REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 200 of 2014
Claim No. CV 2012-04538

Between

THE MINISTER OF PLANNING AND SUSTAINABLE DEVELOPMENT

Appellant

And

THE JOINT CONSULTATIVE COUNCIL FOR THE CONSTRUCTION INDUSTRY

Respondent

PANEL: **P. JAMADAR, J.A.**
N. BEREAUX, J.A.
R. NARINE, J.A.

APPEARANCES: **R. Martineau SC, K. Ramkissoon and S. Sharma for the appellant**
G. Peterson SC and K. Walesby for the respondent

DATE DELIVERED: 28 October 2016

JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] This appeal is from the decision of Seepersad J delivered on 14th July, 2014. It is from an application for judicial review brought by the Joint Consultative Council for the Construction Industry (the Council) against the Minister of Planning and Sustainable Development (the Minister) in respect of a request for information under the Freedom of Information Act, Chap 22:02 (the FIA). The Council sought a variety of reliefs against the Minister's refusal to provide information about legal advice given to him by the Attorney General and by the legal unit of the Ministry of Planning and Sustainable Development (the Ministry).

[2] The advice related to the competence of the Ministry to issue requests for proposals for the development of a strip of coast line at Invader's Bay, Mucurapo, Port-of-Spain. The Council enquired whether such a request should have come from the Central Tenders Board instead of the Ministry of Planning and Sustainable Development. The Minister, having obtained advice from the Attorney General and the Ministry's legal unit, responded that it should not have. He had responded to an earlier enquiry in the Senate in the same terms.

[3] He declined the Council's request to be provided with the advice and related documents on the ground that it was an exempt document under section 27(1) of the FIA. This reason was provided to the Council pursuant to section 23 (1) of the FIA which directs the Ministry to provide, in a written notice, reasons for its refusal to give access to information requested.

[4] In these proceedings the Minister has also relied on the additional defence

of legal professional privilege as provided by section 29(1) of the FIA but, in breach of section 23, this defence did not form part of the reasons in the notice.

Legal professional privilege is expressly provided by section 29(1) of the FIA as a basis for the exemption of documents from production under the FIA.

[5] Undoubtedly, the documents requested by the Council attract legal professional privilege. There is no controversy as to that issue but at the hearing before Seepersad J, the Council objected to the Minister's reliance on section 29(1) on the basis that it did not form part of the reasons for refusal set out in the section 23 notice. The judge rejected the Council's objection. He granted the application and ordered the Minister to provide the information (subject to certain redactions). The Minister has appealed.

The Counsel has cross-appealed the judge's dismissal of its objection to the Minister's reliance on section 29(1).

The parties

[6] The Council is a non-governmental, consultative organization and is incorporated under the 1995 Companies Act. It comprises six member professional organizations and is dedicated to the promotion of professionalism, responsible industry growth, transparency in tendering procedures, fair business practices, training, efficient dispute resolutions, establishment of codes of practice and provision of advice.

[7] At the time of filing of this appeal the relevant Minister was Dr. Bhoendradatt Tewarie, then Minister of Planning and Sustainable Development and a member of the Senate. The Ministry was previously called the Ministry of Planning and the Economy. Minister Tewarie no longer holds office, having demitted office consequent upon a general election.

Relevant Facts

[8] In August 2011, the then Ministry of Planning and the Economy, invited *"expressions of interest for the development of that portion of the Invader's Bay, south of Movietowne"*. The invitation was headed *"Request For Proposals"* and stated that *"This Request for Proposals ... has been assembled to provide potential developers (hereinafter referred to as the "Developer") with the information to prepare a competitive design and build proposal"*.

[9] The Request for Proposals was in respect of the development of some twenty eight (28) hectares (70 acres) of prime state land along the coastline of Invader's Bay. The lands are valued at one billion two hundred and eighty million dollars (TT $1,280,000,000.00). The Request for Proposals gave a comprehensive description of the project, setting out the role of the then Ministry of Planning and the Economy. It stated, inter alia, that:

> ***"The proposed Developer will be chosen via this RFP process and shall then enter into a Memorandum of Understanding (MOU) with the Government of Trinidad and Tobago (Ministry of Planning and the Economy) for an agreed lease rate. It is expected that this activity would be finalized within one (1) month of the submission of the ... RFP".***

[10] On 30th September 2011 the Council, through its President, Afra Raymond, wrote to the Minister expressing concerns about the Request for Proposals and asking for its withdrawal and revision so as *"to attain satisfactory levels of transparency and participation"*. There was an exchange of correspondence between the parties ending with Mr. Raymond's letter of 14th December 2011, by which he expressed the view that *"the process used to select a developer or developers amounted to a clear tender process"* which rendered it subject to the Central Tenders Board Act. He asked the Minister to explain how it was possible to pursue this project through his Ministry when the Central Tenders

Board had the sole and exclusive authority to act for and on behalf of the Government, except for limited exceptions *"which did not apply to this case"*.

[11] The Minister responded by letter of 21st December 2011, stating, inter alia, that the matter had been referred to the Attorney General for his advice. Subsequently, by letter of 1st March 2012, the Minister informed the Council that the Attorney General's office had advised that the Request for Proposals did not have to conform with the Central Tenders Board Act. The relevant paragraph reads as follows:

> ***"Further to my letter of December 21, 2011 on the Invader's Bay Project, I write to let you know that based on advice from the Office of the Attorney General I can say that the publication of the Request for Proposals for screening of potential investors making an investment proposal on State Lands located at Invader's Bay was not required to be in conformity with the Central Tenders Board Act. I trust that this will be of some comfort to you".***

[12] On 28th February 2012, prior to this letter, the Minister had responded in the Senate to a similar enquiry from Senator James Armstrong. He stated that the Request for Proposals was *"not the subject of nor were [sic] required to be in conformity with the Central Tenders Board Act."* He added that advice to this effect was received from the Legal Unit of the Ministry of Planning and the Economy and subsequently, from the office of the Attorney General. However when requested to circulate in the Senate both legal opinions, the Minister declined to do so.

[13] It appears that Minister Tewarie's letter provided no comfort to the Council because the Council responded to the Minister's letter of 1st March 2012, and asked for the publication of the legal opinions. It then wrote to the Minister requesting the information, pursuant to the FIA. Specifically, the Council queried the decision to pursue the Request for Proposals process, in the following terms:

"Has [the Ministry of Planning and the Economy] had legal advice on the applicability of the CTB Act to this RFP process?
When did [the Ministry of Planning and the Economy] request that legal advice? To which legal adviser did [the Ministry of Planning and the Economy] make that request?
We are requesting copies of the written instructions and the legal advices both from the Legal Unit of [the Ministry of Planning and the Economy] and the Office of the Attorney General."

[14] There was no substantive response to that inquiry until 16th August 2012 (after the Council's attorneys-at-law had sent a pre-action protocol letter to the Ministry) when the Permanent Secretary confirmed that the Ministry had sought legal advice. He supplied the information sought except the requests for copies of instructions and legal advice provided to the Minister. The Permanent Secretary stated that:

"The instructions for the provision of the legal advice, the advice and its author are however considered exempt according to Section 27(1) of the Freedom of Information Act. The revelation of same cannot be seen to be justified in the public interest since relevant information surrounding the process is now provided. Further the decision to move forward with the process and the selection of three (3) chosen investors was agreed to by Cabinet."

He added *"Please be informed that any request for copies of instructions and legal advice provided to the Attorney General must be addressed to him. The Ministry of Planning and Sustainable Development has no authority to provide that information."*

[15] Based on that response the Council then applied for and obtained permission to seek judicial review of the Minister's refusal to provide the information sought. On 4th December 2012, when the permission application

came up inter partes before Seepersad J, Mr. Sharma, junior counsel for the Minister, informed the judge that the information sought was also exempt under section 29(1) of the FIA and that the Council had been informed of this by letter of even date. The Council did in fact receive that letter on 4th December 2012 but after the court hearing.

The Council's case

[16] Mr. Peterson contends that the refusal to provide the information sought is illegal, irrational and unreasonable because:

(i) The process that has been used by the Minister to select a developer for the Invader's Bay project amounted to a clear tender process. The Central Tenders Board has the sole and exclusive authority to act for and on behalf of the Government in these matters (subject to limited exceptions which did not apply in this case.) The decision of the Minister to by-pass the provisions of the Central Tenders Board Act in the Request for Proposals process at Invader's Bay is therefore illegal, unreasonable and amounts to an abuse of authority or neglect in the performance of official duties by the Minister. It also amounts to an unauthorized use of public funds.

(ii) The allegation by the Minister that the information sought is exempt by reason of legal professional privilege was made only after the Council had filed and served its application for judicial review and is a completely new reason. The Minister was required (by section 23) to state in the letter of refusal of 16th August, 2012 all of the statutory reasons for refusing to provide the information and, in all of the circumstances, it would be unjust to permit the Minister to rely on the new reason.

(iii) Further, in the Senate on 28th February 2012, the Minister referred to and relied on the nature and substance of the advice thereby publicly disclosing the advice received and waiving any legal professional privilege.

(iv) Even if the information is exempt pursuant to either section 27 or section 29 of the FIA then the Minister's decision to refuse to provide the requested information without first conducting the section 35 public interest override assessment and analysis, was illegal or **Wednesbury** unreasonable and amounted to an omission by the Minister to perform a statutory duty.

The Minister's case

[17] On behalf of the Minister it was contended before the judge that:

(i) The matter is clearly covered by legal professional privilege.

(ii) The Minister could raise the section 29(1) exemption as a matter of substantive law based on evidence that was originally submitted by the Council.

(iii) Although it was given after the filing of the application for judicial review, the section 29(1) exemption was raised at a relatively early stage of the proceedings and could be relied on by the Minister in this case.

(iv) What the Minister said in Parliament did not amount to a waiver of legal professional privilege. The statement made in Parliament was in fulfilment of his parliamentary obligation to answer questions posed to him in Parliament.

(v) The Minister was under no obligation to set out reasons relating to the section 35 public interest question because the Council, on whom the onus lay, did not put any evidence before him to consider.

Judge's findings

[18] I have understood the judge's findings to be as follows:

(i) The Minister's decision was flawed as he failed to adequately outline his

reasons and the public interest considerations which formed the basis of his refusal to disclose the information sought. There was an onus on the Minister to carry out a section 35 public interest override assessment and analysis so as to determine whether disclosure was necessary. This assessment became necessary upon his concluding that the information requested was exempt.

(ii) The Minister is entitled to rely upon the defence of legal professional privilege. The fact that a public authority does not raise an exemption until after the section 23 notice has been issued does not disentitle the authority from relying on it. If the intention of the FIA were that the exemption would no longer apply to the information in such circumstances, then the Act would have expressly so provided.

(iii) Consideration by the Court of the Minister's response in Parliament does not violate section 55 (2) of the Constitution. Section 55(2) of the Constitution contemplates civil proceedings against members of the House in their personal capacity and the proceedings must be based on a cause of action that relates to a statement that was made by the member while speaking in the House. In this case the defendant is accountable in his capacity as an office holder who has taken a decision on behalf of the Ministry and by extension, the Government of Trinidad and Tobago and no personal liability attaches to him.

(iv) When the Minister issued his response, he provided information which became a matter of public record. His statement communicated that the legal advice he received and considered was that the Request for Proposals process did not have to conform with the requirements of the Central Tenders Board Act. The gist and nature of the legal advice was in fact revealed and this amounted to conduct that is inconsistent with the stance that the legal advice is exempt from being disclosed under the Act by virtue of section 29(1).

(v) The requested information should be disclosed to the Council under section 35 of the FIA. The nature of the project in this case and the process adopted by the Minister to pursue the Request for Proposals process require disclosure of all the relevant information that was considered before the decision was taken. Refusal to provide the requested information can create a perception that there may have been misfeasance in the process and any such perception can result in the loss of public confidence.

[19] In his judgment granting permission to file for judicial review, the judge opined that the basis of the Council's opposition to the section 29(1) defence was not an arguable ground. On the face of it, that would appear to be a refusal to permit the Council to pursue, at the substantive hearing, its objection to the section 29(1) defence. However the judge permitted the Council to raise it at the substantive hearing and then proceeded to consider and dismiss it in his judgment on the substantive question. The issue which arose in this appeal was whether the judge's initial view was an outright refusal of permission to the Council to pursue its objection which disentitled it from pursuing the argument at the substantive hearing and in this appeal.

Grounds of Appeal

[20] The Minister contends that it is an infringement of parliamentary privilege for any litigant to question in legal proceedings words spoken or actions done in Parliament. He contends that in considering the Minister's statement in the Senate the judge disregarded the purposive intent of section 55(2) of the Constitution which is to allow members of Parliament to freely speak, debate and answer questions and otherwise to freely conduct the business of the House. The Minister also contends that the judge was wholly wrong to find that the gist and nature of what was said by the Minister in the Senate amounted to conduct that was inconsistent with the Minister's stance that the legal advice was exempt under section 29(1) of the Act.

[21] In written submissions before us the Council raised for the first time that the letter of 1st March 2012 constituted a waiver of legal professional privilege. At the hearing of the appeal we posed, inter alia, two questions to counsel, to wit:

(i) Whether the Council was entitled to raise this point in the appeal, it not having done so before the trial judge?

(ii) If the Council was entitled to do so, did the letter constitute a waiver of legal professional privilege?

Issues

[22] The main issues which fall to be decided in this appeal are:

(i) Did the judge refuse permission to the Council's pursuit of its objection to the use of a section 29(1) defence by the Minister?

(ii) If the answer to that question is no, can the Minister rely on section 29(1) although he did not rely on it in his original objections to disclosure?

(iii) Is consideration of the Minister's statement in the Senate on 28th February 2012 by the Court a breach of parliamentary privilege?

(iv) If the answer to that question is no, did the Minister's statement in the Senate on 28th February 2012 amount to a waiver of legal professional privilege?

(v) Did the Minister's letter of 1st March 2012 amount to a waiver of legal professional privilege and is the Council entitled to raise the letter in this appeal?

(vi) Should the information requested be disclosed in the public interest pursuant to section 35 of the FIA?

Summary of decision

[23]

Issue (i) The Council can pursue its objection. The judge did not refuse permission to pursue the objection when granting permission to

seek judicial review.

Issue (ii) There is no bar to the Minister relying on section 29(1) of the FIA. The fact that the Minister did not rely on legal professional privilege in his original reasons for refusing disclosures, does not prevent the Minister's subsequent reliance in these proceedings. There is no express provision in the FIA which prohibits reliance on section 29(1) in such circumstances.

Issue (iii) Consideration by the Court of the Minister's statement of 28th February 2012 in the Senate, is a breach of parliamentary privilege.

Issue (iv) In light of the decision at (iii) the issue of (iv) will not be considered.

Issue (v) The letter of 1st March 2012 did not amount to a waiver of legal professional privilege.

Issue (vi) The information requested should be disclosed in the public interest pursuant to section 35.

Issue (i) – Can the Council pursue its objection to the Minister's reliance on section 29(1)?

[24] Mr. Martineau submitted that the Council should not be permitted to pursue its objection in this appeal because the judge, in granting permission to apply for judicial review, found that the contention was not arguable. He submitted that the Council should have appealed that finding but did not. He added that although the judge repeated his opinion at the substantive hearing, it was not a new finding neither was it an invitation to appeal the same.

[25] In my judgment, the comments of the judge at the permission hearing were simply his preliminary view of the matter. He made no hard and fast finding rejecting the argument. Had he done so I would have expected him to have expressly prohibited any open discussion of the matter at the substantive hearing; that is to say, the order of the judge would have expressly excluded this objection from discussion at the substantive application for judicial review. Not only did he

permit the Council to make the submission but the judge also proceeded to expressly include it as an issue to be decided in his substantive judgment. He thereafter proceeded to decide upon it in favour of the Minister. The fact that he did so can only have reflected his opinion that the matter was still open to be pursued by the Council. The Council was therefore entitled to pursue an appeal against that finding before us. I turn then to the Council's objection to the Minister's reliance on section 29(1).

Issue (ii) – Can the Minister rely on section 29(1)?

[26] The judge, relying on the decision in **Bowbrick v Information Commissioner App. # EA/2005/0006** at paragraph 42, held in effect that a failure to raise the section 29(1) exemption in the section 23 notice did not preclude the Minister from doing so in subsequent court proceedings. If such a consequence was intended, he would have expected that the FIA would have expressly provided for such a draconian result. He relied on the following comments of the Information Tribunal in **Bowbrick**:

> ***"If a public authority does not raise an exemption until after the s. 17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect, it is giving part of its notice late. However FOIA does not say that that failure to specify the exemption within the 20 working day time limit means that the authority is disentitled thereafter from relying on the exemption in any way. If the intention of FOIA had been that the exemption could no longer apply to the information in such circumstances then it would have been expected that the Act would say this in very clear terms, because otherwise it is a very draconian consequence of the failure to comply with the statutory time limit."***

[27] I agree entirely. I accept that this is at best persuasive authority but I

consider that the comments are well founded. To read such an interpretation into the FIA is tantamount to legislating judicially. Section 29(1) exists as a matter of substantive law. Seepersad J was correct to uphold the Minister's reliance on section 29(1). Any failure to initially rely on the section 23 notice does not affect the continued right to rely on the exemption. Nor can the failure initially to advert to it amount to a waiver. It is a defence provided by the FIA to an application for disclosure which continues to be available to the Minister. He does not lose his entitlement to that defence simply because he or his legal advisors failed initially to rely on it when giving reasons for refusing to disclose.

[28] But the decision of this Court in **Ashford Sankar v. The Public Service Commission, C.A. No. 58 of 2007** (Mendonça, Jamadar and Narine JJA) appears to support the Council's contention. In **Sankar**, the Public Service Commission had objected to the provision of minutes of its meetings in October 2005 at which promotions to the offices of Permanent Secretary and Deputy Permanent Secretary were determined. The Commission had refused to provide them on the sole ground that the minutes were internal working documents and were exempt under section 27 of the FIA. However in written submissions before the trial judge, the Commission sought to bolster its reasons by contending that the minutes were a record of consultation and deliberations between members of the Commission and were confidential. One of the questions in the appeal was whether the Commission should be permitted to rely on that submission when it was not part of its initial reasons for refusing disclosure. The Court of Appeal held that the Commission should not be permitted to rely on it. Narine JA giving the judgment of the Court stated at paragraphs 24-25:

> ***"In this case, no affidavit evidence was filed with a view to supplementing the reasons for refusal provided by the respondent in its letter dated 21st December, 2005. The supplementary reasons arose in the respondent's written submissions filed before the trial judge. There is no evidence that disclosure of the minutes requested will inhibit frankness and candour in future discussions.***

In its oral submissions before this court the respondent contended that the submission is sustainable having regard to the nature and character of the request and the minutes themselves, which were before the trial judge.

In my view, the evidence in this case is clear. The reason provided for refusal by its letter was simply that the documents are internal working documents and are exempt under section 27 of the Act. The respondent should not be permitted to introduce a completely different reason and to rely on public interest considerations, which were not communicated to the appellant before he made his application for judicial review."

[29] In this appeal, Narine JA has stated that the Court did not lay down a principle that was of universal application (see paragraph 31 of his judgment). He adds that:

"Much will depend on the particular circumstance of the case, and the time at which the additional reasons are put forward. Clearly the longer the delay in providing the additional ground or refusal, the less likely the court will be in permitting reliance on it. The court will hardly shut out a public authority which is clearly entitled to rely on an exemption provided in the Act, but which through inadvertence did not include it as a reason at the time of refusal."

[30] He also sought to distinguish this case from **Sankar**, because in this case *"the Minister sought to introduce the additional reason for refusal under section 29(1)... before leave was granted by the trial judge to bring the application for judicial review."* (See paragraph 32 of the judgment.) I can see no real difference between the facts of **Sankar** and the facts of this case to justify a different outcome here on this question. In both cases the application for judicial review

had already been filed at the time of the taking of the new objection. The applicants in both cases would have based their challenge on the reasons provided by the public authority in its section 23 notice. That the objection was taken in this case at the permission stage cannot significantly detract from any prejudice to the Council which would have founded its action on the reasons given to it in the section 23 notice, especially as the notice of the additional reason was given only on the morning of the hearing of the application for permission to apply for judicial review.

[31] Further, the taking of the objection at the permission stage, in this case, was purely fortuitous because the Minister was allowed to participate by leave of the judge. In most cases judicial review is granted ex parte without the public authority having an opportunity to contest the grant of permission. If early disclosure at the permission stage is a substantive distinguishing feature, it would mean that in most judicial review applications a public authority which did not rely on a statutory exemption in its section 23 notice, will be shut out from relying on a valid reason because it would not have been invited to participate in the ex parte application for permission to seek judicial review.

[32] In my judgment a public authority can rely on a reason not originally provided in the section 23 notice. It is not to be forgotten that the FIA recognises that there will be good public interest reasons for keeping a document private and undisclosed. The public authority should not be unceremoniously shut out from relying on it – because the reasons were not included in the notice. See **Birkett v. Department for the Environment, Food and Rural Affairs [2011] EWCA Civ 1606**. This is especially so in a case such as this in which the new reason relied on is a defence provided by the FIA itself as a substantive right. The absence of a sanction for non-compliance would suggest that the legislative intent was not to render ineffective any new reason not originally communicated to the applicant. It will be of course a matter of discretion for the trial judge depending on the circumstances. Public authorities are expected to comply with provisions of the FIA and will not be permitted to simply ignore its timelines. There is no real

difference between **Sankar** and this case. The public interest considerations which arose in **Sankar** fell to be considered on the evidence already before the court (as in this case). If the submissions had succeeded, the public authority could have been punished in costs for having failed to provide notice to the other side, as has now been rightly suggested in this case.

[33] In **Birkett** the English Court of Appeal had to consider the following issue:

> ***"When a public authority has initially relied upon a particular exception when refusing to release environmental information under the Environmental Information Regulations 2004 ("the Regulations") may it rely upon a different exception or exceptions in proceedings before the Information Commissioner ("the Commissioner") and/or the First-Tier Tribunal (General Regulatory Chamber) (Information Rights) ("the Tribunal")?"***

[34] The Tribunal in that case had decided that the public authority could not rely on two new exceptions without its permission. It refused to give its permission. An appeal was taken to the Upper Tribunal which decided that the public authority was entitled as of right to rely on the two new exceptions. An appeal to the Court of Appeal was brought against that latter decision. The relevant regulations implemented Council Directive 2003/4/EC on the public's access to environmental information. It was argued before the Court of Appeal that a public authority may not rely on a new reason in proceedings before the Commissioner and the Tribunal but only on reasons which were specified in its reasons for refusing the request. Sullivan LJ, dismissing the appeal, found that the public authority was entitled as of right to rely on the new exceptions.

At paragraph 24, he stated:

> ***"Suppose a public authority mistakenly fails to rely in its refusal notification upon an adverse effect upon public security or***

national defence because it did not realise the significance of the information; or it fails to rely on an adverse effect upon a criminal inquiry or upon the ability of a person to receive a fair trial because it is unaware of the inquiry or the impending trial; or if it fails to rely on the commercial confidentiality of information which is only raised as an issue by a third party during the review process; or it fails to rely on exception (h) because it does not initially appreciate that the release of the information might endanger a rare species; would a purposive interpretation of the Directive preclude the review process under Article 6 from considering those exceptions however grave might be the adverse effects of disclosure? In my judgment, the answer to that question must be "No" if the Directive is read as a whole."

[35] I accept that given the different considerations set out in the Directive, this decision must be approached with caution. But the premise is the same here. The FIA does not prohibit reliance on a reason not stated in the section 23 notice.

Parliamentary Privilege

Issues (iii) - Is it a breach of parliamentary privilege to consider the Minister's statement which was given in the Senate?

[36] Issues (iii) and (iv) are interwoven. The act alleged to be a waiver of legal professional privilege in this case is the Minister's response in the Senate (to Senator Armstrong) that the Request for Proposals did not have to conform to the Central Tenders Board Act. The judge held that, by revealing in the Senate the conclusion of the legal advice he received and considered, the Minister had waived legal professional privilege. Whether the judge was right so to hold requires an analysis of the Minister's statement in Parliament. However consideration of the Minister's response raises the issue of breach of parliamentary privilege. Thus, the first issue must be whether in considering the

context and contents of the Minister's statement in Parliament, the court will be breaching the principle of parliamentary privilege.

[37] Section 55 of the Constitution falls to be considered. Section 55(1) provides that there shall be freedom of speech in the Senate and the House of Representatives subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of the Senate and the House of Representatives.

[38] Section 55(2) then provides as follows:

> ***"No civil or criminal proceedings may be instituted against any member of either House for words spoken before, or written in a report to, the House of which he is a member or in which he has a right of audience under section 62 or a committee thereof or any joint committee or meeting of the Senate and House of Representatives or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise; or for the publication by or under the authority of either House of any report, paper, votes or proceedings."***

[39] The judge held that section 55 sought to prevent civil proceedings against members of the House in their personal capacity in respect of a statement made in the House. (See paragraph 75 of the decision). This would also apply to members of the Senate. Certainly section 55 is open to such an interpretation. The result is however that statements made in Parliament by Members of Parliament are open to consideration by the courts in judicial review proceedings. The question is whether that is the intention behind section 55.

[40] In my judgment it is not. Seepersad J placed too restrictive an interpretation on section 55. The intention behind the provision is to protect statements made in Parliament by Members of Parliament from any form of

review by the courts. This serves to facilitate and encourage free and open discussion in Parliament by Members of Parliament, uninhibited by concerns that their comments are subject to review and interpretation in the courts. The phrase *"No civil ... proceedings may be instituted against any member of either House"* is not to be limited to personal actions against members but applies to any form of legal proceedings which makes the member's statement in Parliament the basis upon which legal action derives. This is consistent with the historical approach to freedom of speech in Parliament and to parliamentary privileges and immunities.

[41] **Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament**, 23rd Edition, (pages 79 to 82) provides an account of the development of the principle. The earliest evidence of a distinct claim of privilege appears to have been in the petition of Speaker Sir Thomas More in 1523. In 1629, Sir John Eliot and two other Members of the House of Commons were arrested and convicted in the King's Bench for seditious words spoken in debate and for violence against the Speaker. After the nomination in 1667 of a Commons committee to review the issue of freedom of speech, the House of Commons declared that the Court of King's Bench should not have accepted jurisdiction in the matter. The Commons further declared that the judgment was illegal and against the privileges of Parliament. A successful motion was later brought in the House of Lords to reverse the judgment.

[42] Legal recognition of parliamentary privilege was thereafter inserted into article 9 of the Bill of Rights 1689. **May's** notes at page 82 that "*The assertion in article IX of the Bill of Rights that freedom of speech and debates and proceedings in Parliament are not to be 'impeached or questioned in any court or place out of Parliament' was intended to stifle both the courts and the Crown*". The intention as expressed in article 9 was to exclude any form of judicial review. Section 55 of the Trinidad and Tobago Constitution borrows from the same principle and it would be absurd to limit its provisions simply to personal actions against Members of Parliament.

[43] Mr. Martineau cited two authorities in support of his submissions, **Prebble v. Television New Zealand Ltd. [1995] 1 AC 321** and **British American Tobacco Australia Limited v. Secretary, Department of Health and Ageing [2011] FCAFC 107**. While I have found the decision in **British American Tobacco** to be helpful, it is sufficient for the purposes of this appeal to refer only to **Prebble**, albeit extensively.

[44] **Prebble** was a decision of the Privy Council. Article 9 of the Bill of Rights which had the force of law in New Zealand, fell to be considered. Libel proceedings had been brought by the plaintiff, the former New Zealand Minister of State-Owned Enterprises, against the defendant in respect of a television programme which had made allegations against him about the sale of State owned assets while he was a Minister. The defendant alleged that seven of the twelve meanings alleged to be defamatory were true. It also alleged, inter alia, that some of the statements made in the House of Representatives by the plaintiff as a member of the House, were calculated to mislead Parliament or were otherwise improperly motivated. The allegations were struck out at first instance as being an attempt to impeach or question proceedings in the House in contravention of article 9. The striking out was upheld by the Court of Appeal.

[45] On appeal to the Privy Council Lord Browne-Wilkinson, giving the decision of the Board, gave extensive consideration to the whole principle underlying article 9. He noted at page 332 letter D that:

> ***"In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: Burdett v. Abbot (1811) 14 East 1; Stockdale***

v. Hansard (1839) 9 Ad. & El. 1; Bradlaugh v. Gossett (1884) 12 Q.B.D. 271; Pickin v. British Railways Board [1974] A.C. 765; Pepper v. Hart [1993] A.C. 593. As Blackstone said in his Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p. 163:

> *'the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.' "*

The Board considered the judgment of Hunt J in the Australian case of **R v. Murphy (1986) 64 ALR 498**. At issue in **Murphy** was whether, in the course of a criminal trial, the principal Crown witness could be cross-examined in respect of evidence he gave to a Select Committee of the Senate (relating to matters in issue in the trial) with a view to showing a previous inconsistent statement.

[46] Hunt J held that article 9 did not prohibit such cross-examination, even if the suggestion was made that the evidence given to the Select Committee was a lie. He also held that the statements to the Select Committee could be used to draw inferences, could be analysed and be made the basis of submissions. Having summarised the content of Hunt J's decision in the terms just described, Lord Browne-Wilkinson said at page 333 F:

> ***"It is, of course, no part of their Lordships' function to decide whether as a matter of Australian law, the decision of Hunt J. was correct. But article 9 applies in the United Kingdom and throughout the Commonwealth. In their Lordships' view the law as stated by Hunt J. was not correct so far as the rest of the Commonwealth is concerned. First, his views were in conflict with the long line of dicta that the courts will not allow any challenge to what is said or done in Parliament. Second, as Hunt J. recognised,***

his decision was inconsistent with the decision of Browne J. in Church of Scientology of California v. Johnson-Smith [1972] 1 Q.B. 522 (subsequently approved by the House of Lords in Pepper v. Hart [1993] A.C. 593) and Comalco Ltd. v. Australian Broadcasting Corporation (1983) 50 A.C.T.R. 1, in both of which cases it was held that it would be a breach of privilege to allow what is said in Parliament to be the subject matter of investigation or submission.

Finally, Hunt J. based himself on a narrow construction of article 9, derived from the historical context in which it was originally enacted. He correctly identified the mischief sought to be remedied in 1689 as being, inter alia, the assertion by the King's Courts of a right to hold a Member of Parliament criminally or legally liable for what he had done or said in Parliament. From this he deduced the principle that article 9 only applies to cases in which a court is being asked to expose the maker of the statement to legal liability for what he has said in Parliament. This view discounts the basic concept underlying article 9, viz. the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.

Moreover to allow it to be suggested in cross-examination or

submission that a member or witness was lying to the House could lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue."

Lord Browne-Wilkinson went on to note at page 336 that:

"Their Lordships are acutely conscious (as were the courts below) that to preclude reliance on things said and done in the House in defence of libel proceedings brought by a member of the House could have a serious impact on a most important aspect of freedom of speech, viz. the right of the public to comment on and criticise the actions of those elected to power in a democratic society: see Derbyshire County Council v. Times Newspapers Ltd. [1993] A.C. 534. If the media and others are unable to establish the truth of fair criticisms of the conduct of their elected members in the very performance of their legislative duties in the House, the results could indeed be chilling to the proper monitoring of members' behaviour. But the present case and Wright's case, 53 S.A.S.R. 416 illustrate how public policy, or human rights, issues can conflict. There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail."

I shall return to this particular passage at paragraph 49.

[47] As the decision in **Prebble** indicates, the basic principle which underlies Article 9 applies throughout the Commonwealth and it is to ensure that as far as possible that a Member of Parliament can speak freely, without fear that their statements will be held against them in the courts. This safeguards the public interest by ensuring no inhibition on the part of a Member of Parliament in his or her contribution to parliamentary debate. As Lord Browne-Wilkinson noted in **Prebble**, article 9 is in fact a *"manifestation"* of *"a wider principle"* that *"the courts and Parliament are both astute to recognise their respective constitutional roles"* and that the courts as far as possible will not permit any legal challenge to be made to what is said or done within Parliament (see page 332).

[48] For the foregoing reasons I consider that the Minister's response to Senator Armstrong in the Senate cannot be considered in these proceedings. To permit consideration of the Minister's response in the Senate would be to subject the Minister's statement to review by the courts. Seepersad J placed far too restrictive an interpretation on section 55 and fell into error.

[49] I wish to caution however that while **Prebble** has given precedence to the legislature's powers over that of freedom of speech (per Lord Browne-Wilkinson at page 336). I do not accept that the same applies unequivocally to Trinidad and Tobago. We have a written Constitution. It asserts that the Constitution, unlike Parliament, is the supreme law. It also guarantees to the people of Trinidad and Tobago certain fundamental rights and freedoms in sections 4 and 5 thereof. This is not a case in which a conflict arises between a section 4 right and parliamentary privilege but I expressly reserve my views on the outcome of any conflict between those fundamental rights and freedoms and the powers of Parliament; except to say, given the supremacy of the Constitution, the powers of Parliament must be subject to it. Of course section 55 forms part of the Constitution and the issue will be how the provisions of sections 4 and 5 are to be reconciled with section 55.

Issue (iv) – Did the Minister's statement amount to a waiver of legal

professional privilege ?

[50] Having come to the conclusion set out at paragraph 48 it is unnecessary to consider the issue of waiver of parliamentary privilege because to do so would be to do the very thing I have found section 55 to prohibit.

Issue (v) – Did the letter of 1st March 2012 amount to a waiver of legal professional privilege?

[51] Before deciding this issue, I must deal with the objection of Mr. Martineau to the Council's reliance on the letter on the basis that the Council did not raise it before Seepersad J.

In **Jones v MBNA International Bank [2000] EWCA Civ 514**, paragraph 38, Gibson LJ said:

> ***"It is not in dispute that to … take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court."***

[52] Relying on this dictum Mr. Martineau submitted that this Court, being a Court of re-hearing was obliged to hear only issues litigated at first instance. Moreover reliance on the letter had not been raised in the respondent's amended statement. Had that been pleaded the Minister may have led additional evidence in the High Court as to the circumstances under which the letter had been published so as to establish objectively that there was no waiver. He also relied on **Pittalis & Anor. v. Grant & Anor [1989] 2 ALL ER 622**. At page 626 it was stated thus:

"The stance which the appellate court should take towards a point not raised at the trial is in general well settled: see Macdougall v. Knight (1889) 14 App Cas 194 and Tasmania (owners) v. City of Corinth (owners), The Tasmania (1890) 15 App Cas 223. It is perhaps best stated in Ex p Firth, re Cowburn (1882) 19 Ch D 419 at 429, [1881 – 5] ALL ER Rep 987 at 991 per Jessel MR:

> *'...the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.' "*

[53] While I accept the soundness of the authorities cited, in my judgment the respondent should be permitted to make the submission. Legal professional privilege was a live issue before Seepersad J but it was only raised by the Minister after the Council had filed its application for judicial review. The Council was thus presented with a new reason after its application for judicial review had been filed. In any event, the letter speaks for itself. I cannot conceive of any circumstances of its issue which can be put into evidence so as to demonstrate non-waiver. It was a direct response to the Council's correspondence about the Request for Proposals. It is a pure legal argument based on the contents of the letter.

I turn then to whether the letter waived the privilege.

[54] This issue was not before the trial judge. Waiver of legal professional privilege is well traversed. Mr. Martineau relied on a trilogy of Australian decisions which quite authoritatively set out the law on the subject. These are **Mann v Carnell 201 CLR 1 (1999), Osland v Secretary to the Department of Justice [2008] HCA 37** and **British American Tobacco Australia Ltd. v.**

Secretary, Department of Health and Ageing [2011] FCAFC 107. The first two decisions are from the Australian High Court, the last is from the Federal Court of Australia. The decisions in these cases are at best persuasive authority but I consider the law they set out to be applicable to legal professional privilege in Trinidad and Tobago. Generally the test of waiver is whether there is any inconsistency between the conduct of the person entitled to the benefit of the confidentiality of communication between lawyer and client, and the maintenance of the confidentiality (See **Mann v Carnell** at paragraph 28)

[55] Disclosure of the conclusion (or gist, substance or effect) of legal advice may or may not amount to a waiver of privilege in respect of the advice as a whole. It will depend on the circumstances of the case and whether there is inconsistency between the disclosure by the client on the one hand and the maintenance of confidentiality on the other. Waiver may be express or implied. Implied waiver is also described as waiver imputed by operation of law. It reflects a judgment that the conduct of the partly entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case and in the light of any considerations of fairness arising from that context or those circumstances. See **Osland (supra)**.

[56] In **Mann v Carnell (supra)** the High Court of Australia affirmed the decision of the Federal Court of Australia that the privilege was not waived by the provision of copies of documents containing legal advice received by the government of the Australian Capital Territory in respect of an action brought by a member of the public. The litigation had been settled by the government but the litigant complained to a member of the Legislative Assembly of the Territory about the conduct of the government in the litigation. The member passed the complaint on to the Chief Minister for the Territory who, under covering letter, sent to the member in confidence, copies of the documents containing the legal advice. This was to enable the member to consider the reasons for the conduct. The member sent a copy of the covering letter (which the Chief Minister had sent

to him) to the litigant but did not disclose the documents containing the legal advice. The litigant sought production of copies of those documents by way of discovery contending that privilege was lost by their having been shown to the member. In rejecting that contention the majority of the High Court, in a joint opinion, stated at paragraphs 28 and 29 that:

> ***"At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.***
>
> ***Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege."***

The court held that the conveyance, on a confidential basis, of the terms of the legal advice received by the government as a body politic by its Chief Minister to a member of its Legislative Assembly, to enable him to consider the reasonableness of the conduct of the Territory, was not inconsistent with the purpose of the privilege. The purpose of the privilege was to enable the Territory to obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of that advice and to protect the Territory from the disclosure of legal advice it received. Accordingly, the privilege was not waived.

[57] **Osland v Secretary to the Department of Justice (supra)** was a case in which the appellant sought access to legal advice given to the Governor of the state of Victoria by three Senior Counsel. She had been convicted of murder and sentenced to fourteen years' imprisonment. She petitioned the Governor for mercy. The petition was denied. The Attorney General for Victoria issued a press release stating that he had obtained legal advice from the three Senior Counsel which had recommended that the petition be denied. It was held that the disclosure of the effect of the advice was made for the purpose of satisfying the public that due process had been followed and that the petition had not been refused on political grounds. The privilege had not been waived.

[58] In **British American Tobacco Australia Ltd. v. Secretary, Department of Health and Ageing**, the Secretary denied a request by the appellant for access to a copy of a memorandum of advice provided by the Attorney General's Department to it on the basis of legal professional privilege. The appellant contended before the Australian Federal Court that the privilege had been waived by several acts of disclosure including: (i) a reference to aspects of the legal advice in a Government Response paper that was published in the Senate (ii) subsequent publication of the Government Response paper on a government website; (iii) provision of a summary of the advice to a group of advisors to government.

[59] It was held that the privilege was not impliedly waived because the

Secretary did not seek to deploy a partial disclosure of the advice for forensic or any other advantage so as to make his conduct inconsistent with the maintenance of privilege. Secondly the disclosure to a group of advisors to government was not made to *"outsiders"*. As a result it was not inconsistent with the maintenance of legal professional privilege.

[60] The question therefore is whether what was stated in the letter of 1st March 2012 by the Minister amounted to conduct by the party entitled to the privilege which was inconsistent with the maintenance of the confidentiality which the privilege was intended to protect. In my judgment it was not inconsistent. The relevant paragraph stated that *"based on advice from the office of the Attorney General, I can say that the publication of the Request for Proposals for screening of potential investors ... was not required to be in conformity with the Central Tenders Board Act."*

[61] Nothing in that paragraph states the substance of the advice such as to suggest that the gist of the advice has been provided. I agree with Mr. Martineau that the letter does not even give the gist of the legal advice. It must follow that if the gist was not revealed then there is nothing in the paragraph to even remotely suggest that this was conduct which was inconsistent with the maintenance of confidentiality. On the contrary, consistent with the maintenance of such confidentiality this can be seen not only from the letter but from the Minister's refusal to disclose the contents of the legal advice to the Senate. The submissions fails.

Issue (vi) – Should the information be disclosed in the public interest?

I turn finally to the section 35 override.

[62] Section 35 provides as follows:

"Notwithstanding any law to the contrary a public authority shall

give access to an exempt document where there is reasonable evidence that significant –

(a) abuse of authority or neglect in the performance of official duty; or

(b) injustice to an individual; or

(c) danger to the health or safety of an individual or of the public; or

(d) unauthorised use of public funds,

has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so."

The Court's approach to the interpretation of section 35

[63] The approach of the Court to an interpretation of Section 35 in particular and the FIA as a whole, must be a purposive one having regard to the intention of the FIA. That intention is set out at Section 3 which provides that:

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 authorisations, policies, rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those authorisations, 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.

[64] It creates a presumption in favour of disclosure in the exercise of any discretion conferred under the FIA. Section 35 is expressed in mandatory language but it does confer a discretion. Of course public interest considerations are paramount. But where the pros and cons are evenly balanced, the presumption in favour of disclosure in section 3(2) will tip the balance; that is to say, the public authority is mandated to give access.

[65] Indeed it was Narine JA in **Sankar** who commented on the provisions of sections 3 and 35 in these terms at paragraphs 16 and 17:

"Section 3(1) of the Act makes it clear that the object of the Act is to extend the right of the public to access information in the possession of public authorities. Section 3(2) provides that the provisions of the Act shall be interpreted in such a way as to further the object of providing access to information, and any discretion conferred by the Act must be exercised so as to facilitate and promote the disclosure of information in a prompt and cost-effective manner.

Clearly the intention of the framers of the Act was to promote disclosure of information held by public authorities to the public, as opposed to suppressing or refusing access to information. The presumption is that the public is entitled to access the information requested unless the public authority can justify refusal of access

under one of the prescribed exemptions specified under sections 24 to 34 of the Act."

[66] Section 11 thereafter creates the right of every person to obtain access to an official document. That right however is not absolute but is subject to qualifications, among them a number of exceptions and exemptions. The exemptions are set out in sections 24 to 34 of the FIA which protect certain documents falling within their provisions from disclosure. Section 35 then provides that such protection may be overridden where the benefits to the public interest in disclosing them outweigh any damage to public interest which may result from that disclosure. Inherent in such a balancing exercise is the right of the public authority to refuse disclosure where the damage to the public interest outweighs the benefits. It follows that there will also be good public interest reasons to keep certain documents private and undisclosed.

[67] Viewed holistically therefore the FIA recognises the conflict which exists between competing rights - the right to know or to be kept informed on the one hand and the right to privacy and confidentiality on the other hand, as well as the competing public interest considerations which underpin them. In any given case it requires a balancing of those competing interests in considering whether to grant or not grant access to a document.

[68] Lord Mance's comments in **Kennedy v. Charity Commission [2014] UKSC 20** very much summarise the difficulty courts face in resolving the conflict in respect of the U.K. Freedom of Information Act 2000. He observed at paragraph 1 that:

"[1] Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise

the press, non-governmental organisations (NGOs) and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise be forthcoming. These competing considerations, and the balance between them, lie behind the issues on this appeal."

I daresay that they are also at the heart of the issues in this appeal.

[69] The intention of the FIA in making available information about the operations of public authorities is a radical departure from a culture of secrecy and confidentiality which pervaded the public service at the time of the Act's passage. I draw in that regard on my own experience as a legal officer in the public service.

[70] The judgment of Kirby J in Osland gives the history and evolution of the secretive approach of the Australian public service to the dissemination of information. Much of the history of secrecy to which he refers is applicable to the public service culture in Trinidad and Tobago. At paragraphs (60), (62), (65) and (66), he said:

"[60] The Freedom of Information Act 1982 (Vic) ('the FOI Act') introduced to Victoria (as like statutes have introduced elsewhere) an important change in public administration. Australian public administration inherited a culture of secrecy traceable to the traditions of the counsellors of the Crown dating to the Norman Kings of England. Those traditions were reinforced in later dangerous Tudor times by officials such as Sir Francis Walsingham (Walsingham was Principal Secretary of State to

Elizabeth I. See A-G v Heinemann Publishers Australia Pty Ltd (1987) 10 NSWLR 86 at 127; cf Hogge God's Secret Agents (2005), pp 6, 115, 124–125, 276). They were then strengthened by the enactment throughout the British Empire of official secrets legislation (see, eg, Official Secrets Act 1911 (UK)). (See also Heinemann (1987) 10 NSWLR 86 at 129; [1987] HCA 45, [1988] LRC (Const) 1007 at 1013–1014). A pervasive attitude developed 'that government "owned" official information' (see Lane and Young Administrative Law in Australia (2007), p 294). This found reflection in a strong public service convention of secrecy …

[62] The basic purpose of the introduction of freedom of information legislation is the same in all jurisdictions. It is to reinforce 'the three basic principles of democratic government, namely, openness, accountability and responsibility' (see New South Wales Legislative Assembly Parliamentary Debates (Hansard), 2 June 1988 at 1399, cited in Comr of Police v District Court of New South Wales (1993) 31 NSWLR 606 at 612). The central objective is to strengthen constitutional principles of governance not always translated into reality because of a lack of material information available to electors. Fundamentally, the idea behind such legislation is to flesh out the constitutional provisions establishing the system of representative government; to increase citizen participation in government beyond a fleeting involvement on election days; and to reduce the degree of apathy and cynicism sometimes arising from a lack of real elector knowledge about, or influence upon, what is going on in government.

[65] The starting point for resolving the issues presented by the present appeal is an appreciation of the duty of this court, in this context, to do what we are constantly instructing other courts to do in giving effect to legislation. This is to read the legislative text in

its context (including against the background of the significant change that the legislation introduces) and, so far as the text and context permit, to give effect to the legislative purpose (see Bropho v State of Western Australia [1991] LRC (Const) 49 at 61–62 and Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at [69]–[70]).

[66] In the present setting, that purpose is a radical one. It assigns very high importance to a public interest in greater openness and transparency in public administration (see s 3 of the FOI Act and reasons of Hayne J at para [134], below). Given the historical background, the attitudinal shift that FOI legislation demanded of ministers, departments, agencies and the public service is nothing short of revolutionary. The courts ought not to obstruct that shift. On the contrary, they should strive to interpret FOI legislation in a manner harmonious with its objectives, doing so to the fullest extent that the text allows."

The provisions of section 3(2) are consistent with that approach.

[71] Section 35 applies whenever a public authority has decided that a document or information is exempt. See **Caribbean Information Access Limited v. The Honourable Minister of National Security, Civil Appeal No. 170 of 2008**, in which Jamadar JA noted that a section 35 *"public interest override assessment and analysis ... follows [from] a decision that a document is exempt"* and that in relation to the requests for information made *"the [public authority] was and is obliged to make the section 35 assessment, analysis and determination and to indicate this in its reasons ..."* (paragraphs 47 and 48). Seepersad J rightly found that there was an onus on the Minister to consider whether there should have been a section 35 public interest override. It does not appear that any section 35 assessment was made in this case. The Council contends that this failure was illegal or **Wednesbury** unreasonable and amounted

to an omission by the Minster to perform a statutory duty. It certainly was an omission but on the evidence I cannot say that it was **Wednesbury** unreasonable. In **Caribbean Information Access Limited v. The Honourable Minister of National Security,** the matter was sent back to the public authority to consider it. Far too much time has passed for such a remedy to be applied in this case and in any event the Minister who made the decision has demitted office.

[72] I agree with Mr. Peterson that section 35 has two limbs. Firstly, it requires that access to an exempt document be granted by a public authority where there is reasonable evidence of the facts referred to in sub-paragraphs (a), (b), (c) and (d) of section 35. Secondly, access also should be granted, where, in the circumstances, it is in the public interest to disclose the information after weighing the likely harm to the public interest against the likely benefit. Much of the discussion in this appeal has focused on the first limb of section 35. Paragraphs (a), (b), (c) and (d) of section 35 set out separate and independent criteria which may or may not apply in a given case. But they do not apply in this case. It is the second limb of section 35 which falls to be considered. For the purposes of the second limb I have parsed section 35 as follows:

> ***"Notwithstanding any law to the contrary a public authority shall give access to an exempt document where ...***
> ***in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so."***

This is an entirely different question. The issue in such a case is whether in the circumstances there is greater benefit or injury to the public interest in disclosing the information.

[73] The section 35 override must be considered by the public authority on each occasion on which it determines that a document to which access is sought is exempt. Having found the document to be exempt the public authority must then

decide whether on either limb, it should permit access to the document. In the case of the first limb, it must decide whether to disclose on the basis of reasonable evidence that one or all of the factors at paragraphs (a), (b), (c) and (d) has or have occurred. It may be that such evidence may have to be provided by the person seeking the information. Where there is no such evidence the public authority should state in its section 23 reasons that there is no evidence upon which to conclude that all (or any) of the sub-paragraphs (a),(b),(c) and (d) of section 35 have been satisfied.

[74] It may also be that the evidence is in fact available to the public authority. In such a case it must decide whether on that evidence, any of the factors set out in paragraphs (a), (b), (c) or (d) of section 35 have been satisfied. But where no such evidence is available to the public authority, or it is not provided by the person seeking access, or such evidence as is available does not satisfy paragraphs (a), (b), (c) and (d) of section 35, (i.e. the public interest question) the public authority must still consider the second limb of section 35, before responding to the request. If the decision is to deny access because it is contrary to the public interest, this decision and the reasons supporting it must be stated in the section 23 notice. In any event, the public authority must set out in the section 23 notice that it has considered section 35.

[75] No section 35 override has been performed in this case. It thus fell to the Court to decide the public interest issues in the second limb of section 35. The question then is whether there is greater benefit or injury to the public interest in disclosing the information. Seepersad J found that the section 35 override should apply. I agree but for somewhat different reasons. At the invitation of the Court, written submissions were invited of both counsel on this question. Mr. Martineau submitted that greater injury than benefit was likely to occur and set out the following examples of injury to the public interest:

(i) The public interest in the maintaining and protecting of the long established right to legal professional privilege is a fundamental human right -

Disclosure in this case would violate the fundamental human right and one of the basic tenets of the common law. See Lord Hoffman in **R v. Special Commissioners & Anor. Ex parte Morgan Grenfell & Co. [2002] UKHL 21** at para. 7. See also **R. (on the application of Child Poverty Action Group) v. Secretary of State for Work and Pensions [2011] 1 ALL ER 729** at para. 29.

(ii) Confidence - Interference with the right to the confidence of privileged communications with one's lawyer seriously undermines the rule of law. See **Warren v. Attorney General for Jersey [2011] 2 ALL ER 513** at p. 522. Also *"The need to be able to speak freely in the expectation that what is said will remain confidential is also the basis for legal professional privilege"*, **R v K [2010] 2 ALL ER 509** at para. 68. Disclosure will breach the confidence between the Minister and the Attorney General.

(iii) The candour of Ministers can be affected - In terms of the advice of law officers, it is a *"long-established rule of this House that the opinions of the Law Officers are absolutely confidential and that neither Minister nor Law Officers may be interrogated about them"* (**The Law Officers of the Crown**, p. 258-259). Disclosure in this case may lead Ministers to be less than candid in communicating with their attorneys at law when they are seeking advice.

(iv) Candour of law officers can be affected - Disclosure in this case will cause a chilling effect resulting in the government not obtaining full and frank legal advice from its law officers. *"By long-standing convention, observed by successive governments, the fact of, and substance of advice from, the law officers of the Crown is not disclosed outside government ... The purpose of this convention it [sic] to enable the government to obtain frank and full legal advice in confidence."* (See **Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (supra)** at p. 443.)

(v) In-built public interest – *"... there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest"*, **Bellamy v. The Information Commissioner and DTI (EA/2005/023)** at para. 35. See also **Mersey Tunnel Users' Association (MTUA) v. Information Commissioner and Merseytravel (EA/2007/0052, 15 February 2008** at paragraph 28 (the second one as there are two paragraphs 28 in the official judgment). In this case disclosure will significantly interfere with the in-built public interest.

(vi) The administration of justice – Disclosure in this case may undermine the administration of justice if there is litigation in which the advice becomes relevant. Legal professional privilege is a fundamental condition on which the administration of justice as a whole rests. See **R. v. Maxwell [2010] UKSC 48** at para. 28. See also para. 87 of **Three Rivers District Council & Ors. v. Governor and Company of the Bank of England (No. 6) [2005] 1 AC 610**.

(vii) Policy justification and rule of law – Disclosure of the instructions and advice in this case will shock the minds and understanding of the right thinking members of society, especially given the fact, as Baroness Hale said *"The privilege is too well established in the common law for its existence to be doubted now."* (**Three Rivers District Council & Ors. v. Governor and Company of the Bank of England (No. 6) [2005] 1 AC 610** at paragraph 61.) In the same case Lord Scott stated *"the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest"* and *"it is necessary in our society ... that communications between clients and lawyers ... should be secure against the possibility of any scrutiny from others ..."* (paragraph 34).

(viii) Information may get into the wrong hands – Disclosure of the advice and

instructions may put information contained in the advice in the hands of persons with an interest adverse to the Minister. *"Where in addition the information in question is not only confidential but also privileged, the case for a strict approach in unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest".* (See Lord Millette's remarks in **Prince Jefri Bolkiah v. KPMG [1999] 2 AC 222** at p. 236 and also in **Caterpillar Logistics Services (UK) Ltd. v. Huesca de Crean [2012] 3 ALL ER 129** at para. 48.

(ix) Interference with privilege including parliamentary privilege – Disclosure in this case will undermine the principle and doctrine of parliamentary privilege which attaches to statements made in Parliament. The case for strictly protecting privilege and non-disclosure in this case is unanswerable.

[76] Mr. Martineau submitted that these were nine powerful factors which far outweighed the public interest consideration in ensuring that public authorities are transparent in their action and accountable for the decision making process. He added that the latter is a general proposition but on the particular facts of this case it is of slight weight because the Constitution provides the ideal mechanism for achieving this end. Our system of government makes ministers responsible to Parliament. Accordingly, in a case such as this, any Member of Parliament including the Opposition can take steps to make the Minister accountable for his actions. If there are concerns about the disposal of lands at Invader's Bay, any Member of Parliament can ask questions in relation thereto or even raise the matter in debate. In that way, the public can judge the Minister based on the

disclosure which he makes or fails to make in Parliament in relation to disposal of the land. In this case therefore Parliament is a much more effective instrument in to promote transparency and accountability.

[77] Those are weighty considerations. But in considering them I must keep in view the objects of the Act set out in section 3(1). The intention of the Act is to make available to the public, information about the operations of public authorities and to provide a right of access to information in documentary form in the possession of public authorities. With that object as the focus section 3(2) then states that the Court should as far as possible facilitate and promote the disclosure of the information. That is an overarching consideration. The dictum of Kirby J in **Osland (supra)** is relevant. Speaking on section 50(4) of the Freedom of Information Act of Victoria the Victorian, equivalent of Section 35, he stated at paragraph 101:

> ***"It is essential, once again, to view s 50(4) of the FOI Act in the context of the Act as a whole, with its radical purpose to change past practices at the forefront of attention. The power that s 50(4) grants to the Tribunal (subject to exclusions) to override a ministerial claim to exemption on the basis that 'the public interest requires that access to [a] document should be granted under this Act' is significant and exceptional. It is for this reason that s 50(4) has been described, rightly, as a 'most extraordinary provision' (see Secretary to the Department of Premier and Cabinet v Hulls [1999] 3 VR 331 at [28] per Phillips JA). The power must be interpreted and applied with this in mind."***

Kirby J gave a separate judgment concurring with the majority in that case. The views he expressed on the section 50(4) approach were very much his own. Section 50(4) of course is expressed somewhat differently and places the decision to override in the hands of a tribunal. But its purpose is the same as that of section 35. It is the provision of information when to do so is in the public interest. More

significantly, as Kirby J entreats, section 35 must be considered in the context of the Act as a whole with its aims and objects *"at the forefront of attention"*. This approach is reinforced by the provisions of section 3.

[78] The question is whether the benefits of disclosure outweigh the damage if any caused to public interest in this case. In my judgment items (i), (ii), (v), (vi), (vii), (viii) and (ix) of the nine factors apply with considerable force to legal professional privilege between the lawyer and his client where the advice relates to the personal affairs of the citizen. In this case we are dealing with legal advice given by public officers in respect of a project in which considerable public funds are to be expended. Issues of accountability and transparency are far more significant.

[79] I do not wish to be understood as saying that legal officers in the public service are not entitled to the same protections under legal professional privilege. But in such a case as this, those issues tip the public interest concerns in favour of disclosure.

[80] Further, I can see no harm to the public interest in the disclosure of the legal advice given in this case. The proposed development is in respect of state lands valued at over one billion dollars. The project appears to be quite an extensive one. The proposed developer will be chosen by the Ministry as opposed to the Central Tenders Board. The lease rate will be agreed between the Ministry and the developer. Ultimately the burden of payment falls to the public purse.

[81] The Central Tenders Board Act Chap 71:91 sets out a transparent process for the selection of bidders. The Ministry's proposals do not. It is in the public interest that the legal advice permitting the Ministry's process be subject to public scrutiny. Lord Mance's dictum in **Kennedy v. Charity Commission [2014] UKSC 20** (para. 1) is quite apposite – Information *"underpins democracy"*. It is the basis upon which an open society flourishes. Unwillingness to disclose formed by *"habits of secrecy"* and self-protection can only lead to corruption, or

loss of faith in the system. An open democratic society thrives on robust discussion in the court of public opinion. Information properly sourced and provided can only enlighten such discussion and educate the uninformed.

[82] I accept that the Minister (or any other state agency) who (or which) has obtained legal advice to which legal professional privilege applies is entitled to claim the defence. But it is precisely because there will be occasions on which such advice should be made available to the public, that section 35 has been promulgated.

[83] With the disapplication of the provisions of the Central Tenders Board Act the effect of the legal advice is to allow the Ministry to invite proposals for developers and make a choice free from the restrictive rules which govern a choice made under the Central Tenders Board. The tendering process under the Central Tenders Board Act is designed to show transparency and fairness in the awarding of contracts financed by public funds. On the other hand the criteria for discerning the best proposal made to the Ministry in respect of the project is not disclosed.

[84] Having weighed the benefits to the public interest against the damage likely to be caused by disclosure, I consider that it is in the public interest to disclose the legal advice upon which the decision to disapply the Central Tenders Board Act was made. That way both the basis and soundness of the advice will be tested in the court of public opinion. Rather than shock the minds of right-thinking members of society, it will bolster public confidence if the advice given is sound and reveals a proper foundation for allowing the Ministry to invite Requests for Proposals. If the advice is unsound then a defective process will have been thwarted. It is also in the public interest that any advice which is negligent or unsound be revealed and corrected.

See also Kirby J in **Osland (supra)** at paragraph 114 where he stated:

> ***"... Repeated disparagement of the expression 'transparency in government' (see reasons of Hayne J at paras [147]–[150], below) suggests an approach to the FOI Act that I cannot share. In so far as the Tribunal made reference to considerations of transparency, it was correct to do so. As the short title of the FOI Act suggests, as its long title affirms and as its stated objects demonstrate, the public purpose of the FOI Act is precisely to enhance transparency in government to the extent provided. That object is critical given the oft-repeated instruction of this court that statutes should be read, so far as their language permits, so as to fulfil their evident purposes (cf CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384 at 408, Newcastle CC v GIO General Ltd (1997) 191 CLR 85 at 112–113 and Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at [69], [78]). The Tribunal and the courts must bear in mind the distinctive and radical purposes of the FOI Act and take particular care when reaching conclusions that appear to frustrate them."***

[85] The opinion of Narine JA that the Council can seek its own legal advice and challenge the decision to by-pass the Central Tenders Board, misses the point. It is not just a question of legality but also a question of transparency. It is important not only that the decision to by-pass the Central Tenders Board be legal and properly made but also that the process by which that decision was arrived at must be seen to be so. And it is that process which the Council also seeks to examine.

[86] I do not consider that the lawyer/client relationship will be negatively impacted in any significant degree. This is no ordinary case in which legal advice has been given to a private citizen. The nine weighty considerations put forward by Mr. Martineau constitute powerful reasons against disclosure in such a circumstance and in virtually every such case would be upheld. In this case the disclosure sought is in respect of advice by public officers about a project to be

executed on valuable public lands, which is to be financed by a considerable injection of public funds. On the contrary it is likely to foster greater care in the giving of advice. For the same reason it is unlikely that candour between Ministers, or between Ministers and legal officers will be adversely affected. In any event, the public benefits of transparency outweigh it. National security concerns have not been raised in this case.

[87] I must add that it will not be in every case in which legal advice is given in respect of a project involving public funds and public property, that the Section 35 override will be applied in favour of disclosure. It will all turn on the facts and circumstances of a given case.

[88] As to the issue of interference with parliamentary privilege I cannot conceive of how a Section 35 override can affect parliamentary privilege in this case. A section 35 override is authorised by statute itself in the public interest, a provision which Parliament saw fit to insert into the statute. Finally, in regard to Mr. Martineau's submission that questions could be posed to the Minister in Parliament about any concerns about the disposal of the lands at Invaders Bay, I do not agree that such a measure is necessarily sufficient. It was precisely such a tactic which was employed by Senator Armstrong but the details of the basis of the advice were still not provided on grounds of legal professional privilege. The judge was right to permit access to the information under the Section 35 override.

[89] In the result the Minister's appeal is dismissed, so too the cross-appeal.

The order

[90] As to the order made by the judge I agree with Mr. Martineau that it is too wide. The Permanent Secretary in his letter of 16th August 2012 had provided all the information requested except the information relating to the legal advice. It is that latter information which has been the source of the dispute in this case. Copies of the legal advice should be provided. The information sought as to the

date of the request for legal advice, should also be provided. That is sufficient to satisfy the interests of transparency.

Even though I have adjusted the order, the Minister has still lost his appeal. We will hear the parties on costs on both the appeal and cross-appeal.

Nolan P.G. Bereaux
Justice of Appeal