

C Amarasinghe v Board of Investment (BOI)

RTIC Appeal (In-Person Hearing)/791/2018- Order/Minute adopted as part of the formal meeting of the Commission on 26.02.2019.

Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure).

Commission Member: Ms.Kishali Pinto-Jayawardena
Commission Member: Mr.S.G. Punchihewa
Commission Member: Dr. Selvy Thiruchandran
Commission Member: Justice Rohini Walgama

Appellant: C Amarasinghe

Notice issued to: Designated Officer, BOI

Appearance/ Represented by:

Appellant - C Amarasinghe
PA - Dulip Samarasinghe – Director (Media)/IO

RTI Request filed on	07.02.2017 and 07.03.2018
IO responded on	07.07.2017 and 04.06.2018
First Appeal to DO filed on	03.07.2018
DO responded on	No response
Appeal to RTIC filed on	30.10.2018

Brief Factual Background:

The Appellant by information requests dated 07.02.2017 and 07.03.2018 requested for the following item of information.

“The following item of information regarding Melwire Rolling Ltd,

- 1. Copy of the BOI approval letter encompassing the terms and conditions applicable to his industry.*
- 2. Details of survey plans submitted to the Investment and Engineering Departments.*
- 3. Has BOI given this Company permission to expand the factory area, if so, when and for what extra production capacity?*
- 4. Replies for our letters whose dates are embodied in our fax of 07.02.2017.*
- 5. Has BOI inspected the factory location as it is now and is it satisfied with its proximity to the Ja Ela waterway especially in terms of SLLRDC regulations?*

6. *Has BOI investigated matters relating to the wastewater and sewage and its disposal, from the dormitory and discharge of residue materials to the ground?"*

The IO on 07.07.2017 and 04.06.2018 responded with providing information on items 2, 4, 5 and 6. Dissatisfied with the response of the IO the Appellant lodged an appeal with the DO on 03.07.2018. As the DO failed to respond within the time period stipulated under the Act the Appellant preferred an appeal to the Commission on 30.10.2018.

Matters Arising During the Course of the Hearing:

Written submissions of the PA dated 26.02.2019 are accepted of record.

The Appellant in his submissions stated that Melwire Rolling Ltd, the company in question was an illegal establishment in Ekala, however, had been formed with the approval of the BOI. The Appellant further submitted that this request for information was made in order to assess the environmental impact and the PA had provided him with certain information.

With regard to item 1 of the request, the BOI stated that the investor in question is a stakeholder of the BOI and there is a binding obligation on the part of the BOI to protect the confidence of their stakeholders. The PA further submitted that projects of these nature obtains approvals after the conducting of the relevant Environmental Impact Assessment tests (EIA). On being inquired on the ground for refusal under the RTI Act, the PA submitted that it would plead commercial confidence in this regard.

The PA further submitted that there was a confidential clause in the contract with regard to item 3 of the request.

The Appellant submitted that he was satisfied with the information provided for items 5 and 6.

Order:

The PA is directed to substantiate its position with regard to the ability to provide information requested under items 1 – 4 of the request. The PA is further directed to appraise the Commission of any confidentiality clause in relation to the requested information and if such clauses so exists, to provide such documentation for the perusal of the commission.

The PA is informed of its ability to redact information amounting to commercial confidence, as pleaded under the RTI Act, in order to disclose information requested by the Appellant

The PA's attention to section 6 of the RTI Act is drawn in this regard;

"Where a request for information is refused on any of the grounds referred to in section 5, access shall nevertheless be given to that part of any record or document which contains any information that is not exempted from being disclosed under that section, and which can reasonably be severed from any part that contains information exempted from being disclosed"

The Appeal is adjourned.

Next date of hearing: 18.06.2019

RTIC Appeal (In-Person Hearing)/791/2018- Order/Minute adopted as part of the formal meeting of the Commission on 18.06.2019

Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure)

Commission Member: Ms.Kishali Pinto-Jayawardena
Commission Member: Mr. S.G. Punchihewa
Commission Member: Dr. Selvy Thiruchandran
Commission Member: Justice Rohini Walgama

Appellant: C Amarasinghe

Notice issued to: Designated Officer, BOI

Appearance/ Represented by:

Appellant - C Amarasinghe

PA - Dulip Samarasinghe – Director (Media)/IO

Order:

Where information in relation to items 1 - 4 are concerned, it is seeming that the confidentiality clause sighted by the PA does not apply to all said items. On the previous occasion the BOI was required to ascertain the nature and extent of the confidentiality clause in question. That remains yet to be informed to the Commission, in particular, details of survey plans as asked for in item 2 cannot be governed by the confidentiality clause, as it is a public document and as such ought to be supplied to the Appellant.

Further, the question whether the BOI has given the company permission to expand the factory is not in our opinion governed by any confidentiality clause. The PA is therefore directed to supply the information asked for by the Appellant, and if not precisely specify the extent to which this confidentiality clause applies.

This Appeal is adjourned for a final date.

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RTIC Appeal (In-Person Hearing)/791/18 - Order adopted as part of the formal meeting of the Commission on 23.07.2019.

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 Member: Mr. S.G. Punchihewa
Commission Member: Dr. Selvy Thiruchandran
Commission Member: Justice Rohini Walgama

Appellant: C Amarasinghe

Notice issued to: Designated Officer, Board of Investment of Sri Lanka

Appearance/ Represented by:

Appellant - C Amarasinghe
PA - Dilip S Samarasinghe, Information Officer - Board of Investment of Sri Lanka

Matters Arising During the Course of the Hearing:

The PA submitted that it is willing to provide some of the information requested by the Appellant and but that it had reservations regarding item No 1 and No 2 in the information request.

The Appellant was unwilling to accept the PA's response and submitted that the BOI had given approval to the Company in question to build a factory in a Government property violating procedural conditions laid out by the Government.

The Commission observed that it appears that release of the information requested warrants a larger public interest.

The PA provided information requested in Items 2, 5 and 6 to the Appellant in the presence of the Commission and submitted that information Item 4, requested by the Appellant will be handed to the Appellant subsequently.

Order:

The Commission directs the PA to provide written submissions within 2 weeks addressing the issue of the precise exception under which it relies on to refuse the information in items 1 and 3

of the information request as aforesaid as the basis for such refusal is not clear along with the justification as per the legal burden placed on the PA under and in terms of Section 32 (4) of the Act that the public interest does not require the release of the said information.

The Appeal is adjourned.

Next date of hearing: 10.09.2019

RTIC Appeal (In-Person Hearing)/791/2018 - Minute adopted as part of the formal meeting of the Commission on 10.09.2019.

Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure).

Chairperson: Mr. Mahinda Gammampila
Commission Member: Ms.Kishali Pinto-Jayawardena
Commission Member: Mr. S.G. Punchihewa
Commission Member: Dr. Selvy Thiruchandran
Commission Member: Justice Rohini Walgama

Director-General: Mr. D. G. M. V. Hapuarachchi

Appellant: C Amarasinghe

Notice issued to: Designated Officer, Board of Investment of Sri Lanka

Appearance/ Represented by:

Appellant - Not present

PA - Not present

Matters Arising During the Course of the Hearing:

Both parties absent.

The Appellant had communicated his inability to attend the hearing due to an injury on his leg by a telephone call on 10.09.2019.

Order:

Due to the absence of both parties, the appeal was adjourned for the next date of hearing.

Next date of hearing: 13.11.2019

Order is conveyed to both parties in terms of Rule 27 (3) of the Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017).

RTIC Appeal (In-Person Hearing)/791/2018 - Minute adopted as part of the formal meeting of the Commission on 13.11.2019.

Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure).

Chairperson: Mr.Mahinda Gammampila
Commission Member: Ms.Kishali Pinto-Jayawardena
Commission Member: Mr. S.G. Punchihewa
Commission Member: Dr. Selvy Thiruchandran
Commission Member: Justice Rohini Walgama

Director-General: Mr. D. G. M. V. Hapuarachchi

Appellant: C Amarasinghe

Notice issued to: Designated Officer, Board of Investment of Sri Lanka

Matters Arising During the Course of the Hearing:

The appeal was re-scheduled due to Presidential elections. Both parties were informed of postponement.

The appeal will be discussed through documentary proceedings.

Next date-03.12.2019

RTIC Appeal (Documentary Proceedings)/791/2018 - Minute adopted as part of the formal meeting of the Commission on 03.12.2019.

Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure).

Chairperson: Mr.Mahinda Gammampila
Commission Member: Ms.Kishali Pinto-Jayawardena
Commission Member: Dr. Selvy Thiruchandran
Commission Member: Justice Rohini Walgama

Director-General: Mr. D. G. M. V. Hapuarachchi
Appellant: C Amarasinghe
Notice issued to: Designated Officer, Board of Investment of Sri Lanka

Matters Arising During the Course of the Hearing:

Further to the RTIC order dated 23.07.2019, the PA to provided written submissions addressing the precise exception which it relies upon to refuse the information in items 1 and 3 of the information request. By written submissions dated 10.09.2019, the PA stated that the investment agreement between the Board of Investment and Melwire Rolling (Private) Limited, on or about 25 March 2004, encompasses a confidentiality clause which contains the following:

“The Board its agents and servants shall maintain the utmost secrecy in respect of all information and data furnished from time to time by the Enterprise to the Board in its application, reports and correspondence for the purpose of the business of the Enterprise”

Accordingly, the PA stated that it is relying upon Section 5(1)(a) on the basis that the information was supplied in confidence and as such the BOI is unable to disclose items 1 and 3 of the information request, as it is bound by the confidentiality clause under the signed agreement.

The Appellant by written submissions dated 18.11.2019 stated that the establishment of the Melwire factory was illegal as there was non-adherence to the requisite EIA procedure set out in Gazette Extraordinary 772/22 of 24.08.1993 (Regulations relating to the establishment of projects). The Appellant referred to an inquiry held before the Human Rights Commission of Sri Lanka (HRCSL) wherein the same issue was looked into and the BOI was named as a Respondent. According to the Appellant, the BOI has failed to carry out the recommendations of the HRCSL. The Appellant further alleged that there are financial irregularities and falsification of documents submitted by the Melwire factory to relevant government authorities. For the aforementioned reasons, the Appellant submitted that this matter is one of public interest which would require full disclosure of information from the PA.

Order

The Commission overrules the PA’s reliance of the exemption stipulated in Section 5(1)(a) to state that the confidentiality clause in the agreement bars disclosure under the Right to Information Act No.12 of 2016. Section 5(1)(a) is reproduced below:

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

(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;

Attention of the PA is drawn to the fact that Section 5(1)(a) is applicable in the instance where 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.’ However, the information request by the Appellant in his information request does not relate to personal information. The remaining items of information requested are as follows:

No.1: Copy of the BOI approval letter encompassing the terms and conditions applicable to his industry

No.3: Has BOI given this Company permission to expand the factory area, if so, when and for what extra production capacity?

While the PA in its written submission dated 10.09.2019 stated the exemption it relies upon to deny information ‘where the information has been supplied in confidence to the public authority concerned by a third party and the third party does not consent to its disclosure’ the Commission notes that the cited exception of Section 5(1)(a) is unfounded.

In relation to the consent of the third party to the disclosure of the information under and in terms of Section 29 of the Act, the attention of the PA is drawn to the relevant sections of the Act which are reproduced below.

Section 5 (1) (i) states as follows;

subject to the provisions of section 29(2)(c), the information has been supplied in confidence to the public authority concerned by a third party and the third party does not consent to its disclosure;

Section 29 states that,

(1) Where a request made to an information officer by any citizen to disclose information which relates to, or has been supplied by a third party and such information has been

treated as confidential at the time the information was supplied, the information officer shall, within one week of the receipt of such request, invite such third party by notice issued in writing, to make representation for or against such disclosure, within seven days of the receipt of the notice.

(2) An information officer shall be required in making his decision on any request made for the disclosure of information which relates to or has been supplied by a third party, to take into consideration the representations made by such third party under subsection (1), and shall, where the third party

(a) does not respond to the notice, disclose information requested for;

(b) responds to the notice and agrees to the disclosure of the information requested for, disclose such information;

(c) responds to the notice and refuses to the disclosure of the information requested for, deny access to the information requested for

Provided however, the Commission may on the application made in that behalf by the citizen making the request, direct the disclosure of the information in question notwithstanding any objections raised by such third party against its disclosure, where the release of the information concerned demonstrably outweighs the private interest in non disclosure.

In view of Section 29(1) of the RTI Act, the confidentiality clause would strictly be applicable to an instance where information was provided by a third party and it was treated as confidential at the time the information was supplied to the PA. As such, Section 29 (1) is not automatically invoked when a confidentiality clause is in issue, as was explained in *Airline Pilots Guild v Sri Lankan Airlines* (RTIC Appeal (In-Person)/99/2017, Order delivered on 12.06.2018) where the Order of this Commission was that confidentiality clauses in concluded agreements in particular, could not be accepted, *per se*, as a basis to deny information.

Accordingly, the PA is directed to file written submissions citing and demonstrating how the exemptions cited are applicable and that sufficient public interest does not lie warranting the disclosure of information on or before the 14.01.2020. The PA is also directed to provide the written proof of its compliance with Section 29 of the RTI Act to invite the relevant third party in writing to make representation for or against such disclosure.

The Appellant may respond to the same on or before the 21.01.2020.

Next date-28-01-2020
