REPUBLIC OF TRINIDAD AND TOBAGO

CLASSIFICATION : ORGINATING SUMMONS

IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO

H.C.A. NO. 1055 OF 2004

IN THE MATTER OF AN APPLICATION BY VISHNU JUGMOHAN OF NO. 805 ST. CROIX ROAD LENGUA VILLAGE, BARRACKPORE FOR JUDICIAL REVIEW AS OF RIGHT PURSUANT TO SECTION 39 OF THE FREEDOM ON INFORMATION ACT 1999 (AS AMENDED) ("THE SAID ACT)

AND

THE MATTER OF THE ILLEGAL AND/OR UNLAWFUL FAILURE AND/OR REFUSAL BY THE TEACHING SERVICE COMMISSION AND/OR THE MINISTRY OF EDUCATION TO MAKE A DECISION ON THE APPLICANT APPLICATION OR REQUEST FOR CERTAIN INFORMATION PURSUANT TO THE PROVISIONS OF THE SAID ACT

AND

IN THE MATTER OF THE ILLEGAL AND/OR UNLAWFUL DENIAL OF ACCESS TO AND/OR PROVISIONS OF COPIES OF THE DOCUMENTS REQUESTED VIA AN APPLICATION UNDER THE SAID ACT DATED 14TH DAY OF APRIL, 2004

AND

IN THE MATTER OF THE UNREASONABLE DELAY ON THE PART OF THE RESPONDENT IN MAKING A DECISION ON THE APPLICANT'S REQUEST FOR CERTAIN INFORMATION PURSUANT TO AND UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT AND/OR IN PROVIDING THE REQUESTED INFORMATION TO THE APPLICANT

BETWEEN

VISHNU JUGMOHAN

APPLICANT

AND

TEACHING SERVICE COMMISSION

RESPONDENT

****

JUDGMENT

Before the Honourable Mr. Justice V. Kokaram

Appearances:

Mr. Anand Ramlogan, and Ms. J. Furlonge for the Applicant

Mr. Sasha Bridgemohansingh and Ms. S. Sharma for the Respondent

1. THE FOIA APPLICATION:

1.1 Mr Vishnu Jugmohan, the Applicant, a workshop attendant employed at the Moruga Composite School for over 13 years, made a request pursuant to section 13 of the Freedom of Information Act ("FOIA") of the Ministry of Education[1] for the following documents:

1. "*Copy of Minutes of Meeting of the Teaching Service Commission from January 1993 relative to the appointment of Technical Vocational Teacher I"* (hereinafter referred to as "Document 1");
2. *Copies of any letters of recommendation for acting appointment and or promotion,* (hereinafter referred to as "Document 2");
3. *Copy of seniority list for Technical Vocational Teacher 1 and work shop attendant, "*(hereinafter referred to as "Document 3").

[1] The "section 13 request" is dated 14th April 2004.

1.2 The request is in the form as provided in the Schedule to the FOIA. The information requested is said to be important to the Applicant's career and he deposes that:

> "*The requested information pertains to my career and is important to me. It will also enable me to make a determination as to whether I have been unfairly bypassed for promotion and/or acting appointments*".

1.3 There is no evidence that the Respondent actually received this application from the Applicant directly. However, the Applicant's attorney-at-law by letter dated 25th May 2004 enclosed a copy of the Applicant's application to the Respondent. On 9th June 2004 this letter with the Applicant's application was received by Ms Merle Goden, Administrative Officer IV at the Ministry of Education assigned to work on the FOIA and responsible for receiving applications and forwarding same to various departments in order to obtain the required information. [2]

1.4 Ms Goden responded to the Applicant's attorney-at-law on 11th June 2004, indicating that the Applicant's request for Documents 2 and 3 above were forwarded to the Director of Human Resources for action and that Document1 was referred to the "FOI designated officer" of the Respondent, Mrs. Yolande Charles-Mottley.

1.5 By letter dated 7th July 2004, Ms Goden indicated to the Applicant that Documents 2 and 3 were available and that the Applicant can have access to them as outlined in its letter dated 7th July 2004. By 3rd August 2004 the Applicant had obtained Documents 2 and 3. With regard to the Applicant's request for Document 1, Ms Goden stated *"a response to your second request will be issued to you shortly."*

[2] Pursuant to section 15 of the FOIA, the obligation imposed on the Respondent is to respond to this request and:
"*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 the request is duly made*."

1.6 At the same time, Ms Yolanda Charles Mottley, acting on behalf of the Respondent, sought to assist the Applicant with his FOIA request. She deposes in her affidavit that she replied to the request by letter dated 28th June 2004 acting pursuant to sections 14, 15 and 22 of the FOIA. It is this response which is now the subject of this present judicial review application and the contents of this correspondence is set out in full herein below.

2. **THE DECISION OF THE RESPONDENT:**

2.1 By its letter dated June 28th 2004, the Respondent responded to the Applicant's FOIA application in the following terms:

"Re: Request for Information Under the Freedom of Information Act (1999)

In replying to your request under the Freedom of Information Act (1999) (F.O.I. Act) for access to:

- *Copy of Minutes of Meeting of the Teaching Service Commission from January 1993 relative to the appointment of Technical Vocation Teacher 1.*
- *Copies of letters of recommendation for acting appointment and/or promotion for Vishnu Jugmohan.*
- *Copy of Seniority List for Technical Vocational Teacher I and Work Shop Attendant.*

I am unable to provide you with copies of the Minutes of Meeting as this is exempted under section 27 (1) ((b) as being internal working documents.

The disclosure of this would likely affect the frankness and candour of future pre-decisional communications. Also whilst the Act allows a person access to his own information, Section 30 exempts documents if disclosure would involve the disclosure of personal information of an individual to another individual.

The Ministry of Education is presently handling your request regarding documents No. 2 and No. 3. This information is not readily available at the Service Commission Department.

Attached is a copy of the response from Ministry of Education.

You are entitled to apply to the Ombudsman for review of this decision within twenty-one (21) days of receiving this letter or apply to the High Court for Judicial Review in accordance with the Judicial Review Act."

2.2. It is a very terse letter and as is discussed in detail below an inappropriate response to a FOIA request. Indeed it is advisable that at the earliest possible opportunity, Respondents set out full particulars of their reasons and the factual basis for refusing to provide information requested pursuant to the provisions of the FOIA, which is prima facie available, rather than simply parrot the statutory grounds as outlined in the Act. Only by so doing will it completely fulfill its obligations under section 23 of the FOIA to "*state the findings on any material fact, referring to the material on which those findings were based, and the reasons for the decision.*" Moreover with the introduction of the Civil Proceedings Rules 1998 and a pre-action protocol for public law matters such responses as obtained in this case has been hopefully condemned to the past.

3. THE APPLICATION FOR JUDICIAL REVIEW:

3.1 By the time this application was filed there was no dispute that the Applicant had already received Documents 2 and 3 and the sole issue for determination at the hearing of this application was whether the Applicant was entitled to access, to and/or whether the Respondent was entitled to refuse access to the Applicant of, Document 1 for the reasons set out in its letter dated 28th June 2004.

3.2 Section 39 of the FOIA confirms the right of the Applicant to apply to the High Court for judicial review of any decision made by a public authority pursuant to this Act. On 12th July 2004, leave was granted to the Applicant to apply for judicial review pursuant to the Judicial Review Act 2000 for the following relief:

(a) An application of mandamus to compel the Respondent to provide the Applicant with the requested information as set out in his application made under the provisions of the

Freedom of Information Act dated the 14th day of April, 2004.

(b) A declaration that the Applicant is entitled to the information set out in the said application.

(c) Alternatively, an order directing the Respondent to forthwith prepare and supply notice in accordance with section 23 of the said Act.

(d) An order directing the TSC to publish a statement in accordance with the statutory requirements of section 7 of the Act.

(e) A declaration that there has been unreasonable delay on the part of the Teaching Service Commission in making a decision on the Applicant's request under the Freedom of Information Act.

3.3 The grounds of review advanced by the Applicant in challenging the failure of the Respondent to supply Document 1 included inter alia: the omission or failure of the Respondent to perform its statutory duty under the Act and that the denial of access to the document is illegal, unfair and unreasonable.

3.4 It must be noted at the outset that apart from the contents of the letter set out above, the Respondent did not set out in its affidavit any reasons or further material or any factual basis to substantiate its position on refusing to give access or to demonstrate by way of a proper explanation that these documents genuinely qualify as exempt documents under the FOIA.

4. SUBMISSIONS OF THE RESPECTIVE PARTIES:

4.1 Attorney for the Respondent adopted the commendable position of presenting her client's case first before that of the Applicant. In this way the Respondent accepted that it must demonstrate that its decision and reasons set out in its letter dated 28th June 2004, properly complies with Part IV of the FOIA to successfully deny access to the Applicant of the document requested in his FOIA application.

4.2 Both parties agreed that this application raises a very narrow issue for determination: whether Document 1 is an exempt document falling within the classification of the provisions of the FOIA namely section 27(1), "internal working documents" and/or section 30, "documents affecting personal privacy" and whether the Respondent was entitled to withhold or deny access to that document on those grounds.

4.3 Among the reasons advanced by the Respondent in support of its contention that Document 1 is an exempt document for the purposes of the FOIA were as follows:

(i) That the grounds relied upon by the Respondent to refuse access to the documents are to judged against the Wednesbury standard of reasonableness.

(ii) Document 1 is an "internal working document" as defined by section 27 of the Act.

(iii) Disclosure must not be ordered by the Court if there exists in the mind of the Respondent that it is inimical in the public interest to so produce the document.

(iv) Disclosure of this document would be contrary to the public interests as it is likely to affect the "frankness and candour" of future deliberations and meetings of the Commission and/or would result in the diminution in the frankness and candour in pre decisional communications.

(v) The impact on the "frankness and candour" of pre decisional discussions is a well recognized head of public interest factors to be taken into account in refusing access to documents requested under the FOIA.

(vi) The Court must consider the context within which the deliberations take place, the nature and function of the public authority which is asked to provide the documents and the nature of the document, to determine whether it is reasonable to assert this exemption;

(vii) The Court must also note whether the disclosure of the documents will result in the quality and integrity of the decision-making process being damaged.

(viii) It is difficult for the Respondent to lead any evidence with respect to this head of exemption at it considers its information to be confidential.

(ix) Although the Respondent admittedly did not lay any factual basis in detail, their substantial argument against non-disclosure is neither unreasonable nor unmeritorious and is one which only they are competent to make.

(x) A determination as to whether to accept the "candor and frankness" argument is dependent on the circumstances and context of the request and the documents in issue: i.e. the status of the applicant, and the sensitivity of the occupation. The court must conduct a balancing exercise.

(xi) The information requested also contains personal information and is exempt pursuant to section 30 of the Act. This is a factual inquiry conducted by the Respondent.

(xii) If the Court is of the view that the decision is not reasonable it should remit the matter to the Respondent for further consideration and not substitute its views for that of the Respondent.

4.4 Attorney for the Applicant however contended that this Court should engage in a merit based exercise to determine whether or not the documents are exempt under the Act, similar to the exercise conducted by administrative tribunals set up under similar FOIA legislation in the Commonwealth. He further submitted inter alia:

(i) The burden of proof lies on the Respondent to show good reason why the documents are exempt.

(ii) Whenever there is doubt, the scale is titled by Parliament in favor of granting access to documents to applicants.

(iii) An applicant does not have to demonstrate the reason for making the application. See the scheduled request under the FOIA.

(iv) The Applicant is entitled to the information and it is for the Respondent to justify the reasons why access cannot be provided.

(v) The issue to be determined is whether the exemption is properly invoked. Is the exemption valid or justifiable? That is the end question.

(vi) The Respondent must show a specific and tangible harm, which will result from disclosure not general "frankness and candor."

(vii) There is no evidence as to what were the reasons for non-disclosure, no evidence as to what consideration was taken into account by the Respondent to arrive at the decision.

(viii) The public interest favors disclosure of the deliberative process because it promotes fairness in the decision making exercise of the Commission.

(ix) The frankness and candor argument is not a proper reason to justify a refusal to provide access to documents.

(x) The Court can and should ask for the production of the requested document so that it can inspect the document itself prior to making any order for access.

5. THE ISSUES:

5.1 The issues that arise for determination on this application are as follows:

(a) Whether the Respondent is in breach of its obligations under section 16 of the FOIA;

(b) Whether the Respondent has established that the document requested is an exempt document within the meaning of sections 27 or 30 of the FOIA;

(i) which party bears the "burden of proof" as to whether a document is "an exempt document." (ii) has that party discharged "that burden".

(c) Whether the grounds upon which the Respondent rely to deny access to the said documents are lawful and reasonable:

(a) Whether the documents are internal working documents;

(b) Whether its disclosure is contrary to the public interest;

(c) Whether the documents contain personal information within the meaning of section 4 of the Act;

(d) Whether the disclosure of that information is unreasonable.

(d) Whether the Respondent in the circumstances acted contrary to the law, abused its powers or unreasonably exercised its powers in failing to disclose the said document;

(e) Whether and in what manner should the Court exercise its discretion in granting relief if at all, on this application

6. SUMMARY OF FINDINGS

6.1 There is no need for the judicial review court in FOIA applications to conduct a merit-based approach., to determine if a document is an exempt document. The traditional forensic tools available to the judicial review court are sufficient and flexible enough to satisfactorily ensure compliance with the purpose and objectives of the Act.

6.2 For the reasons set out below this Court is minded to make an order for the Applicant to be granted access to the requested document. However, because the Court is mindful of the rights of third parties and the inadvertent disclosure of their personal information, it is prepared to order that the requested documents be produced to this Court for its inspection to determine the extent to which the requested documents in its full form or abridged /edited version should be released to the Applicant.

6.3 Public authorities can no longer rely on standard or stock answers to requests for information under the FOIA. To do so would be to re-create the barriers to access to information, which were torn down by the implementation of the FOIA. The bias under the FOIA is towards the disclosure of documents. The documents no doubt were previously maintained and considered private, imbedded deep in the bosoms of our public administrators. It is no longer sufficient to therefore simply assert that a document is private and confidential without more in the face of a FOIA request, as the premise of such an application is that every person has a right to obtain access to

an official document as defined by the FOIA subject only to the limitations imposed by the legislation and not otherwise.

6.4 In the Commonwealth jurisdiction there is an increasing encroachment on the privacy of deliberations of government officials and public authorities. See ***Conway v Rimmer***[3] which marked the liberation of the common law towards disclosure of documents in the face of public interest immunity objections and is the fore runner to the FOIA in its various incarnations in the Commonwealth.

6.5 In determining whether documents are to be disclosed in the public interest, there is a fine balancing act that must be undertaken between the public's right to know and the public's right to good administration.

6.6 But sufficient reasons should be provided to deny a person access to official documents. The concept of "exempt documents" under the FOIA is the last bastion of administrative secrecy and should be carefully scrutinized to determine if such a classification will be allowed to stand against the public's right to access which is now to be jealously preserved by the Court. Hence a bare reliance on "frankness and candor" cannot be enough to prevent the citizen from piercing the administrative veil.

6.7 The concept of "frankness and candour" cuts both ways. It appears to have been given greater credence in dealing with managerial issues and personnel selection. But it is not sufficient on its own to outweigh the principle of disclosure. The candour argument is not on its own a sustainable proposition. Perhaps taken in the round with other considerations it may be satisfactory to oust the citizen's right to access.

6.8 The Court must be disturbed that the documents requested may run afoul of the personal confidence of third parties. But even in this case the Court can first inspect the documents prior to ordering its production to the Applicants even if only in a sanitized form.

[3] [1968] A.C. 996

6.9 Ultimately there is simply no sufficient reason set out by the Respondent to justify its insistence on the secrecy of the requested documents and it has not discharged the burden of demonstrating that these documents are genuinely "exempt documents," with the meaning of sections 27 and 30 of the Act.

7. **THE APPROACH OF THE JUDICIAL REVIEW COURT ON A FOIA APPLICATION:**

7.1 The Applicant contended that the Court in considering judicial review applications in relation to the FOIA should adopt a merit based approach in its analysis and determination of whether a document is properly exempt under Part IV of the FOIA. This Court is however of the view that there is no need to jettison the traditional role of the supervisory nature of the judicial review court in these applications and the Court must resolve the issue arising in this application based on the traditional tools available to the judicial review court.

7.2 It is trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made. It is concerned with the decision making process. Indeed the traditional and simplistic view of the judicial review Court is that "it acts as the referee merely to blow the whistle when the ball is out of play but not to tell the players how to play the game".

7.3 However, the exercise called upon in this case is in essence a matter of statutory construction. An interpretation of the right of an authority to refuse access to a document under sections 27 and 30 of the Act. There is no question in this case of showing deference or respect for the views of the Respondent because not only is there the meagrest form of evidence to justify the denial of access on public interest grounds, the Court in any event is ordinarily called upon to rule on the availability of "public interest immunity" in the disclosure of documentation.

7.4 In this area of the law as is explained below, no longer are courts reluctant to depart from the views of ministers or administrators. In a fair and effective public law system, policy statements and such decisions must be interpreted objectively, so that

the court may decide the question itself paying close attention to the reasons advanced by the administrators for the in competing interests.

7.5 .The traditional tools of judicial review can effectively chisel away at misconceived perceptions of rights on the grounds of illegality, irrationality and procedural impropriety. See ***CCSU v Minister of the Civil Service***. Public authorities' views on their perception of the protean topic of public interest are subject to the Court's supervision on Wednesbury grounds and not on the Court's own view by substitution. indeed Archie JA stated it succinctly recently in *Sharma v the Integrity Commission*:

> ***"The manner in which a decision is reached can often be critiqued in so many ways that the distinction between manner and merits (as a separate concept) that is easy to state in the abstract disappears. The classic example is a decision that is unreasonable in the Wednesbury sense."*** [4]

7.6 It is noted that section 31 of the FOIAwhich confirms the applicants right to apply for judicial review states "*for the avoidance of doubt*." There was no intention to create a new remedy for the review of decisions of the public authority under the FOIA which pertains in the jurisdictions such as Queensland and New South Wales where jurisdiction is conferred upon administrative tribunals to review the decision under the FIOA on its merits. Applicants in this jurisdiction have recourse to two options to challenge a decision to refuse access to a public document : (a) by reference to the Ombudsman and (b) the court of judicial review.

7.7 In the circumstances, this Court must consider whether the Respondent in relying upon sections 27 and 30 of the Act in refusing the Applicant access to Document1 was acting "Wednesbury unreasonably" or illegally or irrationally or out of proportion to the duty imposed under the Act and will not embark upon an exercise of dictating or fashioning its own policies and directives to this public body.

[4] *C.A. 2005 of 2004*

8. THE RIGHT TO ACCESS

8.1 The Freedom of Information Act (FOIA) is a novel piece of legislation. It has revolutionized the traditional notions of discovery and disclosure in civil litigation both at pre action stages and during proceedings. This is now a new genus of a right to access to information and provides a greater degree of access to members of the public to a number of documents in the possession of public authorities. In its implementation it has exploded one of the last barriers of bureaucracy in the confidentiality of documents generated by pubic authorities.

8.2 Until the enactment of the FOIA, public documents were kept quietly in the cabinets and filing rooms of public authorities. It is clear from the nature of the FOIA that more care must be taken by public authorities in its approach to FOIA applications and that it must be more sensitive to its obligations. There is a paradigm shift in public administration where the public is now entitled to know and have access to documents within the confines of the legislation.

8.3 Prior to its implementation the Court through such authorities as ***Duncan v Cammell Laird and Company Limited,***[5] ***Conway v Rimmer,***[6] ***Burmah Oil Company v Bank of England***[7] made vast leaps towards providing access to documentation to litigants and members of the public, which were held by public authorities notwithstanding claims by the Crown of public interest immunity privilege.

8.4 It is useful, in understanding the concept of disclosure or access now afforded under the FOIA, to examine the manner in which the Court permitted disclosure under the common law in the face of the public interest immunity objection. The cornerstones of disclosure in the face of an objection that it would be detrimental to the public interest is found in the classical statements of law in the following cases.

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[5] [1946] 1 AER 420
[6] [*ibid]*
[7] [1979] 3 AER 420

(a) ***Glasgow Corporation v Central Land Board, 1956 S.C. (H.L.) 1, 18-19:***

> *"The power reserved to the court is…a power to order production even though the public interest is to some extent affected prejudicially…. The interests of government, for which the minister should speak with full authority, do not exhaust the public interest. Another aspect of that interest is seen in the need that impartial justice should be done in the courts of law, not least between citizen and Crown, and that a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty pubic reason. It does not seem to me unreasonable to expect that the court would be better qualified than the minister to measure the importance of such principles in application to the particular case that is before it."*

(b) ***Robinson v State of South Australia (No. 2) [1931] A.C. 704, 715-716:***

> *"In view of the increasing extension of state activities into the spheres of trading business and commerce, and of the claim of privilege in relation to liabilities arising therefrom now apparently freely put forward, [Turner L.J.'s] observations [in Wadeer v. East India Co., 8 De G.M. & G. 182, 189] stand on record to remind the courts, that while they must duly safeguard genuine public interests they must see to it that the scope of the admitted privilege is not, in such litigation, extended. Particularly must it be remembered in this connection that the fact that the production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such 'plain overruling principle of public interest' as to justify any claim of privilege. The zealous champion of Crown rights may frequently be tempted to take the opposite view, particularly in cases where the claim against the Crown seems to him to be harsh or unfair. But such an opposite view is without justification. In truth, the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling*

reason for their production – one only to be overborne by the gravest consideration of state policy or security."

(c) In ***Duncan,*** the House of Lords, in an application for inspection, upheld the objection that disclosure of the requested documents would be contrary to the public interest. :

"It will be observed that the objection is sometimes based upon the view that the public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candor and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation, rather than upon the contents of the particular document itself. Several cases have been decided on this ground protecting from production documents in the files of the East India Company held in its public capacity as responsible for the government of India: see Smith v East India Co. (10) and Wadeer v East India Co. (11).

In the former case ***LORD LYNDHURST, L.C****., said at p. 55:*

"Now it is quite obvious that public policy requires, and looking to the Act of Parliament it is quite clear that the legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests"

There was heavy reliance in this case on the Crown's view as to which documents the release of which would be detrimental to the public interest. However the Court noted that this was a principle to be observed in the administration of justice and one ultimately to be made by the judge:

"Privilege, in relation to discovery, is for the protection of the litigant and could be waived by him. The rule that the interest of the state must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation, and, indeed, is a rule upon which the judge should, if necessary, insist, even though no objection is taken at all. This has been pointed out in several cases, e.g., in ***Chatterton v Secretary of State for India (25), per A.L. SMITH L.J., at p. 195.***

Although an objection validly taken to production on the ground that this would be injurious to the public interest is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce "except under the order of this honourable court." It is the judge who is in control of the trial, not the executive, but the proper rule for the judge to give is as above expressed."[8]

(d) ***Conway v Rimmer*** sought to clarify the law as set by ***Duncan v Camel Laird***. The House of Lords held in that case that in principle, documents are not to be withheld from disclosure unless there is some plain overriding principle of public interest which cannot be disregarded. Lord Reid stated:

"It is universally recognized that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the doubly service by disclosure of certain

[8] See page 428

document and there is the pubic interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation of the public services is of so grave a character that neither interest public or private can be allowed to prevail over it. With regard to such cases it would be proper to say as Lord Simon did that to order production of the documenting in question owed puts the interest of the state in jeopardy. But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the pubic interest involved. I do not believe that Lord Simon really meant than thru smelt probity of injury to the pubic service must always outweigh the gravest frustration of the administration of justice."[9]

However the right to withhold documents on this ground would be jealously scrutinized. Lord Upjohn stated: at page 993;

"A claim made by a minister on the basis that the disclosure of the contents would be prejudicial to the public interest must receive the greatest weight; but even here I am of opinion that the minister should go as far as he properly can without prejudicing the public interest in saying why the contents require protection. In such cases it would be rare indeed for the court to overrule the minister but it has the legal power to do so, first inspecting the document itself and then, if he thinks proper to do so, ordering its production."

(e) The House of Lords recognized the need, even in the face of a minister's certificate, to "take out the scales" to determine where the justice lies. The House of Lords developed this further in ***Burmah Oil***, ordering the inspection of documents to assist in the balancing exercise in the face of a comprehensive minister's certificate. Lord Keith effectively destroyed the "frankness and candour" styled objection:

[9] See page 958

"Over a considerable period it was maintained, not without success, that the prospect of the disclosure in litigation of correspondence or other communications within government departments would inhibit a desirable degree of candour in the making of such documents, with results detrimental to the proper function of the public service. As mentioned by Lord Reid in ***Conway v Rimmer*** *the fashion for this was set by Lord Lyndhurst L.C. through the reasons, possibly oblique, which he gave for refusing production of communications between the directors of the East India Co. and the Board of* ***Control in Smith v East India Co. (1841) 1 Ph. 50****. This contention must now be treated as having little weight, if any. In* ***Conway v Rimmer [1968] A.C. 910,*** *Lord Morris of Borth-y-Gest, at p. 957, referred to it as being of doubtful validity. Lord Hodson at p. 976, thought it impossible at the present day to justify the doctrine in its widest term. Lord Pearce, at p. 986, considered that a general blanket protection of wide classes led to a complete lack of common sense. Lord Upjohn, at p. 995, expressed himself as finding it difficult to justify the doctrine "when those in other walks of life which give rise to equally important matters of confidence in relation to security and personnel matters as in the public service can claim no such privilege." The notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off chance that they might have to be produced in a litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so. Nowadays the state in multifarious manifestations impinges closely upon the lives and activities of individual citizens. Where this has involved a citizen in litigation with the state or one of its agencies, the candour argument is an utterly insubstantial ground for denying him access to relevant documents. I would add that the candour doctrine stands in a different category from that aspect of public interest which in appropriate circumstances may require that the*

sources and nature of information confidentially tendered should be withheld from disclosure."

8.5 Although the issue of the disclosure of documents in these cases was dealt with in the context of applications for discovery under the Rules of Supreme Court, the process of weighing the competing interest of the state and individual is important. The FOIA has developed this trend of balancing the competing public interests of the citizen's right to know and the right of the public authority not to disclose documents that would be prejudicial to the public interest. Such documents are now described as "***exempt documents***" under Part IV of the Act. Under Part IV of the Act, Parliament has codified what previously existed under the common law as recognizable classes of documents, which should be protected from public scrutiny.

9. THE FOIA:

9.1 The FOIA extends the right of members of the public to access to information in the possession of public authorities subject to certain limitations. It imposes a duty upon certain public authorities to make information available to the public on request. The objects of the Act are set out in section 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 authorizations, policies, rules and practices affecting members of the public in their dealing with public authorities are readily available to persons affected by those authorizations, policies, rules and practices; and*

(b) *creating a general right of access to information in documentary form in the possession of public authorities limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in*

respect of whom information is collected and held by public authorities.

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

9.2 This indeed follows to a large degree several of its Commonwealth counterparts.[10] Section 3 of the FOIA is the fulcrum for the interpretation of the provisions of this legislation. From a reading of section 3 the following observations are made:

(a) the Act creates a new right of access to official documents within the possession of public authorities;

(b)this right is only limited by the statutory exceptions created within the Act;

(c) for a public authority to limit its obligations and/or deny access to documents it must demonstrate that the documents fall properly within the limitations of the Act;

(d) these limitations and exceptions are imposed for the protection of essential public interests and the private affairs of persons in respect of whom information is collected;

(d) the Act therefore balances the competing rights of the public to obtain documentation and the right to maintain confidentiality and that in certain circumstances disclosure may not be essential in the public interest.[11]

9.5 It also preserves a degree of autonomy on public authorities to determine whether certain information requested can be disclosed in the public interest. Unless the documents requested fall under these classes of exempt documents, it is disclosable without more.

[10] See FOIA 1989 New South Wales: Section 5; The 1992 Queensland FOIA sections 4 and 5

[11] See sections 11 to 17 inclusive of the FOIA.

9.6 The FOIA goes further in that (a) the issue as to whether a document is exempt or not can quite properly be determined by the Court and (b) even if it qualifies as an exempt document the legislation pries open the hands of the pubic authority under the circumstances outlined in section 35 of the Act, to make the document available notwithstanding its "exempt" status.

9.7 It is now a matter for the Court and not the State to settle the issues of whether the public interest objection is properly taken. The word of the minister would not normally be accepted if he states that the production of any document would harm the interest of the public without more as the Court will engage in a balancing exercise to determine whether the risk of possible injury is substantially less to advance the administration of justice.

9.8 In a proper case a Court will order the inspection of a document when engaged in this balancing exercise utilizing the common law practice discussed in the cases cited above, before giving access to the applicant.

9.9 There is no need for the Applicant to demonstrate a need to know. In ***Re Mann and Australian Tax Office*** (1985) 7 ALD 698, at p. 700, Deputy President Todd explained the approach he had developed, being careful to state that it was not intended to contradict one of the basic tenets of FOI legislation, i.e. that an applicant for access does not have to establish any special interest, or need to know, in order to obtain access to particular government information. See also ***Dr J M Pemberton v University of Queensland*** (1993) s 17/93: *"it is not necessary for an applicant to establish a particular "need to know" in order to establish a right to access. Nor does it even strengthen an applicant's case, save where a question of public interest arises and an applicant is able to demonstrate that his personal involvement in the matter may cause an element of public interest in his "need to know" to arise (see Re Peters and Re Burns*), *to demonstrate some special interest in the documents sought".*

"The main consideration to be taken into account in favour of disclosure is the general right of the public to know about the administration of governmental matters

as provided by the Act; but in relation to persons whose interests are vitally affected, it includes a right to know why an adverse decision is made, so that the matter can be tested if advisable."[12]

9.11 The right to access is denied only if the document falls within the definition of "exempt documents' in the FIOA. A cursory review of these classes of documents as exceptions to access emphasizes the need to preserve the public interest in the limitation of disclosure: in special cases cabinet documents[13], international relations documents,[14], internal working documents[15], law enforcement documents[16], documents affecting legal proceedings or subject to legal professional privilege, documents affecting privacy documents, documents relating to trade secrets, documents containing material obtained in confidence, documents affecting the economy, document to which secrecy provisions apply. This is an exhaustive list and covers a variety of documents, which in the public interest are shielded from scrutiny.

9.12So long therefore that the public document requested does not fall within those categories the applicant is entitled to access to the requested document.

10.**THE SECTION 27 EXEMPTION: (Internal Working Documents):**

10.1 The Respondent does not suggest by its letter of 28th June 2004 that the requested document was not available, but rather that it is not disclosable or is exempt from disclosure by virtue of "section 27(1) (b) of the FOIA". If this is so, then the Respondent is perfectly entitled to limit and refuse access and indeed this will be in keeping with the objects of the Act. However to qualify as an exempt document pursuant to section 27 of the FOIA the Respondent must satisfy a two-prong test. Firstly it must demonstrate that the disclosure of the document or providing access to same would review matters which

[12] ***O Connor v State Superintendant Board of Victoria per Dixon J*** *[1989] unreported p 44 cited in JM Pemberton*
p718
[1313] Section 24
[14] section 26
[15] section 27
[16] section 28

are either (a) in the nature of opinion, advice or recommendations prepared by an officer or Minister of Government, or (b) consultation or deliberation that has taken place between officers and a Minister of Government. [17]Second it must demonstrate that the disclosure of this matter would be contrary to the public interest.

The nature of the document:

10.2 Document 1 which is the subject of this FOIA application is: "Copy of minutes of meeting of the Teaching Service Commission from January 1993 relative to the appointment of Technical Vocational Teacher 1"

10.3 The Respondent does not indicate in which category of internal working documents these minutes qualify. The Respondent simply states: "*I am unable to provide you with copies of the minutes of meeting as this us exempted under section 27(1) as being internal working documents."* The case however was advanced by the Respondent that the minutes fell under the category of *"deliberation between officers".* It is arguable however that minutes of the Respondent within the context of the Teaching Service Regulations and the nature of the Respondent body qualify as matters in the nature of deliberation between officers in the course of or for the purpose of the deliberative processes involved in the function of the public authority.

10.4 In ***Re: Waterford and Department of Treasury No. 2*** (1984) 5A ALD 588 the following comments are noted "*As a matter of ordinary English the expression "deliberative process" appears to us to be we enough to include any of the process of deliberation or consideration involved in the functions of an agency. "Deliberation" means "The action of deliberating : careful consideration with a view of decision": see The Shorter Oxford English Dictionary. The action of deliberating in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course off action. In short, the deliberative process involved in the function of an*

[17] See section 27 (a) of the FOIA

agency are its thinking process – the process of reflection, for example, upon the wisdom and expediency." See para. 18.

There is however simply no evidence in this case. The unhappy state of the evidence is to be contrasted to the detail with which the Respondent set out the nature of their case in the authorities cited to the Court of FOIA applications in other jurisdictions.

10.5 In fact, Lord Wilberforce's observations of the Minister's certificate in ***Burmah Oil*** is commended for future responses under the FOIA:

> *"The starting point in the discussion must be the certificate of the Chief Secretary. This is a lengthy and detailed document to which justice cannot be done without setting it out in full. It is perfectly clear that this document represents the result of careful and responsible consideration: that the minister has read and applied his mind to each of the documents: that, to adopt language used by the courts in other cases, the minister has not merely repeated a mechanical formula, that the certificate is not "amorphous" or of a blanket character, but is specific and motivated. Further, the minister has not contented himself with a general assertion that production would be injurious to the public interest, he has stated very fully the reasons why this would in his opinion be so: in summary that they concern discussions at a very high level, as to one category at ministerial level, and as to another the highest official level, as to the formulation of government policy. He has not even contented himself with a general reference to government policy".*[18]

Public Interest Considerations:

10.3 Even under the common law, as is seen above, public interest considerations are carefully scrutinized. Moreso this is the case under the FOIA where the bias is on granting access. The burden therefore lies squarely on the shoulders of the

Respondent to demonstrate why the granting of access to these minutes would be contrary to the public interest. The only reason advanced (which is not even stated in the Respondent's affidavits) is found in the letter of 29th June 2004 which simply, and in this Court's view inadequately states: "*The disclosure of this would likely affect the frankness and candour of future pre-decisional communications."*

10.4 There is no attempt to expound or explain this reason by reference to the facts and details of the information requested and its possible impact on good administration. Attorney for the Respondent was therefore left to advance "the frankness and candour argument" already doubted in the pre FOIA cases as cited above, as a good public interest reason to refuse access without more.

Frankness and Candor:

10.5 The main contest between the parties was simply put whether (1) the restriction on frankness and candour of future deliberations" (the frankness and candor argument) as a result of granting access qualify in the circumstances of this case as a proper or valid public interest consideration within the meaning of section 27 of the FOIA. The frankness and candour argument was once accepted as a valid public interest consideration but, as was admitted by Attorney-at-Law for the Respondent, has been the subject of harsh criticism. The preponderance of opinion in ***Conway v Rimmer*** was opposed to the use of "candour and frankness" as a ground for granting immunity in a case where production would be normally ordered[19]

10.6 In ***Burmah Oil***, Lord Keith thought the argument had little weight and stated:

"The notion that any competent or conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off chance that they might have to be produced in litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is

[18] p713
p713 [19] See the judgments of Lord Reid, Lord Morris, Lord Hodson and Lord Upjohn

even more so. Nowadays the state in it multifarious manifestations impinges closely on the lives and activities of individual citizens. Where this has involved a citizen in litigation with the state or one of its agencies, the candor argument is an utterly insubstantial ground for denying him access to relevant document".

10.7 Even though Lord Scarman thought that the "frankness and candour" argument could legitimately be put in the balance for consideration, he questioned whether there was anything so important in "secret government" that it must be protected even at the price of injustice in the Courts. *See '[1979] 3 AER 700 at 733 to 734*

10.8 In the authorities cited to this Court by both parties, the frankness and candour argument was seen to have diminished utility over the years.

10.9 In ***J.M. Pemberton*** the tribunal discussed the limited role of "loss of candour" argument as a public interest consideration by examining a number of authorities including ***Re Eccleston***

"I consider that the approach which should be adopted in Quuensland to claims … that the public interest would be injured by the disclosure of particular documents because candour and frankness would be inhibted in future communications of a similar kind … should accord with that stated by Deputy President Todd of the Commonwealth AAT in the second Fewster case (see paragraph 129 above): they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind and that tangible harm to the public interest will result from that inhibition.

I respectfully agree with the opinion expressed by ***Mason J in Sankey v Whitlam*** *that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise inappropriate. It could be argued in fact that the possibility of disclosure under the FOI Act is, in that respect, just as likely to favour the public interest….*

Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a

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

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

" I cannot accept the proposition that those <u>whose duty it was</u> to write reports about a candidate and his record, suitability for promotion, etc., would lack in candour because the reports, or some of them, might possibly sometimes see the light of day. (my underlining) per Lord Salmon Science Research Corvech v Nosse [1980] AC 1028, 1070…

One of the problems with confidentiality is that it is capable of being a double-edged sword. The cloak of confidentiality may permit some people to feel confident enough to express criticisms, which they might otherwise refrain from making. The cloak of confidentiality can also permit a person to indulge a dislike

of, or prejudice against, an applicant for promotion without the fear of being exposed…..

I do 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" on individual performance. Leading academics are no strangers to the professional disciple of having to marshall evidence to support opinion and conclusions expressed in formal written work. More effort may have to go into the process of preparing reports, but given the importance which the University attaches to ensuring promotion on merit, that effort appears to be warranted, and would certainly greatly assist the tasks of selection committees….." [20]

10.10 To accept the Respondent's argument that this Court is obliged to accept the "frankness and candour" reason as advanced simpliciter is to reassert under the guise of reasonableness the outdated notions expressed in ***Duncan*** that the State is the sole arbiter of whether the disclosure is against the public interest on the basis of "frankness and candour." Such notions were expressly overruled by ***Conway v Rimmer***. However the ratio of ***Duncan*** to the effect of accepting on face value a Minster's certificate or statement that a document is not disclosable in the public interest is based on the principle of national security and the defence of the realm. This is totally understandable.[21]

[20] See pgs 56-67

[21] In the CCSU [1984] 3 AER 944, the House of Lords stated authoritatively " The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information and in any event the judicial process is unsuitable of reaching a decision on national security." In the Zamora [1916] 2 AC 77 Lord Parker stated: "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public." It is opted that even in these cases there was evidence adduced on affidavit to demonstrate that the disclosure of information will not be in the interests of national security.

10.11 This principle is reflected in the FOIA where priority has been given to certain high level documents which the framers of the Act still consider to be sensitive enough that only the public functionary would have the necessary information to arrive at that decision. Accordingly in both cases of cabinet documents under section 24 and defence and security documents in section 25, the FOIA adopts the position of ***Duncan*** and gives primacy to a certificate of the Minister certifying that the document is an exempt document:

> *"For the purposes of this Act a certificate signed by the Minister*[22] *certifying that a document as described in a request would, if it existed, be one of a kind referred to in subsection (1) or (2) establishes that if such a document exists, it is an exempt document".*[23]

10.12 It is wrong therefore in the context of Part IV for the Court to simply rely on the Respondent's bare assertion that disclosure of internal working documents will inhibit the frankness and candor of future deliberations, without more.

10.13 The Respondent seeks to cure the gaping hole in its evidentiary basis to support its public interest argument, by contending that the Court should take judicial notice of the nature of the document requested, the nature of the Respondent, its functions and powers and that the request is made of documents previously considered to be private. For the reasons set out above, the latter submission is circular as the FOIA promotes disclosure of documents previously considered private. The court in all cases must conduct a balancing exercise.

The Balancing Exercise:

10.14 In seeking to balance the competing public interests of access to information and the smooth operation of this country's administration, the FOIA seeks to promote

[22] Secretary to the Cabinet in section 24(4)
[23] Indeed in CCSU Lord Denning confirmed: "Natiaon security is the responsibility of executive government. It is par excellence a non-just cable question. The judicial process is totally inept to deal with the sort of problems which it involves."
*See Teaching Service Commission regulations section 4,6,7,8

and facilitate, rather than to stifle and neutralize, the public's access to information.

10.15 The Respondent is a body established under the Constitution. Its meeting are held and deliberations conducted pursuant to the Teaching Service Commission Regulations. The documents requested in this case are not "high level". They are not demonstrated to be "ultra sensitive." They are not minutes concerned with the formulation of policy or advice. They are not part of the inner workings of the government machine. It may contain information in relation to the Applicant's reason for access namely whether he was by passed for promotion. On the facts of the case the exemption from disclosure of these minutes is not necessary for the proper functioning of the Teaching Service Commission.

10.16 The need to preserve the candor and frankness of discussions is not a factor in itself to justify the exemption of a document from disclosure under the FOIA. It does not persuade the Court that it is not in the public interest to provide access to the requested document. The candour and frankness argument has been diluted into insignificance in modern administration, as it should be. To suggest otherwise is to belittle the competence and attitude of members of the Teaching Service Commission. Indeed it will be startling to discover that, in the absence of any evidence to the contrary, the administration of the Teaching Service Commission will be somehow star struck, frozen or rendered ineffective if its deliberations are exposed to public scrutiny. To the contrary the disclosure would enhance the deliberative process and improve transparency, accountability and participation serving to promote the confidence of the public. At the same time it will instill a greater degree of professionalism in the administration of the Respondent.

10.17 Unless the Respondent can point to other more pertinent public interest factors or condescend to particulars of the damaging effect disclosure will have of the deliberative process, the justification advanced by the Respondent is not reasonable.

11. THE SECTION 30 EXEMPTION (Documents affecting personal privacy):

11.1 This can be easily dealt with. There is no evidence to demonstrate that the document is exempt for the purposes of section 30(1) of the FOIA. A document is only exempt under this provision if disclosure "would involve the *unreasonable* disclosure of personal information of any individual".

11.2 The Respondent's statement in its letter *"Also whilst the Act allows a person access to his own information, section 30 exempts documents if disclosure would involve the disclosure of personal information of any individual to another individual."* This therefore is plainly wrong and forms no basis for any exemption claimed under section 30 of the FOIA.

11.3 The touchstone for exemption is "reasonableness". The general objects of the Act set out in section 3 extending the right of members of the pubic to access to information in the possession of public authorities is only limited by exceptions and exemptions *"necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities*." The Court ought not to speculate as to the contents of the minutes of the Respondent's meetings in relation to the appointment of a technical vocational teacher from 1993 onwards. It may well be that it contains references to matters relative to the credential and relative merits and de-merits of candidates for this position. However to qualify as an exempt document under section 30 requires a two step process: first determine whether the requested document contains the personal information of any individual and second, if so, determine if its disclosure of that information would be unreasonable.[24]

11.4 Personal information has been given a wide meaning under the Act. It means information about an individual including:

[24] See Stewart v Department of Transport S 27 of 1993 paragraph 14.

(a) Information relating to the race national or ethnic origin, religion age sex or marital or family status of the individual;

(b) Information relating to the education or the medical, psychiatric, psychological, criminal, or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) Any identifying number symbol or other particular assigned to the individual

(d) The address, telephone number, finger prints or blood type of the individual

(e) The personal opinion or views of the individual except where they relate to another individual

(f) Correspondence sent to a public authority by the individual that is implicitly or explicitly of a private or confidential nature and replies to that correspondence that would reveal the contents of the original correspondence

(g) The views or opinions of another individual about the individual and

(h) The individuals name where is appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.[25]

11.5 There is no evidence from the Respondent to indicate what information is contained in the requested document to assist in the first step determination as to whether it contains personal information. Assuming for the moment that the minutes do contain personal information within the categories as outlined above[26], the Respondent must explain why its disclosure is unreasonable for it to obtain the status of an exempt document. It is suggested in ***Colakovski v ATC*** (1991) 100 ALR 111 that one factor to determine the reasonableness of disclosure is whether disclosure is in the public interest. There certainly can be no bar to the disclosure to the Applicant of personal information in relation to himself.[27] Indeed notwithstanding the fact that the document contains personal information

[25] See section 4 of the FOIA

[26] These categories of personal information do not appear to be exhaustive as the definition of "personal information" includes these categories and is not limited to same.

[27] See section 30(2) of the FOIA

of third parties the public authority can still grant access in accordance with the procedure set out in section 30 (3) of the FOIA.[28]

11.6 The Respondent's submissions in this regard assume that the information contains personal information and is prima facie exempt from disclosure. This is a false premise. The Respondent fails therefore to demonstrate any rationale for maintaing the secrecy of personal information contained in the minutes, if at all, apart from the fact that the information, which is not particularized, is personal information.

11.7 In its report ***Unfair Publication Defamation and Privacy*** (ALRC Report no 11 Canberra 1979) the Australian Law Reform Commission stated:

"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 although 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 pubic information. The dilemma has always been to strike a proper balance between these two interests."

11.8 In our scenario where the balance is tilted in favor of disclosure as set out in section 3 of the FOIA, it is for the public authority to tip the scales back in its favor by evidence to justify the denial of this prima face right to access to information. Even under Sec 30 of the FOIA the Respondent has failed to do so.

12. <u>THE EXERCISE OF THE COURT'S DISCRETION:</u>

[28] Section 30 (3) of the FOIA states:
It is generally regarded as an important aspect of privacy protection that an individual be allowed ready access to personal information about him or herself held by government and be permitted to ensure its accuracy. See paragraph 46 of Stewart (ibid)

12.1There is a discretion in the Court however to ensure the proper administration of justice. This discretion can even be exercised against a litigant if he is successful on the merits of the application. It is clear from the authorities cited by the parties that the Court has a discretion to itself inspect the requested documents before ordering disclosure to either party. Such an approach is appropriate where the Court is of the view that disclosure should be ordered but there is strenuous objection on the part of the Respondent on the grounds of public interest considerations.

12.2***Conway v Rimmer*** provides useful guidance on the circumstances in which the Court's power to inspect documents before ordering disclosure is triggered. Inspection by the Court is a power to be exercised sparingly, only if the Court is in doubt. If a strong case has been made out for production and the Court concludes that its disclosure would not really be detrimental to the public interest an order for production will be made. In striking the balance the Court may inspect the documents. In this case inspection is more appropriate having regard to the position adopted by the Attorney for the Applicant in his submissions. He contended that there was no objection to the Court calling for an inspection of the documents themselves. The Court however notes that no undertaking was made by the Respondent to provide or offer up these documents for the Court's inspection. The Court also notes the defects in the evidence of the Respondent and the absence of facts to substantiate the claim of the Respondent.

12.3 Having weighed all the various factors in the balance this Court has come to the conclusion that the public interest of disclosure as encapsulated in section 3 of the FOIA trumps the "frankness and candor" plea or that they are not documents the release of which would be an unreasonable disclosure of personal information of individuals. The right to access to the documents prevails.

13. CONCLUSIONS AND ORDER:

13.1 On the totality of the evidence before this Court, the Respondent has not shown that the decision to refuse access to Document 1 or to declare that Document 1 is

an exempt document, was one which could reasonably have been based on considerations of the public interest which outweigh the reasonable and legitimate expectations of the Applicant to access to the said document or would involve the unreasonable disclosure of personal information. The request for Document 1 was not in relation to an exempt document pursuant to Sections 27 or 30 of the FOIA. The Respondent was wrong to refuse to release the document.

13.2 This Court has expressed its concern with regard to the deficiencies in the facts of the Respondent's claim, however in the face of the Respondent's strenuous objections the Court orders the Respondent to provide to the Court for its inspection the withheld documents in a sealed envelope marked "confidential". This is to be addressed to the Registrar of the Supreme Court and delivered to her on or before 17th April 2006 for onward transmission to this Court.

13.3 In default, the Court grants the following relief:

(a) A declaration that the Applicant is entitled to access the Document 1 (b) A declaration that Document 1 is not an exempt document pursuant to Sections 27 and 30 of the FIOA. (c) An order of mandamus compelling the Respondent to provide the Applicant document 1 pursuant to the provision of the FOIA and as requested in the Applicant's application under the FOIA. (d) That the Respondent do pay to the Applicant 2/3 of his costs certified fit for 1 advocate attorney to be taxed in default of agreement. Should the Respondent provide to the Court the requested document within the time prescribed by this Order this application stands adjourned to a pre trial review fixed for 25th April 2006 for further directions and consequential orders.

Dated this 4th day of April, 2006.

Vasheist Kokaram

Judge

INSPECTION

1. In my judgment I ordered the private inspection of the requested documents for which exemption is being claimed by the Respondent under sections 27 and 30 of the FOIA.
In various jurisdictions and the Commonwealth there is such an express power conferred on review tribunals under the FOIA. ***See Re Burns and Astralia National University 7 ALD 425 (1985).***

2. However, in an application for judicial review Courts in the exercise of its direction has such a power as discussed in this Court's previous judgments.

3. The Respondent provided the requested documents to this Court for private inspection under cover of letter dated 24th April, 2006 in compliance with the order of the Court.

4. I have perused its contents and I am satisfied that there is no place for the Respondent to assert that the disclosure of the requested documents will inhibit the frankness and candor of the Respondent's discussions. There are bare notations on the minutes and very few if any at all of the minutes bear the hallmarks of consultation and deliberation or the detailed documentation of the exchange of opinion and discussions of matters in relation to the Respondents operation . In so far as the Respondent expressed the concern that disclosure will stymie the frankness and candour of the deliberation process of the Respondent , the Respondent has nothing in the documents to buttress that claim. The court therefore grants the following relief: (a) A declaration that the Applicant is entitled to access to Document 1, copy of minutes of meeting of the Teaching Service Commission from January 1993 relative to the appointment of Technical Vocational Teacher I (b) A declaration that Document 1 is not an exempt document pursuant to Sections 27 and 30 of the FIOA. (c) An order of mandamus compelling the Respondent to provide the Applicant access to Document 1 pursuant to the provisions of the FOIA and as requested in the Applicant's application under the FOIA (d) Upon hearing further arguments on the issue of costs by both parties, the Respondent do pay the Applicant's costs certified fit for one advocate attorney-at-law to be taxed in default of agreement.

Dated this 12th day of June, 2006.

Vasheist Kokaram

Judge