to the Supreme Court. The Supreme Court, in a majority decision, found against the Commissioner. The minority Judgment of Justice Fennelly contained a number of positive endorsements in relation to the spirit of accountability and transparency of the FOIA 1997. At page 1 the Judge said:

> "*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 world-wide trend. The general assumption is that it originates 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."*

Justice Fennelly referred to and endorsed the following statement by Mckechnie J in ***John Deely v The Information Commissioner [2001] 3 I.R. 439 at 442*****:**

> **"***As can thus be seen the clear intention is that, subject to certain specific and defined exceptions, the rights so conferred on members of the public and their exercise should be as extensive as possible, this viewed, in the context of and in a way to positively further the aims, principles and policies underpinning this statute, subject and subject only to necessary restrictions. It is on any view, a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy."*

The Minister for Agriculture and Food v The Information Commissioner 1999 No. 48 MCA

In this case a request was made by one Mr. Glynn, an employee of the Department of Agriculture and Food, pursuant to Section 7 of the FOIA, 1997, to view his personnel file. He was granted access to documents from a particular date but was refused access to documents prior to that date on the grounds that those records were not being used or were not proposed to be used in a manner or for a purpose that effects or would or may affect adversely the interests of Mr. Glynn. He sought a review of the said refusal by the department. The Ministry appealed after the Respondent decided to vary the decision of the Department to not grant full access to all documents. The appeal was dismissed and Mr. Glynn was granted access to all records on his personnel file.

The Court emphasized the importance of the preamble of the FOIA 1997 which describes it as *"an act to enable members of the public to obtain access to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies."* The Court then went on to say at paragraph 12:

> *"In this regard, in the light of its preamble, it seems to me that there can be no doubt but that it was the intention of the legislature, when enacting the provisions of the* ***Freedom of Information Act, 1997****, that it was only in exceptional cases that*

members of the public at large should be deprived of access to information in the possession of public bodies…."

Aston Cantlow PCC v Wallbank (CA) [2001] 3 WLR

This case concerned an attempt by a parochial church council to obtain payment from the lay rectors of a parish for the cost of repairs to the chancel of the parish church. The Court of Appeal held that, "*the parochial church council was a 'public authority' in that it had powers unavailable to private individuals to determine how others should act, and in particular to issue a notice to repair which had statutory force, and was created and empowered by law as part of the church by law established with power to enforce through the courts a common law liability to maintain its chancels which rested on persons who were not necessarily members of the church and was in any event a legal person certain of whose functions were of a public nature."* The Court therefore concluded that for the purposes of Section 6 of the Human Rights Act 1998, the parochial church council was a 'public authority' and that it could not lawfully recover the cost of chancel repairs from the defendants.

The Claimant, Bernard Mohamdally, did not cite the House of Lord decision, reported at **[2003] UKHL 37,** which overturned the decision of the Court of Appeal and held that although the Church of England as the established church had special links with central government and performed certain public functions it was essentially a religious organization and not a 'public authority'. The Law Lords stated that under S.6 of the Human Rights Act, 1998 a public authority could be either a core public authority which exercised functions which were broadly governmental so that they were all functions of a public nature or a hybrid public authority some of whose functions were of a public nature. According to the House of Lord (Lord Scott of Foscote dissenting) the fact that the public had certain rights in relation to their parish church was

not sufficient to characterize the actions of a parochial church council in maintaining the fabric of the parish church as being of a public nature, so that when the plaintiff took steps to enforce the defendants' liability for the repair of the chancel it was not performing a function of a public nature which rendered it a hybrid public authority under the 1998 Act.

R(A) v Partnerships in Care Limited [2002] EWHC 529

The issues raised in this case were whether the decision of the managers of a private psychiatric hospital to change the focus of the ward was a decision made 'in relation to the exercise of a public function" and therefore amenable to judicial review and whether the managers of the hospital were a public authority within the meaning of Section 6 of the Human Rights Act 1998.

The Court held that the decision of the hospital to change the ward was an act of public nature. At para 24:

> *"Decisions as to the form which treatment for a particular patient should take are clinical decisions of the psychiatrists…. But whether facilities can and should be provided, and adequate staff made available, to enable the treatment which psychiatrists say should take place is another matter entirely. That is the subject of specific statutory underpinning directed at the Hospital: the statutory duty imposed by regulation 12(10 of the 1984 regulation on the hospital to provide adequate professional staff and adequate treatment facilities was cast directly on the hospital as the registered person under the Registered Homes Act 1984."*

Queensland Law Society v the Information Commission and S.J. English (1st March 1996 unreported)

In this case the Queensland Law Society challenged the decision of The Information Commissioner that the Society was amenable to the provisions of the *Freedom of Information Act*

1992. The issue was whether the Society was a 'public authority' within the meaning of S.9(1)(a)(i) of the Freedom of Information act which defines a 'public authority' as "a body…that…is established for a public purpose by an enactment". The Court was of the view that the Society fell within the meaning of 'public authority under the Act. At page 6 of the decision the Court said:

> *"…although a body may engage in significant private activities, where it performs functions within the province of government which a have a public nature such as providing for public welfare, it is a public authority, at least in respect of those public functions. That is directly applicable to the present case. It is more emphatically so where the relevant definition speaks to the establishment of a body by an enactment for a public purpose and the enactment which incorporated and established the relevant body is clearly directed to providing for the performance of such public functions by that body."*

Poplar v Donoghue [2001] EWCA Civ 595

In this case the Court granted a possession order under the Housing Act 1988 in favour of a registered social landlord housing association. On appeal by the tenant, the issue was whether Poplar was a 'public authority'. The Court of Appeal found that it was. The Court stressed that the definition of what is a public authority should be given a generous interpretation, however, that the fact that a body performs an activity which otherwise a public body would be under a duty to perform, cannot mean that such performance is necessarily a public function. The Court went on to identify a number of factors which would suggest that a function was public:

- Statutory authority
- Control over the function by another body which is a public authority

- Acts which might be of a private nature being enmeshed in the activities of a public body
- Closeness of the relationship with a public body
- Transfer of responsibilities between public and private sectors.

Authorities for the Defendant

Yukon Medical Council v Information and Privacy Commission 2002 YKCA 14

This case involved a request for access to information in the files of the Yukon Medical Council. Access to certain information within the scope of the request was refused and the Applicant asked the Information and Privacy Commissioner to review the Council's decision to refuse access. At inquiry before the Commissioner, the Council questioned the Commissioner's jurisdiction to continue the review on the basis that the Yukon Medical Council is not a 'public body' as defined by the ATIPP Act. The Act gives the Commissioner authority, at inquiry, to decide all questions of fact and law. The Commissioner decided the Yukon Medical Council was a 'public body'.

The Yukon Medical Council then petitioned the Yukon Supreme Court for a judicial review of the Commissioner's decision. The Yukon Supreme Court dismissed the petition and held the Council to be a 'public body' under the Act.

The Yukon Medical Council appealed the decision of the Supreme Court of the Yukon Territory to the Yukon Court of Appeal. The issue on appeal was whether the chambers judge erred in holding that the Council was ‘an agent of the government of the Yukon’, and therefore a public body subject to the jurisdiction of the Privacy Commissioner. The Court of Appeal disagreed with

the Commissioner and the Yukon Supreme Court, and held that the Yukon Medical Council is **not** a 'public body'.

Both the Commissioner and the Yukon Supreme Court found that the Council's administrative structure and functions were such that it must be considered an agent of the government. However, at Para 40 of the Judgment of the Court of Appeal, delivered by the Honourable Chief Justice Finch, the learned Judge had this to say:

> *"…The correct question is whether the constating statute, the **Medical Profession Act**, conferred powers on the Council which it was intended to exercise free from government control to such an extent that it must properly be regarded as an independent body; or whether the statute retained in government such control that the Council must properly be regarded as an arm of government, carrying out its functions under executive control in the service of the Crown.*
>
> *In my opinion, when viewed in that way, and having regard for the way the test of control has been applied in the cases referred to, the Council is clearly an independent body and not an agent of the Crown. It is not therefore a "public body" within the meaning of the **ATIPP Act**, and the Privacy Commissioner is without jurisdiction to continue his inquiry.*

During the course of his judgment, the Honourable Chief Justice referred to a number of authorities all of which have been referred to and relied on by the Defendant.

The first case is ***Metropolitan Meat Industry Board v Sheedy and others [1927] A.C. 899 (P.C.)***. The appellant in this case was established by statute to administer the provisions of the **Meat Industry Act**. A company in liquidation owed money to the Board. The issue was whether that

debt was due to the Crown, in which event the Board's claim would have priority over debts due to other unsecured creditors of the company. The Privy Council found the Board not to be a Crown agent.

Chief Justice Finch cited the following dicta of Viscount Haldane, who delivered the judgment of the Privy Council:

> *"In the statute before their Lordships they think it not immaterial to observe that under the previous legislation of 1902 the local authorities entrusted with the powers which the Act of 1915 readjusts were certainly not constituted servants of the Crown under the then existing Acts. Their Lordships agree with the view taken by the learned Judge in the Court below that no more are the appellant Board constituted under the Act of 1915 servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund. Under these circumstances their Lordships think that it ought not to be*

held that the appellant Board are acting mainly, if at all, as servants of the Crown acting in its service."

Chief Justice Finch also referred to the case of ***Halifax v Halifax Harbour Commissioners [1935] 1 D.L.R. 657 S.C.C.*** and in particular the statement by Duff C.J.C at page 664 of the judgment:

"To state again, in more summary fashion, the nature of the powers and duties of the respondents: their occupation is for the purpose of managing and administering the public harbour of Halifax and of the Crown; their powers are derived from a statute of the parliament of Canada; but they are subject at every turn in executing those powers to the control of the Governor representing His Majesty and acting on the advice of His majesty's Privy Council for Canada, or the Minister of marine and Fisheries; …"

After referring to and distinguishing ***Metropolitan Meat Industry Board v Sheedy*** and ***Fox v Government of Newfoundland [1898] A.C. 667*** Duff C.J.C. concluded:

"Obviously, there is little relevant analogy between such a body and the respondents, whose duties mainly consist in managing and administering property which belongs to the Crown and whose activities and whose revenues and expenditures are subject to the control and supervision of the Crown as explained above."

The other case that Chief Justice Finch referred to was ***R v Ontario Labour Relations Board (1963) 38 D.L.R. (2 ed) 530***. The Honourable Chief Justice quoted the following passage from page 534 of the judgment delivered by Laidlaw J.A.:

It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.

Further I think that the functions performed and the services rendered by the Board may be regarded as public or semi-public in nature. Nevertheless, and while one of the objects of the Board as declared in the legislation [s.4(10] is to "acquire, construct, equip and operate a wholesale fruit and produce market" and that object no doubt is to serve the needs of many groups of citizens, the establishment, operation, management and maintenance of a wholesale fruit and produce market cannot properly be regarded as a means of fulfilling and duty or responsibility of the Crown to the public or any section thereof. In short the Board was not created as an instrument, arm or agency of the Crown to discharge and duty or responsibility of the Crown.

Further, it appears to me plain that it was not intended by the Ontario Food Terminal Act that the exercise of the powers entrusted thereunder to the Board should be for the benefit of the Crown."

Reasoning and Decision

1. The single issue which arises for the Court's determination in this Claim is whether the documents, which the Claimant has requested from the Defendant, constitute official documents for the purpose of s. 11 of the ***Freedom of Information Act***[1].

2. A document, by virtue of s.4 of the ***Freedom of Information Act,*** is an official document if it is a document held by a public authority in connection with its functions.

3. In the instant case, there is no dispute that the documents are held by the Council of the Medical Board, in connection with its functions as the body responsible for discipline of registered medical practitioners.

4. The Defendant disputes however, that it is a "*public authority*" within the meaning of the ***Medical Board Act***[2]*,* as provided by s.4 of the Act[3].

5. It has been accepted by both parties to these proceedings that the only subsections of section 4 under which the Medical Board can fall are s.4(h) or (k)[4]. In my view, a plain reading of s.4(h) and (k)(i)[5] must necessarily exclude the Medical Board. Section 4(h) includes statutory bodies, responsibility for which is assigned to a Minister of Government. Although the Medical Board is a statutory body, there is no provision by which any Minister is assigned responsibility for it.

[1] Freedom of Information Act No. 26 of 1999
[2] Medical Board Act Ch. 29:50
[3] Freedom of Information Act No. 26 of 1999
[4] Freedom of Information Act No. 26 of 1999
[5] Freedom of Information Act No. 26 of 1999

6. Similarly section 4(k)(iii)[6] is excluded since there is no provision for direct or indirect State funding. In fact, the uncontroverted evidence of Dr. Steve Smith, deponent for the Defendant, Medical Board, was that the Defendant finances its own activities through fees collected from its membership[7].

7. Accordingly, the issue before this Court is reduced to the narrow issue of whether the Medical Board can properly be described as "*a body corporate"* exercising function on behalf of the State as provided at s.4(k)(i))[8].

8. There is no dispute that the Medical Board is constituted a body corporate by s. 3 of the ***Medical Board Act***[9]. The question for this Court's determination is therefore even more narrowly defined, being whether the Medical Board in its disciplinary function, acts on behalf of the State.

9. Learned Senior Counsel for the Medical Board relies on the decision of the Court of Appeal in ***Yukon Medical Council v Information and Privacy Commissioner***[10], in support of the contention that the Medical Board, is not an agent of the State and therefore does not act on the State's behalf.

10. In the ***Yukon Medical Council v. Information and Privacy Commissioner***[11], Chief Justice Finch, in the course of his decision stated that the Yukon Medical Council

[6] Freedom of Information Act No. 26 of 1999
[7] See para. 13 of the Affidavit of Dr. Steve Smith filed on 31st July 2007.
[8] Freedom of Information Act No. 26 of 1999
[9] Medical Board Act Ch. 29:50
[10] 2002 YKCA 14
[11] *Id.*

was not an agent of the government of the Yukon. The Learned Chief Justice identified the correct question thus:

> "*The correct question is whether the constating statute… conferred powers on the Council which it was intended to exercise free of government control to such an extent that it must properly be regarded as an independent body; or whether the statute retained in government such control that the Council must properly be regarded as an arm of the government carrying out its functions under executive control in the service of the Crown.…"*

The formula prescribed by the Court of Appeal of the Yukon Territory depends on an assessment of the extent of government control of the body in question. According to the Yukon test, a body free from government control is an independent body and not a Crown agent. If the Yukon test is applied to the Medical Board, as constituted by the ***Medical Board Act***[12], it will be clear that, Government retained minimal control of the Medical Board.

The Council, the controlling body of the Medical Board, prior to the 2007 amendment[13] is constituted by members elected in tri-ennial elections. The Council acts independently in the function of discipline and holds broad discretionary powers. Moreover, the activities of the Board are not financed by State funds, but through funding generated by collecting registration and post-registration fees.

[12] Medical Board Act Ch. 29:50
[13] Act No. 31 of 2007

11. The structure of the pre-2007 Act underscores the independence of the Board. An application of the "*Yukon Test"* would yield a finding against the Board being a public authority.

12. The decision of the Yukon Court of Appeal is compelling both by virtue of its reasoning and by its reference to decided cases. This authority is not however binding on this Court and is only of persuasive value. The Yukon Case is distinguishable from the instant case in that the ***Access to Information and Protection of Privacy Act*** of the Yukon Territory pertains to an agent of the Crown. The ***Freedom of Information Act*** of Trinidad and Tobago makes no reference to agency, but defines the public authority as one which exercises functions on behalf of the State. This Court considered that the words *"on behalf of"* do not necessarily imply the role of agent, but liberally interpreted means "for the benefit of".

Moreover, it is unclear whether the Yukon Act contains a provision equivalent to s.3 of the ***Freedom of Information Act*** of Trinidad and Tobago, a section whose critical importance was highlighted by Justice Jamadar (as he then was) in ***Chandresh Sharma v The Integrity Commission***[14]***.***

13. In ***Chandresh Sharma v. The Integrity Commission***[15]***,*** Justice Jamadar considered whether the Integrity Commission was a public authority for the purpose of the ***Freedom of Information Act.*** At page 3 of 18, Justice Jamadar considered in particular whether the Integrity Commission was caught by the definition at s. 4(k)(i) of the ***Freedom of Information Act***.

[14] H.C.S. 2005/2004
[15] *Id*

The Integrity Commission, unlike the Medical Board, is not a body corporate. Justice Jamadar identified the functions of the Integrity Commission at page 4 of 18:

> *"That function, which involves the receipt of declarations and statements of registable interests…….is quite clearly being carried out on behalf of and for the benefit of the People of Trinidad and Tobago…."*

Justice Jamadar further highlighted s.3 of the ***Freedom of Information Act***, describing it as *"the interpretative lens through which the Freedom of Information Act must be viewed"*[16]. Having regard to s. 3 of the ***Freedom of Information Act***, Justice Jamadar ruled that:

> *"…the correct approach to determining what is a public authority, is a permissive and not a restrictive one"*[17].

Justice Jamadar proceeded to hold that the independence of a body was not incongruent with it being a public body. The learned judge stated:

> "*There is nothing inconsistent with an entity being independent, and that entity being subject to the Freedom of Information Act. Indeed in my opinion true independence is facilitated by accountability and not undermined by it…"*[18].

[16] *Supra* n. 14 at p. 5 of 18.
[17] *Supra* n. 14 at p. 6 of 18
[18] *Supra* n. 14 at p. 6 of 18

14. The test propounded in ***Chandresh Sharma v. The Integrity Commission***[19] differs from the Yukon Test in two ways:

- seen through the interpretative lens of s.3, the Court adopts a permissive rather than a restrictive approach to the interpretation of the both the ***Freedom of Information Act*** and the constituting legislation. *"State",* at s.4 K(i) interpreted liberally means the "*people of Trinidad and Tobago rather than the Government of Trinidad and Tobago".*

- Secondly, independence is not seen as antithetical to the status of a public authority. In fact according to Justice Jamadar, the attribute of independence is enhanced by the accountability which is required by the ***Freedom of Information Act***.

15. The decision of Justice Jamadar (as he then was) like the decision of the Yukon Court of Appeal, is of persuasive value only and is not binding on this Court.
In my view however, the decision of Justice Jamadar is of higher persuasive value because it applies and interprets the very legislation with which this Court is concerned.

16. I turn therefore to apply the learning in ***Chandresh Sharma v. The Integrity Commission***[20] to the Medical Board, as constituted by the ***Medical Board Act***.

[19] *Supra* n. 14
[20] H.C.S. 2005/2004

Any analysis must necessarily begin with the inescapable premise that the Medical Board is an independent body in so far as it is not answerable to any Minister of Government, save in its rule-making functions. The Council of the Medical Board is certainly not answerable to any Minister or Government official in its functions as a disciplinary tribunal.

Moreover, the Council is financially independent of Government. The factor of independence does not however preclude the Medical Board from being a public authority. The Court must however consider whether it exercises its disciplinary functions on behalf of the people of the Republic of Trinidad and Tobago, or whether the disciplinary functions are exercised only for the benefit of the body of registered medical practitioners.

17. In answering this question, the Court observes that the Council of the Medical Board derives its power under and by virtue of an Act of Parliament. This in itself does not make it a public authority. However, in this way it must be distinguished from bodies such as trade union which derive their authority by the agreement of their membership.

18. The Court observes further, that of the offences which are particularized at s.24 of the ***Medical Board Act*** are all offences which would be purported against patients and members of the public.

19. If therefore a permissive and purposive view is taken of s.24 of the ***Medical Board Act***, it would be clear that the disciplinary power of the Council has been conferred

by Parliament for the protection of the public. The disciplinary function is therefore, exercised on behalf of or for the benefit of the population at large and under a permissive interpretation on behalf of the people of Trinidad and Tobago.

It is therefore my view and I hold that the Medical Board, as constituted by the ***Medical Board Act*** is a public authority for the purpose of s. 4(k)(i) of the ***Freedom of Information Act.***

Orders

The Claimant is entitled to the following reliefs:

1. A declaration that the Medical Board of Trinidad and Tobago is a public authority within the meaning of the ***Freedom of Information Act*** and is subject to the provisions of the said *Act*.

2. A declaration that the Applicant is entitled to the information set out in the said Application

Dated this 30th day of November, 2009.

Mira Dean-Armorer
Judge