

Dialog Axiata v. Telecommunications Regulatory Commission of Sri Lanka (TRCSL)

RTICAppeal(In person)/09/2018 (*Order adopted as part of a formal meeting of the Commission on 16.03.2018*)

Order under Section 32 (1) of the Right to Information Act, No 12 of 2016 and Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure)

Chairperson: Mr. Mahinda Gammampila

Commission Members: Ms. Kishali Pinto-Jayawardena

Dr. Selvy Thiruchandran

Justice Rohini Walagama

Present: Director-General Mr. Piyathissa Ranasinghe

Appellant: Dialog Axiata PLC

Notice issued to: Mr. P.R.S.P. Jayatilake, Director General -TRCSL

Appearance/ Represented by:

Appellant - Trinesh Fernando, SGM - Group Legal and Regulatory- Dialog Axiata PLC

Pulasthi Hewamanne, Attorney-at- Law

Aruna de Silva, Attorney– at- Law

J.C. Weliamuna, P.C.

PA - P.R.S.P. Jayatilake, Director- General - TRCSL

M.C.M. Farook, DD - TRCSL

L.S.P. Rodrigo, AD – Legal/IO - TRCSL

RTI Request filed on:	29.06.2017
IO responded on:	29.06.2017 (acknowledgement) 10.07.2017 (requesting further time) 01.08.2017 (response-rejecting the request)
First Appeal to DO filed on:	14.08.2017
DO responded on:	15.08.2017 (acknowledgment) 28.08.2017

Appeal to RTIC filed on:	26.10.2017
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Brief Factual Background

On 29.06.2017, Dialog Axiata PLC (Dialog) filed an information request with the TRCSL requesting the below information:

1. Confirmation of whether or not there was a recent allocation of 7.5 MHz Spectrum in the 1800 MHz frequency band to the State Controlled Service Provider Mobitel (Private) Ltd.
2. If such an allocation was made, whether due process was followed with respect to the said allocation and in particular whether any or all of the following processes were adhered to by the TRCSL in its capacity of being the custodian of valuable and scarce state resources
 - a. Evidence of a competitive bidding process in line with the commitments to “Good Governance” of the Government of Sri Lanka (GoSL)
 - b. Evidence of process followed with respect to the valuation of the scarce resource and ongoing fees to be levied in this regard
 - c. Evidence of payment being made to the said scarce resource
 - d. Due process with respect to the evaluation of the credentials of service providers considered eligible for such allocation including inter-alia
 - i. Assessment of ongoing contribution of service providers to the revenues of the GoSL cumulative investments to date and subscriber base supported by competing service providers
 - ii. Evaluation of spectrum resources already granted to competing service providers *vis a vis* d. (i.)
3. Copies of
 - a. All papers, reports, decisions and recommendations submitted to the Commission by the Frequency Allocation Committee (FAC) of the TRCSL and or any other officer of the TRCSL since 1st January 2017 to-date with respect to allocation of 7.5 MHz in the 1800 MHz Band and/or with respect to the Methodology and Process allocation of the said 7.5 MHz slot in the 1800 band AND the decision/s made by the Commission thereon.
 - b. All Commission papers, minutes of meetings/ discussions and decision relating to the 1800 MHz band during the period starting 01.01.2017 to date (29.06.2017)

By response received on 01.08.2017, the Appellant was informed that its request was denied on the basis of Section 5 (1) (d) of the RTI Act, No. 12 of 2016. Dissatisfied with this response, Dialog appealed to the Designated Officer (DO) on 14.08.2017 and received a response on 28.08.2017 upholding the decision of the Information Officer (IO). Dialog thereafter preferred an appeal to the RTI Commission on 26.10.2017.

In its appeal to the RTI Commission, Dialog alleged that on or around June 2017 7.5MHz spectrum in the 1800 MHz frequency band had been allocated to Mobitel (Pvt) Ltd arbitrarily without recourse to a competitive bidding process. It submitted that thereby it was deprived of the opportunity to bid for the same.

Matters Arising During the Course of the Hearing

The Appellant Company stated that this appeal related to allocation of spectrum for provision of mobile telecommunication networks. It stated that according to the Sri Lanka Telecommunications Act (SLTA), No. 25 of 1991 (as amended), TRCSL is provided with the power to allocate spectrum. The Appellant submitted that Sri Lanka had committed under World Trade Organisation agreements to do allocations of scarce resources (e.g. frequencies/spectrum, right of way, etc.) in a transparent manner as spectrum is a national asset and a scarce resource. It stated that the TRCSL had held out and committed publicly to carry out its duty under Section 10 (1) of the SLTA through fair, equitable and transparent procedures.

Section 10 (1) of the SLTA states,

‘The Authority shall be the sole lawful body in Sri Lanka to manage and control the use of the radio frequency spectrum and incidental and restricted emissions, matters relating to the stationary satellite orbit and shall have the power where he deems necessary to withdraw or suspend its use or prohibit any such emission.’

The Appellant submitted that the particular band in issue was a 1800 4G band used mainly for broadband services to provide internet services for customers, stating that it should be provided the opportunity to make a competitive bid.

The Appellant stated that in mid- June it had come to know that 7.5 MhZ of this Spectrum broadband had been allocated to Mobitel (Pvt.) Ltd. Its request had been denied under Section 5 (1) (d) of the Act even though the information requested had nothing to do with commercial confidence given that spectrum is a national asset and not a commercial or industrial secret. The Appellant further submitted that when there is a competitive bid, the opportunity for the State to earn revenue is greater than through automatic allocation based on the rationale that it was the duty of TRCSL to promote competition in the industry as stipulated in Section 4 (1) of the SLTA.

When questioned by the RTI Commission as to why Section 5 (1) (d) was cited by the PA as reason for refusing the request, the PA explained that it was the sole regulator of the industry in the country, and therefore, could not provide the information to a competitor in the same field as the company to which the spectrum frequency was allocated (ie; Mobitel). It further stated that under Section 10 (Radio Frequencies) of the SLTA, TRCSL had the sole right to manage spectrum, which had been auctioned only once before in 2013 and in other years it was provided through an administrative process for an amount decided by TRCSL. The PA further stated that it was the sole body having discretion in that regard.

Order

It is not clear as to why the information in issue was denied under the RTI Act, No.12 of 2016 by the Public Authority in the context of the statutory duty incumbent on the Public Authority to establish the manner in which the public interest in disclosing the information is

less than the harm that may arguably result from its disclosure (Section 5(4) of the Act) or the manner in which it is not satisfied that the '*larger public interest warrants the disclosure of such information*', (Section 5 (1) (d) of the Act). On appeal, the burden of proof shall be on the Public Authority to show that it acted in compliance with the Act (Section 32 (4) of the Act).

While the discretion afforded to the Public Authority by the SLTA in the allocation of spectrum frequency is undeniable, (whether by auction or an administrative decision as the case may be), such discretion is not unfettered but must be exercised 'in accordance with law' and subject to the application of the RTI Act, absent a clearly applicable exemption set out in Section 5 (1) of the Act which overrides the public interest (Sections 5 (4) and 5 (1)(d)).

It is also pertinent in this regard that 'every officer in any public authority giving a decision which affects any person in any way' is under a duty to disclose reasons for the decision as mandated by Section 35 of the Act. No immunity is afforded to the Public Authority in regard to the operation of these statutory provisions and this Commission is bound by law not to privilege any particular Public Authority.

In this instance, the Public Authority has justified the refusal to give the requested information by citing the exemption in Section 5 (1) (d) of the RTI Act, which states as follows:

'Section 5. (1) Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where—

(d) information, including commercial confidence, trade secrets or intellectual property, protected under the Intellectual Property Act, No. 36 of 2003, the disclosure of which would harm the competitive position of a third party, unless the public authority is satisfied that larger public interest warrants the disclosure of such information;'

However, this refusal lacks reasoning as to the manner in which the public interest is subordinated to an arguable need to protect the 'competitive position of a third party', particularly considering the subject matter of this information request which is of national importance as reminded by the Supreme Court of Sri Lanka in 1997, given the 'limited availability of spectrum frequencies' and the accompanying judicial caution that only a limited number of persons can be permitted to use the frequencies; (*Atukorale & Others v. The Attorney General*, SD 1/97-15/97, SCM 5 May 1997).

Indeed, this Commission finds that the application of the public interest test is even greater in instances where Section 5 (1) (d) is cited to explain the refusal of information as that subsection itself refers to the fact that information may be disclosed where '*the public authority is satisfied that larger public interest warrants the disclosure of such information.*' In effect, the 'public interest' test applies both by virtue of Section 5(1) (d) itself and by Section 5 (4) of the Act.

It also of note that in the hearings before this Commission, the Public Authority appears to be under the misapprehension that its discretion to allocate spectrum frequencies under the SLTA is equated with the absence of a duty to explain its reasons for the decision that has been impugned, which position is not in accordance with Section 35 of the Act.

The PA is directed to abstain from a blanket refusal to provide the information requested, to examine what portions of the information request can be provided and further, to clearly detail the relevant legally applicable exemption under Section 5 if information is being denied together with the manner in which it is not satisfied that the ‘*larger public interest warrants the disclosure of such information*’, in accordance with Section 5 (1)(d) and Section 5 (4).

The PA may file written submissions if required (with copy to Appellant) by 11am on April 2, 2018 as to the above. The Appellant may file written submissions containing its response (with copy to PA) by close of day on April 2, 2018.

The Appeal is adjourned.

Next date of hearing: 03/04/2018

RTICAppeal (In person)/09/2018 (*Order adopted as part of a formal meeting of the Commission on 03.04.2018*)

Order under Section 32 (1) of the Right to Information Act, No 12 of 2016 and Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure)

Summary of Record of Proceedings and Order

The Public Authority has, of record handed over the information pertaining to below mentioned items of information in the information request;

1. Confirmation of whether or not there was a recent allocation of 7.5 MHz Spectrum in the 1800 MHz frequency band to the State Controlled Service Provider Mobitel (Private) Ltd.
2. If such an allocation was made, whether due process was followed with respect to the said allocation and in particular whether any or all of the following processes were adhered to by the TRCSL in its capacity of being the custodian of valuable and scarce state resources
 - a. Evidence of a competitive bidding process in line with the commitments to “Good Governance” of the Government of Sri Lanka (GoSL)
 - b. Evidence of process followed with respect to the valuation of the scarce resource and ongoing fees to be levied in this regard
 - d. Due process with respect to the evaluation of the credentials of service providers considered eligible for such allocation including inter-alia
 - i. Assessment of ongoing contribution of service providers to the revenues of the GoSL cumulative investments to date and subscriber base supported by competing service providers

- ii. Evaluation of spectrum resources already granted to competing service providers *vis a vis* d. (i.)

3. Copies of –

- a. All papers, reports, decisions and recommendations submitted to the Commission by the Frequency Allocation Committee (FAC) of the TRCSL and or any other officer of the TRCSL since 1st January 2017 to-date with respect to allocation of 7.5 MHz in the 1800 MHz Band and/or with respect to the Methodology and Process allocation of the said 7.5 MHz slot in the 1800 band AND the decision/s made by the Commission thereon.
- b. All Commission papers, minutes of meetings/ discussions and decision relating to the 1800 MHz band during the period starting 01.01.2017 to date (29.06.2017).

In relation to requested item 2. (c) of the information request, this relates to the following information;

- c. Evidence of payment being made to the said scarce resource.

On perusal of the documents submitted by the Public Authority, it is evidenced that the documents relate to payment terms discussed and offered for the allocation of the said spectrum frequency as contrasted from the actual and final payment made for the same. Consequently, the Public Authority is directed to hand over the final payment voucher by the Government for the allocation of the said spectrum frequency to Mobitel (Private) Ltd to the Appellant and undertakes to furnish the same.

The Appeal is concluded on the basis that the information is to be provided on or before 09.05.2018.
