Reality Check

30th July 2014

After a flurry of attempted explanations from the Minister of Planning & Sustainable Development, Dr. Bhoe Tewarie, as to the real meaning of the High Court's 14 July ruling on the Invader's Bay matter, the State has now appealed that ruling and applied for expedited hearing of the matter while having the judgment stayed.

What that means is that the State is asking the Court to agree an extension of the Stay of Execution until the appeal is decided, so that the requested information could be withheld while the case is being heard. Presumably, the State has asked for a speedy hearing so as to avoid any impression of them encouraging needless delay in this matter of high public concern.

This article will focus on the three critical findings in the judgment. I will be examining Dr. Tewarie's statement to Parliament on Friday 18 July, alongside the facts and the actual High Court ruling.

1. Legal Professional Privilege

The very first point to be made in relation to this is that the reason given by the State for refusing the JCC's request for this information was not originally 'legal professional privilege'.

That reason for refusal was only advanced after the litigation started, literally arising out of the very briefcase of the State's attorney, on his feet before Justice Seepersad on 4 December 2012.

We contested the State's late introduction of these new reasons for refusal, but the Court ruled at para 37 –

> *38.The Court…is of the view that the Defendant is entitled to rely upon additional reasons with respect to the refusal to disclose the said information…*

The question of whether the legal opinions are privileged was ruled-upon by Justice Seepersad –

> *41.It cannot be disputed that the said information requested, is information that would ordinarily attract legal professional privilege…*

So that issue is not in dispute, in the Court's mind at least. I continue to hold the view that it is highly-questionable to easily accept this notion of client confidentiality, given that the State ought to be acting on our common behalf.

In fact, no evidence was tendered nor was any real case made by the State as to the difficulties which would result from publishing the requested information. None. It is only now, with a ruling in the JCC's favour, that we are getting these positions being advanced.

For the record, the JCC's original request under the Freedom of Information Act (FoIA) was for the legal advices and the letters of instruction.

Consider this, from Dr. Tewarie's opening statement –

> *The very first point that I wish to make with regard to the high court ruling is that there is no issue of disclosure here. There is no issue of failing to disclose or of wanting to withhold disclosures. The Government is not seeking to prevent disclosure of any matter nor is the Government fearful of making any disclosure of fact.*
>
> *The only issue we are contesting is whether the advice of an Attorney to his/her client, which is generally regarded as privileged information, is subject to the jurisdiction of the Freedom of Information Act or whether, since it is a privileged exchange of information between Attorney and Client, it is exempt from the Act…"*

If that is truly the case, with the State's only concern being the possible adverse impact of releasing the legal advices, the question has to be – 'Why not publish the letters of instruction now?'

2. Waiver of Privilege

A significant aspect of the case was as to the impact of Dr. Tewarie's statement to the Senate on 28 February 2012, in reply to a question by then Independent Senator Dr. James Armstrong – see pg 716 of Hansard –

> *The answer to (c); the publication of the request for proposals was not the subject of nor required to be in conformity with the Central Tenders Board Act. Advice to this effect was received from the Legal Unit of the Ministry of Planning and the Economy, and subsequently from the Ministry of the Attorney General…*

The point being advanced by the JCC was that a statement like that one, which purports to publicly disclose the very essence of the advice, has the effect of extinguishing the State's right to suppress the document as being exempted.

The Court ruled clearly on this –

> *77.The gist and nature of the legal advice was in fact revealed when the Minister's response was made and this amounted to conduct that is inconsistent with the stance that the said legal advice is exempt from being disclosed under the Act by virtue of section 29(1)…*

So, the High Court found that Dr. Tewarie's statement to the Senate neutralized the State's 'legal professional privilege'. That is an important aspect of this ruling, given the frequency with which legal opinions and names are brandished by our leaders, always when convenient, of course.

3. The Public Interest Test

This ruling is significant in that Justice Seepersad weighed the existing 'legal professional privilege' – making a clear ruling on that at para 41 – against the 'Public Interest Test' set out in S.35 of the FoIA.

At one point it was widely reported that Dr. Tewarie was insisting that the ruling had nothing to do with transparency, but was only on the narrow issue of legal professional privilege.

The substance of Justice Seepersad's ruling was at paras 85 & 86 –

> *85.The nature of the project in this case and the process adopted by the Defendant to pursue the Request for Proposals process without regard to the provisions of the Central Tenders Board act, requires disclosure of all the relevant information that was considered before the said decision was taken and the refusal to provide the requested information can create a perception that there may have been misfeasance in the process and any such perception can result in the loss of public confidence. Every effort therefore ought to be made to avoid such a circumstance and if there is a valid and legally sound rationale for the adoption of the Request for Proposals process, then it must be in the public interest to disclose it and the rationale behind the process adopted ought not to be cloaked by a veil of secrecy.*
> *86.The public interest in having access to the requested information therefore is far more substantial than the Defendant's interest in attempting to maintain any perceived confidentiality in relation to the said information…"*

The real point here is that Justice Seepersad has carried out the Public Interest Test, as mandated at S.35 of the FoIA and ignored by the State in this matter, to find that the 'legal professional privilege' is subordinate to the Public Interest in this case, given all the evidence submitted to the Court.

The entire process possesses all the ingredients for corruption, I maintain that view.

Dr. Tewarie has repeatedly claimed that the process was transparent because he disclosed the assessment rules for the Invader's Bay development at the T&T Contractors' Association Dinner on Saturday 5 November 2011. That assertion is perfectly tautological, in that it is entirely true that the rules were revealed for the first time on that occasion, but it does not explain anything of substance. The decisive fact is that the closing-date for the Invader's Bay RFP process was 4 October 2011, a full month before the rules were disclosed. That fact alone renders the entire process voidable and illegal.

What is more, we have to consider the widely-advertised public consultations on the redevelopment of King's Wharf in San Fernando; the South-Western Peninsula development; the issue of 'City-status' for Chaguanas; Constitutional Reform and of course, the latest one, the Civil Society Board. The

glaring question has to be – ‘When is the State hosting the first in its series of Public Consultations on the Invader’s Bay development?’

Finally, will this development process continue, while the legal arguments continue?