

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-04538

BETWEEN

**THE JOINT CONSULTATIVE COUNCIL FOR THE
CONSTRUCTION INDUSTRY**

Applicant/Intended Claimant

AND

**THE MINISTER OF PLANNING AND SUSTAINABLE
DEVELOPMENT**

Respondent/Intended Defendant

Before the Honourable Justice Frank Seepersad

Appearances

1. Ms Kingsley Walesby for the Applicant
2. Mr Russell Martineau S.C and Mr Shiv Sharma, Deowattee Dilraj- Batoosingh for the Respondent.

Date of Decision: October 1, 2013

Decision

Introduction

1. In the proceedings before the court, the Applicant/Intended Claimant is seeking leave to institute Judicial Review in order to challenge the decision of the Respondent/Intended Defendant to refuse to disclose copies of the written instructions, the legal advices and the identity of the authors of such legal advices it received from the Legal Unit of the Respondent and the Office of the Attorney General.
2. The refusal was primarily on the basis that the documents were exempted under the Freedom of Information Act (Chap 22:02)
3. The application was filed with notice on the 31st October, 2012 and it was later amended and re-filed without notice on the 11th January, 2013.
4. The relief sought included *inter alia*
 - i. A declaration that the continuing decision of the Respondent by letter dated the 16th August, 2012 to refuse to provide the said information which was requested by the Applicant in its Freedom of Information application dated the 20th April, 2012 is illegal, null and void and of no effect,
 - ii. A declaration that the Respondent is not entitled to rely upon the additional reasons for its refusal to provide the said information as set out in its letter dated the 4th December, 2012 as a ground for its refusal to provide the said information,
 - iii. A declaration that the Applicant is entitled to the said information; and
 - iv. An order of Mandamus compelling the Respondent to provide the said information.

Background Information

5. The Ministry of Planning and Sustainable Development was formerly known as the Ministry of Planning and the Economy until the year 2012. Senator the Honourable Minister Dr Bhoendrat Tewarie while functioning under the Ministry of Planning and the Economy initiated a Request for Proposal process to select a developer or developers for state lands located at Invader's Bay
6. The Applicant/Intended Claimant contends that the request for proposal process amounted to a tender process and by letter dated 14th December, 2011 called upon the Minister to explain how this was possible under the Ministry when the Central Tenders Board has the sole and exclusive authority to act for and on behalf of the government subject to limited exceptions which did not apply in this case.
7. The Applicant/Intended Claimant requested a response from the Ministry on this apparent circumvention of the Central Tenders Board and described same as a 'matter of grave public concern'
8. By letter dated the 21st December, 2011, the Minister informed the Applicant that with respect to its query advice was being sought from the Attorney General on the matter.
9. By letter dated the 1st March, 2012, the Minister wrote to the Applicant indicating *inter alia* that based upon advice received from the Office of the Attorney General the Request for Proposals process was not required to be in conformity with the Central Tenders Board Act (Chap. 71:91)
10. By letter dated the 29th March, 2012, the Applicant called upon the Minister to publish the legal advice received with respect to the Central Tenders Board Act.
11. By letter dated the 20th April, 2012 the Applicant wrote to the Ministry pursuant to the Freedom of Information Act requesting access to various information including a printed copy of the following documents and information -

- i *"Has MPE had legal advice on the applicability of the CTB Act to this RFP process?"*
- ii *"When did MPE request that legal advice? To which legal adviser did MPE make that request?"*
- iii *"We are requesting copies of the written instructions and the legal advices both from the Legal Unit of MPE and the office of the Attorney General "*

- 12 Having regard to the lack of acknowledgement or a substantive response to the said letter the Applicant wrote to the Ministry again indicating that its previous letter had not been acknowledged by the Ministry and that the Ministry was in breach of section 15 of the Freedom of Information Act by failing to indicate within thirty (30) days whether it was acceding to or refusing the Applicant's request for the requested documents
13. By letter dated 5th July, 2012 the Ministry acknowledged receipt of the Applicant's letter dated the 27th June, 2012 and in which it apologized for the delay and informed the Applicant that the matter was receiving its attention
- 14 By letter dated the 13th July, 2012 the Applicant wrote to the Respondent referring to its letter dated the 29th March, 2012 and indicated that it was still awaiting a copy of the said information.
15. By letter dated the 10th August, 2012 the Applicant through its Attorneys at law sent a pre-action protocol letter to the Respondent indicating that the Ministry in failing to indicate whether it was approving or refusing to grant the information requested by the Applicant was in direct and continuing breach of Section 15 of the Freedom of Information Act The Respondent was requested to provide its substantive response on or before the 24th August, 2012 failing which it was indicated that the Applicant would apply for judicial review of the said continuing refusal and/or failure of the Ministry to provide its substantive response to the request
- 16 By letter dated the 16th August, 2012, the Permanent Secretary, Ministry of Planning and Sustainable Development refused to provide the legal advice obtained on the matter and informed the Applicant as follows

“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 process is now provided. Further the decision to move forward with the process and the selection of the three (3) chosen investors was agreed by cabinet.”

17. Further by Letter dated the 4th December, 2012 the Respondent indicated that the information requested by the Applicant is exempt under section 29(1) of the Freedom of Information Act on the ground of legal professional privilege and therefore could not be made available to the Applicant.

Attorneys’ Submissions

18. By submission dated the 7th February, 2013 the Applicant/Intended Claimant’s attorney submitted as follows:

- i. The test to be applied when considering whether leave for Judicial Review should be granted is whether the Applicant has an arguable ground for judicial review with a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. The case of *Sharma v Antoine [2006] UKPC 57* was relied upon,
- ii. There has been no unreasonable delay in the filing of this application and that the Applicant has no alternative remedy or means of obtaining the requested information having regard to the refusal of the Respondent to provide same,
- iii. The Request for Proposals process adopted by the Ministry was illegal given that it was not in conformity with the Central Tender Boards Act,

- iv. Section 27 (1) (b) of the Freedom of Information Act does not apply to the requested information as it would not be contrary to the public interest for the requested information to be provided to the Applicant,
- v. Neither of the explanations provided by the Respondent/Intended Defendant for withholding the information is a credible explanation,
- vi. The Respondent/Intended Defendant's refusal to provide the requested information on the ground that the documents are exempted on the ground of legal professional privilege under Section 29 (1) of the Freedom of Information Act was not an original reason relied upon by the Respondent in its letter date 16th August, 2012 and therefore the court should refuse or be reluctant or at least highly circumspect in accepting reasons provided by the decision maker that were not advanced at the time that the decision was made
- vii. Even if the court accepts the additional reason provided by the Respondent/Intended Defendant in its letter dated 4th December, 2012, that is, that the requested information is also exempted on the grounds of legal professional privilege, the action of the Respondent/Intended Defendant in requesting advice on an issue that was raised by the Applicant as a matter of public interest and the subsequent actions of the Respondent in referring to the said advice and voluntarily relying upon the contents of same in the Senate on the 28th February, 2012 amounted to a publication and disclosure of the substance of the advices received and constituted an act of waiver or loss of legal professional privilege
- viii. Even if the requested information is exempted under Section 27 and/or Section 29, the Respondent/Intended Defendant is in breach of its statutory duty as it has refused to provide same without first conducting the section 35 assessment, analysis and determination and communicating this in its reasons to the Applicant.

19 By submission dated the 11th March, 2013 the Respondent/Intended Defendant's attorney submitted as follows:

- i. In deciding whether or not leave should be granted the Court should apply the elevated threshold test, that is, whether the applicant has a reasonably good chance of success, as outlined in the case of *R v Cotswold District Council ex parte Barrington* [1998] 75 P &CR 515.
- ii. The Respondent/Intended Defendant should be allowed to rely on section 29(1) because it raises a substantive issue of law and having regard to the clear nature of the information sought the Respondent should be allowed to rely on the exemption especially since no new evidence is required
- iii. There has been no waiver in the circumstances of this case of the legal professional privilege provided under section 29(1).
- iv. The Respondent/Intended Defendant was under no obligation in this instance to set out reasons relating to the overriding section 35 provision in the public interest as the Applicant placed no evidence before it to consider

20. The primary issue that the Court is required to determine at this stage is

- i. Whether or not the Applicant/ Intended Claimant has an arguable case so as to justify a review of the Respondent's decision to refuse to provide copies of written instructions, legal advice and the identity of the author(s) of same received by the Respondent from their legal unit and the office of the Attorney General

Test for granting leave

21. The Applicant and the Respondent are at odds with respect to the test that should be applied when determining whether leave for judicial review should be granted
22. The Applicant/Intended Claimant relied on the case of *Sharma v Antoine* [2006] UKPC 57 for its position that the test is 'whether the applicant has an arguable ground for judicial review with a realistic prospect of success'

23. The Respondent/Intended Defendant submitted that the threshold test as outlined in *Sharma* is not the only test and relied on the case of *R v Cotswold District Council ex parte Barrington* [1998] 75 P&CR 515 in support of its position that the elevated test, that is, 'whether the applicant have a reasonably good chance of success with its claim for judicial review as amended,' should be applied in these circumstances
- 24 Before determining which test is to be proffered it is important to understand the reason(s) why leave is required for judicial review The entire law was analysed in *Mitchell v Georges* by Rawlins JA (as he then was) at paragraphs 46 to 49 in these terms

"[46] An applicant for leave is required to show that there is an arguable case, one that is not frivolous This is to prevent busy-bodies from wasting the court's time with misguided or trivial complaints Thus in Inland Revenue Comrs v National Federation of Self-Employed and Small Business Ltd Lord Diplock stated as follows

'The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.'

[47] In Sharma v Browne-Antoine, the appellant, the then Chief Justice of Trinidad and Tobago, allegedly attempted to influence the course of a trial conducted by the Chief Magistrate The Chief Justice denied the allegations and maintained that proceedings against him were influenced by political pressure He applied for judicial review of the decision to prosecute him, and for a stay of the criminal proceedings against him pending the determination of the application The judge granted leave and stayed the proceedings In affirming the decision by the Court of Appeal to set aside the judge's order, the Privy Council held that the challenge to the decision to prosecute was in principle susceptible to judicial review but in extremely rare cases Their Lordships were satisfied that the judge had failed, inter alia, to look at the evidence overall and to identify the grounds on which the appellant's challenge was arguable Their Lordships therefore held that the Court of Appeal was justified in making its own analysis of the facts and circumstances

[48] In arriving at its decision in Sharma's case, Lords Bingham and Walker elucidated the test for the grant of leave in the following terms (2006) 69 WIR 379 at 387-388)

'The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability

' the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities '

It is not enough that a case is potentially arguable, an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen', Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733 '

[49] In my view this statement did not change the 'arguable case' standard for leave laid down in the Inland Revenue Comrs case. It merely qualifies arguable to require a greater degree of arguability. The quotation from R (on the application of N) v Mental Health Review Tribunal (Northern Region) seems merely to suggest that arguability cannot be supported on a speculative basis from evidence that may emerge during the course of the interlocutory process. It is also indicating that the nature and gravity of the issues must be taken into consideration in determining the sufficiency and cogency of the evidence which will be taken into consideration to justify the grant of leave. Thus the court must bear in mind that 'a more serious allegation has to be proved to a higher degree of probability'. While the 'balance of probability' remains the test, the strength and quality of the evidence required to prove a serious allegation on the balance of probability will, 'in practice', be higher than that required to prove an allegation of trivial nature. This explains the statement 'thus the flexibility of the standard lies not in any adjustment to the degree of probability but in the strength or quality of the evidence'. It is on this basis that I do not agree with Mr Astaphan's contention, for which he cited *Mass Energy Ltd v Birmingham City*

Council, R (on the application of the Noble Organisation) v Thanet District Council and Tanfern Ltd v Cameron-MacDonald as authority, that there are special circumstances in the present case, which require the standard of proof on this application for leave to be more than just an arguable case "

- 25 Having considered both cases referred to by the respective parties and the principles outlined in *Mitchell* the overriding factor in the court's view is arguability. In the Oxford Concise Dictionary 'arguable' is defined to mean, "capable of being supported or sustained by argument." This must necessarily come from the affidavit evidence, by the authorities cited and the Freedom of Information Act.
- 26 The local authorities which dealt with leave for judicial review generally have relied on the test as outlined in *Sharma*, and the court is of the view that there is no need in these circumstances to depart from same. Accordingly the relevant test is whether the "applicant has an arguable ground for judicial review with a realistic prospect of success and not subject to any discretionary bar such as delay or an alternative remedy."
- 27 At this stage therefore the Court is not concerned with facts but rather with the nature of the evidence for the purpose of arguability and with a view of determining whether any of the arguments advanced reveal arguable grounds which have a realistic prospect of success.
28. In order to determine whether there are arguable grounds for judicial review the court considered the purport and effect of the Freedom of Information Act and also consider the arguments advanced as to whether in all the circumstances disclosure would be contrary to the public interest.
- 29 The Applicant/Intended Claimant in this case says that it requested the information because it had concerns about the legality of the request for proposals process for screening for potential investors initiated by the Minister. The Applicant/Intended Claimant was of the view that the process by-passed the Central Tenders Board Act and thus might not have been in conformity with the law.

30 The Respondent/Intended Defendant in its Notice of Refusal dated 16th August, 2013 relied on section 27 of the Freedom of Information Act as the basis for refusing the requested documents.

31 Section 27 (1) provides as follows

"Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act -

(a) Would disclose matter in the nature of an opinion, advice or recommendation prepared by an officer or Minister of Government, or consultation or deliberation that has taken place between officers, Minister of Government, or an officer and a Minister of Government, in the course of, or for the purpose of, the deliberative processes involved in the function of a public authority, and

(b) Would be contrary to the public interest "

32. By the said Notice the Respondent/Intended Defendant relying on section 27 informed the Applicant/Intended Claimant that the documents were exempted and gave the following two reasons for this position:

- i That since relevant information surrounding the process is now provided disclosure was not justified in the public interest; and
- ii. That the decision to move forward with the process and the selection of the three (3) chosen investors were agreed to by Cabinet.

33 By Submissions dated the 7th February, 2013 the Applicant/Intended Claimant submitted that the reasons provided by the Respondent in its letter dated the 16th August, 2012 when carefully scrutinized, are untenable and the Respondent on whose shoulders the burden

lies to demonstrate why the granting of access would be contrary to the public interest has wholly failed to provide compelling reason as to why such access should be withheld

34. The Applicant/Intended Claimant further submitted that it's reasonable and legitimate expectation to gain access to the said document under the Freedom of Information Act far outweighed the explanations that have been provided by the Respondent in its letter dated 16th August, 2012 as to the public interest considerations for withholding such information.

35 The Applicant/Intended Claimant further submitted that the clear intention of the legislation is for information requested under the Act to be supplied save and except in limited exceptions and circumstances which are necessary to protect essential public interests and private business affairs and in this case the public interest exception in withholding the requested information does not apply.

36. In order to determine whether disclosure of the requested document is contrary to public interest a careful examination of the intent and purport of the Freedom of Information must be carried out. The approach to the Freedom of Information Act is set out comprehensively in the decision of the Honourable Justice Moosai in Ashford Sankar v Public Service Commission Claim No. CV2006-00037, delivered April 2 2007

37 The Freedom of Information Act allows public authorities to refuse disclosure of information requested if one or more of the exemptions contained in the Act are applicable. Some of these exemptions are absolute, while others are qualified

38. The exemption provided for under section 27 appears to be qualified. In Ashford Sankar v Public Service Commission CV 2006/ 00037 Moosai J stated as follows:

"As is immediately apparent, the requirements of section 27 (1) are twofold, so that a document falling within the definition of s-27 (1) (a) must also be shown to be such that its disclosure would be contrary to the public interest. s 27 (1) (b) "

39 The Applicant/Intended Claimant advanced that the Respondent/Intended Defendant in this case does not have an automatic right to non-disclosure, and that the Intended Defendant must have considered whether the public interest in keeping the information confidential was of greater importance, than the public interest in disclosing the said information

40 The argument is that the onus is on the Respondent/Intended Defendant to show that it is entitled reasonably to rely on an exemption claimed and to not grant access to the documents requested. In *Nimmo v Alexander Couran and Sons Ltd.* [1968] A.C. 107 at 130 Lord Wilberforce stated:

“the orthodox principle (common to both the criminal and the civil law) that exceptions etc., are to be set up by those who rely on them”

41 Additionally, the Applicant/Intended Claimant contends that the Respondent having decided that the document was exempt was required to carry out a section 35 public interest override assessment and analysis to determine whether disclosure was necessary notwithstanding that it may have been exempt

42 Section 35 of the Freedom of Information Act provides

“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 of performance or official duty or (b) injustice to an individual, has or is likely to have occurred or in the circumstances of giving access of the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so”

43 The Respondent/Intended Defendant submitted that it was under no obligation in this instance to set out reasons relating to the overriding section 35 provision in the public interest as the Applicant/Intended Claimant placed no evidence before it to consider whether the Applicant/Intended Claimant had an obligation to place evidence before the Respondent/Intended Defendant is an issue that the Court would have to determine on a

substantive hearing. At this stage however, it appears to this Court that position advanced that the Respondent/Intended Defendant ought to have undertaken a public interest assessment is an argument that is arguable and has a realistic prospect of success.

44. The Respondent/Intended Defendant has also sought to rely on section 29 of the Act and the Court must consider the argument as whether the Respondent/Intended Defendant can rely on section 29 of the Freedom of Information Act as a ground for denying access to the requested information and whether the said position ought not to be considered given the fact that it was raised after the commencement of these proceedings and whether there has been any waiver of privilege.
45. The Applicant/Intended Claimant contends that the Respondent/Intended Defendant is not entitled to rely on section 29 of the Freedom of Information Act as a ground for refusal to provide the requested information given that same was not advanced at the time that the decision was made and conveyed to the Applicant in the Respondent's letter of refusal dated 16th August, 2012.
46. The Applicant/Intended Claimant also contends that the Respondent/Intended Defendant in this case was statutorily bound to provide reasons for its decision and by its letter of refusal dated the 16th August, 2012 the Respondent refused to disclose the requested information on the basis that same was considered exempt under 27(1) of the Act and disclosed that the revelation of same could not be justified in the public interest since relevant information surrounding the process was now provided and further the decision to move forward with the process and the selection of the three (3) chosen investors was agreed by Cabinet.
47. The Applicant/Intended Claimant stated that the reasons outlined in its letter of refusal dated the 16th August, 2012 did not advance the reason that the requested documents are exempted on the ground of legal professional privilege under section 29 (1) of the Act and given that there are no exceptional circumstances to justify the court accepting any subsequent reason for the Respondent refusing to provide the requested information, as

outlined in its 4th December, 2012 letter, it is just, in all the circumstances of the case for the court to refuse to consider the subsequent reason of the Respondent as contained in its letter dated 4th December, 2012

48 The Applicant/Intended Claimant further contends that the Respondent/Intended Defendant had ample time during the three months limitation period to rely on section 29 as a ground for refusal but failed to do so. It was not until after the application for leave had been filed and served on the Office of the Attorney General on the 16th November, 2012 and re-served on the 23rd November, 2012 that the Respondent/Intended Defendant by letter dated 4th December, 2012 for the first time indicated that its refusal was also based on the ground that the documents are exempted on the ground of legal professional privilege under section 29(1) of the Act

49 In support of its position the Applicant/Intended Claimant relied on the following authorities.

(a) R (s) v London Borough of Brent [2002] EWCA Civ 693, in which it was stated that “it is not ordinarily open to a decision maker who is required to give reasons to respond to a challenge by giving different or better reason;”

(b) R v (Goldsmith) v London Borough of Wandsworth [2004] EWCA Civ 1170 (2004) 7 CCLR 472 AT [91] “The court has to look at the decision at the time it was made and at the manner in which it was communicated to the person or persons affected by it,”

(c) R (D) v Secretary of State for the Home Department [2003] EWHC 155(Admin) “it is well established that the court should exercise caution before accepting reasons for a decision which were not articulated at the time of the decision but were only expressed later, in particular after the commencement of proceedings,”

- (d) *R v Secretary of State for the Environment ex p Kingston upon Hull City Council* [1996] Env LR 248 at 262 in which the court preferred contemporaneous letters to letters written after the event in response to the application for judicial review,
- (e) *R v (Nash) v Chelsea College of Art and Design* [2001] EWHC (Admin) 538 at 34 in which Stanley Burnton J held, *inter alia*, that: “where there is a statutory duty to give reasons as part of the notification of the decision, so that the adequacy of the reasons is itself made a condition of the legality of the decision, only in exceptional circumstances it at all will the Court accept subsequent evidence of the reasons,”
- (f) *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302 in which the court held, *inter alia* that there is a statutory duty to give reasons and where there is a failure on the part of the Respondent to provide accurate reasons at the time of the decision a Claimant is *prima facie* entitled to have the decision quashed

50 The Applicant/ Intended Claimant advocated that even if the court accepts the additional reason provided by the Respondent/Intended Defendant in its letter dated 4th December, 2012, that is, that the requested information is also exempted on the grounds of legal professional privilege, that the action of the Respondent/Intended Defendant in requesting advice on an issue that was raised by the Applicant as a matter of public interest and the subsequent actions of the Respondent in referring to the said advice and voluntarily relying upon the contents of same in the Senate on the 28th February, 2012 amounted to a publication and disclosure of the substance of the advice received and constituted an act of waiver and resulted in the loss of legal professional privilege.

51. The Respondent/Intended Defendant contended that it should be allowed to rely on section 29(1) because it raises a substantive issue of law and having regard to the clear nature of the information sought, the Respondent should be allowed to rely on the exemption especially since no new evidence is required

52. In support of its position the Respondent/Intended Defendant relied on the case of *Birkett v Department for Environment Food and Rural Affairs* [2012] Env L R. 24. In that case, the applicant's initial request was refused by the public body on a particular exception. After a reversal by the Information Commissioner, the public body appealed to the Information Tribunal seeking to rely on two further exceptions. The issue for the court of appeal to decide was whether the authority could rely on exceptions not previously relied on, "as of right" or only in circumstances where there was "reasonable justification" for allowing them so to do. The Court of Appeal found itself unable to accept the applicant's submission that permitting a public authority to rely on a new exception in the administrative and legal review process deprived the person seeking the information of any effective judicial control and thereby destroying the effectiveness of the process.

53. At paragraph 24 of Birkett's case Sullivan LJ 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 realize 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 or information which is only raised as an issue by a third party during the review process, or it fails to rely on exemption (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 art 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 "

54. With respect to the issue of waiver, the Respondent/Intended Defendant contended there has been no waiver in the circumstances of this case of the legal professional privilege provided under section 29(1). The disclosure to the Senate is not disclosure to the world.

at large particularly since leave is often required for persons to refer to contents of proceedings in Parliament

- 55 The Respondent/Intended Defendant contended that it is imperative that one gives weight to the circumstances in which the Honourable Minister's statement was made. The Minister made the statement in Parliament and in response to a written question that was posed to him and there could have been no intention to waive the privileged nature of the advice since the intention was to fulfill his Parliamentary obligation to answer questions posed to him in Parliament
- 56 The Respondent/Intended Defendant further contended that it could not be fairly asserted that a Senator answering a question in Parliament by merely stating that he obtained legal advice before embarking on a project would amount to a waiver of legal professional privilege enabling an applicant to obtain the entire legal advice. The purpose of such disclosure was not to disadvantage anyone or create a misleading impression. Section 29(1) provides as follows.

"A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege"

- 57 According to *Waterford v Commonwealth (1987) 163 CLR 54, 63—4* professional privilege protects confidential communications between a lawyer and their client, made for the dominant purpose of giving or receiving legal advice, or for use in actual or anticipated litigation
- 58 The Freedom of Information Act gives rights of public access to information held by public authorities. Public authorities have two basic functions under the Act, that is, to confirm or deny whether requested information is held and to provide the requester with that information. If a public authority is refusing to meet either of these duties it is required to issue a refusal notice to the requester explaining the reasons for its decision

59 The Respondent/Intended Defendant provided its refusal notice on the 16th August, 2012 but did not rely on the exemption under section 29(1) as a reason for its refusal. In deciding whether this failure disentitled the Respondent/Intended Defendant from raising the exemption at a later date the court considered the reasoning found at paragraph 42 in the case of *Bowbrick v Information Commissioner App no EA/2005/0006* on this point:

"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."

60 The Court is of the view that the Applicant/Intended Claimant's argument that the Respondent/Intended Defendant is limited to the reasons upon which it relied at the time of the refusal, is also not an arguable ground that has a realistic prospect of success

61 However the issue as to whether the Minister's response to questions posed in the Senate should be taken, impliedly or by imputation of law, to have waived the entitlement of the Respondent to rely on legal professional privilege in respect of the advice received from the Office of the Attorney General must be considered

62. In *Mann v Carnell (1999) 201 CLR 1* it was stated at paragraphs 28, 29 and 34 respectively as follows

"[28] 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.

[29] 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 recognizes the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality, not some overriding principle of fairness operating at large.

[34] Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency.

63 In *Grant v Downs (1976) 135 CLR 674 at 685*, the majority of the High Court described the rationale of legal professional privilege as follows:-

"According to traditional doctrine (the rationale) is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their

communications, thereby inducing the client to retain the solicitor and seek his advice and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that all relevant documentary evidence is available. As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. Nonetheless, there are powerful considerations which suggest that the privilege should be confined within strict limits "

64 The factors laid down in the case of Mann v Carnell (1999) CLR 20 are the relevant factors that ought to be considered namely:

- I Whether the privilege information was circulated confidentially;
- II The purpose for which the privilege material was created,
- III How widely the privilege material has been circulated,
- IV. Whether the circumstances of disclosure is inconsistent with the maintenance of confidentiality;
- V The nature of the obligation of confidentiality in the recipient

65. In Goldberg v Ng (1995) 185 CLR 83 Deane, Dawson and Gaudron JJ held that:

"in considering whether there is an imputed waiver of legal professional privilege, the governing consideration is whether fairness requires that the privilege should cease irrespective of the intention of the holder of the privilege "

66 The court also considered the case of Bennett v Chief Executive Officer, Australian Customs Service (2004) 210 ALR 220 in which (Tamberlin, Gyles and Emmett (dissenting) JJ) applied the reasoning of the majority in Mann v Carnell (supra). It was held that the voluntary disclosure of the gist or conclusion of legal advice in the circumstances of the case amounts to a waiver of the whole advice, including the reasons for the conclusion. The substance and the effect of the advice were being communicated

in order to emphasize and promote the strength and substance of the case to be made At para 6, Tamberlin J stated:-

"It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice is that certain action will be taken or not taken In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege The whole point of an advice is the final conclusion. This is the situation in this case "

67 Having regard to the law and the information before the court, the court is of the view at this stage, that the argument that the Minister's conduct in the Senate was inconsistent with the maintenance of confidentiality which the sec. 29 privilege is intended to protect and that the said privilege was waived, is an argument that is arguable and same has a realistic prospect of success

68 In the circumstances, the court finds that the Applicant/Intended Claimant has an arguable ground(s) for judicial review with a realistic prospect of success Accordingly, leave is hereby granted to the Applicant/Intended Claimant to institute an action for judicial review

FRANK SEEPERSAD

JUDGE