THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: CV2019 –1644

SHELLEY ANNE VISSER

ROBERT VISSER

Claimants

AND

THE PERMANENT SECRETARY, MINISTRY OF EDUCATION

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery 17 July, 2020

APPEARANCES

Mr. Rudyard E. Davidson Attorney-at-law for the Claimants.

Ms. Niquelle Nelson Granville instructed by Ms Laura Persad Attorneys-at-law for the Defendant.

JUDGMENT

"There are already many contentious issues about the placement of children in schools. In certain schools 80% of the placement are expected to be done on merit, and in other schools 100%. How the other 20% is placed is a mystery to most citizens, there is always talk about how one child with a lower score got into "X" school ahead of another child with a higher score. It understandably leads to much speculation about the process; about the hidden interest lying behind the scenes. The issues have been memorialised in calypso in Cro Cro's "Corruption in Common Entrance." Transparency and accountability of the process of marking and placement will shed

light on what, for some persons, is a murky affair. The potential for corruption is there when the system of marking of scripts and placement of students is kept a secret."[1]

INTRODUCTION

1. Every year, students in Trinidad and Tobago who wish to be placed in a public secondary school must undergo the right of passage of taking an examination administered by the Ministry of Education ("the MOE").The students are placed in various secondary schools based on their marks, amongst other things. Before 2002, this examination was the Common Entrance Examination ("the CEE") which was replaced by the Secondary Entrance Assessment Examination ("the SEA Exam") from 2002. The process of the placement, under both the CEE and the SEA Exam, has been and continues to create heated debate each year in this society. The aforesaid comment of my brother Boodoosingh J uttered some three years ago in October 2017, about the process for the placement of students based on the SEA Exam, has summed up the general perception of this process.

2. The instant action concerns the refusal of a request[2] ("the FOIA Request") made by the Claimants, under the **Freedom of Information Act**[3] ("the FOIA") for the English Language Arts Writing ("ELAW") component of the examination script and the breakdown of the marks for the said component for their son, JMV ("JMV") when he sat the 2018 SEA Exam.

THE CLAIMANTS CASE[4]

3. May 2018 was an important month for the Claimants and more so their son, JMV. In that month, JMV wrote the 2018 SEA Exam as a student of the Curepe Presbyterian School. JMV scored the following marks: Mathematics - 98%; English Language Arts - 96% and

[1] Paragraph 34 of the judgment of Boodoosingh J in CV 2017-00869 Roger Simon and Anor v the Permanent Secretary of the Ministry of Education delivered on 27 October 2017
[2] Dated 17 October 2018
[3] Chapter 22:02
[4] As set out in the Affidavits of the First Claimant filed on the 26 June 2019 and on the 20 November 2020.

ELAW – 70% (14 out of 20). He passed for the school he selected as his first choice, Presentation College, Chaguanas.

4. Despite JMV's placement, he was very depressed and agitated that he had received 70% in ELAW in the 2018 SEA Exam. JMV was a high achiever and he consistently topped his class overall and in ELAW while he was in Standards 4 and 5. JMV's average Creative Writing test scores in mock SEA and school practice tests were consistently 20 out of 20 or 10 out of 10 (100% equivalent) from September 2017 through May 2018. Additionally, JMV was awarded the School Valedictorian for Curepe Presbyterian for the graduating Standard 5 class of 2018; the Creative Writing prize; the Principal's Prize (Boys); and the General Proficiency prize.

5. JMV's goal was to place in the national top ten of all students for the 2018 SEA Exam. JMV was devastated when he failed to achieve his goal as he did not even make the national top 200. JMV and his parents, the Claimants, were of the view that his relatively low score in ELAW in the 2018 SEA Exam was the primary and significant contributor to his national ranking.

6. In order to find out what went wrong with JMV's score for the ELAW component of the 2018 SEA Exam, the Claimants followed the MOE's published policy for querying SEA results and lodged a Request for Review ("the Request for Review") querying the score for JMV's ELAW within the time frame. The MOE had designated the 20 August 2018 as the relevant date by which the response for the Request for Review would be made available to the Claimants and other persons who had made similar requests.

7. However, the process was not smooth. On the 20 August 20, 2018, the St George East District (the relevant Education District Office for Curepe Presbyterian School) distributed reviews to a select number of parents. It then issued an announcement to those persons who still had to collect reviews that the said reviews were being recalled due to some

"mistake" and no further distribution of reviews would be made on that day. The distribution of reviews was discontinued on that day and the parents who were there were advised to contact the relevant Education District Office to ascertain the date on which the distribution of reviews would be resumed.

8. The remaining reviews were subsequently released on 23 August, 2018 and the Claimants received JMV's review response which indicated that his score in the ELAW had remained the same. The said correspondence also noted that JMV's Composite Standard Score (weighted) had not changed and, as such, his assigned school remained the same.

9. The First Claimant was very concerned about the discontinued review process at the time. This was because there had been newspaper reports of several 'coding errors' in the 2018 SEA review process, and such reports had been attributed to 'officials' at the MOE's Port of Spain offices, who had reportedly indicated that notwithstanding this, in nearly all cases the scores had remained unchanged post-review. In addition, a number of parents who had gathered awaiting review results at the aforesaid Education District Office on 20 August, 2018, and who had received responses on that day, expressed the view that they had found several 'inconsistencies' in the review responses which they had received.

10. The First Claimant also noted certain irregularities in the review process both generally, and specifically in respect of JMV, which did not give her confidence in the process. First, the review responses commenced on 20 August 2018 were discontinued and recalled, ostensibly due to 'mistakes'. Second, when the remaining review responses were subsequently released on the 23 August 2018, the MOE officials conceded that 'coding errors' had previously occurred in the initial review responses. Third, the official letter conveying the review response for JMV was dated the 16 August 2018, which pre-dated the recall of reviews of 20 August 2018.

11. The First Claimant formed the view that in the 2018 SEA Exam there was an errant assignment of grade to JMV or a miscoding of his grade when his examination script was first graded as he was consistent high performer.

12. Not being satisfied with the process thus far, the Claimants attorney at law by letter dated the 17 October 2018, wrote to the Defendant making the FOIA Request. In it, they requested access to the following information:

    (i) The ELAW script for the 2018 SEA Exam for JMV

    (ii) Individual scores assigned to JMV for each Dimension or Sub-category of the Creating Writing Rubric, that is, WRITING PROCESS, CONTENT; LANGUAGE USE; GRAMMAR and MECHANICS; and ORGANISATION.

13. By letter dated 8 November 2018, the Defendant acknowledged receipt of the FOIA Request. By subsequent letter dated 21 January 2019 ("the substantive response"), the Defendant provided the following response to the FOIA Request:

    (i) The review letter for JMV was not modified since the Caribbean Examinations Council ("CXC") had indicated that there was no change in the ELAW score of JMV.

    (ii) With respect to the request for each component of the marking scheme for the ELAW, those documents were the property of CXC to whom certain immunities were attached pursuant to **the Caribbean Examinations Council (Privileges and Immunities) Act**[5].

    (iii) CXC was not a public authority within the meaning of the FOIA.

14. The Claimants were not satisfied with the Defendant's response as they initiated the instant action in judicial review seeking the following orders:

[5] Chapter 17:07

(a) An order of mandamus to compel the Defendant to grant access to and/or otherwise provide the documents requested in the FOIA Request;

(b) A declaration that the Defendant, as a public authority within the meaning of the FOIA, cannot avoid its statutory duty pursuant to section 11 of the FOIA to grant access to official documents held by it in connection with its functions, that is to say, documents within its custody, possession or power, by asserting, in this case, that the documents are the 'property' of CXC and that certain immunities are attached to CXC pursuant to the Caribbean Examinations Council (Privileges and Immunities) Act;

(c) A declaration that the documents/information requested by the Claimants pursuant to their FOIA Request are documents within the custody, possession or power of the Defendant;

(d) A declaration that the Defendant breached its statutory duty in failing and/or neglecting to consider, or expressively consider, pursuant to section 35 of the FOIA, the balancing of interests in the public interest between a benefit to or damage from granting access—the so-called "public interest test";

(e) A declaration that the Claimants are entitled to the documents/information set out in the FOIA Request;

(f) A declaration that the continued failure and/or refusal by the Defendant to grant access to or otherwise provide the documents/information requested by the Claimants pursuant to the FOIA Request is unreasonable, irrational, illegal and amounts to a breach of the provisions of the FOIA;

(g) Costs; and

(h) Such further orders, directions or writs as the court considers just and as the circumstances of this case warrant pursuant to Section 8(1) (d) of the Judicial Review Act[6]

[6] Chapter 7:08

THE DEFENDANT'S POSITION[7]

15. The Defendant's position in the instant action to the FOIA Request was that the information and/or documents requested by the Claimants cannot be disclosed under the FOIA as : (a) they are not in the possession, custody or power of the Defendant but CXC, which is not a public authority within the meaning of the FOIA; and (b) the second limb of the information requested is not available as the ELAW component of the 2018 SEA Exam was not marked based on the categories requested. The Defendant did not file any affidavit by the decision maker who issued the substantive response to the FOIA Request, but instead relied on an affidavit of Mervyn Sambucharan, Acting Director of Research and Evaluation of the MOE ("the Sambucharan Affidavit").

16. According to Mr Sambucharan, CXC was established in 1972 by the agreement between various Caribbean countries including Trinidad and Tobago ("the 1972 Agreement"). The Government of the Republic of Trinidad and Tobago represented by the MOE then entered into an agreement with CXC on the 7 December 2001 ("the SEA Agreement"). The SEA Agreement covered the 2002 administration of the SEA Exam. He gave his interpretation of Clause 7 of the SEA Agreement, which was that all material, documents and data produced by CXC and the copyright subsisting therein are the property of CXC. He stated that the MOE has always acted in accordance with the SEA Agreement. He stated that CXC has no duty or obligation to provide the documents and/ or information requested by the Claimants even if a formal demand is made by the MOE. Mr Sambucharan also stated that under sections 3, 4 and 5 of the Caribbean Examinations Council (Privileges and Immunities) Act, CXC, its members and officials enjoy certain privileges and immunities.

17. Mr Sambucharan set out his understanding of the SEA Agreement. According to him, the MOE provides the curriculum on which the SEA Exam is based. Thereafter, CXC is responsible for overseeing the construction of items for the assessment, the field testing

[7] As set out in the affidavit of Mervyn Sambucharan filed on the 8 November 2020

of the said items, the production of the papers and the marking, analysis and processing of data, which is then provided to the MOE for its placement exercise. At the end of the examination, the scripts are taken to the MOE's vault until CXC officials take possession of the scripts to oversee the marking, analysis and processing of data in relation to the scripts. After the marking process, the scores and scripts are conveyed by CXC officials to its headquarters in Barbados for analysis and storage. After the analysis, the scores are uploaded by CXC to the MOE's online registration system, which was established by CXC on behalf of the MOE. The MOE then uses the data to facilitate the placement process. Mr Sambucharan also stated that the Government of Trinidad and Tobago makes financial contributions to CXC.

18. According to Mr Sambucharan, on the 20 August 2018, parents of a few students whose scores were reviewed, brought to the attention of the district offices certain inconsistencies. He explained that in the reviewing process, if the score of the student increases in the queried subject, then the letter communicating the review results will contain a comparison of the original score and the reviewed score. In producing the letters containing the reviewed scores on behalf of the students whose results had changed, the computer read or interpreted something wrong and inputted other students scores in the column pertaining to their original scores. When the MOE realised the error, it was immediately corrected. He stated that the discrepancy was not in the review process nor with respect to the accuracy of the scores but rather a technical error in respect to the recording of the original scores. He stated this technical error had no impact or effect on the revised scores provided by CXC, which were always communicated accurately by the MOE. Mr Sambucharan stated that, after review from CXC, JMV's score remained unchanged. Therefore, this discrepancy did not affect JMV as his letter confirmed his original score and did not contain a comparison as in the case of children whose scores had changed. He explained that out of an abundance of caution, the MOE recalled all the review letters for 2018 and once the issue was corrected, the review letters

were then issued. The review letter pertaining to JMV was not issued on the 20 August 2018 because of the recall, but it was distributed to his parents, the Claimants later.

19. Mr Sambucharan stated that there were similar requests for the disclosure of the SEA scripts received by the MOE in the past and the MOE has previously requested from CXC the disclosure of the SEA scripts. He stated that CXC indicated that it has a policy on the release of examination scripts which was set out in a letter dated the 10 September 2018 addressed to him from Mrs Sharon Armstrong-Mullah, Director, Corporate Services of CXC with respect to another matter in which SEA scripts were requested. It stated:

> "…[W]e are unable to accede to this request as Council does not make examination scripts available to candidates for any reason whatsoever, given its duty to safeguard these scripts not only for marking purposes but also to ensure that the integrity of the marking process is not compromised in any way…"
>
> "In addition, under the agreement between CXC and the Ministry of Education which was executed on 7 December 2001, CXC retains ownership and copyright over all materials, documents and data produced by it under this agreement. Further, both CXC and the Ministry of Education are obligated to ensure that examination materials, including scripts, are kept confidential and protected from disclosure to unauthorised parties so as to ensure that none of the related processes are compromised in any way."

20. According to Mr Sambucharan, CXC's policy on the disposal of examination scripts is that they are disposed by the 31 October of the year in which the SEA Exam was written. He stated that he was advised of this practice by email sent to him on the 7 August 2018 [8]from Ms Trecia Boucher, Project Manager of the Examination Services Division of CXC in relation to another request for the disclosure of a SEA script by a parent of a child who previously sat the exam.

[8] Exhibit M.S 6 to the Sambucharan Affidavit

21. Mr Sambucharan stated that in the marking of a candidate's script in the ELAW for the SEA Exam, two markers assign a score with a maximum of 10 marks each for the essay independently of each other using the rubric. The essay is marked as an entire piece as long as it satisfies one of the five score bands and not for each sub-category. The five score bands are 'superior', 'competent', 'satisfactory', 'emerging' and 'makes attempt.' Therefore, each marker would give a mark out of 10 for the essay and both marks together would give the total score for the essay. The markers' scores are recorded on the script of the student and only the total score is captured electronically by CXC.

22. Mr Sambucharan stated that on the 30 August 2019, he sent an email to officials at CXC concerning the information in the FOIA Request. He requested if the said information could be provided to the MOE and whether they could be disclosed to the Claimants. By email in response dated the 4 September 2019, Ms Dianne Medford, Manager, Examinations Administration and Security Division of CXC indicated that based on the most recent agreement, CXC is required to electronically store the raw scores for candidates and that the average score has always been the information provided by CXC. Ms Medford also confirmed that in accordance with CXC's retention policy for examination materials, CXC retains the physical scripts for the candidates for a period of *six months* and that the scripts for the 2018 SEA are not available[9]. The Claimants were already provided with JMV's score in relation to ELAW and based on the response from CXC relative to the email dated 4 September 2019, the MOE is unable to provide his individual scores on the ELAW component as requested.

THE ISSUES

23. At the case management conference the following issues were identified to be decided:
    a) Whether the Defendant is a public authority within the meaning of the FOIA.
    b) Whether the documents and/or information requested in the FOIA Request were within the custody, possession or power of the Defendant at the material time.

[9] Exhibit M.S .7 of the Sambucharan Affidavit

c) Whether the Defendant had a duty to engage the section 35 public interest test in deciding if to disclose the documents and/or information requested.

d) Whether the Defendant's continued failure and/or refusal to grant access to the documents constitute illegal, irrational and unreasonable conduct under the FOIA.

WHETHER THE DEFENDANT IS A PUBLIC AUTHORITY WITHIN THE MEANING OF THE FOIA

24. There was common ground by the parties in their closing submissions that the Defendant was a public authority within the meaning of the FOIA. Section 4 (d) of the FOIA defines a public authority to include *"a Ministry or a department or division of a Ministry"*. Therefore, the MOE being a public authority for the purposes of the FOIA. The Claimants named the MOE as the public authority in the FOIA Request. The substantive response of the MOE dated the 21 January 2019 to the Claimants was issued by its Acting Permanent Secretary in the MOE pursuant to section 22(1) of the FOIA which provides that a decision in respect of a request made to a public authority may be made, on behalf of the public authority, by a Permanent Secretary.

25. The dispute between the parties were with respect to the other issues.

WHETHER THE DOCUMENTS AND/OR INFORMATION REQUESTED IN THE FOIA REQUEST WERE IN THE CUSTODY, POSSESSION OR POWER OF THE DEFENDANT AT THE MATERIAL TIME

26. Counsel for the Claimants submitted that, when the MOE took possession of the 2018 SEA Exam scripts from the individual students and placed them in its vault after the said exam, it had possession, custody and power over the scripts and they became official documents or documents held by the MOE, a public authority within the meaning of section 4 of the FOIA.

27. It was argued on behalf of the Defendant that at the time of the FOIA Request, the requested documents and/or information were not in the possession or custody of the MOE but CXC. Counsel relied on the judgment in **Roger Simon and Anor v The Permanent Secretary of the Ministry of Education**[10] to support this position.

28. Section 4 of the FOIA defines an official document as "a document held by a public authority in connection with its functions as such, whether or not it was created by that authority, and whether or not it was created before the commencement of this Act and, for the purposes of this definition, a document is held by a public authority if it is in its possession, custody or power".

29. Section 11 (1) of the FOIA confers the right on any person to obtain access to an official document, subject to the provisions of the FOIA. It provides:

> "11. (1) Notwithstanding any law to the contrary and subject to the provisions of this Act it shall be the right of every person to obtain access to an official document."

30. The issue is whether the 2018 SEA Exam script for JMV is an official document and subject to disclosure under the FOIA.

31. Paragraph 15 of the Sambucharan Affidavit stated that:

> "…At the end of the examination, the scripts are taken to the Ministry's vault until CXC officials take possession of the scripts to oversee the marking, analysis and processing of data in relation to the scripts. After the marking process, the scores and scripts are conveyed by CXC officials to its headquarters in Barbados for analysis and storage. After the analysis, the scores are uploaded by CXC to the Ministry's online registration system, which was established by CXC on behalf of the Ministry. The Ministry then uses the data to facilitate the placement process…"

[10] CV 2017-00869

32. Part 3 of the Second Schedule of the SEA Agreement (which was annexed as MS 5 of the Sambucharan Affidavit) provides:

> "the Ministry shall make all scripts available to CXC for marking six working days immediately following the date of the administration of the examination".

33. Part 4 of the First Schedule of the SEA Agreement provides:

> "…01. CXC shall conduct the script-marking exercise under the leadership of the Chief Examiner in Mathematics and English.
>
> 02. CXC, in consultation with the Ministry of Education, shall identify and select examining personnel (markers) for appointment from Trinidad and Tobago Secondary and Primary school systems. If necessary, training programmes for inexperienced personnel will be conducted in advance of the marking by the Chief Examiner appointed by CXC. The Ministry shall meet the cost of such training sessions.
>
> 03. CXC shall make arrangements for the marking of scripts in Trinidad and Tobago at centres to be agreed by both parties and shall standardize the marking and shall double mark by holistic method the Essay scripts. The marking shall begin at eleven workings days immediately following the date of the administration of the examination.
>
> 04. CXC, shall at its premises in Barbados, retain the marked scripts for a specified period to be agreed in consultation with the Ministry."

34. In **Roger Simon** the Claimants made a request under the FOIA for their daughter's examination script for the 2016 SEA Exam. The Defendant presented evidence on the process with respect to the initial storage of the completed SEA script at the MOE until CXC takes custody for the marking procedure. Paragraph 30 of the judgment stated:

"From the evidence, the Ministry did not have custody of the exam papers at the time of the request. They also did not have physical control over it. The question, however, that remains is whether they could have had control or power over it. That is not as clear."

35. **Roger Simon** supported the position asserted by the Defendant that at the material time of the FOIA Request, the information and/or documents requested were not in the possession or custody of the Defendant.

36. The 2018 SEA Exam took place in May 2018. Based on Part 3 of the SEA Agreement, the scripts for the 2018 SEA Exam, including JMV's were in the custody or possession of CXC by a day in May 2018 which was five months before the FOIA Request. The scripts continued to be in the possession or custody of CXC for a period of six months after the SEA Exam which would have been until November 2018. The Claimants evidence was that the FOIA Request was sent with a letter via registered mail to the Defendant. It was not served personally. Under the Practice Direction issued pursuant to the Civil Proceedings Rules 1998, a document served via registered mail is deemed to be served on the 14th day after posting. In the instant case the FOIA Request was deemed to be served on the 1 November 2018 which is the material date,

37. On a literal interpretation of section 4 of the FOIA, at the time the FOIA Request was made to the Defendant, the information requested was not in the possession or custody of the Defendant but that of CXC at its headquarters in Barbados.

38. I now turn to whether JMV's 2018 SEA Exam script was within the *power* of the Defendant at the time of the FOIA Request.

39. It was submitted on behalf of the Claimants that although the 2018 SEA Exam scripts were conveyed to CXC, it was still within the power of the Defendant as Trinidad and Tobago is

contributing financial member of CXC to obtain the requested information. Counsel relied on the judgment in **Roger Simon** to support this submission.

40. Counsel for the Defendant argued that the information and/or documents requested in the FOIA Request are not within his or her power and therefore there was no duty to disclose them for the following reasons namely: (a) at the material time it is within CXC's power under the SEA Agreement as it retains ownership and copyright over all materials, documents, and data produced by it for the 2018 SEA Exam and it has a duty not to disclose information to unauthorised persons; (b) CXC enjoys certain privileges under the Caribbean Examination Council (Privileges and Immunities) Act ; (c) CXC has a policy that it does not release marked SEA Exam scripts.

41. Counsel for the Defendant also submitted that the judgment of **Roger Simon** is of limited assistance on the issue of the Defendant's power over the 2018 SEA Exam script as it is the subject of an appeal and the Court in **Roger Simon** did not have the benefit of the SEA Agreement in evidence for consideration in arriving at its decision. However, in the instant action, the SEA Agreement was annexed as MS 5 to the Sambucharan Affidavit for the Court's consideration which may persuade the Court to arrive at a different outcome.

42. It is settled law that until the trial Court's findings in **Roger Simon** are reversed upon the determination of the appeal, they remain the law unless the facts and circumstances can be distinguished. In any event, if the Defendant in **Roger Simon** appealed the Court's ruling, it is notable that no steps have been taken, by the Defendant, to expedite the hearing of this appeal as the issues concern matters of public interest and based on the Sambucharan Affidavit, similar request for scripts and review of marks have been made by parents and or guardians in the past.

43. The provisions of the FOIA are to be interpreted purposively in order to give effect to the objects of the FOIA. In **Caribbean Information Access Ltd v The Minister of National Security**[11] Jamadar JA (as he then was) set out this position at paragraph 8:

> "There is no dispute that 'the policy, purpose and object of the FOIA are to create a general right of access to information 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. There can also be no dispute that the court in both interpreting and applying the provisions of the FOIA is mandated to do so purposively, so as to further the policy, purpose and object stated above. The FOIA provides for a statutory right to information held by public authorities, and its effect is to broaden and deepen the democratic values of accountability, transparency and the sharing of and access to information about the operations of public authorities." (Emphasis added)

44. The concept of the documents or information which are within the "power" of a public authority is akin to the information which a party is required to disclose in the process of civil litigation. Two English cases define the term "power". In **B v B**[12] Dunn J said:

> "power means 'an enforceable right to inspect the document or to obtain possession or control of the document from the person who ordinarily has it."

45. Lord Diplock in **Lonrho Ltd v Shell Petroleum Ltd**[13] put it this way:

> "…the expression 'power' must, in my view, mean a presently enforceable right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it

[11] CA 170/2008
[12] [1978] Fam 181 at 186
[13] [1980]1 WLR 627 at 635

to obtain immediate inspection would not prevent the document from being within his power…"

46. A purposive interpretation of the word "power" in the context of section 4 of the FOIA, in my opinion, is any information which the public authority without the need to obtain the consent of another, can retrieve or has access concerning its business. It is in this context I will examine the positions put forward by the Defendant for refusing disclosure.

The SEA Agreement

47. The Defendant relied on specific provisions of the SEA Agreement as a basis for non disclosure. According to paragraph 11 of the Sambucharan Affidavit, in the past, based on requests received by the MOE, it has made similar requests for disclosure of SEA scripts from CXC. He referred to a letter dated 10 September 2018 which he received from Mrs Sharon Armstrong-Mullah, Director of Corporate Services of CXC with respect to another matter in which SEA scripts were requested. He annexed as MS 4 to the Sambucharan Affidavit a copy of the said letter. The relevant part of the said letter stated:

> "In addition, under the agreement between CXC and the Ministry of Education which was executed on 7 December 2001, CXC retains ownership and copyright over all materials, documents and data produced by it under this agreement. Further, both CXC and the Ministry of Education are obligated to ensure that examination materials, including scripts, are kept confidential and protected from disclosure to unauthorised parties so as to ensure that none of the related processes are compromised in any way."

48. Paragraph 7 the SEA Agreement deals with "Property in Data Material". It states:

> "All materials, documents and data produced by CXC under this Agreement and all copyright subsisting therein shall be the property of CXC, save that the Ministry shall be entitled to utilize if after the final marking and presentation of

data to the Ministry, any information gathered from the said materials, documents and data for research or statistical purposes."

49. In **Roger Simon**, Boodoosingh J concluded at paragraph 41 of the judgment that:

> "I also disagree with the defendant about the ownership of the script. While CXC owns the examination in the sense of the copyright in the examination paper, when a student writes the examination on a script it seems to me that a strong case can be made as to at least joint ownership of the written examination script by the student. In the same way a patient is entitled to a copy of his medical records, or an accused is entitled to a copy of a confession statement given by him to the police, or a person is entitled to a copy of a form filled out by that person for a public service, I see no reason in principle why a child who writes a public examination, which is mandatory for a child to be placed in a secondary school, in a competitive process, in schools funded substantially by citizens, should not be allowed to view a copy of his or her paper, through their parent. It is the student's script."

50. Having examined the SEA Agreement, I have no reason to come to a different interpretation and conclusion than that arrived by Boodoosingh J as set out aforesaid. It seems to me that CXC adopted a narrow interpretation to the role of the MOE under the SEA Agreement but it adopted a broad interpretation of its role in ownership under Paragraph 7 of the SEA Agreement.

51. In my opinion, on a literal interpretation of Paragraph 7 of the SEA Agreement, CXC owns the copyright of the examination paper, the materials documents and data produced by it for the SEA Exam. However, under this Paragraph CXC does not own the right of the exam script, which has been submitted by each student who has taken the SEA Exam. It seems to me that each script is the body of work of the individual student, which is unique. In order for CXC alone to own the copyright of the exam scripts after they have been

completed by the students, the parents or guardians of the students must provide written approval before the said exam, giving up any rights of ownership of the students work to CXC. However, there was no such evidence in this action.

52. The aforesaid finding by Boodoosingh J was made in October 2017. It is remarkable that the MOE did not implement any system, subsequent to October 2017, for example for the 2018 SEA Exam, for the parents or guardians of the students to expressly give up any rights of ownership over their exam scripts. In the absence of this evidence, the marked exam script is jointly owned by CXC and the respective student, in the instant case JMV, and this is not a basis for the MOE failing to provide it.

53. Paragraph 8 provides for secrecy and security. It states that both the MOE and CXC mutually undertake not without prior consent in writing to disclose or permit the disclosure of any information relating to the said examination for entrance to secondary schools to any person or body not otherwise authorised to receive such information; and to take all reasonable precautions in dealing with all documents submitted and any other information relating to the examinations and any papers provided to either of them so as to prevent unauthorised persons from having access to such documents, components of the examination paper or to any report and/or records of any test and/or scripts.

54. In my opinion, once the information requested was available at the material time, this provision in the SEA Agreement is not any proper basis for refusing to provide it to the Claimants. As the parents of JMV, the Claimants are the persons who are authorised to view his examination script.

55. Further, in the SEA Agreement the MOE plays a significant role in the SEA Exam and there is no provision which prevents CXC from providing a script of any information which is available to the MOE upon its request.

56. At paragraph 43 of **Roger Simon**, Boodoosingh J stated:

> "43. In the absence of the Ministry putting before the court the agreement with CXC on the SEA examination, it seems reasonable to me that the Ministry can be seen to have the power to demand production by CXC and sight of the SEA scripts in order to satisfy legitimate requests of parents."

57. In the instant case, the Sambucharan Affidavit exhibited the SEA Agreement. Having examined the duties and responsibilities of each party under the SEA Agreement, I have concluded that under the SEA Agreement, the MOE has outsourced certain aspects of the SEA Exam to CXC but it has not abdicated its responsibilities to account for the results of each SEA Exam. In my opinion, the overall scheme of the SEA Agreement clearly demonstrates that at every step of the process the MOE performs an equally if not a more important role then CXC.

58. The First Schedule of the SEA Agreement set out the duties and responsibilities of CXC with respect to the SEA Exam. However, under this Schedule, the MOE performs several critical functions in the entire process.

59. In particular, under Part 1 of the First Schedule to the SEA Agreement, the MOE and CXC set the date for the SEA Exam; the MOE provides CXC with the sybllabus specifications, the guidelines for the content of the examination papers, essay topics and essay mark schemes, changes to the invigilator's manual and weighting factors of the examination components for the SEA Exam; the pretests which is conducted by CXC is done at a time agreed to by both the MOE and CXC; CXC must consult with the MOE to appoint a Chief Examiner for each subject area to assist in the construction of the question papers and to standardize the marking of the examination. The MOE also finances the costs of the assembly and production of the two sets of tests papers which are constructed in each SEA Exam year[14].

[14] Part 1 First Schedule of the SEA Agreement

60. Under Part 3 of the First Schedule to the SEA Agreement, the MOE facilities the administration of the SEA Exams and it assigns two staff members to CXC headquarters during the packing of the exam to ensure that the exam is packed in accordance with the needs of the individual centres.

61. With respect to the marking of scripts, the MOE also plays an integral role. Part 4 of the First Schedule to the SEA Agreement deals with the marking of the exam scripts. Under this Part 4, CXC consults with the MOE in identifying and selecting examining personnel (markers) for appointment from Trinidad and Tobago Secondary and Primary school systems. If necessary, CXC is responsible for conducting training programmes but it is the MOE which bears this costs. Further, while CXC makes the arrangements for the marking of the scripts in Trinidad and Tobago, it must be done at centres to be agreed by CXC and the MOE.

62. Part 5 deals with data processing. Under this part, the MOE must submit, six weeks prior to the administration of the exam, the candidates registration information on computer or agreed storage media to CXC. The other responsibilities such as capturing the raw scores recorded on the front of the marked scripts, compiling the reports of candidates and submitting the final scores of the candidates in order of rank lies with CXC. Part 6 deals with reporting on examination results. Under this part, CXC is responsible for submitting to the MOE the final scores and reports for individual candidates and appropriate reports on the examination results.

63. The Second Schedule sets out the responsibilities of the MOE. Part 1 concerns the settling of the question papers. Under this Part, the MOE is responsible for liasing with CXC in setting the examination and selecting personnel for appointment as markers. In particular the MOE must identify personnel responsible for setting the essay topic and checking the examination papers; provide CXC with the guidelines for setting the question papers before the 31 October; recommend to CXC suitable persons for appointment as Chief

Examiners; set the essay topics and prepare the essay mark scheme and meet with CXC three months before the examination dates to select two topics for the essay examination; provide CXC with guidelines for settling all braille papers; amend draft essay question papers, if necessary having regard to CXC's comments; return amended drafts to CXC by the date agreed by both CXC and the MOE and sign and approve final form of the examination papers for printing six weeks prior to the date of administration of the examination.

64. Part 2 concerns the administration of the examination. Under this Part, the MOE must: identify appropriate resources persons from the MOE to visit CXC for any consultation where necessary; set the date for the administration of the examination; provide CXC with a register of the candidates for the examination in hard copy and appropriate storage medium agreed to both parties six weeks before the administration of the exam; provide in writing by the 30 November, the required quantities of question papers including papers for special needs, manuals, packing instructions and date for dispatch of materials; received the question papers, answer booklets and invigilator's manuals from CXC 10 days immediately preceding the date of administration of the examination and protect, guard and keep all these documents in safe custody while they are in Trinidad and Tobago; provide other appropriate materials other than answer booklets required by candidates to write the examination; administer the examination in accordance with agreed instructions; liase with CXC in the dispatch of all completed answer booklets to CXC for the purpose of marking and processing in an agreed manner and provide storage for the answer booklets after the examinations and during marking.

65. Part 3 deals with marking. The MOE has three responsibilities here namely: liaising with CXC for the selection of markers for the script marking exercise; providing accommodation and facilities in Trinidad and Tobago for the script marking exercise; and making all scripts available to CXC for marking six days immediately after the date of the

administration of the examination. While the MOE is not directly involved in the marking of the SEA Exam scripts, it still plays an integral role in critical aspects of the process.

66. Part 4 is data processing. The MOE must submit to CXC six weeks before the date of the examination the registration information on compute media.

67. According to paragraph 4 of the SEA Agreement the MOE pays to CXC a certain sum for the services it performs under it. Paragraph 7 deals with property in data material and paragraph 8 provides for secrecy and security which I have already dealt with.

68. In my opinion, given all the critical functions which the MOE performs in the SEA Exam, it would be absurd to construe the SEA Agreement as if the marked SEA Exam scripts are not within the "power" of the MOE. Indeed the failure to include any expressed provision in the SEA Agreement preventing CXC from providing the marked script to the MOE upon the latter's request, supports the position that it was never intended that CXC had the power to refuse such a request from the MOE.

CXC Privileges and Immunities Act

69. Under sections 3, 4 and 5 of the Caribbean Examinations Council (Privileges and Immunities) Act, CXC, its members and officials enjoy certain privileges and immunities including inviolability of the archives of the CXC and inviolability of all papers, documents and materials related to its work. CXC, its members and officials also enjoy immunity from legal process, and it also enjoys immunity from search, acquisition, confiscations, expropriation and any other form of interference whether legislative, administrative or judicial in respect of its property, funds and assets. Therefore, CXC and its property, funds and assets are protected from legal process.

70. It was submitted on behalf of the Defendant that the FOIA was fully in force by the 30 August 2001 and the commencement date of the Caribbean Examinations Council

(Privileges and Immunities) Act, was the 28 September 2006, a date subsequent to the commencement of the FOIA. Counsel argued that if it was the intention of Parliament to limit the effect of the Caribbean Examinations Council (Privileges and Immunities) Act there would have been provisions, which expressly stated so.

71. In my opinion, CXC Privileges and Immunities Act is not relevant to the disclosure of the information requested as the FOIA Request was made to the Defendant and not CXC. Further, under the SEA Agreement the Defendant had the right to be provided with the information contained in the FOIA Request once it was available at the material time which was the 1 November 2018.

CXC's policy on the release of SEA exam scripts

72. According to the Sambucharan Affidavit, CXC has a policy on the release of SEA Exam scripts. The said policy was set out in a letter dated the 10 September 2018[15] from the Director, Corporate Services of CXC to Mr. Sambucharan with respect to another matter in which SEA scripts were requested. The relevant part stated:

> "...[W]e are unable to accede to this request as Council does not make examination scripts available to candidates for any reason whatsoever, given its duty to safeguard these scripts not only for marking purposes but also to ensure that the integrity of the marking process is not compromised in any way."

73. The said letter did not state that the basis for the aforesaid position was the SEA Agreement. It also did not identify when the policy was introduced. In the absence of these details, the only basis for CXC to act is on the SEA Agreement.

74. At paragraph 44 of **Roger Simon**, Boodoosingh J addressed this policy by CXC where he stated:

[15] Exhibit MS 4 to the Sambucharan Affidavit

"44. Accordingly, I direct that the Ministry of Education make a formal demand of CXC to provide a copy of the scripts requested by the claimants. The Ministry ought to be prepared to seek to enforce its right to the return of the scripts to them if refused by CXC… If the request is refused by CXC pursuant to CXC's unexplained policy, the Ministry may wish to review its contractual negotiations with CXC in future with a view to negotiating, if the present agreement does not so provide, that CXC be required to produce the examination papers on request by the Ministry of Education."

75. In my opinion, even if there was an identified policy, any policy of CXC cannot have the effect of absolving the Defendant from his/her responsibility under the FOIA.

76. Having concluded that at the material time of the 1 November 2018 the Defendant had the power to access the information as set out in the FOIA Request once it was available, it follows that those documents and/or information are "official documents" as defined in section 4 of the FOIA and are subject to disclosure.

77. Having made this finding, it is important at this juncture to address what information was available at the material time.

78. Under the first limb, the information, which was requested, was the ELAW script of JMV. It was not in dispute that the FOIA Request was made on the 17 October 2018 and that the Defendant's substantive response was given on the 21 January 2019. However, this substantive response was not based on a response from CXC on the FOIA Request. According to exhibit MS 7 of the Sambucharan Affidavit, the first time the MOE informed CXC of the FOIA Request was by an email dated 30 August 2019. This was eleven months after the FOIA Request was made and nine months *after* the substantive response was given to the Claimants. Based on the Sambucharan Affidavit, with respect to the FOIA Request for JMV, there was no substantive response from CXC *prior* to the Defendant issuing the letter dated 21 January 2019. The Defendant's substantive response was based

on the position taken by CXC on similar requests for disclosure of SEA exam scripts in previous matters where CXC refused.

79. The evidence on behalf of the Defendant, if the ELAW script for JMV was still available on the 1 November 2018 was from the Sambucharan Affidavit which stated at paragraph 17 that:

> "In any event pursuant to CXC's policy on Examination scripts, CXC disposes of examination scripts by the 31st October of the year in which the examination was written. I was advised of this practice by email sent to me on the 7th August 2018 from Ms Trecia Boucher, Project Manager of the Examination Services Division of CXC in relation to another request for the disclosure of an SEA Essay Script by a parent of a child who previously sat the exam. A true copy of the redacted email dated 7th August 2018 is now produced, shown to me and hereto annexed and marked "**M.S.6**"

80. This evidence is in direct conflict with the letter dated 4 September 2019 from Ms Medford of CXC which stated:

> "2. In accordance with CXCs retention policy for examination materials, we retain the physical scripts for the candidates for a period of six months. The scripts for the 2018 TTSEA are therefore not available at this time. If the Ministry requires a change in the retention period, this would need to be negotiated in the next contract."

81. The email of the 4 September 2019 addressed the MOE's request for the ELAW script for JMV as opposed to other previous similar request which the email of the 7 August 2018 addressed. For this reason, CXC's policy on the disposal of scripts for the 2018 SEA Exam, which JMV wrote was six months. In my opinion, the information contained in the September 2019 email from CXC is material as it was pursuant to a request for JMV's ELAW script and it was the first time that the Defendant was informed that the said script was available until sometime in November 2018 as opposed to October 2018.

82. In my opinion, if the Defendant has acted with a degree of urgency and immediately dispatched to CXC instructions not to dispose of the said script as it was now the subject of a FOIA Request the said script would still be available. However, there was no evidence from the Defendant that any such action was taken. The effect of the Defendant's conduct now means that there is no evidential basis for me to grant the Claimants the order for mandamus to compel the Defendant to grant access to and/or otherwise provide the documents and/or information requested in the first limb of the FOIA Request.

83. With respect to the second limb of the FOIA Request, the Defendant's substantive response was that:

> "With respect to your clients request for the disclosure of the SEA 2018 Essay Writing Script of JMV Maarten Visser and his scores for each component of the marking scheme for the SEA Essay Writing Examination, please be advised that these documents are the property of CXC to whom certain immunities are attached pursuant to the *Caribbean Examination Council (Privileges and Immunities) Act, Chap 11:07*."[16]

84. Paragraph 19 of the Sambucharan Affidavit explained how the ELAW component of the script is marked. He stated that:

> "In the marking of a candidate's script in English Language Arts Writing (Essay) for SEA, two markers assign a score with a maximum of 10 marks each for the essay independently of each other using the rubric. The essay is marked as an entire piece as long as it satisfies one of the five score bands and not for each sub-category. The five score bands are 'superior', 'competent', 'satisfactory', 'emerging' and 'makes attempt'. Therefore, each marker would give a mark out of 10 for the essay and both marks together would give the total score for the essay. The markers' scores are recorded on the script of the student and only the total score is captured electronically by CXC."

[16] Exhibit M.S.2 of the Sambucharan Affidavit

85. The Defendant did not indicate in the substantive response to the Claimants, anything about the scores on JMV's ELAW exam script being marked in a manner which did not indicate the breakdown as requested by the Claimants. Indeed this is an entirely new reason and explanation given on behalf of the Defendant to account for not complying with the second limb of the FOIA Request.

86. However, that is not the only mis-step by the Defendant. The Sambucharan Affidavit stated that on the 30 August 2019, he sent an email to officials from CXC enquiring whether JMV's individual scores on his Creative Writing Script for each Sub-Category of the requested Creative Writing Rubric used in 2018 can be provided to the MOE and whether they can be disclosed to the Claimants.

87. By email in response dated the 4 September 2019, the Manager, Examinations Administration and Security Division of CXC indicated that as per the most recent agreement, CXC is required to electronically store the raw scores for candidates for a minimum of two years. It also stated that the MOE has never requested that both scores be captured for the Essay and that the average score has always been the information provided by CXC and that if the MOE now has that requirement, it would require a change to the current application and would need to be discussed for inclusion in the new contract.

88. The First Schedule, Part 4, paragraph 3 of the SEA Agreement states that CXC shall double mark by holistic method the Essay scripts. Part 5 of the First Schedule which deals with data processing confirms that CXC is to design a computerized system for capturing the results of the examinations and capture the candidates' raw scores recorded on the front of the booklets. CXC also has to submit to the MOE the final scores of the students.

89. Based on an email exchange between Mr Sambucharan and the Manager, Examinations Administration and Security Division of CXC between the 30 August 2019 and the 4

September 2019 with respect to the breakdown of the scores of the ELAW submitted by JMV for marking by CXC, it was confirmed that only the average score is provided by CXC to the MOE.

90. However, at the time the Defendant issued the substantive response to the FOIA Request, he or she did not have this information as a basis for not disclosing the information requested in the second limb of the FOIA. Therefore the only reasonable inference is that the information requested in the second limb of the FOIA Request was available and within the power of the Defendant to disclose.

91. The information which has now been put before the Court on behalf of the Defendant, long after the substantive response was provided, is only relevant as it effectively stymies the Court's ability to grant the relief sought with respect to the disclosure of the information requested in the second limb of the FOIA Request.

WHETHER THE DEFENDANT HAD A DUTY TO ENGAGE THE SECTION 35 PUBLIC INTEREST TEST IN DECIDING IF TO DISCLOSE THE DOCUMENTS

92. Section 35 of the FOIA deals with the disclosure of an exempt document in the public interest. It states:

> "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."

93. Counsel for the Claimants argued that by the Defendant putting forward certain privileges and immunities of the CXC under the Caribbean Examinations Council (Privileges and Immunities) Act, it has in substance and effect ascribed the status of exempt documents within the meaning of the FOIA to the information in the FOIA Request. It was also argued by the Claimant that by the Defendant raising the terms of the SEA Agreement concerning the duty to secrecy, he or she has ascribed to the requested documents and/or information the status of exempt documents within the meaning of the FOIA on the basis of confidentiality and secrecy.

94. In response, Counsel for the Defendant submitted that, the Defendant has not invoked any exemption under the FOIA as the Defendant's position has been that the documents and/or information requested under the FOIA Request are not official documents under the FOIA.

95. The first hurdle to be crossed before section 35 of the FOIA is engaged, is that the public authority must identify in its decision letter that it has invoked a particular exemption under the FOIA. I agree with the Defendant's position that in the letter dated 21 January 2019 to the Claimants, the Defendant did not invoke any exemption under the FOIA. In the absence of so doing the question of the section 35 test of the FOIA does not arise.

WHETHER THE DEFENDANT'S CONTINUED FAILURE AND/OR REFUSAL TO GRANT ACCESS TO THE DOCUMENTS CONSTITUTE ILLEGAL, IRRATIONAL AND UNREASONABLE CONDUCT UNDER THE FOIA

96. The local Court of Appeal judgment of **Paul Lai v The Attorney General of Trinidad and Tobago**[17] cited the landmark English decision in **Council of Civil Service Unions v Minister for the Civil Service**[18] where Lord Diplock at page 952 of his judgment stated the following of "illegality" in judicial review:

[17] Civ Appeal No. P 129/ 2012
[18] (1984) 3 All ER 935

"By 'illegality' as a ground of judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

97. The Court of Appeal in **Paul Lai** stated the following on the principles of unreasonableness and irrationality at paragraph 105 as:

"105. The starting point for any discussion on unreasonableness is by reference to the well-established principle as stated by Lord Greene, M.R in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation:

"...a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."

And later at pages 233 to 234 the Court went on to state as follows:

"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see

whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

98. Lord Diplock, in **Council of Civil Service Unions and Others** expressed his view on the law regarding irrationality at page 951A as:

> "By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Limited v Wednesbury corporation (1948) 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer..."

99. It was submitted by the Claimants that the Defendant acted unreasonably by not disclosing the documents and/or information requested as at the material time they were within the possession, custody or power of the Defendant. The Claimants also argued that under section 42 of the FOIA, the Defendant had a duty to preserve and maintain all official documents which are within his or her possession, custody or power which included the examination scripts. As such the Defendant breached this statutory obligation when it '*permitted CXC to destroy the said scripts'*.

100. Counsel on behalf of the Defendant argued that the Defendant acted lawfully throughout the handling of the FOIA Request as he or she provided a substantive response maintaining at all times that the information and /or documents were the property of CXC. Counsel also submitted that there was no breach of the statutory duty as section 42 of the FOIA applies to official documents which are created by or come into the possession, custody or power of a public authority and the requested documents are not official documents for the purposes of the FOIA. Counsel submitted that the FOIA Request

was deemed to have been received on the 1 November 2018 by the Defendant and this was after the scheduled date for disposal of 2018 SEA exam scripts.

101. In determining whether the Defendant acted unreasonably in issuing the substantive response to the FOIA Request, the Court must determine if the Defendant directed himself or herself properly in law, considered matters which he or she was bound to consider and excluded matters which were irrelevant. The Court must also consider if the Defendant arrived at a conclusion which was so unreasonable that no public authority could come to the same decision. If the decision is so outrageous in its defiance of logic then it is irrational. If the Defendant did not correctly understand and applied the law then it was illegal.

102. One of the main challenges in determining the reasonableness of the decision of the Defendant, in the instant matter, is that the person who made the decision and issued the substantive response to the FOIA Request to the Claimants did not place any evidence before this Court on the matters which were considered before the decision was made to refuse disclosure. The only evidence on behalf of the Defendant was from Mr Sambucharan. He did not state that he was the decision maker and he did not issue the substantive response.

103. This failure by the Defendant to provide evidence of the decision maker was addressed by the author in the text of **Judicial Remedies in Public Law**[19] where he stated:

> "The courts generally recognize that there is an obligation on a public authority to make candid disclosure to the court of its decision-making process, laying before it the relevant facts and the reasoning for the decision challenged. The Court of Appeal has indicated that judicial review is unlike civil litigation and once permission has been granted the defendant should provide sufficient information to enable the court to determine whether the actions complained of were lawful. Sir John Donaldson M.R

[19] 5th ed, Lewis at paragraph 9-07

expressed the view that the defendant was under "a duty to make full and fair disclosure" once permission was granted. Purchas LJ expressed his view more circumspectly, stating that the defendant "… should set out fully what they did and why so far as is necessary fully and fairly to meet the challenge" made by the claimant." (Emphasis added).

104. The Defendant's duty of candour in judicial review proceedings was set out in great detail by Lord Donaldson MR in **R v Lancashire County Council ex p Huddleston**[20] where he stated:

> "Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration. With very few exceptions, all public authorities conscientiously seek to discharge their duties strictly in accordance with public law and in general they succeed. But it must be recognised that complete success by all authorities at all times is a quite unattainable goal. Errors will occur despite the best of endeavours. The courts, for their part, must and do respect the fact that it is not for them to intervene in the administrative field, unless there is a reason to inquire whether a particular authority has been successful in its endeavours. The courts must and do recognise that, where errors have, or are alleged to have, occurred, it by no means follows that the authority is to be criticised. In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority. The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done

[20] [1986] 2 All ER 941 at page 945

and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why". (Emphasis added)

105. In the absence of any evidence from the decision maker, I am entitled to make the adverse inference that the Defendant did not properly direct himself or herself on the law and the relevant matters before he or she made the decision to refuse disclosure and for this reason alone I can conclude that he or she acted unreasonably when the substantive response was issued to the Claimants.

106. In any event, even in the absence of any evidence of the decision maker, with respect to the first limb of the FOIA Request, the Defendant ought to have been well aware of the law as set out in the judgment of **Roger Simon** which was delivered in October 2017 as the office of the Permanent Secretary of the MOE was the Defendant in that matter. In **Roger Simon** the Court had concluded some fifteen months, before the substantive response was issued in the instant action, that the SEA Exam script was within the power of the Defendant and that no policy of CXC could prevent the Defendant from having access to a SEA Exam script unless the terms of the SEA Agreement were varied.

107. However, it appears from the contents of the substantive response to the FOIA Request, that the Defendant did not apply the law as set out in **Roger Simon** in arriving at his or her decision and by failing to do so his or her action was illegal.

108. The decision is also irrational as there was no proper basis for the substantive response. I have already set out aforesaid that the substantive response was issued eight months *before* the Defendant requested any information from CXC and nine months before it received CXC's response. As such the substantive response was based on matters which were irrelevant to the FOIA Request.

109. With respect to the second limb of the FOIA Request, again there was no evidence from the Defendant on the matters which he or she considered before the decision was made to issue the substantive response to the Claimants.

110. In any event, even if the Defendant was aware, that the ELAW was not marked according to the breakdown which was requested, in the second limb of the FOIA Request and therefore such information was never available, this was not the reason set out in the substantive response to the Claimants. Based on the Sambucharan Affidavit, the Defendant ought to have been aware of this before the substantive response was issued. For this reason the Defendant acted irrationally since he or she provided a response which defied logic and the actions was unreasonably since no proper evidential basis for the decision in the substantive response.

111. Section 42 of the FOIA sets out the public authority's duty to preserve documents which are within its possession, custody or power. It states:

> "42. (1) A public authority shall maintain and preserve records in relation to its functions and a copy of all official documents which are created by it or which come at any time into its possession, custody or power.
>
> (2) A person who wilfully destroys or damages a record or document required to be maintained and preserved under subsection (1), commits an offence and is liable on summary conviction to a fine of five thousand dollars and imprisonment for six months.
>
> (3) A person who knowingly destroys or damages a record or document required to be maintained and preserved under subsection (1),while a request for access to the record or document is pending commits an offence and is liable on summary conviction ten thousand dollars and imprisonment for two years."

112. The Defendant's failure to treat the FOIA Request with the degree of urgency mandated by the FOIA meant that JMV's ELAW script which was within the Defendant's power on

the 1 November 2018 was destroyed and for this reason the Defendant is in breach of section 42(1) of the FOIA. However, I am not of the view that there is evidence in this action that the Defendant's action was wilful.

CONCLUSION

113. The Defendant is a public authority under section 4 (d) of the FOIA. At the time the Defendant was in receipt of the FOIA Request, i.e. 1 November 2018, in the absence of any evidence from the decision maker who issued the substantive response, the information requested was within the power of the Defendant.

114. Under the SEA Agreement, the SEA Exam is an examination for students of Trinidad and Tobago for which the MOE is still ultimately responsible. The SEA Exam scripts are not the sole property of CXC but is the joint property of CXC and the students who wrote on the scripts. The Defendant is entitled to have access to those exam scripts and the parents and or guardians of students are persons who are authorised to view the said scripts and it was never the intention of the parties to the SEA Agreement that the Defendant was not to have such access.

115. The duty to consider section 35 of the FOIA did not arise as the Defendant did not rely on any exemptions under the FOIA.

116. In the absence of any evidence from the decision maker, the Defendant acted unreasonably when the substantive response was issued to the Claimants as he or she did not properly direct himself or herself on the law and the relevant matters before he or she made the decision to refuse disclosure. Further, the Defendant's decision was illegal with respect to the first limb of the FOIA Request, the Defendant ought to have been well aware of the law as set out in the judgment of **Roger Simon** where the Court found that the SEA Exam script was within the power of the Defendant and that no policy of CXC could prevent the Defendant from having access to a SEA Exam script unless the terms of

the SEA Agreement were varied. The decision was also irrational as there was no proper basis for the substantive response as it was issued eight months *before* the Defendant requested any information from CXC and nine months before it received CXC's response. As such the substantive response was based on matters which were irrelevant to the FOIA Request.

117. The failure by the Defendant to treat with the FOIA Request with dispatch has the effect of depriving the Claimants of obtaining the orders for access for the information in the FOIA Request as the 2018 SEA Exam script for JMV was destroyed by CXC within the same month the Defendant was in receipt of the FOIA Request.

118. The conduct of the Defendant in the instant action must be condemned in the strongest language and steps must be taken forthwith by the Defendant to treat any application under the FOIA with the degree of urgency which the public of Trinidad and Tobago deserves.

119. Finally, this action was filed in April 2019. When it first came up before me I indicated to the parties that due to the nature of the reliefs sought it is a matter that is to be treated with dispatch. The Defendant only filed the affidavit in response on the 8 November 2019 and the Claimants replied shortly thereafter on the 20 November 2019. I gave directions for written submissions on the 22 November 2019 and based on the timelines this decision was scheduled to be delivered in May 2020. In the intervening period, the directions I had given were impacted by the various Covid 19 Emergency Practice Directions. The directions for submissions were varied in order to deliver the decision as soon as possible. Despite any restrictions caused by the Covid 19 the attorneys at law for both parties willingly co-operated to ensure that the submissions were sent to the Court and they must be commended for working diligently on this matter so that I can deliver this judgment without any further delay as the issues in this action are important to the parties but also the wider public.

ORDER

120. It is declared that the documents/information requested by the Claimants pursuant to their FOIA Application dated 17 October 2018, were official documents under the FOIA and they were within the custody, possession or power of the Defendant.

121. It is declared that the failure and/or refusal by the Defendant to grant access to or otherwise provide the documents/information requested by the Claimants pursuant to the FOIA Application dated 17 October 2017 is unreasonable, irrational, illegal and amounts to a breach of the provisions of the FOIA.

122. The Defendant to pay the Claimants the costs of the action to be assessed by the Registrar in default of agreement.

Margaret Y Mohammed

Judge