

REPUBLIC OF TRINIDAD AND TOBAGO

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

H.C.A. No. S-262 of 2005

**IN THE MATTER OF AN APPLICATION BY
CLYDE RAMPERSAD OF NO. 8 RAILWAY ROAD
COUVA, FOR JUDICIAL REVIEW AS OF RIGHT TO
PURSUANT TO SECTION 39 OF THE FREEDOM
OF INFORMATION ACT(AS AMENDED)**

BETWEEN

CLYDE RAMPERSAD

Applicant

AND

THE PUBLIC SERVICE COMMISSION

Respondent

Before: The Hon. Mr. Justice Bereaux

**Appearances: A. Ramlogan for the Applicant
R. Thurab for the Respondent**

DATE OF DELIVERY: 7th November 2006

JUDGMENT

The facts

[1] The applicant is a Prison Officer II who alleges that he has been bypassed for promotion several times by junior officers. On 1st November 2004 he requested the following documents from the Public Service Commission, pursuant to the provisions of the Freedom of Information Act 1999 (“The Act”):

- (a) All documents, staff records and correspondence on his personal file;
- (b) Copies of all order of merit lists for the period 1979-1989 for the office of Prison Officer II;
- (c) A copy of all order of merit lists for the period 1979-1989 for the office of the Prison Supervisor.

- [2] When no response was received from the Commission his attorney wrote to the Director of Personnel Administration by letter of 31st January 2005 noting that the deadline for submission of the requested documents had passed and giving notice of his intention to institute legal proceedings if the documents were not supplied within seven days.
- [3] On 18th February 2005, the applicant filed these proceedings seeking several remedies, some of which he has now abandoned. The application for leave was heard and granted by Narine J. on 21st February 2005.
- [4] On 25th February 2005, the Applicant visited the office of Mrs. Yvonne Charles-Mottley at the Service Commissions Department and was given a copy of his personal file and a copy of the edited order of merit list of 1985 for both Prison Officer II and Prison Supervisor. He had been contacted by Mrs. Charles-Mottley's office the day before. The lists with which he had been provided

were edited because it revealed the personal information of other officers. The applicant was also given a copy of the seniority list for 2002 and 2004 and a letter dated February 24th 2005 replying to his request.

[5] In that letter Mrs. Charles-Mottley explained that the delay had been occasioned by the relocation of the Service Commissions Department in 2004 and all files were still packed in boxes, with the result that his personal file could not be retrieved within the thirty day deadline set by Section 21 of the Act. She explained as well that she was unable to provide him with copies of the order of merit lists from 1979 to 1989 (1985 excepted) because these records were in the archives, located off the compound and would “*take some time to locate.*” At the time of the applicant’s visit, Mrs. Charles-Mottley was not aware that these proceedings were filed nor does it appear that she was told by the applicant.

[6] Such information as had been provided had been taken from the applicant’s file when it had been located. Mrs. Charles-Mottley, in her affidavit of 11th November 2005, filed in opposition to these proceedings, explains that the order of merit list requested by the applicant dated back to 1979 and the information sought was difficult to locate. She “*requested that a search be undertaken in the archives at El Socorro*” but as at the date of filing her affidavit, the files had not been located. She also admits to receiving on 20th February 2006, a letter from the applicant’s attorney dated 31st January, 2005 by which time she had already met with the applicant.

[7] The matter came up before Benjamin J. on 11th March 2005 at which both the applicant and the Commission were represented by Counsel. Counsel for the Commission had not yet been briefed and directions were given to filing of affidavits. It does not appear to have been disclosed to Benjamin J. that some of the information requested had been already provided to the applicant and that efforts were being made to provide the rest of the information sought. Benjamin J. adjourned the matter to the next available cause list.

On 4th May 2005 the respondent's counsel served notice of her intention to apply to discharge the leave granted by Narine J. on the grounds:

- (a) that there has been an abuse of process;
- (b) that there was non-disclosure by the Applicant of a material fact.

The matter came up before me on a pre-trial review on 21st October 2005. It was adjourned to 22nd November 2005, when Counsel for the applicant, no doubt aware of Miss Thurab's notice, indicated that he would be pursuing only four reliefs on the notice of motion including costs, and the matter was fixed for trial on 24th January 2006.

[8] On 16th January 2006, Mrs. Charles-Mottley telephoned the applicant to inform him that additional information had been obtained in respect of the order of

merit lists for Prison Supervisors for 1980 and 1989 and the Order of Merit Lists for Prisons Officer II for the year 1995. She did not speak with the applicant but with “*a relative*”. Up until the date of hearing on 24th January 2006 she had not heard from the applicant in response to her telephone call. Mrs. Charles-Mottley also states (in her supplemental affidavit of 20th January 2006) that “*searches are still continuing to locate the order of merit lists for the years requested.*”

She adds that because these lists span a period of seventeen to twenty seven years, she could not say how long it would take to locate them.

The preliminary objection

[9] At the hearing of the application Miss Thurab for the Respondent submitted that there was material non-disclosure by the applicant when on the return date of the hearing of the notice of motion before Benjamin J. he failed to mention to the court that the Commission had communicated with him, had provided some of the material he had sought, had explained the reasons for the delay in providing the material and was endeavouring to supply the rest of the material to the best of its ability.

She added that to pursue these proceedings in light of the Commission’s willingness to provide the information was also an abuse of process. That the applicant and his attorney at law were under a duty to disclose this information

which continued even after the grant of leave to file for judicial review. That submission is undoubtedly correct and is supported by the decision in **R v Newham London Borough Council [2001] EWHC Admin 92**, The Times 27th April 2001 at paragraph 23 where it is stated that a claimant's lawyer had

“ a clear and well-known duty to inform the court of all material facts known to them. That duty does not stop when the proceedings are instituted. It continues until the decision is made by the Court, indeed, it continues after the decision is made without notice, if the [applicant] discovers that the facts placed before the Court were inaccurate or incomplete, or if there is a material change in circumstances while the proceedings continue without notice to the other side.”

See also **Commercial Bank of the Near East v A A.B.C. and D [1989] 2 Lloyd's Rep 319.**

[10] Mr. Ramlogan submitted that there was no deliberate non-disclosure because the applicant having received the information abandoned some of the relief he had been pursuing. He added that the relief he has pursued is still relevant because the full information has not been disclosed since the documents provided were edited. There was no intention to deceive the court and there was no prejudice suffered.

While I accept Mr. Ramlogan's assurance that there was no intention to deceive the court it seems to me that there has been non-disclosure. The duty of

Counsel to disclose is an ongoing one. On 11th March, 2005 there appears to have been no intimation of the Commission's position by Mr. Ramlogan to Benjamin J. On that occasion although the Commission was represented by Counsel, Counsel had not yet been briefed and was unaware of what had transpired between Mrs. Charles-Mottley and the applicant.

[11] Certainly there was no intimation to me by Mr. Lalbeharry of that position on 21st October 2005 at a pre-trial review. There was no appearance on behalf of the Commission and the respondent had not yet filed any affidavits in reply to the applicant's. By then of course, Miss Thurab had already served notice of her objection but it did not relieve him of the duty of informing me of the Commission's efforts. A second pre-trial review was fixed for 22nd November 2005. On that day Mr. Ramlogan simply indicated that he would only be pursuing certain reliefs. However Mrs Charles-Mottley had by then filed her affidavit setting out the facts.

[12] Mr. Ramlogan further submitted that the non-pursuit of certain reliefs initially sought in the notice of motion is the normal practice adopted when information is disclosed by the relevant authority after legal action has been initiated. In my judgment that does not detract from Counsel's ongoing duty to fully disclose and to update the court on all matters relevant to the issue arising in the action. Such a position should have been intimated to Benjamin J. on 11th March 2005 and to me on 21st October 2005 when no one appeared for the Commission. I

consider that there has been a sufficient breach of the duty to disclose to affect the outcome of this action. I shall return to that issue later in this judgment.

The hearing

[13] While Mr Rampersad had been provided with information as to his ranking in respect of the years from which information was available, the ranking and score of other public officers on the list was edited out. At the hearing on 24th January, 2006 Mr. Ramlogan submitted that the applicant was entitled to all the information available and the legal question was whether the revelation of rankings and scores of other public officers fell within the definition of personal information in the Act. He added that having regard to sections 30 and 4 of the Act, an officer's rank on the merit list was not personal information.

He submitted in the alternative that even if it were personal information it is not unreasonable disclosure per section 30(1).

[14] The information sought by the Applicant is for copies of all order of merit lists relating to Prison Officer II and Prison Supervisors from 1979 to 1989. In the normal course it would be all information on that list. The provision of that information is subject to section 30(1), which exempts unreasonable disclosure of personal information of any individual. The question is whether the rank and score of other public officers constitute "*personal information*" pursuant to section 4 of the Act, and if so, is their disclosure unreasonable. Having read

section 4(1) of the Act, I have no doubt that they constitute personal information which is defined in section 4 to “*include*” a number of things set out in that section. The word “*include*” suggests that personal information is not confined to the class of information set out in section 4 but includes any information which is of a sufficiently personal nature as to require protection of the Act. I consider the rank and score of public officers to be sufficiently personal as to fall within the definition.

[15] The second question is whether it is unreasonable to disclose it to the applicant. In all the circumstances of this case I do not think that it is. The applicant is seeking information relevant to his having been bypassed for promotion. The scores and rank of other officers are relevant. I do not see that their disclosure is unreasonable, more so given that the information sought dates back between seventeen and twenty-seven years.

[16] But that is not the end of the matter. Miss Thurab has urged that I refuse relief in light of the non-disclosure. The Commission has indicated that the reason for the delay in providing the information sought has been because of the lengthy period to which the request dates back and that the information is located in its archives but has been difficult to locate. I consider that explanation is a valid one and do not consider that there has been unreasonable delay. The Commission had done its best to accommodate the applicant and has provided the applicant with such information as it has been asked to locate. Moreover, it

appears that the information is now academic since I am informed from the bar table by Mr Ramlogan that the order of merit lists are no longer kept by the Commission. Miss Thurab has confirmed this. The applicant has essentially been provided with the information sought save and except the edited information about other prison officers and those years which the Commission has been unable to locate despite its best efforts.

The question is should the information, which has been edited, be provided as Mr. Ramlogan has requested. In the normal course I can see no reason why it should not, and in the normal course I would have ordered its provision. However I shall make no mandamus order in this case in view of the non-disclosure. I do not consider that there has been any serious injustice occasioned because the applicant has been essentially provided with the information he has sought in respect of the years, which the Commission has been able to locate but I must register my displeasure at Counsel's failure fully to update the court on the on-going efforts of the Commission to fulfil its duty. Certainly at the hearing of 21st October 2005 I ought to have been apprised of the facts. Had that been done it was unlikely that I would have fixed this matter for trial at all.

The application is dismissed, but I shall award the applicant costs fit for advocate attorney up to the return dates of the application for leave ending 21st October 2005 when I fixed the date of trial. I do so for two reasons:

- (1) The applicant filed his judicial review application more than three months after his initial request for the information and after his letter before action was written. I consider that not having heard from the Commission he cannot be faulted for doing so.

- (2) He was not contacted by the Commission until after the application for judicial review was filed.

In light of the non-disclosure, all costs after 21st October are refused.

NOLAN P.G. BEREAX
Puisne Judge