

Ceylon Bank Employees Union v People's Bank

RTIC Appeal (In person)/58/2018 (Order adopted as part of a formal meeting of the Commission on 30.01.2018)

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

Mr. S.G. Punchihewa

Justice Rohini Walgama

Present: Director-General Mr. Piyathissa Ranasinghe

Appellant: Ceylon Bank Employees' Union

Notice issued to: Samantha Senanayaka/ Designated Officer, People's Bank

Appearance/ Represented by:

Appellant Union - W. E. Nalin Amarageewa

Indula Hewage

PA - Samantha Senanayaka- Information Officer, People's Bank

RTI Request filed on:	29.08.2017
IO responded on:	19.09.2017
First Appeal to DO filed on:	25.09.2017
DO responded on:	No response
Appeal to RTIC filed on:	23.11.2017

Brief Factual Background:

The Appellant Union by letter dated 29.08.2017 requested the following information.

- (a) A certified copy and/or extracts and/or such other documentary material of the decision taken by the People's Bank to disregard and override the legal opinion given by the Legal Consultant of the bank Mrs. Minoli Jinadasa, AAL to desist from initiating or continuing disciplinary action against three employee-members of the Appellant Union, namely, MR. S.M. A. R. Senanayaka, Mr. A. M.M.S.M. Ruwais and Mr. S. K.D. Hewapathirana.
- (b) A certified copy and/or extracts and/or such other documentary material of the decision taken by the People's Bank to retain Instructing Attorney and Counsel from the private Bar in case Nos. DSP 179/2016, 183/2016 and 184/2016 filed in the District Court of Colombo without first consulting and retaining the Hon. Attorney General for the said three cases.

- (c) A certified copy and/or extracts and/or such other documentary material of the decision taken by the People's Bank to retain Instructing Attorney and Counsel from the private Bar without first consulting and retaining the Hon. Attorney General in case Nos. WP/HCCA/COL/04/2017 as well as case Nos. WP/HCCA/COL/15/2017 (LA), WP/HCCA/COL/16/2017 (LA) and WP/HCCA/COL/17/2017 (LA) filed by the People's Bank against the said three employees, namely, Mr. S. M. A. R. Senanayake, Mr. A. M.M.S.M. Ruwais and Mr. S. K.D. Hewapathirana.
- (d) A certified copy and/or extracts and/or such other documentary material of the decision taken by the People's Bank to refer SC HCCA LA Leave to Appeal Application Nos. 316/2017, 318/2017 and 319/2017 to the Supreme Court without consulting and retaining the Hon. Attorney-General despite the High Court of Civil Appeal in case Nos. WP/HCCA/COL/15/2017 (LA), WP/HCCA/COL/16/2017 (LA) and WP/HCCA/COL/17/2017 (LA), held against the People's Bank.
- (e) A certified copy and/or extracts and/or such other documentary material of the People's Bank of the vouchers raised to make payments to date in respect of case Nos. DSP 179/2016, 183/2016 and 184/2016 filed in the District Court of Colombo and the case WP/HCCA/COL/04/2017 filed and withdrawn by the People's Bank and the case Nos. WP/HCCA/COL/15/2017 (LA), WP/HCCA/COL/16/2017 (LA) and WP/HCCA/COL/17/2017 (LA) filed by the People's Bank and dismissed by the High Court of Civil Appeal and SC HCCA LA Leave to Appeal Application Nos. 316/2017, 318/2017 and 319/2017 filed by the People's Bank.
- (f) A certified copy and/or extracts and/or such other documentary material of the decision taken by the People's Bank seeking approval and/or provisional approval from the Auditor General to authorize the payment of fees of the Instructing Attorney and the counsel for the case Nos. DSP 179/2016, 183/2016 and 184/2016 filed in the District Court of Colombo and the case WP/HCCA/COL/04/2017 filed and withdrawn by the People's Bank and the case nos. WP/HCCA/COL/15/2017 (LA), WP/HCCA/COL/16/2017 (LA) and WP/HCCA/COL/17/2017 (LA) filed by the People's Bank and dismissed by the High Court of Civil Appeal and SC HCCA LA Leave to Appeal Application Nos. 316/2017, 318/2017 and 319/2017 filed by the People's Bank.
- (g) A certified copy and/or extracts and/or such other documentary material of the criteria adopted by the People's Bank in selecting and retaining the Instructing Attorney and the counsel for the cases referred in (f) above
- (h) A certified copy and/or extracts and/or such other documentary material of the People's Bank informing the Auditor General of the said cases referred to in (f) above for auditing purposes to reflect the same in Annual and/or quarterly audited accounts.
- (i) A certified copy and/or extracts and/or such other documentary material of the People's Bank calling for fees from other Instructing Attorneys and Counsel than those who have been retained currently
- (j) A certified copy and/or extracts and/or such other documentary material of the People's Bank deciding whether the legal fees claimed by the Instructing Attorneys and Counsel in the said cases referred to in (f) above are excessive and/or exorbitant or similar to fees customarily charges in like manner by lawyers of equal standing in the locality for similar legal services in similar circumstances

- (k) A certified copy and/or extracts and/or such other documentary material of the People's Bank to the effect that the Bank attempted to settle the said case Nos. DSP 179/2016, 183/2016 and 184/2016 filed in the in the District Court of Colombo following the dismissal by the High Court of Civil Appeal of the WP/HCCA/COL/04/2017 filed and withdrawn by the People's Bank and the case Nos. WP/HCCA/COL/15/2017 (LA), WP/HCCA/COL/16/2017 (LA) and WP/HCCA/COL/17/2017 (LA) filed by the People's Bank
- (l) A certified copy and/or extracts and/or such other documentary material of the decision of the People's Bank whether the Governor and/or Director of Banking Supervision of the Central Bank have been informed of the existence and progress of the said cases referred above.

The Information Officer on 19.09.2017 responded to the Appellant Union refusing the provision of the information on the basis that the information comes within Section 5 of the Right to Information Act i.e. that the information is privileged communication between a lawyer and a client on the basis that there is an ongoing court case.

Thereafter, by appeal dated 25.09.2017, the Appellant Union submitted an appeal to the Designated Officer. Upon the failure of the Designated Officer to respond to the said appeal an appeal dated 23.11.2017 was submitted to the Right to Information Commission.

Matters Arising During the Course of the Hearing:

The Appellant Union referred to its affirmation in the positive that it is a citizen in the information request filed to the Public Authority dated 29.08.2017 and submitted further as of record that it is a registered body with more than three-fourths of its membership being citizens of Sri Lanka, therefore falling within the definition of citizen in Section 43 of the RTI Act.

Order:

The ruling of this Commission in *TISL v. Prime Minister's Office/Presidential Secretariat* (RTICAppeal/05/2017 & RTICAppeal/06/201, RTIC Minutes of 23.02.2018) is to the effect that an averment affirming the fact of citizenship in an information request will suffice to meet the jurisdictional requirements of Section 3(1), read with Sections 24(1) and 43 of the RTI Act. As was emphasized in that ruling, for reasons more fully set out therein, 'it is only in the rarest of rare cases and where sufficient reasons objectively are shown to exist awakening a *bona fide* doubt as to the said averment not being indicative of the correct factual position, that the Information Officer will be justified in law in requiring an incorporated or unincorporated body filing an RTI application under Section 24 (1) to furnish proof of the said averment, viz; to demonstrate by annexed material that three-fourths of such body are citizens.'

In any event, it is of note that no jurisdictional objection of this nature has been raised before this Commission by the Public Authority in the instant appeal.

The Parties are directed to file Written Submissions (with copies to each other) in respect of the substantive issues for determination by this Commission before the next date of hearing.

Next date of hearing is 27.03.2018. The Appeal is hereby adjourned.

RTIC Appeal (In person)/58/2018 (*Order adopted as part of a formal meeting of the Commission on 27.03.2018*)

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
Mr. S.G. Punchihewa
Dr. Selvy Thiruchandran
Justice Rohini Walgama

Present: Director-General Mr. Piyathissa Ranasinghe

Appellant: Ceylon Bank Employees' Union

Notice issued to: Samantha Senanayaka/ Designated Officer, People's Bank

Appearance/ Represented by:

Appellant Union - Channa Dissanayake Senior Vice President (CBEU)

A M M S M Ruwais Assistant Secretary (CBEU)

Nalin Amarajeewa, Attorney-at-Law

Indula Hewage Attorney-at-Law

PA - Sandun Gamage, Attorney-at-law (Counsel for representing the PA)

Tharanga Gamage, Assistant Manager, People's Bank

Navod Hewage, Attorney-at-Law

Chamindri Liyanage, Attorney-at-Law

Matters Arising During the Course of the Hearing:

In its Written Submissions dated 07.09.2018, the PA submits that the principle of *sub judice* prevents the release of all specified items of information in the Appellant's information request by reason of the fact that there is a pending court case in regard to the substantial matter on the basis that Section 5 (1) (j) of the RTI Act No.12 of 2016 mandates refusal of information where 'the disclosure of such information would be in contempt of court or prejudicial to the maintenance of the authority and impartiality of the judiciary;'

The PA further submits that in relation to items b), c), d), g) and k) of the said information request, the exemption set out in Section 5 (1) (g) of the Act which requires 'the information to be kept confidential by reason of the existence of a fiduciary relationship' applies. The PA further substantiates this position by citing *Weerasuriya v Fuard* (56 NLR 12) where the Court recognized the existence of a fiduciary duty between a proctor and a client. The PA submits that 'all material relating to the decision to retain the services of the Instructing Attorneys and Counsel from the private Bar are required to be kept confidential and therefore, will necessarily

come within the scope and ambit' of Section 5(1) (g). In relation to items e), i), and j), the PA claims that the information falls within Section 5 (1) (f) of the Act.

Section 5 (1) (f) reads as follows;

the information consists of any communication, between a professional and a public authority to whom such professional provides services, which is not permitted to be disclosed under any written law, including any communication between the Attorney General or any officer assisting the Attorney General in the performance of his duties and a public authority;

The PA submits that 'not only opinions *per se*, but all vouchers, memos setting out the fees of the Attorneys are privileged communications. The said section applies to "any communication" between a professional and a Public Authority.' The PA further claims that this information (i.e. items e), i), and j)) falls within Section 5 (1) (a) of the Act as payment vouchers of instructing attorneys and their counsel are personal information.

Section 5 (1) (a);

the information relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure.

In consequence thereto, it submits that where a fiduciary relationship exists, the information must be kept confidential. There exists a fiduciary relationship between a client and an attorney and therefore items e), i), and j) fall within that exemption as well. The PA further cited Regulation 20 Clause 01 (vi) of the RTI Regulations published in Extraordinary Gazette bearing No. 2004/66 published on 03.02.2017 which requires proactive disclosure only in relation to 'salary scales pertaining to the emoluments and related allowances of officers' to maintain that the said Regulation does not in any manner require, payments/fees paid to an independent professional by a PA, in respect of professional services provided, be disclosed.

In sum, the PA relied on Sections 5(1) (a), 5 (1) (f), 5(1) (g) and 5(1) (j) of the Act, (the provision of information such as fees charged by the said counsel/ instructing attorneys will affect the privacy of respective counsel/ instructing attorneys; that the information is privileged; there is a fiduciary duty preventing the PA from disclosing the information by virtue of the client-lawyer relationship and that the information requested relates to matters pending before court. It further claimed that there is no public interest or public purpose in the disclosure of the information.

In response, the Appellant Union emphasized that there is no real link between the information requested and the litigation to which the PA is a party. It was pointed out that a substantial amount of public money is spent by the Public Authority in the retention of private counsel disregarding state law officers of the Attorney General's Department and that the said decision to retain counsel cannot therefore be an arbitrary decision. It submitted that the discretion

exercised to retain Attorneys-at-Law in order to exercise whatever aspect of litigation, cannot be unfettered and must be, and be seen to be, in accordance with law, unlike in the case of a private bank.

Further, the Appellant Union submitted that the PA is a Public Bank liable to be held accountable for the expenditure of public funds and therefore accountable to the people. The Appellant-Union provided examples of instances in the past where such information had been disclosed despite the RTI Act having not been in force and contended that even if the retention of counsel can be justified, outsourcing/ retaining external instructing attorneys cannot be justified when there are several in-house instructing attorneys. It submitted that the criteria it sought to obtain would enable them to identify whether the PA had gone through a procurement process in the selection of counsel and instructing attorneys.

Specifically addressing the question of the public interest/purpose in the release of the information, the Appellant Union stated that it has a membership of over 30000 members out of which 6500 are employees of the PA who significantly contribute to and are involved in the banking sector and as such, is a key stakeholder in the banking sector playing a significant role in the protection of that sector. The Appellant Union- cited previous instances where financial scams in the banking sector had taken place in which it was able to influence the Central Bank of Sri Lanka to intervene and mitigate the adverse consequences of financial irregularities.

The Appellant Union submitted that this request arises in the context of the largest digitization scam (as alleged by the Appellant Union) in Sri Lanka. Three employees of the PA had published and distributed an internal bulletin amongst employees of the PA with the purpose of exposing this scam. The Management of the PA had subsequently taken disciplinary action against these members on the basis that this conduct by the three employees was in breach of the Disciplinary code of the Bank, which action, the Appellant Union submitted was without proper basis and for the purposes of serving the whims of the Director-General and Chairman of the PA.

It was alleged that the scam had been noted by the Auditor-General and that the PA had initiated a disciplinary inquiry in order to victimize the union leaders at the forefront of exposing this alleged scam. The Appellant Union further alleged that the decision to commence a disciplinary inquiry was in contradiction to the opinion of the legal consultant of the bank whose opinion had been disregarded in the Bank's decision to retain private counsel.

The PA clarified that the aforesaid employees had acted in breach of the Disciplinary Code of the PA, and that the said Bulletin/ Publication 'contained grossly scurrilous, mischievous and erroneous facts regarding the proposed digitization project of the Bank.' The PA therefore issued charge sheets to which the three employees had responded. After perusal of the material, the PA decided to hold a formal inquiry. Prior to the commencement of the disciplinary inquiry, the three employees had filed cases (case Nos. DSP 179/2016, 183/2016 and 184/2016) in the District Court of Colombo seeking and obtaining *inter alia* an enjoining order suspending the inquiry for 14 days. The PA objected to the extension of the enjoining order applications were preferred to the High Court of Civil Appeals (WP/HCCA/COL/15/2017

(LA), WP/HCCA/COL/16/2017 (LA) and WP/HCCA/COL/17/2017 (LA)) from the interim injunctions issued by the District Court. To the extent that the High Court refused to grant relief, the PA filed Leave to Appeal applications before the Supreme Court (SC HCCA LA Leave to Appeal Application Nos. 316/2017, 318/2017 and 319/2017).

The Appellant Union forcefully reiterated that the disciplinary inquiry was commenced with the intention of victimizing union leaders who sought to expose through the Bulletin, the largest scam in relation to the digitization process conducted by the PA. The Appellant Union submitted that

The PA objected to the allegations made by the Appellant, requesting that documents be placed before the Commission to such effect without resorting to baseless claims. Pressing the ground that the requested information is *sub judice* and cannot be revealed, it reiterated that the disclosure of payments made to private counsel in the requested vouchers will enable other litigants to take undue advantage of that information.

Order:

The Right to Information Act No. 12 of 2016 (the Act) seeks to promote a culture of transparency and accountability and has been legislatively intended to prevail over any other written law in the event of a conflict (Section 4) of the Act.

As the appellate body established under the Act, the Commission is obliged to 'affirm, vary or reverse' the decision of the Public Authority appealed against in terms of Section 32(1) of the Act with the key underlining purpose of ensuring the promotion of accountability and transparency in the utilization of public funds, for whatever purpose, by a PA.

In this instance, during the hearings before us, the PA has submitted that the information requested by the Appellant is *sub judice* and cannot therefore be given. Information may only be refused strictly within the four corners of Section 5(1), which refusal is finally subject to the public interest override in Section 5 (4) in terms of which, information cannot be declined 'where the public interest in disclosing the information outweighs the harm that would result from such disclosure.'

it must be reminded at the outset that the very concept of *sub judice* is applicable primarily to jury trials and has long been interpreted not to preempt and prevent discussions of established public interest, merely on the basis that there are in existence, contemporaneous legal proceedings (vide; *Maxwell v Pressdram Ltd* (1987) 1 All ER 656). The established principle is that there must be a real risk (emphasis ours), as opposed to a remote possibility, that interference or prejudice would be caused to the due administration of justice. Thus Section 2 (2) of the United Kingdom's Contempt of Court Act, 1981 applies the prohibition only where there is a 'substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.'

That legislation was compelled by the reasoning in *The Sunday Times v. United Kingdom*, (26 April 1979, Series A No. 30, 14 EHRR 229) where it was cautioned that what was in issue was not a choice between two conflicting principles or “balancing” the public interest in freedom of expression and the public interest in the fair administration of justice. Rather, the correct test was to apply a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.

That distinction is important in the first instance for the purposes of assessing the relevance of the exemption set out in Section 5(1)(j) of the Act which the PA heavily relies on in this appeal. This Commission is called upon to apply the primary principle of the Right to Information on the basis of the test of maximum public disclosure that the Act is premised on in the intention of its drafters, against the exceptions set out in Section 5(1) of the Act which, as excellently cautioned in *The Sunday Times v. United Kingdom* (supra) in a different but comparable context, must be narrowly interpreted.

The Public Authority’s submissions in this regard conspicuously lack the establishing of a connection between this requested information and the manner in which ‘a real risk’ may therein be posed to the ‘authority and impartiality of the judiciary’ so that ‘prejudice’ is caused thereby. This same lacunae applies to the other exemptions cited by the Public Authority under Sections 5(1) (f) and 5(1) (g) of the Act, particularly in regard to the Public Authority’s claimed inclusion of payment vouchers to lawyers as being included within the ambit of professionally privileged information or confidential information claimed to be submitted within the context of a fiduciary relationship.

In this instance, the Appellant has requested information relating to payment vouchers of fees paid to private counsel by the Public Authority. While the Public Authority is undoubtedly within its discretion to arrive at decisions to retain private counsel in litigation, this Commission is mindful of the submission of the Appellant that such decisions involve the expenditure of public funds. It is a matter of comparative note that where public officers retain private counsel in court proceedings, standards of financial probity are stringently mandated through Sri Lanka’s Establishments Code (XXX111, para 6.4).

At the second level of assessing whether information may be disclosed or not under this Act, Public Authorities must satisfactorily discharge the burden of proof imposed on it in appeal by the RTI Act (Section 32 (4)), to show that they have acted in compliance with the Act in processing a request. This includes demonstrable grounds on which the harm test has been applied by Public Authorities in terms of Section 5(4) of the Act when refusing an information request.

Excepting in the case of Section 5(1)(i) where in instances of confidential information submitted by third parties, the duty of determining the public interest in applying the harm test is solely vested in this Commission, Public Authorities must clearly demonstrate the discharging of the burden under Section 32 (4). Indeed that duty is exceedingly onerous when the exemption in Section 5(1)(j) is cited to refuse information by a Public Authority. At this stage as well, the ‘real risk’ of prejudice to the ‘authority and impartiality of the judiciary’ must be established rather

than mere citation of pending or contemporaneous proceedings. If that were not to be the case, the RTI Act would be frustrated in fundamental respects as a filing of any case in any court, argued as relevant thereto, would immediately thwart the application of its provisions, which surely must not have been the intention of Parliament in passing this Act which is prioritized 'notwithstanding anything to the contrary in any other written law' (Section 4). The Public Authority's submissions in this regard do not appear to sufficiently take this matter into account.

Further, it is pertinent that the PA's submission that Regulation 20 Clause 01 (vi) (Gazette No. 2004/66, 03.02.2017) contending that proactive disclosure is required only in relation to 'salary scales pertaining to the emoluments and related allowances of officers' and that it 'does not in any manner require, payments/fees paid to an independent professional by a PA, in respect of professional services provided, to be disclosed' is misconceived.

Regulation 20 pertains to proactive (voluntary) disclosure as follows;

*20.(1). In accordance with the power to direct a Public Authority to provide information in a particular form under Section 15(d) of the Act and in keeping with the overriding principle of Proactive Disclosure, all Public Authorities shall routinely disseminate, **at a minimum**, the following key Information including through a digital or electronic format... (emphasis ours)*

This is differentiated from reactive disclosure which is related to the process by which a Public Authority is statutorily challenged under Sections 23-25 and Sections 27-29 of the Act to provide the information and in respect of which appeals lie to the Designated Officer in that Public Authority under Section 31 and to this Commission under Section 32 of the Act.

Both processes are entirely different in nature. Minimum requirements relating to proactive disclosure which must be voluntarily and '*routinely disseminated*' cannot be cited as a ground to justify refusal of information under the reactive disclosure process in particular specific instances. Rather, as was observed by this Commission in *Airline Pilots Guild v. Sri Lankan Airlines*, RTIC Appeal (In-Person)/99/2017, RTIC Minutes, 08.01.2018, Regulation 20 'relates to the lowest standard possible in respect of information disclosure.' Information released by way of reactive disclosure under the Act must necessarily and logically be more extensive in nature.

The PA is directed to file further written submissions on or before 20.04.2018 with copies to the Appellant Union. The Appellant Union is directed to file written submissions thereafter with copies to the PA on 04.05.2018.

In order to assess the public interest element in this appeal against which this Commission is called upon to evaluate the application of the public interest override contained as aforesaid in Section 5(4) of the Act, the PA is directed to provide the legal opinion submitted by the consultant to the PA, to '*desist from initiating or continuing disciplinary action against three employee-members of the Appellant Union-, namely, MR. S.M. A. R. Senanayaka, Mr. A. M.M.S.M. Ruwais and Mr. S. K.D. Hewapathirana.*'

Next date of hearing is 22.05.2018. The Appeal is hereby adjourned.
