

**Legal Commentaries to Selected
Orders of the Right to Information
Commission of Sri Lanka**

2019 - 2021

December 2021

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Acknowledgements

The trilingual (English, Sinhala and Tamil) publication, *'Legal Commentaries to Selected Orders of the Right to Information Commission of Sri Lanka, 2019-2021'* is a companion Volume to 'Selected Orders of the Right to Information Commission of Sri Lanka, 2017-2018' (published, February 2019).

Both volumes reflect key decisions handed down during the full period of the RTI Commission in its first term (2016-2021). The current Volume, which contains analyses of selected decisions is, however, independently published, compiled and edited after the first term of the RTI Commission which ended in September 2021.

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The law and the facts are stated as at December 5th 2021.

List of Abbreviations

CGO	-	Comptroller General's Office
CIABOC	-	Commission to Investigate Allegations of Bribery or Corruption
COPE	-	Committee on Public Enterprises
CT	-	Consultation Task Force on Reconciliation Mechanisms
DALL	-	Declaration of Assets and Liabilities Law
DHQC	-	Defence Headquarters Complex
DMC	-	Disaster Management Centre
DO	-	Designated Officer
EIA	-	Environmental Impact Assessment
HRC	-	Human Rights Commission
ICTA	-	Information and Communication Technology Agency
IO	-	Information Officer
IR	-	Information Requestor
IRA	-	Inland Revenue Act
LKR	-	Sri Lankan Rupee
MP	-	Member of Parliament
NBRO	-	National Building Research Organization

NBT	-	Nation Building Tax
NGO	-	Non-Governmental Organization
NOC	-	National Olympic Committee
OMP	-	Office on Missing Persons
PA	-	Public Authority
RTI	-	Right to Information
RTIC	-	Right to Information Commission
SC (FR)	-	Supreme Court (Fundamental Rights) Application
SCM	-	Supreme Court Minutes
SEIA	-	Supplementary Environmental Impact Assessment
SD	-	Special Determination
SLLRDC	-	Sri Lanka Land Reclamation and Development Corporation
SLR	-	Sri Lanka Law Reports
TISL	-	Transparency International Sri Lanka
UDA	-	Urban Development Authority
UGC	-	University Grants Commission
UNHRC	-	United Nations Human Rights Council
VAT	-	Value-added Tax

Introductory Note

The constitutional Right to Information in Article 14A of the 19th Amendment (2015) as retained in the 20th Amendment to the Constitution of Sri Lanka (2020) together with Sri Lanka's Right to Information Act, No. 12 of 2016, (the RTI Act), the Rules of the Right to Information Commission ('RTI Commission' or 'the Commission') and the RTI Regulations,¹ operationalized on 3rd February 2017, comprise the country's RTI regime.

During 2017-2021, a substantive body of normative decisions advocating best practice standards was developed by the RTI Commission in its first term (2016-2021)², as part of this regime. Not only the State but also non-state entities were brought into the information regime within the limits prescribed by the RTI Act. In terms of RTI imperatives, non-state, private entities, as much as state entities are required to be transparent about their internal decision making and expenditure of funds, especially where the same has been made from the public purse. Such information had hitherto been inaccessible where private entities were concerned due to the "corporate veil," which the RTI has been able to lift, with some success, in the manner sampled in this analysis. Section 5 (4) of the Act has been instrumental in this process, which mandates that information be disclosed where the public interest in such disclosure outweighs any resultant harm.

This publication compiles 23 Orders handed down by the RTI Commission between 2019 and 2021 to complement an earlier publication

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1. Gazette No 2004/66 (3rd February 2017) <http://www.rticommission.lk/web/images/pdf/rulescorrections-rti-2006-43_E.pdf>
 2. The RTI Commission in its first term (2016-2021) comprised Chair Mahinda Gammampila and RTI Commissioners Kishali Pinto - Jayawardena, Justice Rohini Walgama, S. G. Punchihewa and Dr. Selvy Thiruchandran.

containing extracts of 24 Orders with keywords and an Index (Selected Orders of the Right to Information Commission of Sri Lanka, 2017-2018, published February 2019). In this instant effort, extracts of the Interim and Final Orders are followed by a Legal Commentary. The extracts of the Order have been selected along the lines of relevance to the core issues. The Legal Commentaries identify the substantive and procedural issues that arise for determination, analyse the determinations so made together with the thinking of the Commission and concludes with reflections on the ramifications of each Order.

While the RTI Commission handed down a considerable number of Orders during its first term, approximating close to 4,500 substantively deliberated Orders as reflected in its public statements, the Orders selected for this compilation reflect the public interest or matters of importance to public or corporate governance. Orders have also been selected on the basis of the significance of the principles emanating from the determination of the Commission. Some of these precepts clarify conceptual and statutory dilemmas in the RTI regime. Yet other determinations reflect precedent-setting standards of interpretation of provisions in the RTI Act and Regulations.

In selecting Orders, the compilers have also sought to provide the readers with an idea of the range of information routinely sought from the Commission. One Order relates to the draft of a transitional justice-related law, while another is about digitization costs and salaries paid out of public funds in a bank. The shortlisted members of a sports team, the internal procedures of the Human Rights Commission, Environmental Assessment Reports of an investment project, and asset declarations, qualifications and criminal records of Parliamentarians all reflect the broad spectrum of information which the citizens look to the RTI mechanism to obtain.

The Legal Commentaries seek to structure, elucidate and analyse the Order preceding each Commentary, without replicating the contents

of the Order or the rationale of the Commission in deciding matters. The Commentaries also provide comparative perspectives from the judiciary of Sri Lanka, or RTI oversight authorities from different jurisdictions.

As discussed in the Legal Commentaries, several other aspects of Sri Lanka's emerging RTI regime are of particular importance.

For example, the RTI Commission's power to inspect any information³ held by a Public Authority in the course of appeal hearings before it has been vigorously used to determine if indeed, restraints on the release of information as argued by the State, are justified. This power of inspection has led to the release of information in appeals where the State has argued that information must be withheld as it relates to national security and law and order whereas the issue in question has been corruption in procurements. These cases concern far from routine, administrative or mundane releases of information and include decisions of 'high State' including Cabinet reports. Release of statistical data not impacting on the defence of the State has been an important part of this process.

The Commission's use of the public interest disclosure clause has been particularly pronounced where the public purse is concerned or when fundamental matters of governance and state accountability are contested.

Similarly, the Commission has used the RTI Act to supply deficiencies in the governance system; for example, its decisions that draft legislation should be released for public scrutiny in advance before the Bills are gazetted. This is of tremendous import in a legal system which, unlike in India and the United States, does not allow for judicial review of unconstitutional laws and in addition, does not allow pre-enactment challenges to the Bills unless lodged in the Supreme Court within a limited period of the Bill being placed on the Order Paper of Parliament. This has been a major constraint in objecting to proposed laws that are unconstitutional. Thus, in enabling Bills to be released under the RTI

3. RTI Act, Section 15(c).

Act on the basis that the citizenry must be properly apprised of future laws under which they may be governed, the RTI regime has enabled the transparency of the law-making process.

However, in so proceeding to bring about the accountability of Public Authorities, it is clear that Sri Lanka's RTI regime has not given way to a 'free for all' disclosure policy. Particularly in matters of individual privacy, an effort has been made to balance competing rights where the public interest does not override the harm to privacy that can ensue from disclosure. This is seen in two widely known information requests regarding disclosure of the names of prisoners on death row which were heard on appeal by the Commission as a matter of urgent threat to life and liberty. In these cases, information relating to statistics, regulations, policies and other decisions were ordered to be released along with those names of prisoners on death row who had no objection to their identities becoming public. The names of prisoners who declined to give permission were withheld. As the relevant Legal Commentary to this Order discusses, this may seem a conservative position to take, given that such identities are discernible through an examination of the relevant court records but nevertheless, that caution was deemed to be important by the Commission in the context of safeguarding privacy rights of incarcerated persons.

Further, the concept of 'information which can be legitimately released' as embodied in these decisions, has underpinned information disclosure in a variety of contexts including instances where citizens have questioned the manner in which public money is expended by state banks. Several propositions emanating from the Orders include the following:

Definitions

- Definition of what constitutes 'information' in terms of Section 43 of the RTI Act;

- Definition of a 'Public Authority' under Section 43 of the RTI Act;
- Definition and application of the scope of the burden of proof (Section 32 (4)) and the public interest override (Section 5 (4));
- Definition and treatment of what constitutes 'confidential information' and who a 'Third-Party' is in the context of Section 5 (1) (i) read with Section 29 of the RTI Act;

Application of the RTI Act

- Extension of the freedom of expression, information and franchise to include within its ambit the right to know the qualifications, criminal charges and/or convictions of elected representatives;
- Public importance of the disclosure of Cabinet decisions in terms of Section 5 (1) (m), Cabinet Memoranda and observations made on a Cabinet Memorandum;
- Information determined as 'legitimate information' that ought to be released in view of the spirit and letter of the RTI Act;
- Duty to give reasons for decisions, particularly in the context of Sections 28 (a), 31 (3) and 35 of the RTI Act;
- In what circumstances can a plea of "excusable delay on the part of the Appellant" as against an objection raised by the PA to the consideration and hearing of an appeal by the Commission outside the time limit imposed by the RTI Act be entertained?;
- Procedures in dealing with appeals relating to life and liberty in terms of Section 25 (3);
- Limitations and challenges in the Commission's response to threats to the lives of information requestors and the duties of state officers to assist information officers under Section 39 (2);
- Exercise of the Commission's statutory, supervisory and enforcement powers under Section 15 and the effect of non-compliance with an Order of the Commission under Section 39;

Concepts, Principles and Precepts

- Similarities of the approach followed by the Commission in regard to the doctrine of severability (Section 6) in line with the judicial approach in the application for Orders in the nature of writs (administrative law);
- The limits of the principle of *delegata potestas non potest delegari* (which, in constitutional and administrative law means that "no delegated powers can be further delegated") as emanating impliedly from the RTI Act;
- Invocation of the principle of proactive disclosure to disclose details of salary scales of employees in pursuance of Regulation 20 of the RTI Commission Rules of 2017 (Gazette No 2004/66 published on 03.02.2017);
- *Locus standi* as measured against the doctrine of reasonable classification and intelligible differentiation;

Implementation and Contextual Issues

- The manner in which the fundamental right to information decreed under the 19th Amendment as continued in the 20th Amendment to the Constitution gives teeth to the RTI Commission under Act; No. 12 of 2016, in the context of the Supreme Court commenting that the said constitutional right has afforded the Commission, the status of a quasi-constitutional body;
- Release of institutional information which must be made available as a matter of public record. The decisions discussed provide some indication as to what may constitute such information, for example, internal decisions and institutional procedures to be followed in acting on public complaints, or expenditures incurred from the public purse in digitizing the operations of a public bank.
- Proposed amendment of the RTI Act;

- Dealing with ‘conflicts of interest’ in the context of the RTI Act;
- Encouraging a culture of compromise rather than confrontation in information disclosure;
- The right to information being used to fulfil and achieve other associated rights such as the right to vote, consumer rights etc.;

By nature and mandate, the Commission’s role has been one of favouring the disclosure of information. In assessing the claims of confidentiality or secrecy made by Public Authorities, the Commission is duty-bound by statute to assess the veracity of such claims, and weigh them against a constitutionally entrenched Fundamental Right of the Appellants. The RTI Commission in Sri Lanka plays a role quite distinct to ‘Information and Privacy’ Commissions or Commissioners in other jurisdictions. The mandate of the Commission, as understood in terms of the Statute establishing it, is to further the objects of ‘foster(ing) a culture of transparency and accountability.’ While it does weigh competing claims against disclosure in arriving at a decision, its role is to be understood within this pro-disclosure framework. Meanwhile, in procedural aspects, the approach adopted under the RTI Act in permitting additional information to be released at the appeal stage, provided that the Public Authority does not object to the same, is perceptibly different from the technical approach of traditional courts.

A deliberative process has been taken which allows time for a compromise to evolve between the parties rather than a strict laying down of the law, which would then result in decisions being or challenged in the Court of Appeal under Section 34 of the RTI Act. This avoids confrontation between the information requestors and Public Authorities, creating a mediatory or arbitral culture.

This publication looks at some of the significant patterns in the use of RTI in that regard during the past five years. Its contents were finalised between 1st October – 5th December 2021.

Compilers

Selected Orders of the RTI Commission of Sri Lanka (2019-2021)

December 2021

T. Nadesan v Office of the Cabinet of Ministers

‘Even in the event that the exemptions are found to apply... the information must be disclosed upon an assessment of the public interest in disclosure and based on whether the private interest in disclosure is outweighed by the public interest in disclosure in terms of Section 5 (4) RTI Act... Cabinet Decisions should, in any event, be in the public domain.’

Decision: The Appellant requested true copies of the full report of the Committee appointed in terms of Cabinet Decision of 2015 to investigate and make recommendations on the matters related to the ‘consultancy firms and related payments’ of the project on the construction of the Defence Headquarters Complex (DHQC) in Akuregoda and true copies of the said Cabinet Decision dated 05.08.2015. The IO denied the information on grounds of national security, citing Section 5 (1) (b) (i) of the RTI Act. On appeal, the DO refused to entertain the appeal citing Section 29 of the Act; thereafter it was forwarded to the Secretary, Ministry of Defence for the Ministry’s consent. The Ministry of Defence refused consent, citing Sections 5 (1) (h) and 5 (1) (i). As such, the Appellant preferred an appeal to the Commission. At the appeal hearing, the Commission directed the PA to release the requested information on the basis that the subject matter concerned alleged irregularities and corruption in the construction of a key state building with no relevance to national security. As a follow-up to the Order however, and on a motion by the Counsel for the Attorney General’s Department representing the PA, part of the annexures to the reports which disclosed the plans as well as means of access to the Defence Headquarters and the troop strength that could be accommodated thereto were assessed by the Commission as affecting national security concerns in terms of Section

5 (1)(b)(i) and were redacted from the general release of the information under Section 6 of the RTI Act.

Keywords: *Article 14 A of the Constitution/Articles 42 (1) & (2), 50 (1) & (2) of the Constitution/Confidential information given by a Third-Party (Section 5 (1) (i) read with proviso to Section 29 (2) (c)) /Cabinet Decisions/ Disjunctive nature of language/Information in 'possession, custody, or control' (Section 3 (1))/ Interpretations (Section 43)/National Security (Section 5 (1) (b) (i))/ Pending investigation (Section 5 (1) (h) (i)and (ii)/Public Authority permitted to raise new exemptions during the pendency of an appeal / Commission's powers of inspection of information denied by PA (Section 15(c))/RTI Regulation 19 (reuse of information)/Source of origin of a Cabinet sub-committee report*

Brief Factual Background¹

By information request dated 12.10.2017, the Appellant requested true copies of

- I. The full report of the Committee appointed in terms of Cabinet Decision dated 05.08.2015 (No. 15/1131/603/045) to investigate and make recommendations on the matters related to the 'consultancy firms and related payments' of the project on the construction of the Defence Headquarters Complex (DHQC) in Akuregoda, together with all annexes, appendixes and attachments thereto.
- II. The Cabinet Decision dated 05.08.2015 (No. 15/1131/603/045) to investigate and make recommendations on the matters related to the

1. RTIC Appeal 216/2018 heard as part of formal meetings of the Commission on 17.07.2018, 04.09.2018, 12.02.2019 and 02.04.2019. Heard in tandem with RTIC Appeal 217/2018, *Thirukumar Nadesan v Ministry of Defence* on substantially the same matters in appeal; *Appearances for the parties:* Mr. T. Nadesan, Dilumi de Alwis, AAL, and Dilini Jayasuriya AAL, for the Appellant; Suren Gnanaraj, SC for the Attorney General, Mayuri Perera, Senior Assistant Secretary Office of the Cabinet of Ministers, M. S. Wickramasinghe Legal Advisor, Sriyanthi Dissanayaka Assistant Secretary, R.P.R. Rajapaksa Additional Secretary, Brigadier Upali Weerasinghe, A Jayasekera Legal Officer for the PAs (Office of the Cabinet of Ministers and Ministry of Defence).

See, <https://www.rticcommission.lk/web/images/pdf/rticappeal-216-2018/rtic-216-2018-en-11042019.pdf> & <https://rticcommission.lk/web/images/pdf/rticappeal-217-2018/t-nadesan-v-ministry-of-defence-en-12082018.pdf>

‘consultancy firms and related payments’ of the project on the construction of the DHQC in Akuregoda.

Written Submissions filed on behalf of the Parties

The PA:

The PA filed Written Submissions on 30.05.2018, stating that the Appellant is appealing the decision of the Cabinet of Ministers but that the Cabinet does not fall within the definition of a PA in terms of Section 43 of the RTI Act, resulting in the Appeal being procedurally flawed. The PA submitted that in terms of Article 50 (2) to the Constitution, the Secretary to the Cabinet of Ministers has charge of the Office of the Cabinet of Ministers and as such, the relevant PA is the Office of the Cabinet of Ministers (emphasis ours).

Further, the PA submitted that,

The Information Officer, having observed that the requested documents were interconnected, interdependent and contained vital classified information pertinent to the establishment and structure of the Defence Headquarters at Akuregoda and being cognizant that under Regulation 19, the Appellant can copy, publish, translate, adapt, distribute or otherwise reuse in any mode or format the said classified information, refrained from granting access to the same, thereby preventing a potential threat to the defence of the State and national security, that may have arisen through the said information being released to the public domain and eventually being accessed by undesirable elements that pose a threat to the National Security.

Regulation 19 which concerns the ‘Use and Reuse of Information’ states that:

1. *Any information disclosed by a PA under this Act is subject to a royalty-free, perpetual, nonexclusive license to reuse the information.*

For purposes of clause 1, reuse includes copying, publishing, translating, adapting, distributing or otherwise using in any medium, mode or format for any lawful purpose.

The DO had stated that subsequent to the appeal being submitted to him, 'being cognisant of the provisions of Section 29(1), as well as the provisions of Section 5(1)(h)(i)', he 'inquired from the IO as to whether he has, in his capacity as the IO, written to the Secretary to the Ministry of Defence in compliance with the provisions of Section 29(1).' The DO submitted that the IO had informed him that he 'had thought that restrictions imposed in Section 5 (1) (b) (i) would preclude him from providing the requested information.' However, the DO submitted that he 'thought that it would be best to obtain the views of the Secretary to the Ministry of Defence since the Note to the Cabinet and the Official Committee Report are in his custody and control, and inquire regarding the feasibility of the disclosure of its contents as sought by the Appellant.'

The DO 'being fully aware of the fact that in terms of Section 29, it is the IO who is mandated to act under Section 29, invited the Third-Party who supplied the information, which is of a very confidential nature, to make representation for or against such disclosure,' by letter dated 30.10.2017. The Ministry of Defence by letter dated 23.11.2017 refused to consent to the disclosure citing Section 5 (1) (h) (i) of the Act 'as the material relating to this issue has been forwarded to the Hon. Attorney General for advice and under investigation for apportioning accountability in the conduct of those responsible...'

In paragraph 16 of his Written Submissions, the DO noted, that the Appellant is labouring 'under the misapprehension that since the Cabinet of Ministers is the author of a Cabinet decision, the Cabinet would also be the author of any document that is submitted by a Third-Party under its direction.' The DO thereafter set out to distinguish between 'a Cabinet Memorandum/Note to the Cabinet, a Report by a Cabinet Appointed Sub-Committee and a Cabinet Decision... which are authored by three different persons.'

Thus, it was maintained that a Cabinet Memorandum should be prepared by the Secretary to the Ministry on the instructions of the Minister and that ‘even though the relevant Minister is responsible for the proposals in the Memorandum, the Secretary to the Ministry should be responsible for the accuracy of the facts contained therein. As such, where the covering letter sent to the Cabinet Office with the Cabinet Memorandum is not signed by the Secretary to the Ministry, it should be counter-signed by a Senior Officer of the Ministry.’ Accordingly, ‘the source of origin of the Note to the Cabinet, on which the decision of the Cabinet of Ministers dated 05th August 2015, referred by the Appellant was the Ministry of Defence.’

With regard to the ‘source of origin of a Committee Report’ of a Sub-Committee appointed by the Cabinet, the PA stated that the source would be ‘the members of that particular Sub-Committee, and not the Cabinet of Ministers.’ It was further stated in regard to the matter at hand, that the Secretary had chaired the Sub-Committee to the Ministry of Defence, and this Sub-Committee had authored the Report. The PA thus contended that the report, ‘having been officially received at this office as a confidential document, is in its “possession” and “custody.”

However, by virtue of originating from, and being authored by, a “Third-Party,” the PA claimed that the document was not under the “control” of its office. The PA submitted that it ‘cannot release such a document submitted by a “Third-Party” in response to an RTI request, without first ascertaining the consent of the said “Third-Party” who has authored the said document and who are the “rights holders” of the said document.’ The PA, therefore, strongly pursued the line that as the report originated and was authored by the Ministry of Defence as opposed to the PA, the report is not under the “control” of the PA. Rather, the Ministry of Defence is the proper “rights holder” of the said document.

With regard to the decision of the Cabinet of Ministers, the DO submitted that the Cabinet of Ministers arrives at a decision ‘based on the contents of such a Report.’ Sections 5 (1) (b) (i), 5 (1) (h) (i) and 5 (1) (i) were relied on to deny the information on the basis that the information

in question ‘in its entirety relates to the defence of the State’ and as these were ‘confidential documents,’ the same cannot be disclosed ‘in part or full, in the interests of preventing a potential threat to national security.’ The DO further submitted that the Appellant’s right to appeal ‘flows from his right under Article 14A(1) of the Constitution and that the right of access to information is necessarily subject to the restrictions in Article 14A(2) of the Constitution.’

The DO reiterated that ‘the grounds put forward by the Appellant are not substantive enough to outweigh the threat to the defence of the State and National Security’ and in fact ‘non-disclosure would be in the public interest.’

The Appellant:

Filing Written Submissions on 10.07.2017, the Appellant (in paragraph 5), addressing the issue of procedural irregularity alleged by the PA, submitted that the Office of the Cabinet of Ministers is merely the administrative arm which is responsible for supporting the Cabinet of Ministers. The Appellant accordingly noted that the PA is ‘under a misconception that it is the Office of the Cabinet of Ministers and not the Cabinet of Ministers that is established under the Constitution which is *ex-facie* erroneous in law and fact.’

It was contended that since a Note to the Cabinet is not requested, the PA’s extensive submissions on the Note to the Cabinet/Cabinet Memoranda is unnecessary given that the information request does not concern any Note to the Cabinet but a Cabinet Decision itself. The Appellant further stated that a Cabinet Decision cannot fall within the ambit of Section 5 (1) (i) as the sole author of a Cabinet Decision is the Cabinet itself and as such, is not information supplied in confidence by a Third-Party.

The Appellant further pointed out that the PA in paragraph 16 (ii) of its Written Submissions had argued that the source of the requested report is the members of the Sub-Committee appointed for a said purpose,

which in this instance was chaired by the Secretary to the Ministry of Defence, in contradiction to its claim that the report was supplied by the Ministry of Defence itself. The Appellant contended that the mere fact of the Secretary to the Ministry chairing a Sub-Committee appointed by the Cabinet of Ministers does not amount to the report originating from the Ministry of Defence and that further, it is immaterial as to who the author of the document is. In any event, with respect to a Cabinet Memorandum, it is a document tabled by the Minister at a meeting of the Cabinet of Ministers which then becomes a part of the record of the Cabinet of Ministers and does not constitute an item of information supplied in confidence by a Third-Party. Accordingly, if a citizen is to request a Cabinet Memorandum, the request would be lodged with the Cabinet of Ministers and not with the line Ministry which prepared the Memorandum.

The Appellant said further that in any event, the PA is very clear that the information requested is in its custody which ‘means “to be in charge”, or “have guardianship or care” of a thing.’ The Cabinet had appointed, mandated and directed the Committee, ‘in the same manner that an officer or employee or external consultant or advisor or auditor or an entity may carry out an investigation or inquiry and submit a report to the said entity.’

Interim Order²

Article 42(1) of the Constitution states that ‘there shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic,’ which in terms of Article 42 (2) ‘shall be collectively responsible and answerable to Parliament.’ Section 43 (1) of the RTI Act states that *‘anybody or office created or established by or under the Constitution, any written law, other than the Companies Act, No. 7 of 2007, except to the extent specified in paragraph (e), or a statute of a*

2. Order delivered on 17.07.2018.

Provincial Council, is deemed to be a PA. Therefore, there can be no doubt that the Cabinet of Ministers falls within the ambit of the Act.

Articles 50 (1) and 50 (2) of the Constitution states that

- (1) *There shall be a Secretary to the Cabinet of Ministers who shall be appointed by the President.*
- (2) *The Secretary shall, subject to the direction of the President, have charge of the office of the Cabinet of Ministers, and shall discharge and perform such other functions and duties as may be assigned to him by the President or the Cabinet of Ministers.*

In this instance, Section 5 (1) (i) interlinked to Section 29 of the Act has been cited by the named PA as one of the exemptions relied on for refusing the information. The RTI Act stipulates a time period within which a Third-Party must respond. Section 29 (1) states that the PA is required to direct the Third-Party to respond ‘within seven days of the receipt of the notice.’

Although the PA has referred to the letter by the Ministry of Defence in this context as amounting to a refusal by a Third-Party, this letter is not before us. Accordingly, the PA is directed to produce the letter by the PA to the Ministry of Defence noticing the Ministry to make representation for or against disclosure, as well as the response by the Ministry of Defence (the Third-Party) refusing to consent to the said disclosure.

The PA contends that since the report has been authored by the Sub-Committee chaired by the Secretary to the Ministry of Defence although it is in the possession and custody of the PA it is not in its control. It is noted that Section 3 (1) which states that ‘Subject to the provisions of Section 5 of this Act, every citizen shall have a right of access to information which is in the possession, custody or control of a Public Authority,’ does not envisage that all aspects i.e., possession, custody and control be fulfilled for a citizen to have right to access to information, and for the corresponding obligation on the part of the PA to provide the information, to arise. It is merely sufficient that the information is in the possession, custody or

(emphasis ours) in the control of the PA for the right to access to arise under Section 3 (1) of the Act.

Public Interest

Section 5 (4) states that information may be released ‘where the public interest in disclosing the information outweighs the harm that would result from its disclosure.’ The *proviso* to Section 29 (2) (c) states that the Commission may release the information ‘where the release of the information concerned demonstrably outweighs the private interest in non-disclosure.’ Thus, even in the event that the exemptions are found to apply, the information must be disclosed in any instance upon an assessment of the public interest in disclosure and based on whether the private harm in disclosure is outweighed by the public interest in disclosure in terms of Section 5 (4) of the RTI Act.

At the last hearing, the PA was directed to show/justify how the information requested falls within the exemptions relied on by the PA. Counsel appearing for the Attorney General representing both PAs submitted that one of the exemptions relied on in the instant Appeal was Section 5 (1) (h) (i) which exempts information where ‘the disclosure of such information would cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders.’³ Counsel further stated that although the Cabinet had written to the Ministry of Defence because the decision concerned the Ministry of Defence, there was further concern that the information would impact national security as envisaged by Section 5 (1) (b) and causes prejudice to the prosecution of offenders as envisaged by Section 5 (1) (h) (i) of the Act.

It was submitted that both items of information requested from the Office of the Cabinet of Ministers consist of sensitive information in relation to the Defence Headquarters under construction which include pictorial diagrams, the disclosure of which would cause serious prejudice

3. At the hearing before the Commission on 11.12.2018.

to National Security. Thus, the contents of the report and the Cabinet Decision requested are much broader than what the Appellant describes, and the information may be provided for the perusal of the Commission in order to substantiate this contention.

With respect to the Third-Party exemption claimed, it was stated that since the Ministry of Defence has refused consent under and in terms of Section 29 (2) (c), the IO is mandatorily precluded from providing access to the information and it can thus be inferred that the DO is necessarily required to act in the same manner. It is only the Commission that can thereafter decide otherwise.

Upon being asked by the Commission as to whether the Sub-Committee was not commissioned by the Cabinet of Ministers, with the result that the information would effectively be in the 'possession, custody or control' (Section 3 (1)) of the Office of the Cabinet of Ministers, Counsel for the PA responded that the report flows from a series of Cabinet Decisions and what is being requested is just one of such decisions which concern the Tri-forces and effectively impact the national security of the country.

The Commission noted that the report too was not a general report but rather prepared in response to the Cabinet Decision on a specific issue by a committee appointed by the Cabinet and the two items of information requested are necessarily interconnected. Counsel for the PA noted that nevertheless, this relates to a Third-Party as the Defence Headquarters and all related activities are spearheaded by the Ministry of Defence and it is not in the Ministry's interest to make the information contained in the report public especially in view of the fact that it includes plans, diagrams and is a pictorially detailed report. Reliance on Section 5 (1) (i) is particularly untenable in relation to the item of information concerning the Cabinet Decision.

Responding to the submissions on behalf of the PA, Counsel for the Appellant stated that if there was sensitive information, the PA had not claimed the appropriate exemption by citing Section 5 (1) (h) (i) and 5

(1) (i) given that reliance on Section 5 (1) (b) was abandoned at the initial stages by the PA. The Commission pointed out that the practice adopted by it at the stage of appeal was to allow PAs to raise new exemptions during the pendency of the appeal and in this instance, it was in the context of the PA's insistence that the report contains diagrams and other sensitive details in relation to the Defence Headquarters. The Appellant submitted that the Commission may call for the report and sever such sensitive information, as what is required by the Appellant are details in relation to certain payments made which in any event should pass through the Auditor-General for audit purposes annually. It was further submitted that any pictorial diagrams or other material which impacts national security are not required.

Reverting to the denial of the Cabinet Decision itself, Counsel for the PA submitted that the two items of information cannot be delinked and that the decision itself consists of sensitive information. The Commission was of the view that Cabinet Decisions should, in any event, be in the public domain. The fact that the decision has already been published on the website makes the submissions of the PA even more untenable.

Interim Order⁴

The PA is directed to submit the full report of the Committee appointed in terms of Cabinet Decision dated 05.08.2015 (No. 15/1131/603/045) to investigate and make recommendations on the matters related to the 'consultancy firms and related payments' of the project on the construction of the DHQC in Akuregoda, together with all annexes, appendixes and attachments thereto and the Cabinet Decision dated 05.08.2015 (No. 15/1131/603/045) to investigate and make recommendations on the matters related to the 'consultancy firms and related payments' of the project on the construction of the DHQC in Akuregoda under confidential cover

4. Order delivered on 11.12.2018.

for the perusal of the Commission on or before 29.01.2019 in order to assess whether the information can be severed and provided...

Interim Order⁵

... Counsel for the Attorney General's Department representing the PA apprised the Commission that, by Cabinet decision dated 17.02.2019, the information (namely the report in issue) had been released under confidential cover to the Commission.⁶ The official copy of the report of the Committee appointed in terms of Cabinet Decision dated 05.08.2015 (No. 15/1131/603/045) to investigate and make recommendations on the matters related to the 'consultancy firms and related payments' of the project on the construction of the DHQC in Akuregoda, sent under confidential cover by the Office of the Cabinet to this Commission, is filed of record.

An unofficial copy of the said report is in the public domain and news clippings regarding the same have already been handed over to the Commission by the Appellant in previous proceedings of this Appeal. Both parties agree to the said official report now under confidential cover being perused by this Commission for the purpose of checking if its contents correspond to the substance of the unofficial report in the public domain consequent to which a notification to that effect will be provided to both parties. It stands to reason that the release of information already in the public domain is of stronger force by that very fact. If there are segments that do not correspond, these will be assessed for release or not as against the exemptions provided for in Section 5(1) of the Act and the parties to this Appeal will be required to provide arguments for and against the same...

...By Cabinet Paper No 19/0547/101/029 and Memorandum dated 12.02.2019 by the President on 'Request for information including a Committee Report which contains plans pertaining to the Akuregoda

5. Order delivered on 26.02.2019.

6. At the hearing before the Commission on 26.02.2019.

Defence Headquarters under the RTI Act, the President sought the advice of the Cabinet of Ministers as to the following⁷ (*Vide Paragraph 7*);

- (i) *Regarding the release of the information relating to the information requested by the Appellant, pertaining to the consultancy services provided for the Akuregoda Defence Headquarters Complex, with the said plans to the RTI Commission; and*
- (ii) *As to whether the instructions given by the Cabinet of Ministers on 2017.03.28, treating the Office of the Cabinet of Ministers as the 'Public Authority', need to be reconsidered.*

The said Memorandum, while dealing with the context of the said information request, had noted that an Order had been made by the RTI Commission treating the Cabinet of Ministers as the PA. It was also pointed out that the Attorney General had stated that 'there is no legal impediment for the Secretary to the Cabinet of Ministers to release the said information to the RTI Commission' (*Vide Paragraph 6*).

Accordingly, by decision dated 12.02.2019, the Cabinet of Ministers decided to request the Ministry of Justice & Prison Reforms, functioning as the Chairman of the Cabinet Sub-Committee on Legislation:

- (I) To take up the matters of Paragraph 7 of the above Memorandum, at a meeting of the Cabinet Sub-Committee on Legislation to be summoned early with the participation of relevant authorities; and
- (II) To submit its recommendations of the Cabinet Sub-Committee to the Cabinet for consideration.

Having met in Parliament on 21.02. 2019, the Cabinet Sub-Committee on Legislation gave due consideration to the points in (I) above and decided, as requested in (II) above;

to recommend to the Cabinet to comply with the Order of the RTI Commission dated 11.12.2018 while requesting that the RTI Commission

7 At the hearing before the Commission on 02.04.2019.

obtain the views of the Ministry of Defence under whose purview the subject of Defence has been assigned, as to whether the disclosure of such information would undermine the Defence of the State or its territorial integrity or national security.

The said Cabinet Sub-Committee on Legislation gave due consideration to the following in arriving at its recommendation.

- (a) That the information contained in certain documents requested by the Appellant falls within the restrictions imposed under Section 5(1)(b)(i) of the RTI Act;
- (b) The sensitivity of the information requested by the Appellant;
- (c) That the RTI Commission has the power, under Section 15(c) of the RTI Act to inspect any information held by a PA including any information denied by a PA under the provisions of the Act;
- (d) That the RTI Commission, in its Order dated 11.12.2018, has directed the Secretary to the Office of the Cabinet of Ministers to submit the documents in question under confidential cover for the perusal of the said Commission on or before 29.01.2019 in order to assess whether the information can be severed and provided, and;
- (e) That the Attorney General is of the view that there is no legal impediment in complying with the Commission's Order dated 11.12.2018.

Having considered the above report on 06.03.2019, the Cabinet informed the Commission on 08.03.2019 of its Decision as follows;

- a. *To accept the stance taken by the RTI Commission that the 'Cabinet of Ministers' is the 'Public Authority' for the purpose of the RTI Act, No. 12 of 2016 (RTI Act) as stated in its Order dated 2018.07.17;*
- b. *To direct the Secretary to the Cabinet of Ministers to comply with the Order of the RTI Commission dated 2018.12.11.*
- c. *To request the RTI Commission to obtain the views of the Secretary, Ministry of Defence under whose purview the subject of Defence has been assigned as to whether the disclosure of information referred to*

in its Order to the Secretary to the Cabinet dated 2018.12.11 would undermine the Defence of the State or its territorial integrity or national security; and

- d. *To direct the Secretary, Ministry of Defence, to submit his view to the RTI Commission as to whether the information referred to in its Order to the Secretary to the Cabinet dated 2018.12.11 falls within the restrictions imposed under Section 5 (1) (b) (i) of the RTI Act.*

Further, the following was noted in a Cabinet Decision of the same date (*viz*; 06.03.2019) as summarized under ‘Any Other Business’, following consideration of the recommendations in the Report of the Cabinet Sub-Committee on Legislation dated 22.02.2019 accepting the stance taken by the RTI Commission that the Cabinet of Ministers is the ‘Public Authority for the purposes of the RTI Act as stated in its Order dated 17.07.2018;

- (I) To authorize the Secretary to the President, the Secretary to the Prime Minister, the Secretaries to the Cabinet Ministries and non-Cabinet Ministries to provide information pertaining to the Cabinet decisions which are based on Cabinet Memoranda originating from their Offices/Ministries, adhering to the restrictions imposed under the said Act, with effect from 07.03.2019...’

(II) To direct the Secretary to the Cabinet of Ministers-

- i. To release only the Cabinet decisions taken by the Cabinet during their deliberations under ‘Any other Business’ which are not originated by a specific Ministry, adhering to the provisions of the said Act;
- ii. To facilitate the citizens when information is requested from the Office of the Cabinet of Ministers by providing guidance in obtaining the requested information directly from the relevant Ministry;
- iii. To continue with the procedures adopted hitherto with regard to the release of information pertaining to the Cabinet decisions until 06.03.2019; and

(III) To request the Non-Cabinet Minister of Mass Media to submit a proposal through H.E. the President to appoint a committee to review the RTI Act and to make recommendations on the amendments to the said Act or the Regulations or the Rules made thereunder in order to ensure effective implementation of the same whilst addressing the various issues that have other ramifications.

Both Decisions were confirmed and the Secretary to the Cabinet was authorised to convey the same to the relevant authorities for necessary action accordingly. The Commission was informed of the same through communications dated 28.02.2019 (referencing Cabinet Decisions – 12.02.2019) and 08.03.2019 (referencing Cabinet Decisions – 26.02.2019) addressed to the Commission by the Secretary to the PA (Cabinet of Ministers).

Final Order⁸

Cognisant of the contents of the Cabinet Decision dated 06.03.2019 and ancillary documentation relating to the same as summarised above, we note the assertion by Counsel for the Attorney General's Department on behalf of the Ministry of Defence in the hearing of this Appeal, that the Ministry has no objection to the release of the requested information and that such release will not undermine the defence of the State or its territorial integrity or national security as envisaged by Section 5 (1) (b) (i) of the RTI Act.

As the statutory appeal body mandated under the Act to enable the disclosure of information in accordance with the need to foster a culture of transparency and accountability in Public Authorities (*vide* the Preamble to the RTI Act), we have assessed the relevant exemptions in Section 5 (1) of the Act as not being applicable to prohibit and/or deny and/or impede the release of the said information. Consequently, we order the release of the below information;

8. Order delivered on 02.04.2019.

1. The full report of the Committee appointed in terms of Cabinet Decision dated 05.08.2015 (No. 15/1131/603/045) to investigate and make recommendations on the matters related to the 'consultancy firms and related payments' of the project on the construction of the DHQC in Akuregoda, together with all annexes, appendixes and attachments thereto.
2. The Cabinet Decision dated 05.08.2015 (No. 15/1131/603/045) to investigate and make recommendations on the matters related to the 'consultancy firms and related payments' of the project on the construction of the DHQC in Akuregoda.

The said information is directed to be provided to the Appellant within two weeks of the receipt of the Order. Further, and for the purposes of elucidation of the point raised in the aforesaid deliberations of the Cabinet reconsidering the instructions given by the Cabinet of Ministers on 28.03.2017, treating the Office of the Cabinet of Ministers as the 'Public Authority' in view of the position taken by this Commission in a previous Order in this Appeal (RTIC Minute of the Record, 17.07.2018), the following matters are emphasized;

- a) The said Order on 17.07.2018 referencing the position of the Commission that, 'there can be no doubt that the Cabinet of Ministers does fall within the ambit of the Act' was made in the limited context of an objection being raised by the PA in regard to the maintainability of the instant appeal as the appeal had not been filed to the 'Office of the Cabinet of Ministers' but rather to the 'Cabinet of Ministers';
- b) That position was taken on a strict reading of Article 42(1) of the Constitution ('there shall be a Cabinet of Ministers (emphasis ours) charged with the direction and control of the Government of the Republic,' which in terms of Article 42 (2), 'shall be collectively responsible and answerable to Parliament') read along with Section 43 (1) of the RTI Act, No. 12 of 2016 'any body or office (emphasis ours) created or established by or under the Constitution, any written law, other than the Companies Act, No. 7 of 2007, except to the

extent specified in paragraph (e), or a statute of a Provincial Council is deemed to be a PA.’

- c) The Decision of the Cabinet dated 06.03.2019 ‘to accept the stance taken by RTI Commission that the ‘Cabinet of Ministers’ is the ‘Public Authority’ for the purpose of RTI Act as stated in its Order dated 2018.07.17’ is noted. It is also placed on record that hitherto, the conformity of the Office of the Cabinet of Ministers to information requests filed by Sri Lankan citizens has been an illustrative example of best practice in accordance with the spirit and letter of the RTI Act.
- d) For greater clarity in this matter and if so required, it may also be kept in mind that the terms ‘body or office’ in Section 43 (1) of the RTI Act have consequential effect in that, the ‘Cabinet of Ministers’ or the ‘Office of the Cabinet of Ministers’ may interchangeably fall within one or the other of those terms in the circumstances of any given case.
- e) While each PA has the discretion to adopt the necessary nomenclature and/or administrative procedures required in processing information requests under the RTI Act, it is reiterated that the legal question that will arise before this Commission upon an appeal being filed in respect of the denial of an information request, will be confined to the wording of Section 3(1) of the RTI Act, viz; ‘Subject to the provisions of Section 5 of this Act, every citizen shall have a right of access to information which is in the possession, custody or control of a PA (emphasis ours).

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

The relevant legal issues can be classified under two principal heads,

- I. Procedural objections*
- II. Substantive matters*

Procedural Objection

The PA had taken exception to the Appeal stating that the Appeal is against the decision of the Cabinet of Ministers which does not fall within the definition of a PA in terms of Section 43 of the Act, resulting in the Appeal being procedurally flawed. It was contended that in terms of Article 50(2) of the Constitution, the Secretary to the Cabinet of Ministers has charge of the Office of the Cabinet of Ministers and as such, the relevant PA is the Office of the Cabinet of Ministers.

Substantive Matters

The substantive matters urged in appeal by the PA traversed a wide compass of exemptions under Section 5 (1), such as:

1. National security concerns (Section 5(1)(b)(i))
2. Sri Lanka's international relations (Section 5(1)(b)(ii))
3. Disclosure of information causing prejudice to the prevention or detection of crime (Section 5(1)(h)(i))
4. Exposing the identity of a confidential source of information (Section 5(1) (h)(ii))
5. Information supplied in confidence by a Third-Party to the PA (Section 5(1)(i) read with Section 29)

Reflections on the Propositions Established in the Order of the Commission

Re: The Procedural Objection

Section 43 (1) of the RTI Act defines any “body or office’ created or established by or under the Constitution, any written law, other than the Companies Act, No. 7 of 2007, except to the extent specified in paragraph (e), or a statute of a Provincial Council” to be a PA. It was affirmed that the terms, ‘body or office’ in that Section have the effect of bringing the ‘Cabinet of Ministers’ or the ‘Office of the Cabinet of Ministers’ (interchangeably) within the ambit of the RTI Act in the circumstances of any given case.

Re: The Substantive Matters

The Commission delivered its Order making several observations which may be construed as propositions laid down by it.

Allowing Exemptions under Section 5 (1) to be raised for the First Time in Appeal

The Appellant had objected to the PA citing Section 5(1) (h)(i) and Section 5(1)(i) to deny the release of the Committee report (the information asked for) in appeal on the basis that the IO and DO had relied on different exemptions earlier, which were then abandoned. Responding thereto, the Commission ruled that “PAs are allowed to raise new exemptions in terms of the Act during the pendency of the Appeal.”⁹ In this instance, the new exemptions were cited in the context of the PA’s insistence that the report contains diagrams and other sensitive details in relation to the Defence Headquarters.

It is established law that a pure question of law could be raised for the first time in appeal before an Appellate court of law. By analogy, the Commission is seen accepting an exemption for the first time before it

9. RTIC Appeal 216/2018, RTIC Minute of 17.07.2018 page 12.

on appeal in terms of Section 5 (1) of the RTI Act and not limiting the PA to exemptions claimed at the first stage of acceptance of the information request (at the level of the IO). In other words, only one criterion is to be applied, namely, whether the exemption pleaded in appeal comes within Section 5 (1) of the RTI Act or not. The Commission allowing the PA to plead new exemptions upon appeal meanwhile serves the purpose of a fuller and comprehensive consideration of the competing interests in question (even where such arguments were not previously raised in the pre-appeal stages), especially considering that the decision could be appealed in Court. It is of relevance that when refusing the information at pre-appeal stages, the IO and DO may not have had access to the gamut of considerations preventing a PA from disclosure.

Powers of Inspection and the Doctrine of Severability

The Commission directed that the Cabinet Sub-Committee report on the consultancy firm and related payments of the construction project of the Akuregoda Defence Head Quarters Complex (DHQC) be sent under confidential cover to it in terms of Section 15(c) “for the perusal of the Commission in order to assess whether the information can be severed (under Section 6).”¹⁰ The authority to make the said Order was well within the Commission’s jurisdiction vested in it under Section 15(c) of the RTI Act.¹¹

The Appellant had submitted that the Commission may call for the report and sever such “sensitive information” under Section 6 of the RTI Act given that what was required by the Appellant were details in relation to certain payments made. That information would, in any event, be required to pass through the Auditor-General for audit purposes annually. He had further submitted that any pictorial diagrams or other material which impacts national security were not required.¹²

10. *Ibid.*

11. See further in this connection, *Center for Policy Alternatives v Ministry of Justice and Prison Reforms*, RTIC Appeal (In Person)/1491/2019, RTIC Minute of 02.07.2019 and the reflections made in the legal commentary.

12. *Ibid.*

The PA had argued that that the aforesaid two items of information¹³ cannot be delinked. However, in rejecting that argument, the Commission reiterated that information not connected to national security concerns, particularly where questions of procurement and alleged financial irregularities were concerned had a strong public interest in disclosure. A pertinent observation was also made to the effect that, “the Cabinet Decision” in appointing the said committee was already made public with the Commission observing that: “Cabinet Decisions should ‘in any event’¹⁴ be in the public domain.”¹⁵ These propositions are pertinent given that the fundamental right to information guaranteed under Article 14A (introduced through the 19th Amendment and retained in the 20th Amendment) of the Constitution read with the RTI Act, has enabled the Commission to overcome any inhibitions or reservations it may have had in this regard.

Following examination of the said report, it became clear that national security considerations were not relevant in regard to its main contents. This is borne out by the fact that the Attorney General reversed the earlier objection, clarifying as of record that the State had no objection to the release of the requested information and that such release will not undermine the defence of the State or its territorial integrity or national security.”¹⁶

Accordingly, the Commission made an order that the PA release the full report of the Committee appointed in terms of the relevant Cabinet Decision in question to the Appellant.¹⁷ This release was subject to the caveat, as revealed by the Record, that part of the annexures to the reports which disclosed the plans as well as means of access to the building and consequently affected matters of national security under [Section 5 (1)

13. “Payments and details of the confirmation of DHQC” on the one hand and “plans and diagrams of the proposed construction” (admitted by the PA as being sensitive information impacting on national security concerns) on the other.

14. Eventually, even if the said Cabinet Decision had not been published on the website.

15. RTIC Appeal 216/2018, RTIC Minute of 17.07.2018 page 12.

16. *Ibid* page 17-18.

17. *Ibid*

(b) (i)] were redacted from the general release of the information under and in terms of Section 6 of the RTI Act.

Concluding Comments

As the proceedings in this matter were ongoing, the Cabinet had “directed its Secretary, *inter alia*, to request the (non-cabinet) Minister of Mass Media to submit a proposal through H.E the President to appoint a committee to review the RTI Act...”¹⁸ Some questions need to be asked in that regard.

1. What is the need to ‘review’ the RTI Act?
2. Is it to clip the wings of the Commission’s power under the provisions of Section 15(c) of the Act enabling the Commission to call for and examine information denied by a PA on any of the grounds listed under Section 5 (1)) which the Commission has employed in several decisions?
3. If not, for what purpose? Is it designed to reject the culture of transparency and accountability sought to be brought under the Act?
4. If so, the very Government that had brought in the RTI Act and enshrined the Right to Information under the 19th Amendment¹⁹ as well as its successors, must ask itself, what is the purpose and justification for any contemplated amendment to the RTI Act?

Indeed, those are questions, *inter alia*, that remains to be answered.

18. RTIC Appeal 216/2018, RTIC Minute of 17.07.2018 page 17.

19. Article 14A, which was retained in the 20th Amendment to the Constitution, 2020.

Centre for Policy Alternatives v Ministry of Justice and Prison Reforms

‘... Taking cognizance of the fact that the information request...was indeed a matter which concerned the life and liberty of certain citizens, (the Commission) listed the matter as an expedited appeal, for consideration on 02.07.2019.

...the RTI Act is itself silent in relation to the procedure to be followed beyond the filing of the information requests pleading that the life and liberty of a citizen is involved under and in terms of Section 25 (3) of the RTI Act. Section 25 (3) states as follows; Where the request for information concerns the life and personal liberty of the citizen, the response to it shall be made within forty-eight hours of the receipt of the request.

As such and considering the gravity of the matter as well as the fact that, given the injunction in Section 25 (3), it may logically be inferred that the same urgency attaches to the consequential steps of appeal as mandated under the Act...’

Decision: The Appellant requested the names of persons convicted of the death penalty for drug-related crimes, conviction dates and cases numbers of persons convicted of the death penalty for drug-related crimes forwarded to the President in February 2019. The IO rejected the information request citing Section 5(1)(a) and 5(1)(g) of the Act. On appeal, the DO rejected disclosure in terms of Section 5(1)(a). Consequently, the Appellant appealed to the Commission. At the appeal hearing, Commission directed the PA to release the conviction dates and case numbers as they are statistical data relating to concluded cases and therefore did not fall under the privacy exemption in 5(1) (a). With regard to the names of prisoners, the PA was directed to obtain written instructions from the prisoners as to whether they wish to disclose their names publicly. Names of prisoners who expressed their consent for such disclosure were directed to be released.

Keywords: *Commission's powers of inspection of information denied by PA (Section 15(c))/Details of persons convicted of death penalty/ Expedited appeals, life and personal liberty of citizen (Section 25(3))/ Personal information (of prisoners), (Section 5 (1) (a))/ Prisoners/ Public interest (Section 5 (4))/Rules on Fees and Appeal Procedures/Statistical data*

Brief Factual Background¹

...The Appellant by letter/e-mail dated 26.06.2019, requested urgent consideration of the instant Appeal on the basis that it concerned the life and personal liberty of a number of citizens. The Appellant stated that this request was made subsequent to His Excellency the President's announcement on 26.06.2019 that he has signed the death warrants of four persons who were convicted of the death penalty for drug-related crimes and whose names would be included in item one of the information request. The Appellant further stated that as per media reports, the President had affirmed that the death sentences will be carried out "soon" without specification of the date of the execution. The Appellant submitted therefore that, 'according to media reports, there is reason to believe they could be carried out immediately given that National Drug Eradication Week ends on 01.07.2019'.

The Commission, taking cognizance of the fact that the information request dated 01.03.2019, as well as that dated 26.06.2019, was indeed a matter which concerned the life and liberty of certain citizens, listed the matter as an expedited appeal, for consideration on 02.07.2019.

A similar appeal (RTIC Appeal 1492/2019) had been lodged with the Commission, against the Department of Prisons in relation to similar information requests by another citizen on 01.07.2019 via e-mail. Although

1. RTIC Appeal (In-Person) 1491/2019 heard as part of formal meetings of the Commission on 02.07.2019 and 09.07.2019. Added party to the Appeal: Department of Prisons. *Appearances for the parties:* Pasan Jayasinghe for the Appellant; A. Mansoor, Additional Secretary, G.P.A. Sirimalatha- SAS (Admin) and K.A.A.L.P. Gunawardena- Assistant Superintendent of Police, for the PA (Ministry of Justice and Prisons Reforms). See <https://www.rticommission.lk/web/images/pdf/15092019/rtic-1491-2019-en-15092019.pdf>

in terms of Rule 13 (2) of the Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017), an Appeal is required to be handed over in person and/or sent by registered post, given the urgency of the subject matter of the Appeal and given that it concerned the same subject matter, the said Appeals were fixed for consideration on 02.07.2019 together with the present Appeal. Furthermore, since it appeared that the Department of Prisons is also a relevant PA in whose possession, custody or control the requested information would be deposited in terms of Section 3 of RTI Act, both Appeals were considered together.

Further, the Appellant also submitted that he had filed information requests to the Ministry of Justice and Prison Reforms, the Presidential Secretariat, and the Department of Prisons on 26.06.2019 requesting, within 48 hours as per Section 25(3) where a request concerns the life and liberty of a citizen, the following:

1. *Names of the four convicted prisoners whose death warrants have been signed by the President, as announced by the President to the media on 26/06/2019*
2. *Conviction dates and case numbers of the four convicted prisoners whose death warrants have been signed by the President*
3. *Date the death sentences of the four convicted prisoners whose death warrants have been signed by the President will be carried out*

Matters Arising During the Course of the Hearing

The Appellant submitted that the IO had initially refused to release the information citing Section 5 (1) (a) and 5 (1) (g) which are reproduced below although subsequently, the DO justified the denial citing only Section 5 (1) (a);

- (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*

(g) *the information is required to be kept confidential by reason of the existence of a fiduciary relationship*

In counter, the Ministry of Justice and Prison Reforms was asked as to whether information as requested in item one, of the requests dated 01.03.2019, namely, the names of persons convicted of the death penalty for drug-related crimes on whom the death penalty can be imposed, had been forwarded to the President in February 2019. The representatives on behalf of the Ministry stated that they were unaware of the same and that they responded to the request of the Appellant on the assumption that the information was in fact in its possession, custody or control of the Department of Prisons.

The representative on behalf of the Department of Prisons however stated that a list of twenty prisoners who were on death row for drug-related offences had been forwarded to the President through the Ministry. The representatives of the Ministry submitted that to the best of their knowledge, the Ministry has not received such a list while conceding that another division of the Ministry dealing with the Prisons Department may have received such communication. The Ministry undertook to ascertain the same.

It was further pleaded by the Department of Prisons that though the said information was in its possession, custody and control, the provision of the information is problematic given that it will adversely affect the privacy of the prisoners concerned. In response, the Appellant submitted that in any event, the names would have become public at the point of filing the cases against the said prisoners and as such the Department would merely be sharing what is already in the public domain. Furthermore, it was submitted that the information requested does not fall within Section 5 (1) (a) and even in the event that it does, the overriding public interest is greater than the harm caused by the disclosure of the information. The Department of Prisons stated however that it was unable to provide the names without the consent of the prisoners concerned and also sought a clarification from the Commission on the applicability of Section 24(5) (c) and the Appellant's reliance thereof;

A citizen making a request for information shall... where the citizen making the request believes that the information is necessary to safeguard the life or liberty of a person, include a statement to that effect, including the basis for that belief.

The Department of Prisons queried as to what was the basis for the belief on the part of the Appellant underscoring the assertion in its information request that the information is necessary to safeguard the life or liberty of a person. The Appellant clarified that the basis was the President's statement to the media on 26.06.2019 that he has signed the death warrants of four persons who were convicted of the death penalty for drug-related crimes, which created specific urgency in the provision of the information.

Interim Order²

At the outset, it must be noted that the RTI Act is itself silent in relation to the procedure to be followed beyond the filing of the information requests pleading that the life and liberty of a citizen is involved under and in terms of Section 25 (3) of the RTI Act.

Section 25 (3) states as follows;

Where the request for information concerns the life and personal liberty of the citizen, the response to it shall be made within forty-eight hours of the receipt of the request.

As such and considering the gravity of the matter as well as the fact that, given the injunction in Section 25 (3), it may logically be inferred that the same urgency attaches to the consequential steps of appeal as mandated under the Act, this Commission listed this Appeal as well as RTIC Appeal 1492/2019 as urgent Appeals before it. Accordingly, it is recorded as such and further, that no procedural and/or jurisdictional objections have been persisted with by both respondent PAs to the aforesaid at this instant hearing.

2. Order delivered on 02.07.2019.

We find no objection arising in terms of Section 5(1) or any subsection thereto in regard to releasing the conviction dates and case numbers relating to the twenty named prisoners on death row for drug-related offences. This is statistical data relating to concluded cases and therefore, no consideration of privacy attaches to the same. As such, the (added) respondent Prisons Department is directed to release that information to the Appellant.

Where the names of the said prisoners are concerned, the Department is directed to obtain written instructions from the individuals if they do not wish their names to be disclosed publicly consequent to which the Commission will consider the applicability of Section 5 (1) (a) read together with Section 5 (4) and issue a ruling on the same. In any event, the information requested may be handed over to this Commission for its confidential perusal. The attention of the PA is drawn to Section 15 (c) of the Act which states as follows;

For the purpose of performing its duties and discharging of its functions under this Act, the Commission shall have the power... to inspect any information held by a Public Authority, including any information denied by a Public Authority under the provisions of this Act.

The Department of Prisons is accordingly directed to provide the relevant documentation in its possession, custody and control in terms of Section 3 of the Act as specified in the information request dated 01.03.2019, and, to obtain the written consent of the prisoners to the disclosure of their names or refusal thereof following which, this Commission will decide the matter taking the public interest, as stated in Section 5 (1) (a) and in Section 5 (4) of the Act, into consideration.

Where the later information requests of the Appellant dated 26.06.2019 are concerned and notwithstanding the expedited procedures adopted by this Commission in the instant case, the Appellant is directed to file an appeal as of record with the DO of the relevant PA and if so warranted, to file an appeal to this Commission in terms of the Act in the event the PA fails to respond or the response is dissatisfactory to the Appellant...

...On 09.07.2019 the representatives on behalf of the Ministry of Justice provided a list containing 18 case numbers and the respective dates of conviction.

Subsequent to the Order of the Commission on 02nd July 2019 in RTIC Appeal 1491/2019, the PA submitted in response to the information request of the same, that having consulted all the prisoners convicted for drug-related crimes to ascertain whether they consent to the disclosure of their names, 7 prisoners have not given their consent for the disclosure of their names. The PA stated that there are 18 names in total and the prisoners awaiting death row for drug-related crimes are from 3 different institutions, namely, Welikada, Angunakolapelassa and Dumbara. However, the officer representing the PA reiterated that he has not received any intimation as to which four prisoners were selected to be executed.

Final Order³

Insofar as the list containing all the prisoners on death row for drug-related crimes is concerned, the PA is directed to redact the names of the prisoners who have not provided their consent. On balancing the public interest with the privacy of the prisoners concerned, we deem it sufficient that only the names and case details of prisoners who have consented to disclosure should be made available to the Appellant. This is in keeping with the spirit of Section 5(1)(a) read with Section 5(4) of the RTI Act which states as follows:

Section 5 (1) (a) exempts from disclosure information which,

... 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;

3. Order delivered on 09.07.2019.

Section 5 (4) states,

Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.

Accordingly, the Commission is of the view that disclosure of the names of those who have expressed their consent for disclosure sufficiently fulfils the requirement of public interest. The Department of Prisons is accordingly directed to release a copy of the same with the names of those withholding consent redacted as specified above, to the Appellant in the instant case as well as to the Appellant in RTIC Appeal 1491/2019.

Furthermore, the Ministry of Justice and Prison Reforms has provided a list of case numbers and convictions dates with respect to the same prisoners which can be provided to the Appellant in the instant case as well as to the Appellant in RTIC Appeal 1491/2019, given that both are being heard together.

As the PA confirmed that the President has not conveyed to it, details of the four prisoners who have (reportedly) been singled out to be executed for drug-related crimes as per a recent announcement by the President, it is concluded that details in relation to the four specific prisoners are not within the 'possession, custody or control of a public authority,' as envisaged by Section 3 (1) of the RTI Act.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

Re: Procedural Objections

Appellate procedure to be followed by the Commission in regard to the filing of an information request involving the life and liberty of a citizen under Section 25 (3).

Re: Substantive Matters

Release of information pertaining to the conviction dates and case numbers of the 20 condemned prisoners on death row, established data relating to concluded cases;

Reflections on the Propositions Established in the Commission's Order

- a) Although Section 25(3) of the RTI Act is silent thereto, it is a logical inference that an appeal, once found to attract issues of life and liberty, must be treated by the Commission with the same urgency as that which attends the consideration of the information request within 48 hours by the IO of the PA. As such, such appeals must be given priority in the hearing process of the Commission.
- b) Case numbers and dates of conviction, being “statistical data,” did not justify non-disclosure. However, disclosure of the names of the individuals that were on death row was a matter that pertained to privacy and was, therefore, subject to the consent of the concerned prisoner being obtained prior to their names being disclosed. If no consideration of privacy is attached to the names, the Prisons Department was directed to release the information to the Appellant.
- c) In any event, the information requested was directed to be handed over to the Commission for its confidential perusal in terms of Section 15 (c) of the Act.

Doctrine of Severability, Section 6

In referring to Section 6 in the context of releasing certain information and redacting other information determined as attracting the applicability of one or other exemptions under Section 5(1), the Commission reiterated what may be described as a doctrine or principle of severability which has become an established part of its reasoning. As we will see, use of that flexibility afforded by Section 6 is often coupled with the Commission's power to inspect any information, as provided for in Section 15 (c) of the Act.

Powers of Inspection, Section 15 (c)

In contrast, diverse judicial responses when the executive declines to disclose information have been evidenced. Judges have, at times adopted a "hands-off policy" though in some instances, particularly in the context of fundamental rights cases, the Bench has sometimes called for and inspected the material. Clearly, however, the Commission has vigorously exercised these twin powers in the case under review, where the lists of prisoners sentenced to death were called for, from the PA and examined by the Commission before its consequent order to release the list, subject to redaction of the names of the prisoners who had not consented to their names being released into the public domain.

Concluding Comments

Employed to good effect in overcoming persistent denials of PAs to release information in heavily contested Appeals, Sections 6 and 15 (c) are of extraordinary value in the RTI Act as this decision demonstrates. It is through employing these provisions that the Commission has been able to exercise its authority to determine a matter on the public interest override in Section 5 (4) and release information in consequence thereof.

Its position on not releasing names of incarcerated persons who have not consented to such release may be seen as conservative, given that these names are ascertainable in investigation and trial records, if perused.

In India, the approach has been that such information cannot be withheld for the purpose of publication through the media. Even so, this caution was deemed to be important by the Commission in the context of safeguarding privacy rights of incarcerated persons in the context of extreme media sensationalisation in Sri Lanka where prisoners have, on occasion, attempted to commit suicide due to trial by media.

Malinda Seneviratne v Department of Prisons

‘...It has transpired as of record during these hearings that a list of twenty prisoners on death row for drug-related offences had been forwarded to the President through the Ministry. That said list is directed to be produced for the confidential perusal of the Commission. The Commission is called upon to consider the release of such information in terms of its statutorily mandated role to release information not subject to the exemptions in Section 5 (1) (a) and taking into account also, the public interest as laid down in Section 5 (4)...

...the PA is directed to redact the names of the prisoners who have not provided their consent to release their names in the list containing all the prisoners on death row for drug-related crimes. On balancing the public interest with the privacy of the prisoners concerned, the Commission deems it sufficient that only the names and details of prisoners who have consented to disclosure (are released)’.

Decision: The Appellant requested rules and regulations relevant to the Prisons Department relating to the prisoners on death row and the execution of a death sentence on any prisoners made under Section 94 of the Prisons Ordinance and, *inter alia*, whether there were any intimations, orders and writings from the President or any other person relating to the execution of the death sentence on any prisoner. If there was such an order, all specifics in relation thereto, such as, which prison, when, whether executioners were appointed and so on, were also requested. The Appellant had requested that the information be provided within 48 hours due to the belief that there is a threat to the life and liberty of the prisoners concerned. The Appellant had thereafter directly preferred an appeal to the Commission. At the appeal hearing, all information was released.

Keywords: *Commission’s powers of inspection of information denied by PA (Section 15(c))/Details of persons convicted of death penalty/ Expedited appeals,*

life and personal liberty of citizen (Section 25(3))/ Personal Information (of prisoners), (Section 5 (1) (a))/ Prisoners/ Public interest (Section 5 (4)) /Rules on Fees and Appeal Procedures/ Statistical data

Brief Factual Background¹

The Appellant had requested that the information be provided within 48 hours due to the belief that there is a threat to the life and liberty of the prisoners concerned, arising from H.E. the President's public statement to the effect that four prisoners are to be executed imminently and that he has signed the relevant documents giving effect to the same.

The Appellant had thereafter directly preferred an appeal to the Commission via e-mail on 01.07.2019, given that it concerned the life and liberty of persons. Although in terms of Rule 13 (2) of the Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017), an Appeal is required to be handed over in person and/or sent by registered post, given the urgency of the subject matter of the Appeal and given that it concerned the same subject matter in RTIC Appeal 1491/2019, it was decided that this Appeal be fixed for consideration on 02.07.2019 together with RTIC Appeal 1491/2019. Furthermore, since it became evident in the context of the Appeal that the Ministry of Justice will also be a relevant PA it was suitable that these appeals were taken up simultaneously?

However, the Appellant was informed of the fact that the RTI Act specifies that an appeal must be filed as of record with the DO of the Department of Prisons in terms of Section 31 (1). Accordingly, the Appellant in the present Appeal was directed to file an appeal to the DO of the PA in relation to his request and requesting a response within 48 hours given the fact that the information request concerns the life and liberty of citizens.

1. RTIC Appeal (In-Person) 1492/2019 heard as part of a formal meeting of the Commission on 02.07.2019 and 09.07.2019. *Appearances for the parties:* N.K. Ashokbaran AAL, for the Appellant; K.A.A.L.P. Gunawardena- Assistant Superintendent of Police for the PA (Department of Prisons). See: <https://www.rticommission.lk/web/images/pdf/09042020/rtic-1492-2019-en-09042020.pdf>

Matters Arising During the Course of the Hearing

Submitting for the Respondent PA, its authorised officer clarified that the Department did not possess the names of the four prisoners selected for imminent execution as per the announcement of the President but that a list of twenty prisoners who were on death row for drug-related offences had been forwarded to the President through the Ministry.

He also stated that the provision of the information is problematic given that it will adversely affect the privacy of the prisoners concerned and stated that it was unable to provide the names without the consent of the prisoners concerned, further seeking a clarification in regard to the applicability of Section 24 (5) (c) of the Act which states,

A citizen making a request for information shall... where the citizen making the request believes that the information is necessary to safeguard the life or liberty of a person, include a statement to that effect, including the basis for that belief.

The PA queried as to what was the basis for the belief on the part of the Appellant underscoring the assertion in its information request that the information is necessary to safeguard the life or liberty of a person. Counsel for the Appellant clarified that the basis was the President's statement to the media on 26.06.2019 that he has signed the death warrants of four persons who were convicted of the death penalty for drug-related crimes, which created specific urgency in the provision of the information.

The PA further noted that it cannot provide answers to questions but that it can only provide documents. The Commission noted that the PA may provide any documentation which will contain therein responses to these questions. Furthermore, it was observed that although in relation to the names of the prisoners concerned and other peripheral details, their privacy may be in issue, however, in relation to the provision of relevant rules and regulations made under Section 94 of the Prisons Ordinance, such privacy concerns are irrelevant. The PA conceded to this point.

Interim Order²

At the outset, it must be noted that the RTI Act is itself silent in relation to the procedure to be followed beyond the filing of the information requests pleading that the life and liberty of a citizen is involved under and in terms of Section 25 (3) of the RTI Act.

Section 25 (3) states as follows;

Where the request for information concerns the life and personal liberty of the citizen, the response to it shall be made within forty-eight hours of the receipt of the request.

As such, and considering the gravity of the matter, as well as the fact that, given the injunction in Section 25 (3), it may logically be inferred that the same urgency attaches to the consequential steps of appeal as mandated under the Act, the Commission listed this Appeal as an urgent appeal before it. Accordingly, it is recorded as such. Further, it is recorded that no procedural and/or jurisdictional objections have been raised by both Respondent PAs to the aforesaid at this instant hearing.

Where the Appellant's first information request is concerned, the PA has, of consent, agreed to provide 'all rules and regulations relevant to the prisons department relating to the prisoners on death row and the execution of a death sentence on any prisoner inclusive of rules and regulations if any made under Section 94 of the Prisons Ordinance.' This information may be provided to the Appellant or an authorised representative on his behalf on or before the next date of hearing upon mutual agreement between the two.

Where the second information request is concerned, this relates to departmental orders to which no consideration of privacy will arise as per Section 5(1)(a). The PA is directed to provide the information itemized as below in terms of the RTI Act or if not able to do so, to cite any other Section of the Act on which it relies, for the consideration of this Commission.

2. Order delivered on 02.07.2019.

1. *Whether the Department of Prisons or any officer therein has received any directions and/or orders and/or intimations and/or writings about the date and/or place from H.E. the President or any other person on which the execution of the death sentence on any prisoners is to be carried out?*
2. *If so:*
 - a. *A copy of the said direction and/or order and/or intimation and/or writing*
 - b. *In which prison and/or facility and/or place are the said executions to be carried out?*
 - c. *At what date and time?*
 - d. *On which prisoners?*
 - e. *Have the relevant prisoners been informed of the above in writing?*
If so:
 - i. *When were the said prisoners so informed?*
3. *Whether any Executioners have been recruited to the Department of Prisons for the purpose of carrying out the execution of a death sentence?*
4. *If so:*
 - a. *When?*
 - b. *How many officers have been recruited?*
 - c. *In what capacity, post or rank?*
 - d. *What training has been provided to the said officers?*
 - e. *Have any such officers conducted and/or participated in an execution previously?*

If so required, such information may be submitted confidentially to the Commission in terms of Section 15 (c) of the Act which reads as follows;

For the purpose of performing its duties and discharging of its functions under this Act, the Commission shall have the power... to inspect any information held by a public authority, including any information denied by a public authority under the provisions of this Act.

It has transpired as of record during these hearings that a list of twenty prisoners on death row for drug-related offences had been forwarded to the President through the Ministry. That said list is directed to be produced for the confidential perusal of the Commission. The Commission is called upon to consider the release of such information in terms of its statutorily mandated role to release information not subject to the exemptions in Section 5 (1) (a) and taking into account also, the public interest as laid down in Section 5 (4) ...

...With regard to the Appellant's first information request pertaining to 'all rules and regulations relevant to the prisons department relating to the prisoners on death row and the execution of a death sentence on any prisoner inclusive of rules and regulations if any made under Section 94 of the Prisons Ordinance', the PA produced before the Commission standing orders of the Department of Prisons relating to death row prisoners which were provided to the Appellant.

The PA also produced a letter in response to the Appellant's information request concerning '*any directions and/or orders and/or intimations and/or writings about the date and/or place from H.E. the President...*' In the said letter, in relation to items 1 and 2, the PA confirmed that the Department has not received any written instructions with respect to any executions or any instructions which will enable the PA to respond to items 1 and 2 of the information request. The Appellant stated that he was satisfied with the response given by the PA.

In relation to items 3 and 4, answering the question on whether any executioners have been recruited to the Department of Prisons, the PA has responded in the affirmative and by letter dated 08.07.2019 confirmed that two executors have been recruited. It was further submitted that they have not conducted or participated in any execution previously.

Subsequent to the Order of the Commission on 02nd July 2019 in RTIC Appeal 1491/2019, the PA submitted in response to the information request of the same, that having consulted all the prisoners convicted for drug-related crimes to ascertain whether they consent to the disclosure

of their names. Accordingly, it was revealed that 7 prisoners have not given their consent for the disclosure of their names. The PA stated that there are 18 names in total and the prisoners awaiting death row for drug-related crimes are from 3 different institutions, namely, Welikada, Angunakolapellasa and Dumbura (prisons). However, the PA reiterated that he has not received any intimation as to which four prisoners were selected to be executed.

Final Order³

The PA is directed to redact the names of the prisoners who have not provided their consent to release their names in the list containing all the prisoners on death row for drug-related crimes. On balancing the public interest with the privacy of the prisoners concerned, the Commission deems it sufficient that only the names and details of prisoners who have consented to disclosure should be made available to the Appellant.

This is in keeping with the spirit of Section 5 (1) (a) read with Section 5 (4) of the RTI Act which states as follows:

Section 5 (1) (a) exempts from disclosure information which,

... 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;

Section 5 (4) states that,

Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.

Accordingly, the Commission is of the view that disclosure of the names of those who have expressed their consent for disclosure sufficiently fulfils

3. Delivered on 09.07.2019.

the requirement of public interest. The PA is accordingly directed to release a copy of the same with the names of those withholding consent redacted to the Appellant in the instant case as well as to the Appellant in RTIC Appeal 1491/2019.

Furthermore, the Ministry of Justice and Prison Reforms has provided a list of case numbers and conviction dates with respect to the same prisoners which may be provided to the Appellant in the instant case as well as to the Appellant in RTIC Appeal 1491/2019.

As the PA confirmed that the President has not conveyed any information as to which four prisoners will be executed for drug-related crimes, it is concluded that details in relation to the 4 specific prisoners are not within the '*possession, custody or control of a Public Authority*,' as envisaged by Section 3 of the RTI Act. Furthermore, as the PA has provided information relating to the rule and regulations regarding death row prisoners as well as those recruited as executioners..

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

Re: Procedural Objections

The Appellate procedure to be followed by the Commission in regard to the filing of an information request involving the life and liberty of a citizen under Section 25 (3).

Re: Substantive Matters

Release of departmental rules & regulations and the release of information pertaining to any intimations, orders and writings from the President or any other person relating to the execution of the death sentence on any prisoner.

Reflections on the Propositions Established in the Commission's Order

- a) On similar reasoning as the previous Appeal, this Appeal was given priority in the hearing process of the Commission. In as much as the information sought relating to departmental orders are concerned in respect of which no consideration of privacy arose in terms of Section 5 (1) (a) of the RTI Act, the PA was called upon to release the same.
- b) In balancing the public interest with the privacy of the individual concerned (the prisoners), the names and details of the prisoners who consented to disclosure were liable to be disclosed which could be said to be in keeping with the spirit of Section 5 (1) (a) of the RTI Act.
- c) The President not having conveyed to the PA information in regard to which prisoners (four in number) stood to be executed for drug-related crimes, the PA was not liable to provide such information as it was not within its "possession, custody or control" as envisaged in Section 3 (1) of the RTI Act.

As the proceedings reveal, the PA provided several items of information which the Appellant had sought during the course of the appeal hearing, *viz.*,

- i. Rules and regulations relevant to the Prisons Department relating to the prisoners on death row and the execution of a death sentence on any prisoners inclusive of any rules and regulations made under Section 94 of the Prisons Ordinance.
- ii. Statutory orders of the Department of Prisons relating to death row prisoners.
- iii. The names and details of the prisoners who had consented to the same being disclosed.
- iv. Those who had been recruited as executioners.

Concluding Comments

The RTI Act itself (Section 25 (3)) is silent in regard to the appeal process beyond prescribing as to how the request for information concerning “the life and liberty of a citizen” should be initially responded to. It is that silence in the Act which was met by extending the application of Section 25 (3) to the urgent hearing of this Appeal before the Commission.

The fact that the PA did not object to this assumption of authority by the Commission speaks to the importance of the release of information in a spirit of camaraderie avoiding confrontation. Substantive issues in this Appeal involved a balancing exercise impacting on an individual’s privacy concerns and the public interest demand when it became clear that some prisoners had not consented to their names and details being disclosed, which information was therefore redacted in terms of Section 6 of the Act prior to release.

Shreen Saroor v Prime Minister's Office

‘... where the drafting of laws is concerned, this Commission reiterates its observations in Gomez v Ministry of Social Empowerment, Welfare and Kandyan Heritage RTIC Appeal 51/2018, that ‘in many countries in the region as well as globally, draft laws are required to be presented before the public in advance and before the Bill is gazetted, in order to obtain public feedback on its contents which is a beneficial process leading to public consensus around the framing of legislation.’ This observation was made in the context of the fact that the definition of information in Section 43 of the Act expressly includes ‘draft legislation’ within its ambit.’

Decision: The Appellant requested information relating to copies of proposals and draft legislation and/or concept notes relating to the commitments made by Government of Sri Lanka in the UNHRC resolution 30/1 to establish the Office of Missing Persons (OMP), truth-seeking mechanism, and a judicial mechanism with a special counsel. Dissatisfied with the response of the IO and DO, the Appellant appealed to the Commission on 06.10.2017. At the appeal hearing, Commission noted that the information requested pertains to matters relevant to Sri Lanka’s transitional justice mechanism process and therefore concerns information that is vital to the public interest. The Commission therefore directed the PA to submit all documents in its possession on the same resulting in the Office for Reparations Bill being released. However, the Prime Minister’s Office as well as the Ministry of National Integration confirmed that they have no further information on the truth-seeking mechanism or the judicial mechanism for a special counsel. Therefore, it was noted of record that information in this regard was not its possession, custody or control of the PA as per Section 3 (1) of the Act.

Keywords: *Cabinet Memorandum (Section 5 (1) (m))/Draft law/Duty to transfer (Regulation 4 (6))/ Information in 'Possession, custody or control' (Section 3(1))/Transitional justice*

Brief Factual Background¹

The Appellant filed an information request on 21.06.2017 seeking the following information:

- A. Copies of proposals and/ or draft legislation and/ or concept notes and/ or documentation relevant to the commitments made by the Government of Sri Lanka in the United Nations Human Rights Council Resolution 30/1 (UNHRC 30/1) to:
 - a. Establish an Office on Missing Persons.
 - b. Establish a Truth-Seeking mechanism.
 - c. Establish a judicial mechanism with a special counsel.
 - d. Establish any other mechanism for the purpose of delivering truth, justice, reparations, or guarantees of non-recurrence.
- B. Copies of reviews and/ or correspondence and /or documentation prepared by nation and/ or international consultants and/or experts with respect to the above-mentioned proposals and/ or draft legislation and/ or concept notes and/ or documentation.
- C. Copy (s) of a roadmap of the action plan with regard to the implementation of the UNHRC 30/1.

The IO responded on 07.07.2017 stating that the two Acts on the Office on Missing Persons were public documents and accessible on www.documents.gov.lk and cited the exemption of Section 5 (1) (m) for

1. RTIC Appeal (In-Person) 01/2018 heard as part of a formal meeting of the Commission on 15.05.2018. *Appearances for the parties:* Shreen Saroor, Sankhitha Gunaratne AAL, Lakwijaya Bandara AAL and Mangala Shanker for the Appellant; Suren Gnanaraj, State Counsel, for the Attorney General's Department and Hashini Jayasekera, Assistant Secretary for the PA (Prime Minister's Office).

See, <https://www.rticcommission.lk/web/images/pdf/rticappeal-001-2018/rtic-01-2018-en-31122019.pdf>

the remaining items, stating that the matters under consideration were to be submitted to the Cabinet of Ministers for a decision. Dissatisfied with this response the Appellant appealed to the DO on 22.07.2017. The Appellant stated that she received a letter from the DO on 31.07.2017 which contained two copies of letters sent to the Secretaries of the Ministry of National Integration & Reconciliation and the Ministry of Foreign Affairs in relation to her RTI request. The Appellant in her Appeal to the Commission did not consider this a decision of the DO and had stated that she had not received a decision from the DO. Dissatisfied with the purported response of the DO, the Appellant appealed to the Commission on 06.10.2017.

Matters Arising During the Hearing

The PA had filed Written Submissions dated 03.05.2018 with the Commission. Therein the PA noted that the Appellant's appeal to the DO had indeed been responded to by letter dated 27th July 2017 and had attached a copy of the said letter. The PA noted that it had duly transferred the request of the Appellant to the Ministry of National Integration and Reconciliation and the Ministry of Foreign Affairs by letters dated 27. 07.2017 (with a copy to the Appellant). It stated that it had acted in compliance with Regulation 4 (6) of the RTI Regulations gazetted under Gazette No. 2004/66 dated 03.02.2017.

Accordingly, the PA stated that after the transfer of the requests, the Appellant could not have legal recourse against the first PA under the RTI Act and its Rules and Regulations. Furthermore, the PA noted that the Appeal was bad in law as the Appellant had not disclosed the response by the DO. It also submitted that the Appeal was time-barred as the decision of the DO had reached the Appellant by 31.07.2017 but her Appeal was dated 06.10.2017 which was more than the two months' time limit provided for an Appellant to appeal to the Commission according to Section 32 (1) of the RTI Act.

The PA also noted in its Written Submissions that strictly without prejudice to its submissions regarding information not in its possession, custody, or control, it had proactively obtained some information from the appropriate PAs and would make available the following at the hearing of the Appeal:

With regard to Item A:

- (a) Establish an Office on Missing Persons
 - Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016 (OMP Act) (available on the website)
 - Office on Missing Persons (Establishment, Administration, and Discharge of Functions) Amendment Act, No. 9 of 2017 (available on the website)
 - Order under Section 1 (2) of the OMP Act (as amended) and published in the Gazette No. 2036/21 dated 12th September 2017
- (b) Establish a Truth-Seeking mechanism.
 - The Final Report of the Consultation Task Force on Reconciliation Mechanisms (CTF), 17th November 2016 (available on the website)
- (c) Establish a Reparation Office.
 - Cabinet Memorandum dated 5th March 2018 and the Cabinet Decision dated 6th March 2018
- (d) Establish a Judicial Mechanism with a Special Counsel.
 - The Final Report of the Consultation Task Force on Reconciliation Mechanisms, (CTF) 17th November 2016 (available on the website)
- (e) Establish any other mechanism for the purpose of delivering truth, justice, reparations or guarantees of non – recurrence
 - International Convention for the Protection of All Persons from Enforced Disappearances Bill which was passed in Parliament on the 7th of March 2018.

- Joint Cabinet Memorandum dated 11th December 2017 and Cabinet Decision dated 12th December 2017 on Sri Lanka's accession to the Ottawa Convention on the Prohibition on the Use, Stockpiling, Production and Transfer of Anti – Personnel Mines and on their Destruction.
- The Cabinet Memorandum dated 10.11.2017 and the Cabinet Decision dated 14.11.2017 on Sri Lanka's accession to the Optional Protocol to the Convention against Torture and other cruel, inhuman and degrading treatment or punishment.

With regard to Item C:

Copy (s) of a roadmap of the action plan with regard to the implementation of the UNHRC 30/1

- National Action Plan for the Protection and Promotion of Human Rights 2017 – 2021 launched on 01.11. 2017 (available on the website)

At the hearing, the Appellant stated that as a human rights activist, she and other affected people who had participated in the process of the Consultation Task Force on Reconciliation, wanted to know if their recommendations had been taken into consideration in the transitional justice initiatives being undertaken by the Government.

She also observed that activists working with families of the disappeared were particularly concerned regarding the fact that the Office on Missing Persons Act had been passed into law without allowing affected persons the right to access confidential information submitted to the Office on Missing Persons (OMP) and that it was important that all institutions established under the umbrella of transitional justice reforms function transparently and with accountability. She pointed out that, often, activists in the periphery were not involved with law reforms planned in Colombo and that therefore she and the other activists had filed an RTI request for the above documents.

Counsel for the PA reiterated the submissions made in the Written Submissions of the PA. He clarified that with regard to information about the OMP, the request had been transferred to the Ministry of National Integration and Reconciliation to which the subject had been assigned and with regard to all other information, the request had been transferred to the Ministry of Foreign Affairs.

The RTI Manager of TISL noted that the PA had refused information citing Section 5 (1) (m) of the Act which states,

(m) the information is of a cabinet memorandum in relation to which a decision has not been taken.

She submitted that in order to invoke the exemption the officer would have perused the documents in question, which would imply that the information being sought was under the custody of the PA.

Counsel for the PA clarified in response that the reply of the IO in regard to the citation of Section 5(1)(m) as an exception to refuse the information was on the basis of broadly assessing the information requested as including some documents that would have been before Cabinet at the time rather than in terms of knowing the specifics of the same.

When queried by the Commission as to what extent Section 5(1) (m) would apply at this stage of hearing of the Appeal, to any of the documentation requested, Counsel for the PA stated that he was not aware of the exact status regarding the matter and that as far as he was aware, all information that the PA had been able to obtain was now being furnished to the Appellant at the instant hearing. He contended that otherwise, the PA would be compelled to collect information from other Ministries and compile the information which was not a duty of the PA under the RTI Act, its Rules or Regulations. He reiterated that the information now being placed by the PA before the Commission was out of respect for the RTI Commission upon receiving its notice to appear in this Appeal.

Final Order²

This information request pertains to matters relevant to Sri Lanka's transitional justice process and therefore concern information that is vital to the public interest.

In particular, where the drafting of laws are concerned, this Commission reiterates its observations in *Gomez v Ministry of Social Empowerment, Welfare and Kandyan Heritage* (RTIC Appeal 51/2018, RTIC Minutes, 27.02.2018) that 'in many countries in the region as well as globally, draft laws are required to be presented before the public in advance and before the Bill is gazetted, in order to obtain public feedback on its contents which is a beneficial process leading to public consensus around the framing of legislation.' This observation was made in the context of the fact that the definition of information in Section 43 of the Act expressly includes 'draft legislation' within its ambit.

In her Appeal to the Commission dated 06.10.2017, the Appellant has referred to the two letters sent by the PA to the Secretaries of the Ministry of National Integration & Reconciliation and the Ministry of Foreign Affairs dated 27.07.2017 in relation to her RTI request and this Commission is inclined to accept her explanation that the omission to file the letter of the PA on that same date apprising her that the information requests had been transferred to the relevant PA (which letter had not been annexed to the Appeal) was inadvertent rather than deliberate.

The PA has also raised the question of delay on the part of the Appellant to appeal to the Commission within the time limits laid down in Section 32(1)(a) on the ground that the Appellant had not 'established that she was prevented by a reason beyond his or her control from filing the appeal in time' as required by Section 32(2). The Appellant has explained that she had been occupied in attempting to get the requested information through following up with the relevant Ministries to which the said information requests had been directed by the PA during the

2. Order delivered on 15.05.2018.

months in question before she filed an appeal to the Commission upon failing in that attempt.

We will note this explanation of the Appellant of record as a satisfactory ground to explain delay under and in terms of Section 32(2) of the Act. It is also a relevant factor that Sri Lanka's RTI Act is (relatively) still a new law and both citizens and PA are still getting accustomed to the procedures and practices that need to be followed in filing information requests and appeals.

In regard to the material that has been furnished to the Commission, its contents include the Cabinet Memorandum No 18/0430/702/008 dated 05.03.2018 relating to the establishment of an Office of Reparations signed by the Prime Minister and Minister of National Policies and Economic Affairs which is information that would have been legitimately 'within the possession, custody and control' of the PA in this Appeal (*viz*; the Office of the Prime Minister) under and in terms of Section 3 of the Act.

It is further noted that the said Cabinet decision thereof on 06.03.2018 states that approval had been granted to establish an Office for Reparations as proposed in the Memorandum and that the Legal Draftsman had been instructed to draft legislation based on the draft attached as Annexure 1 to the Memorandum which has also been furnished to this Commission. The furnishing of the said draft legislation on reparations as a result of this information appeal merits special mention, given this Commission's observations in *Gomez v Ministry of Social Empowerment, Welfare and Kandyan Heritage* (*supra*) as noted above.³

Appeal Allowed

3. The Appeal was concluded on 03.09.2019 with the Government stating that nothing further was pending to the extent of being draft legislation as at that point.

Legal Commentary

Matters for Determination by the Commission

This Appeal pertained to the release of documentation relating to pending legal reforms of enormous significance in Sri Lanka's transitional justice process. The questions that arose for determination before the Commission were as below:

Re: Procedural Objections

- (i) Is the appeal to the Commission time-barred in terms of Section 32, and if so, was the Appellant prevented from adhering to the timelines set out in Section 32 due to a "reason beyond her control" in terms of Section 32 (2)?

Re: Substantive Issues

- (ii) Is 'draft legislation' encompassed within the definition of 'information' in Section 43?
- (iii) What is the relevance and applicability of Section 5 (1) (m), exempting Cabinet Memoranda pertaining to which decisions have not been taken, to the said draft legislation?
- (iv) Is the information within the "possession, custody or control" of the PA in terms of Section 3 (1)?

Reflections on the Propositions Established in the Commission's Order

Release of Draft Legislation

The Commission made its express finding, citing one of the earlier precedents,⁴ that the definition of what constitutes information in the RTI Act expressly includes "draft legislation." Insofar as the duty imposed

4. *Mario Gomez v Ministry of Social Empowerment*, RTIC Appeal 51/2018, RTIC Minute of 27.02.2018.

on a PA which pleads that information sought is in the hands of another PA, the procedure to be followed is spelt out in Regulation 4(6) of the RTI Regulations gazetted under the RTI Act.⁵ That is to transfer the request to the appropriate PA. This is a proposition impliedly reiterated on account of some earlier precedents of the Commission which the respondent PA apparently had addressed its mind to in effecting the transfer by the time that the matter came up before the Commission in appeal.

Where the plea of ‘excusable delay’ was concerned, the Commission laid down the clear proposition that any delay in hearing an appeal before it would be excused if the reasons for the delay could be found to be justified on the given facts and circumstances of a case.

Application of Legal Provisions

Ever since the Second Republican Constitution (1978), of various debates had raged as to what forum has the jurisdiction to interpret Constitutional provisions as opposed to their application. The available jurisprudence reveals that while any court or any institution administering justice could apply the provisions of the Constitution, the exclusive power to interpret the same is in the domain of the Supreme Court. Consequently, the Commission is seen merely ‘applying’ Section 43 of the RTI Act in regard to holding that a copy of the “draft legislation” sought by the Appellant falls within the ambit of that Section.

Without having to remind the respondent PA of the terms of Regulation 4(6) of the Regulations in Gazette No. 2004/66 as observed earlier, the PA had effected the transfer, presumably being apprised of some of the Commission’s earlier orders. Properly construed, the bringing together of different parties *inter se* and reconciling relevant information requests is perchance to avoid potential conflicts that may arise.

Admittedly, the Appeal before the Commission was time-barred. Where the ordinary legal process is concerned, jurisprudence reveals

5. As per Gazette No 2004/66 of 3rd February 2017.

situations where the Courts are faced with belated Appeals, in regard to the invocation of their appellate powers. For instance, in an appeal from the District (original) Courts to the Court of Appeal, as a rule, the Court of Appeal is obliged legislatively to reject appeals filed in non-compliance with time limits. Such appeals being matters involving contested property and personal rights, the rationale for the said rule is that there must be a speedy end to litigation in settling people's disputes. However, if a party is aggrieved by a judgement/final order of a Court of first instance (original court), the procedural law of the country provides an opportunity for such an aggrieved party to make an application to the Appellate Courts to entertain and hear the belated appeal, notwithstanding the lapse of time where the grounds for the lapse could be shown.

Powers of the Court of Appeal as prescribed in Article 138 of the Constitution include powers by way of Revision of lower Courts' orders. Sometimes an aggrieved party invokes the said powers of Revision where such party has failed to appeal within the statutory time limit, in which event, the Appellate Court would entertain such a Revision Application, provided exceptional circumstances could be pleaded and established.

Yet, another situation is where a party seeks "an order in the nature of Writ" from the Court of Appeal or the High Court of the Provinces where time limits are not statutorily perceived, but the delay would be held against a party for inordinate and culpable delays where Third-Party interests stand to be prejudiced on account of delay and no excusable reasons are shown by the complainant for the said delay. Another instance where time limits have been overcome is where an application for alleged violation of Fundamental Rights is filed beyond the one-month period decreed under the Constitution upon the establishing of "impossibility of performance"⁶ to come within the said period and where that the alleged violation is a continuing violation.

6. *Gamaethige v Siriwardane* (1988) 1 SLR 384.

Concluding Comments

The Commission adopted the aforementioned principles aided by the laxity that it is given in this respect by Section 32 (2) which must rank as a positive feature of the RTI Act, holding that “it is also a relevant factor that, Sri Lanka’s RTI Act is (relatively) still a new law and both citizens and Public Authorities are yet becoming accustomed to the procedure and practices that need to be followed in filing information requests and appeals.”⁷ The matters that required determination by the Commission, the propositions established in pursuance thereof and critical evaluation made in their wake show emergent RTI jurisprudence in the country.

7. RTIC Appeal No 01/2018, RTIC Minute of 15.05.2018 page 2.

K. Guruparan v University Grants Commission

‘It needs reiteration that the operative words in this regard are, ‘such information has been treated as confidential at the time the information was supplied’ (Section 29). As such and given the wide-ranging negative implications that a liberal reading thereto may have on the overall ambit and purpose of the RTI Act, it has been our consistent approach that, if a document is to be treated as confidential ‘at the time the information was supplied,’ that fact must be ex facie indicated on the said document ‘at that time’, rather than be allowed to be casually interpolated by a PA at a later stage.’

Decision: The Appellant requested a copy of the Memo and all related documents placed before the 1017th meeting of the University Grants Commission (UGC) in relation to the nature of the Appellant’s academic engagement with the University of Jaffna and Minutes of the decisions taken at the 1017th meeting as confirmed at the 1018th meeting. The IO, in response, provided a copy of the Memorandum requested by the Appellant but informed that a decision was made to withhold information relating to the letter received by Army Headquarters dated 21.08.2019 and other related attachments/documents. According to the PA, this decision had been arrived at on the basis that this constituted information exempted under Section 5 (1) (i) read with Section 29 of the RTI Act due to the same being supplied in confidence to the PA by a Third-Party (the Sri Lanka Army) and the Third-Party objecting to its disclosure. The Commission noted that there has been a failure on the part of the PA to comply with the procedure laid down in Section 5 (1) (i) of RTI Act read with Section 29 in terms of purported refusals by the Third-Party to release the information. It was noted that the facts at issue must be studied in order to understand the actual nature of the information, purported to be confidential and further, to ascertain whether

the element of 'confidentiality' that is contemplated by Section 5 (1)(i) read with Section 29 (1) existed at the time such information was supplied to the PA. Calling for the document marked 'X1' for inspection in terms of Section 15 (c) and upon examination of the same, the Commission did not find that it had been received by the PA as a confidential document, and that there was no indication of its purported confidentiality discernible on the face of the document as contemplated by Section 5 (1) (i) of the Act. Accordingly, the PA was directed to release the said information with a copy to the Commission.

Keywords: Commission's powers of inspection of information denied by PA (Section 15(c))/Confidential information given by a Third-Party (Section 5 (1) (i) read with Section 29)/ Information in 'Possession, custody or control' (Section 3 (1))

Brief Factual Background¹

By information request dated 13.11.2019, the Appellant requested the following:

1. A copy of the Memo and all documents attached to it, placed at the 1017th meeting of the UGC in relation to the Applicant.
2. Minutes of the decision taken at the 1017th meeting as confirmed in the 1018th meeting.

The IO responded on 12.12.2019 stating as follows;

...in accordance with Section 25 (1) of the Act we have decided to provide you with the information requested by you through application dated 13.11.2019 with the registration number RTI/2019/111 and relevant information is attached herewith. The relevant memo which referred to 6 annexures and annexures X4 to X6 of the said

1. RTIC Appeal 1891/2020 (In Person) heard as part of a formal meeting of the Commission on 21.01.2019. *Appearances for the parties:* Dr. K. Guruparan, Senior Lecturer, Department of Law, University of Jaffna for the Appellant; Samantha Wickramaarachchi, Senior Assistant, Secretary of the University Grants Commission for the PA (University Grants Commission). See, <https://www.rticommission.lk/web/images/pdf/rticappeal-1891-2019/rtic-1891-2019-en-2822020.pdf>

annexures had been provided. Furthermore, Minutes dated 05.09.2019 has been provided...

The Appellant thereafter preferred an appeal to the DO on the basis that the IO had provided incomplete information in that the IO had only provided the memo without the documents annexed. The Appellant had further alleged that a reason has not been provided for the non-provision of the said annexures.

Thereafter the IO had once again responded to the Appellant on 20.12.2019 stating that the following has been provided;

1. Memo placed for 1017th meeting on Dr K. Guruparan, Attorney-at-Law employed at the University of Jaffna.
2. Minutes of the decision taken at the 1017th meeting of the UGC as confirmed 1018th of the UGC.
3. The relevant provision in Chapter VIII of the Establishments Code of the University Grants Commission and Higher Educational Institutions.
4. The UGC decisions taken at its 885th & 935th meetings on clarification for practice as Attorney-at-Law and Notary Public by the Academic Staff: Eastern University Sri Lanka

The IO had also stated that the decision has been made to withhold the letter received from Army Headquarters dated 21.08.2019 and related documents since they are considered as exempted information under Section 5 (1) (i) of the RTI Act due to it being supplied in confidence to the PA concerned by a Third-Party and the Third-Party did not consent to its disclosure.

Upon receipt of this response, the Appellant lodged an appeal with the Commission on 27.12.2019. The Appellant states that the appeal is against the decision of the IO dated 20.12.2019 and is lodged in terms of the *proviso* to Section 29 (1) (c) which states that,

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.

The Appellant by e-mail dated 06.01.2020 had requested an expedited hearing on the basis that,

1. He had filed a Fundamental Rights Petition in the Supreme Court to be supported on 27.01.2020 for interim relief against the ban on his legal practice and that the document the PA was refusing to provide was important to impress upon the court the *mala fides* of the decision.
2. He has many pending cases before courts in Jaffna including many cases of public interest, particularly the *habeas corpus* applications, in relation to which the Sri Lankan Army wishes to have him removed as counsel for the Petitioners. The *habeas corpus* Applications (MCCV/1/2019, MCCV/2/2019 and MCCV/3/2019) are fixed for inquiry on 07.01.2020 in the Chavakacheri Magistrate Court and although his instructing Attorney will move for a date on the 07.01.2020 it is important that he be able to appear on the next date given it is difficult to find willing lawyers to conduct the said cases. As such the document is of importance to the obtaining of interim relief from the Supreme Court on 27.01.2020.

Considering the same at the 148th meeting of the RTI Commission (07.01.2020), the Commission decided to prioritise the hearing of the Appeal given the public interest nature of the issues in question. However, given alleged procedural improprieties in the reliance on Section 29 of the RTI Act by the IO in refusing a component of the information asked for on the basis of refusal by a Third-Party of information confidentially given at the time, it was decided that the DO must be afforded an opportunity within the statutory time limits specified for appeal in Section 31 of the RTI Act to examine the Appeal and the said refusal along with the said alleged procedural improprieties, notwithstanding the fact that, in terms

of a substantial refusal under Section 29, the DO has no discretion in the matter.

As such the Appellant was directed to file a fresh Appeal to the RTI Commission after a lapse of the statutorily mandated period for appeal to the DO specified in terms of Section 31. Accordingly, the Appellant filed a fresh appeal on 08.01.2020. The DO had not responded as of 08.01.2020.

Matters Arising During the Course of the Hearing

The IO disclosed that the said information request was received by the UGC, on 19.11.2019 and that thereafter, the IO had informed the Appellant by letter dated 12.12.2019 that the UGC has decided to provide the requested information to the Appellant. However, the Appellant submitted that the UGC – at this point, (in contradiction to its said letter dated 12.12.2019) had failed to give him the attachments to the Memo. The Appellant stated that on the date of appeal to the DO i.e., 16.12.2019, the IO had informed the Appellant, by a telephone call that the UGC can provide the Appellant with three of the attachments to the said Memo, namely, X4, X5 and X6. However, the Appellant was informed that the UGC is unable to tender copies of attachments X1, X2 and X3 because the UGC had written to the Sri Lanka Army Headquarters seeking its permission to release the said attachments by letter dated 10.12.2019. The Sri Lanka Army had refused to consent to the provision of attachment X1 by letter dated 19.12.2019. However, when the Appellant visited the Office of the IO on 20.12.2019, the IO had provided him with copies of X2 and X3.

When queried as to how and why there was a delay on the part of the UGC in obtaining the consent of the Sri Lanka Army, the IO responded stating that there have been certain internal institutional obstacles that have prevented him from acting within the time limits stipulated under and in terms of the RTI Act.

The Appellant further reiterated the fact that he had filed a Fundamental Rights Application against a decision of the UGC, and that it is important for him to obtain a copy of X1, on an urgent basis, because the violation

of the rights alleged by him, germinates from the issuance of X1, and as such is a necessary document that needs to be produced before Court in support of interim relief.

The IO submitted that the refusal to provide a copy of X1 to the Appellant was based on the provisions set out in Section 29 of the RTI Act, which basically relates to any information that has been supplied by a Third-Party in confidence to a PA. A copy of X1 was produced before the Commission, in order to ascertain whether the information in fact fell within Section 5 (1) (i) of the Act as purported by the UGC.

An examination of the document of X1 has revealed that the document was not marked 'confidential'. When the IO was questioned as to the basis on which he determined that this document i.e., X1 was confidential, he informed the Commission that it was based on the instructions given to him by the PA.

Final Order²

Considering the facts as laid before us in this Appeal, it is discernible that there has been a failure on the part of the PA to comply with the procedure laid down in Section 5 (1) (i) of the RTI Act read with Section 29 of the Act.

Section 5 (1) (i) states that,

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*

2. Order delivered on 21.01.2020.

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.

Accordingly, in terms of Section 29(1), it is the mandatory duty of the IO to seek the consent of the Third-Party who supplied the information, within one week (emphasis ours) of the receipt of the request. In the instant Appeal, while the IO received the information request on 19.11.2019, the communication seeking consent from the Third-Party i.e., the Sri Lanka Army is dated 10.12.2019, which is in violation of the statutory requirements detailed above. While the IO submitted that certain internal institutional obstacles prevented him from acting in terms of the Act, we find this excuse placed before us to be untenable in the context of the mandatory statutory requirement. These lapses go to the core of the

statutory duty laid upon PAs in terms of the Act and as such, are specifically noted given that the relevant timelines in the Act were defined with the legislative intent to better realize the statutory objective of ‘giving’ effect to the right of access to information’ (preamble to the RTI Act).

Considering the core substantive objection raised by the PA to deny the said information based on Section 29 of the Act read with Section 5(1) (i), it must be noted that the legal question pertaining to confidentiality of documentary information has been considered by this Commission in several appeals in the context of the entirety of the RTI Act. We have been mindful thereto to keep in mind that the preamble to the Act seeks to foster a culture of transparency and accountability in Public Authorities. Thus, this Commission has been cautious when considering a decision of a PA to refuse any requested information on the basis of a loose reading of ‘confidential’ and has applied Section 29 strictly in the context of each case.

It needs reiteration that the operative words in this regard are, ‘such information has been treated as confidential at the time the information was supplied’ (Section 29). As such and given the wide-ranging negative implications that a liberal reading thereto may have on the overall ambit and purpose of the RTI Act, it has been our consistent approach that, if a document is to be treated as confidential ‘at the time the information was supplied,’ that fact must be *ex facie* indicated on the said document ‘at that time,’ rather than be allowed to be casually interpolated by a PA at a later stage.

Accordingly, in a matter such as the present case, we are called upon to consider the surrounding circumstances of the case and the facts at issue in order to understand the actual nature of the information, purported to be confidential and further, if the ‘confidentiality’ element that is contemplated by Section 29(1) existed at the time the information was supplied to the recipient of the information. The annexure marked X1 which is the information denied by the PA on the basis of it being confidential has been examined by us. It is of particular note that this document has not been marked confidential at the time it was communicated to the PA and

that no indication of its purported confidentiality is discernible. On the contrary, X1 contains details pertaining to the Appellant's employment relationship with the University of Jaffna and as such, seems eminently not encompassed within the scope of information that can be considered confidential within even the common-sensical meaning of that term. As such we do not find that X1 is in fact a confidential document, as contemplated by Section 5 (1) (i) of the RTI Act.

In the aforesaid circumstances, it is our view that the release of X1 in this appeal meets the requirements of the accountability and transparency provided for in Preamble of the RTI Act, and Section 5 (1) (i) of the Act read with Section 29 does not obstruct the release of X1. We, therefore, direct the PA to release the said information to the Appellant with a copy to the Commission.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

Re: Procedural Objections

In this instance, the Appellant had appealed directly to the Commission from the decision of the IO dated 20.12.2019, giving some of the requested information but not the letter received by the PA from the Army Headquarters dated 21.08.2019 and related documents on the basis that they were exempted under Section 5 (1) (i) read with Section 29 of the Act. This was on the premise that it was redundant to have appealed to the DO as, under Section 29, the DO has no discretion to reverse the decision of the IO.

Re: Substantive Matters

Release of the information held out as having been confidentially handed over to the PA by the Sri Lanka Army in terms of Section 5 (1) (i) read with Section 29.

From the perspective of the PA, the following matters were in question;

- (i) That the Sri Lanka Army had refused consent to the disclosure of a letter sent to the PA dated 21.08.2019 and related documents;
- (ii) That the refusal in regard to the other documents was based on Section 29 of the Act which relates to information supplied by a Third-Party in confidence to the PA.

From the perspective of the information requestor (the Appellant);

- (i) That he had filed a Fundamental Rights (FR) Application against a decision of the PA and one document withheld is urgently needed by him to be produced in Court in support of the interim relief sought by him.
- (ii) That his FR Application is related to his employment relationship with the University of Jaffna *vis-a-vis* his right to practise as an Attorney-at-Law while on the staff of the Eastern University of Sri Lanka.
- (iii) That he is appearing in many pending cases of public interest before the Courts in Jaffna, particularly *habeas corpus* applications in relation to which the Sri Lanka Army was wishing to prevent him from appearing as the lawyer for his clients.

Reflections on the Propositions Established in the Commission's Order

The gist of the matters in issue may be enumerated thus,

- (1) The Appellant by-passing the DO and appealing to the Commission in the context of Section 29 of the Act.
- (2) The PA's position as based on,

- (a) Confidential information and;
- (b) Such information being provided by a Third-Party who withheld consent for disclosure.

On the procedural objection in (1) above, the Commission directed that an appeal be made to the DO, satisfying the procedural requirements to invoke the jurisdiction of the Commission under Section 32. Thereafter the Appeal was heard in substance after the DO failed to respond. In so far as (2) above is concerned, the Commission ordered the document concerned (a copy of 'X1') thereof to be produced before it for its perusal under Section 15 (c) of the Act which was complied with by the PA.

Having so perused the impugned document, the Commission noted that the said document was not even labelled as "confidential" and ordered its disclosure in the absence of any competing interest. Thus, the need for transparency and accountability, as reflected in the preamble to the Act was highlighted in the wake of the information requested, not being held to be exempted under and in terms of Section 5(1) (i) read with Section 29 of the Act.

Procedural Requirements in Vindicating Substantive Rights

As stated by the Supreme Court,

*"There is substantive law and there is the procedural law. Procedural law is not secondary. The maximum "ubi jus ibi remedium" reflects the complementary character... The two branches are also independent. It is by the procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives it remedy and effectiveness and brings it into action."*³

However, the Commission is not part of the traditional Court structure. Judges may perhaps be obliged to uphold procedures sometimes resulting in litigants' substantive rights being sacrificed. In contrast, the Commission chose to exercise discretion in aiding the Appellant on the road to justice

3. *Fernando v Sybil Fernando & Others* [1997] 3 SLR 1, per Justice (Dr) A R B Amerasinghe

to vindicate his right (to information) although he had acted recklessly in failing to pursue his first-tier appeal to the DO. The procrastination on the part of the IO and the conduct of the DO, no doubt, helped the Commission in exercising discretion in the manner it did.

Striking a Balance in the Interests of Justice

The value in the Commission's approach lies in the oft-quoted judicial sentiment that "*finality is a good thing, but justice is better.*"⁴ While the law (the Act) required a first appeal to the DO, the Commission is seen striking a balance in directing the Appellant to file a fresh appeal to the DO from the impugned decision of the IO. The Commission not being part of the court system, there is another reason why the Commission's approach stood justified. That is, the non-applicability of the principle "*res judicata.*"⁵

Had the Commission been inclined to reject the Appellant's initial appeal to the Commission, for his failure to go before the DO against the decision of the IO that would have compelled the Appellant to repeat the process right from the beginning. This would inevitably have resulted not only in protracted proceedings but could very well have defeated the very purpose of his initial request, namely, the cause he was pursuing in the Courts, the FR application, interim relief he was seeking in that matter, the *habeas corpus* applications and other cases. 'Justice delayed is justice denied' is a well-known legal sentiment that the Commission was seen responding to.

Powers of Inspection Section 15 (c)

Further, the Commission had called for and examined the document in question under Section 15 (c) of the Act. This is different to the traditional judicial approach which has been, subject to rare exceptions, to adopt a

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4. *Singh v Prasad* [2002] Fiji Supreme Court 7, page 22 per President of the Supreme Court.
 5. This aspect has been discussed in some of the earlier reflections on the Commission's orders.

“hands-off policy” when the executive branch refuses disclosure of any information. However, in departing from this, the Commission directed the said information (document ‘X1’) to be placed before it for its perusal, noting that the said document had not been even marked “confidential” which was imperative in terms of Section 29.

Having done so the Commission did not place reliance on a mere technicality but rather met the substantive content of the rival contentions, finally ordering release of the information that was requested by the Appellant.

Concluding Comments

For the aforesaid reasons and on the basis of the analysis that preceded them, this is an approach that gives material content to the concept of the sovereign power of the people enshrined in the Constitution of Sri Lanka⁶ as being not a mere lip-serving constitutional promise.

6. Constitution of Sri Lanka, Article 3.

***Tharindu Jayawardena v The National Building
Research Organization, Sri Lanka
and
Tharindu Jayawardena v Divisional Secretariat,
Aranayaka***

‘The Commission notes that when an individual requests information relating to a public document, the PA is under a duty to release such documents, even if the said documents are compiled on a request made by a Third-Party. Since the said public document had not been compiled based on confidential information given by a Third-Party, the said documents must be released to the Appellant.’

Decision (v the National Building Research Organisation, Sri Lanka):

The Appellant requested several items of information connected to the Aranayake landslide that occurred in May 2016. This included the Report prepared by the PA after conducting investigations in the area falling under the Aranayaka Divisional Secretariat subsequent to the landslide identifying “high-risk and moderate-risk areas”, methodology and criteria used in conducting such investigations, a copy of the inspection report conducted by the NBRO after re-inspecting the same area in 2017 and 2018 to identify “high-risk and moderate-risk areas, and letters sent to Divisional Secretariat, Aranayake and Disaster Management Centers after 2016. The information request was made in terms of Section 25(3) concerning the life and personal liberty of the citizen and as such the IO was bound to respond within 48 hours. As the IO failed to respond within such time period, the Appellant appealed to the DO. However, after the lapse of the said 48 hours, the IO had informed the Appellant that, the said investigations were conducted at the request of a Third-Party and that therefore the information pertaining

to the same cannot be released without the consent of such Third- Party in terms of Section 5 (1)(i) read with Section 29 (1). At the appeal hearing, the Appellant informed that individuals from 16 families who are at risk of landslides had requested information similar to his request and that he was authorized to represent them in accordance with Section 33 of the Act. Having regard to the heavy rainfall that occurred at the time of filing this Appeal and the applicability of Section 25(3) of the RTI Act, the Commission directed to release the requested information as it did not fall under any of the exemptions pleaded by the PA. The Commission further considered the overriding public interest in this Appeal in arriving at its decision.

Decision (v the Divisional Secretariat, Aranayaka): The Appellant requested 11 points of information relating to the Aranayake landslide that occurred in 2016. This included information relating to persons who had lost their lives due to the landslide, persons who were declared missing, persons who sustained injuries. The information request was made in terms of Section 25(3) of the RTI Act concerning the life and personal liberty of the citizen and as such the IO was bound to respond within 48 hours in this Appeal warranted the disclosure of the information.

.....

At the appeal hearing, the Appellant informed that individuals from 16 families who are at risk of landslides had requested information similar to his request and that he was authorized to represent them in accordance with Section 33 of the Act. Considering that the natural disaster of a similar nature may recur due to the heavy rainfall at the time of filing this Appeal and the applicability of Section 25(3), the Commission directed to release the requested information as it did not fall under any of the exceptions pleaded by the PA and also the overriding public interest

Keywords: *Appeal made on behalf of an aggrieved party (Section 33)/ Confidential information given by a Third-Party (Section 5 (1) (i) read with Section 29)/Life and personal liberty of citizen (Section 25(3))/ Personal information (Section 5 (1) (a))/Public interest (Section 5 (4))*

Brief Factual Background to Both Appeals^{1 2}

In RTIC 1890, by information request dated 19.12.2019, the Appellant requested the following:

1. Certified copies of reports compiled by the National Building Research Organization (NBRO) on investigations conducted to identify high-risk areas and moderate-risks areas in the Aranayake Divisional Secretariat area after the landslide that occurred in May 2016.
2. The methodology and criteria used in conducting the above-mentioned investigations.
3. Certified copies of tests conducted in identifying 'high-risk areas' and 'moderate-risk areas in the Aranayake Divisional Secretariat in the years 2017 and 2018.
4. The methodology and criteria utilized in the tests carried out mentioned in no. 3 (above):
5. Certified copies of letters referred to the Disaster Management Centre (DMC) and the Aranayake Divisional Secretariat after 2016.
6. A list of houses in the high-risk areas within the Aranayake Divisional Secretariat (including addresses).
7. A list of houses in the moderate risk areas within the Aranayake Divisional Secretariat (including addresses).

The Appellant had stated that, as there is a high risk of a landslide, this information request is being made under and in terms of Section 25 (3) concerning the life and personal liberty of the citizen and as such the IO

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1. RTIC Appeal /1890/2020 heard as part of a formal meeting of the Commission on 14.01.2020. *Appearance for the parties:* Tharindu Jayawardena for the Appellant; Wasantha Senadeera, Senior Scientist, R.S. Bandara, A.M. Faizal, District Secretary and A.A. Surangi , Additional District Secretary for the PA (National Building Research Organisation). See, <https://www.rticommission.lk/web/images/pdf/rti-cappeal-1890-2019/rtic-1890-2019-si-2822020.pdf>
 2. RTIC Appeal /1889/2020 heard as part of a formal meeting of the Commission on 14.01.2020 . *Appearance for the parties:* Tharindu Jayawardena for the Appellant; A.M. Faizal, District Secretary and A.A. Surangi, Additional District Secretary for the PA (Divisional Secretariat, Aranayaka). See, <https://www.rticommission.lk/web/images/pdf/rticappeal-1889-2019/rtic-1889-2019-si-2822020.pdf>

is bound to respond within forty-eight hours. However, as the IO failed to respond within the stipulated time frame, the Appellant preferred an appeal to the DO on 03.01. 2020. As the DO also failed to respond within the said period the Appellant appealed to the Commission on 06.01.2020.

In RTIC 1889/2020, by information request dated 26.12.2019, the Appellant requested the following:

1. The number of deaths caused by the landslide in the Aranayake Divisional Secretariat in 2016.
2. Provide a list containing the names and ages of the persons who died in the landslide.
3. Provide the number of persons declared missing as a result of the landslide.
4. Provide a list containing the names and ages of the persons declared missing.
5. Provide a list containing the names and ages of persons who sustained injuries because of the landslides.
6. Provide certified copies of documents handed over to the Divisional Secretariat by the NBRO after the investigations conducted aftermath of the May 2016 landslides, identifying the high-risk areas and moderate-risk areas to evacuate families in the area.
7. Provide certified copies of the documents handed over to the Divisional Secretariat by the NBRO after conducting fresh investigations in the area in 2017 and 2018, re-evaluating the moderate and high-risk area and with recommended advisories to inform the people living in such areas.
8. Provide a list of houses in the high-risk areas in the Aranayaka Divisional Secretariat area (including addresses).
9. Provide a list of houses in the moderate-risk areas in the Aranayaka Divisional Secretariat area (including addresses).
10. Provide a list of families removed from the identified high-risk areas (addresses will be sufficient).

11. Provide a list of persons who were given compensation after the landslides and the quantum of compensation given to the victims.

The Appellant requested the IO to provide the information within 48 hours under Section 25 (3) of the Act because there was a high risk of a landslide. However, as the IO failed to respond within the stipulated time period, the Appellant preferred an appeal to the DO on 03.01.2020. Since the DO also failed to respond within the stipulated time, the Appellant appealed to the Commission on 06.01.2020.

Matters Arising During the Course of Both Hearings

In RTIC 1890/2020, the Appellant, by email dated 13.01.2020, informed the Commission that 16 individuals who were affected by the landslides/ at risk of facing landslides had made similar information request as the Appellant and that appeals for these information requests were also filed with the DO. The Appellant further stated that these information requests were also made per Section 25 (3) of the RTI Act. Further, he stated that Section 33 of the RTI Act authorizes the Appellant to appear on behalf of the information request made by the 16 individuals and; therefore, the Appellant requested the Commission on 13.01.2020 *via* email that this appeal dated 14.01.2020 be heard accordingly.

The Appellant further informed the Commission that at the outset the information was sought within 48 hours and, upon the IO's failure to respond, an appeal was preferred to the DO. However, on 01.01.2020, the IO responding to the Appellant stated:

“While we acknowledge the receipt of your letter requesting information under the RTI Act, we have provided the said report in response to a request made by the Kegalle District Secretariat. Therefore, examinations/ investigations conducted on the request of a Third-Party and/or information pertaining to such exercise cannot be released or shared without the consent of the said party that originally requested for the examinations/investigations to be carried out, in compliance with Section 29 (1) of the RTI Act. Accordingly, we have written to the relevant

authority to obtain their consent to share the information requested by you and we will take necessary action in the near future in line with the instructions given by the said authority (i.e., Kegalle, District Secretariat)”.

The Appellant contended that Section 29(1) of the RTI Act does not provide for such an interpretation. The Commission queried from the PA as to how Section 29(1) applies to the entirety of this information request. As such, attention was drawn to each item of information listed from 1 to 7 in the Appellant’s information request.

01. Certified copies of reports compiled by the National Building Research Organization (NBRO) on investigations conducted to identify ‘high-risk areas and ‘moderate-risks areas’ in the Aranayaka Divisional Secretariat area after the landslide that occurred in May 2016.

The Appellant stated the PA had not provided information relevant to item 1 of the information request.

In response, the PA stated that it is in possession of the said report on the investigations conducted to identify high-risk areas and moderate-risk areas in the Aranayaka Divisional Secretariat after the landslide that occurred in May 2016. As such the PA noted that certified copies of the reports can be released to the Appellant.

02. The methodology and criteria used in conducting the above-mentioned investigation.
04. The methodology and criteria utilized in the investigation carried out in no 3 (above).

The Commission considered both items of information 2 & 4 together as the two are interconnected.

The Appellant informed the Commission that he was not satisfied with the response provided by the PA in relation to items 2 & 4 on the criteria and methodology used in conducting the investigations. The Appellant contended that the response stated that experts in the subject

performed the investigations based on early signs of landslides, geological conditions, topographical features and hydrological data.

The PA in response submitted that the investigations were done by experts in the field taking into consideration early signs of landslides, geological conditions, topographical features, and hydrological data. The PA further noted that the report containing the recommendations that were reached after the investigation was handed over to the Divisional Secretariat and District Secretariat. Accordingly, based on the report, areas were identified as being high-risk areas and moderate risk areas.

The Commission noted that the response for items of information 2 & 4 provided by the PA is insufficient as it was too technical and very limited.

03. Certified copies of investigation reports after the re-investigation done by the NBRO in 2017 and 2018 to identify high-risk areas and moderate risk areas in the Aranayaka Divisional Secretariat.

The PA's stance on this item of information was that the complete report containing investigations conducted since the Aranayaka landslide in 2016 was handed over to the relevant Divisional Secretariat and the District Secretariat and that these investigations were carried out on the request of said authorities. As such, they can only issue the report after obtaining the consent of the relevant Divisional Secretariat and the District Secretariat.

05. Certified copies of letters referred to the Aranayaka Divisional Secretariat and the Disaster Management Center after 2016.

The Appellant pointed out that even though there was no requirement to explain reasons for requesting the above information to the Commission or the PA, the letters were requested as they can be used to ascertain the objectives of these institutions.

06. A list of houses in the high-risk areas within the Aranayaka Divisional Secretariat (including addresses).

07. A list of houses in the moderate-risk areas within the Aranayaka Divisional Secretariat (including addresses).

The Commission considered both items of information 6 and 7 together as they are interconnected matters.

The PA stated that there is no list containing information on the houses in high-risk areas and moderate-risk areas within the Aranayaka Divisional Secretariat. However, the PA noted that a list containing the names of the heads of households in the risk areas was included in the report, and it could be provided to the Appellant.

The Appellant further informed the Commission that the information requested by the 16 individuals who were affected by the landslides/at risk of facing landslides are similar to the information requested by him. However, he noted that the individuals have requested the following additional items of information:

1. Who were the officials that participated in these investigations?
2. How did areas that were initially classified as high-risk areas subsequently change to moderate-risk areas?

In RTIC Appeal 1889/2020, by email dated 13.01.2020, the Appellant informed the Commission that 16 individuals affected by the landslides/at risk of facing landslides had made similar information request as the Appellant and that appeals for these information requests were also filed with the DO per Section 25 (3) of the RTI Act. Further, he stated that Section 33 of the RTI Act authorizes the Appellant to appear on behalf of the information request made by the 16 individuals and further informed the Commission that, after the appeal to the Commission, by response letter dated 13.01.2020, the PA had stated that it is unable to provide the information requested by items 4, 5, 6, 7, 8, 9 and 10. The letter further stated that the information requested by items 1, 2, 3 and 11 can only be provided after the relevant fees are paid.

The PA informed the Commission that it did not consider any information requested by the Appellant to fall under Section 25 (3) of the Act, requiring it to be released within 48 hours. Accordingly, attention was drawn to each item of information listed from 1 to 11 in the Appellant's information request.

1. The number of deaths caused by the landslide in the Aranayaka Divisional Secretariat in 2016?

The Appellant informed the Commission that the PA had not released information pertaining to this item. However, subsequent to the filing of the instant Appeal, the PA in its response to the Appellant had informed that the information can be released upon payment of Rs. 40. At the hearing before the Commission, the PA submitted that the number of deaths due to the 2016 landslide was recorded between 121-131 and explained that a person was categorized as 'deceased' only if their corpse had been found.

When the Commission inquired whether the PA was in possession of a document that contains the exact number of deaths caused by the landslide, the PA noted that it's only in possession of information provided by the Grama Seva officials of the respective areas and that there is no other document relating to this.

3. Provide a list containing the names and ages of the persons who died in the landslide.

The PA noted that the decision to refuse information on this item was based on prior experience where relatives of the deceased had objected to releasing such information to Third-Parties. The Commission noted that the PA cannot refuse to provide information based on its prior experience and it should seek the consent of the relatives of the deceased to release such information in writing according to Section 29(1) of the RTI Act.

When the Commission inquired as to why relatives would object to releasing such information, the PA stated that the residents in the area believed that this natural calamity took place as punishment for their sins and therefore was unhappy to release such information. The PA further

stated that operations into recovering bodies beneath the soil continued for several days and bodies that were unearthed were unrecognizable. Because the people in the area had objected to the operations carried out to recover bodies, the PA noted that the operations had to be suspended.

However, the Commission observed that in the event compensation was given to persons who died from the landslide it was likely that the PA had in its possession, information relating to names and ages of the deceased persons. As such Commission noted that it was not a difficult task for the PA to compile the available information.

Accordingly, the Appellant inquired from the PA under which provision of the Act they are refusing to share the said information if they are in possession of the names and ages of the deceased. In response, the PA stated that it denied the information request based on the exemption provided under Section 5 (1) (a), in that it would amount to an invasion of the privacy of the individuals.

3. Provide the number of persons declared missing due to the landslide.
4. Provide a list containing the names and ages of the persons declared missing.

The Commission considered items 3 and 4 together as they addressed the same issue. The PA informed that it was unable to provide an exact number in relation to persons who were declared missing in the landslides. However, the PA stated that any person whose corpse was not recovered was considered as “missing” and though there is a list of names of such missing persons, it doesn’t include any other information such as their age. The PA further stated that releasing such information is tantamount to an invasion of their privacy and that it can further amount to an invasion of the privacy of their relatives and for this reason, the information was refused to the Appellant.

5. The registry of persons who sustained injuries due to the landslide and their respective ages.

The Appellant stated that no information was released on this matter. The position of the PA on the information requested under this item was that they were not in possession of a list with names of persons who sustained injuries as a result of the landslide.

6. Provide certified copies of documents handed over to the Divisional Secretariat by the NBRO subsequent to the investigations conducted aftermath of the May 2016 landslide, identifying the high-risk areas and moderate-risk areas to evacuate families in the area.

The Appellant conveyed to the Commission that out of all the items of information requested, the need to obtain information for this item of information was of paramount importance.

Upon being questioned by the Commission, the PA confirmed that it is in possession of the said report, which was handed over to the Divisional Secretariat to evacuate families from the high-risk areas and moderate-risk areas. As such, the PA informed that certified copies of the report can be released to the Appellant. The Appellant contended that the PA had earlier in its letter refused to release the said information on the basis that the information had been prepared at the request of a Third-Party.

7. Certified copies of the documents provided by the NBRO subsequent to conducting further investigations in the area in 2017 and 2018, identifying moderate and high-risk areas in order to inform the relevant families and take the necessary action.

The PA informed that the Aranayaka Divisional Secretariat division has 61 Grama Niladhari Divisions and the NBRO carried out the investigations in the relevant Grama Niladhari Divisions based on necessity and that there were no subsequent investigations conducted in 2017 and 2018 in relation to the same Grama Niladhari Divisions.

However, the PA agreed to provide the Appellant with copies of the reports which were currently in its possession.

8. List of houses situated in the high-risk area in the Aranayaka Divisional Secretariat area (including addresses).

9. List of houses situated in the moderate-risk area in the Aranayaka Divisional Secretariat area (including addresses).

The PA assured that by releasing the information requested under item 7 above; the information pertaining to items 8 and 9 would also be released to the Appellant.

10. List of families removed from the identified high-risk areas (addresses will be sufficient).

The PA informed the Commission that as this list is in their possession it can be provided to the Appellant.

11. List of persons who were given compensation subsequent to the landslides and the quantum of compensation given to the victims.

The PA responded stating that compensation was only provided to victims who died or/and whose houses were damaged. The PA further stated that no compensation was given to any other category of victims and that information relating to this request can be released to the Appellant.

Final Order – RTIC Appeal 1890/2020³

Upon consideration of the aforesaid matters, the Commission enters into Final Order in this Appeal.

Section 25(3) of the RTI Act states as follows.

“Where the request for information concerns the life and personal liberty of the citizen, the response to it shall be made within forty-eight hours of the receipt of the request.”

As the information request relates to the landslide that occurred in Aranayake and considering the possibility of a similar disaster occurring due to the detrimental weather at the time this Appeal is taken into consideration, the Commission is of the view that the instant Appeal falls under the scope of Section 25(3) of the RTI Act.

3. Order delivered on 14.01.2020.

Accordingly, the PA is directed to provide the Appellant with certified copies of the documents requested under item 1. It is further directed that the PA take necessary steps to release information requested under items numbers 2 and 4 in detail to the Appellant within three weeks of receipt of this order.

Since the information requested under item number 3 directly affects the public interest of the people, that too is directed to be released.

In relation to item number 5, the Commission notes that when an individual requests information relating to a public document the PA is under a duty to release such documents, even if the said documents are compiled on a request made by a Third-Party. Since the said public document had not been compiled based on confidential information given by a Third-Party, the Commission directs the PA to release the said documents to the Appellant.

Given that the PA is already in possession of a list of persons living in the high-risk areas and moderate risk areas in Aranayaka, as requested under information items 6 and 7, that too is directed to be released.

Final Order – RTIC Appeal 1889/2020⁴

Section 25(3) of the RTI Act states as follows.

“Where the request for information concerns the life and personal liberty of the citizen, the response to it shall be made within forty-eight hours of the receipt of the request”.

The Commission is of the view that the information requested falls within the ambit of Section 25 (3) of the Act, as this information request concerns the landslides that took place in the Aranayaka area and at the time this information request was made, there was heavy rainfall reported in the area with a high probability of a similar disaster occurring.

The Commission directs the PA to provide the Appellant, in writing, the information requested under item 1. The Commission notes that

4. Order delivered on 14.01.2020.

Section 5 (1) (a) of the Act does not apply in relation to persons deceased and/or disappeared and that the said provision applies only to the privacy of persons who are alive. Therefore, the Commission directs the PA to issue the said information. The Commission further notes that the PA had refused to release information requested under items 2, 3, and 4 based on Section 5 (1) (a).

Section 5 (1) (a) states:

access to information shall be refused...

“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;”

The Commission is of the view that public interest overrides the privacy of individuals in this instance. The Commission notes that the list containing the names of individuals deceased and missing as a result of the landslide should be a public document and that the PA should take steps to progressively release these details. Accordingly, the PA is directed to issue the said list containing the names of individuals deceased and missing to the Appellant, and it is placed on record that the PA does not have in its possession a list including the age of deceased and/or of the missing persons.

The PA in response to the information requested under item 5 noted that such information is not in its possession, custody or control. The Commission directed the PA to inform the Appellant of the same in writing within two weeks. The PA is further directed to release all information requested under item 6. The Commission notes that when an individual requests information relating to a public document the PA is under a duty to release such documents, even if the said documents are compiled on a request made by a Third-Party. Since the said public document had not been compiled based on confidential information given by a Third-Party, the said documents must be released to the Appellant.

Similarly, information requested under item 7 is directed to be released since the said information directly concerns the public interest and no applicable exemption under Section 5 (1) of the RTI Act has been cited.

The PA has assured that the information related to items 8 and 9 will be provided through the release of information related to item 7. In relation to item 10, the PA is directed to release to the Appellant the list of families evicted from high-risk areas. As the PA stated that the information requested under item 11 was already in its possession, the Commission notes that the documents already in the possession of the PA could be released to the Appellant.

The attention of the PA is drawn to Rule No 11 under Section 42 of the RTI Act.⁵

“If a citizen making an information request is successful in an appeal either to the Designated Officer or the Commission, the information requested by the citizen making the request should be provided free of charge.”

Accordingly, the PA is directed to release the information to the Appellant free of charge, with copies to the Commission, within two weeks of the receipt of this order.

Appeal Allowed

5. RTI Regulations gazetted on 3 February 2017 (Gazette No 2004/66).

Legal Commentary

Matters for Determination by the Commission

Re: Procedural Objections

- Application of Section 25 (3) of the RTI Act in the context of (potential or imminent) threats to life and liberty.
- An information requestor-citizen purporting to appear for citizens in matters of public interest (Section 33).

Re: Substantive Matters

In both Appeals, details were sought of (i) relevant reports on the risks to communities due to landslides in an area prone to natural disasters, (ii) persons who had lost lives on account of the procrastination (as alleged) by the Appellant, (iii) persons who were missing, (iv) persons who were relocated after identifying 'the risks' and (iv) any compensation paid to persons under (i) and (iii).

Reflections on the Propositions Established in the Order of the Commission

Application of Section 25 (3) and Section 33

In relation to both Sections, a liberal approach was followed in admitting the Appeals as urgent appeals in the interests of a significant public interest on the facts thereto. Given the high risk of deaths due to landslides in the area, a direct link could be established with Section 25 (3), resulting in the Appeals being heard on an urgent basis. This could be seen as a (logical) extension of the legislative flexibility allowed in Section 25 (3).

Sufficiency (or lack thereof) of the Information provided to the Requestor

In RTIC Appeal 1890/2020, the said reasons adduced by the PA in refusing the information speak to evasive conduct and indeed the Commission is seen being kind to the PA in not having said so. From a legislative

perspective, the Commission's expressed view is that the reasons as offered by the PA were not adequate to meet its obligations under and in terms of the RTI Act. This is reminiscent of the accepted legal rationale that the inadequacy of reasons given for a decision by a PA provides a basis for judicial review under Article 140 of the Constitution.

In a related context, though may not specifically arising on the facts of the instant Appeal, we may also look at Section 35 of the RTI Act which states that there is a duty imposed on 'every officer in any Public Authority' to disclose reasons for decisions made thereto.⁶ This is an underused provision in the RTI Act which may be expanded in the future considering the public interest and indeed the public duty inherent thereto.

On the Third-Party Defence Advanced by the PA

The Commission's position was that the said information could not have been regarded as "confidential information" as provided by a Third-Party in terms of Section 5(1)(i) read with Section 29. As the proceedings show, clearly, the authorities concerned had been lax, and given the fact the PA was in possession of the information asked for under Section 3(1), the Commission had no difficulty in ordering the release of the information.

The State's duty to ensure the quality of life for its citizens ought to be, by definition, preventative. In such situations, procrastination is not only the thief of time, but it can also cost lives. This is illustrated in a recent ruling of a Coroner in the United Kingdom where air pollution had contributed to the death of a 9 year-old child, through respiratory failure and asthma.⁷

6. Section 35 of the RTI Act states: "Every officer in any public authority giving a decision which affects any person in any way, shall be required on request made in that behalf by the person concerned, to disclose to that person in writing the reasons for arriving at such decision."

7. 'Air pollution: Coroner calls for law change after Ella Adoo-Kissi-Debrah's death' (BBC Word, 21 April 2021) <https://www.bbc.com/news/uk-england-london-56801794>

In RTIC Appeal 1889/2020 which was a sequel to the earlier analysed Order,⁸ the same facts were in issue with additional information requested regarding persons who had died/been relocated. The PA took the following positions;

- The information so requested could be made available upon the payment of Rs 40/=.
- Having said so, however, the PA furnished information to the effect that 121 to 131 persons had died on account of the environmental hazards in question. In so far as the exact numbers of missing persons was concerned, it was not possible to furnish that information because their bodies had not been found and some bodies that were found had got decomposed and could not be identified.
- Regarding the details of persons who had died, the PA alleged that their relatives had not wanted the same to be released to a Third-Party and that accordingly it was not released to the Appellant.⁹ Notably, however, no substantive material was produced evidencing such objections. As to whether any compensation has been paid for the deaths of the persons who had been subject to the hazards in question, the response of the PA was that, although it had no difficulty in providing that information, it was not provided on the basis of “privacy” or “personal information” as per Section 5 (1) (a) of the RTI Act.

In the light of the terms and philosophy behind Section 25 (3) of the Act, the Commission made an order directing the PA to release the information sought, on the below reasoning;

- I. That, Section 5 (1) (a) sought to be pleaded by the PA was not relevant in as much as that provision relating to privacy concerns applied to 'living persons' on its general application (apart from exceptional

8. Tharindu Jayawardena v Nationa lBuilding Research Organisation RTIC Appeal/1890/2020.

9. Apparently on the basis of Section 29 (1) of the RTI Act. N.B: As submitted by the Respondent (PA) for, mythological, superstitious or religious reasons.

instances) and that, the request was in the nature of a public issue and of public interest overriding the harm that may result from the disclosure as envisaged in Section 5(4).

- II. Although the Appeal surfaced on account of a Third-Party's intervention, the persons concerned had intervened, supporting the Appeal.

In view of Rule 11 of the RTI Commission Rules of 2017, the PA was ordered to release all the information sought without any payment of fees (together with a copy thereof submitted to the Commission).¹⁰

Concluding Comments

The Sri Lankan Constitution, unlike the Indian Constitution,¹¹ has not yet recognised the positive concept of the right to life, as containing conditions required to protect life by reference to such aspects as health and environment. It is only through judicial interpretation of Article 13 (4) that the right to life has been acknowledged in a negative form, *viz.*, not to be deprived of a person's life unless according to law, as provided for in Article 13 (4) of the Constitution.¹² The Court has inferred a positive right from the negative, as contained in the constitutional right not to be punished with death or imprisonment except by Court order (Article 13 (4)).

It was reasoned that this constitutional Article means that a person has a right to live unless a Court orders otherwise. In turn, a person has a right to life - at least in the sense of mere existence as distinct from the quality of life - which he can be deprived of only under Court order. Similarly, Article 11 of the Constitution guarantees freedom from torture, and cruel and inhuman treatment or punishment. Thus, to unlawfully

10. RTI Commission Rules of 2017 (Gazette No 2004/66 published on 03.02.2017), Rule 11.

11. Constitution of India, Article 21.

12. *Perera v Iddamalgoda* (the *Durage Sriyani Silva* case) 2003 [2] SLR 63; *Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and others v OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others*, SC(FR) No 700/2002, SCM 26/07/2004.

deprive a person of life, without his consent or against his will would certainly be inhumane treatment.

But in not clearly enshrining the right to life in all its positive aspects, the Indian jurisprudence depicts a clear march over the Sri Lankan constitutional conspectus. Taking this thinking further in the context of Right to Information, it may be said that this negative protection has been converted to a positive form through the release of information relevant to extending to the quality of life (right to health, environment and risk of life). The RTI Act is now very much a part of the Constitution *via* Article 14A of the 19th Amendment as preserved in the 20th Amendment. Within the Commission's strict function and role, which is to release or refuse information sought, an inextricable nexus between RTI jurisprudence and constitutional jurisprudence has been established. Where these two particular Appeals are concerned, the Orders therein stand as an object lesson to Public Authorities not to treat people's rights, (and their lives in particular) lightly, unless they wish to run the risk of facing prosecutions.

T. Rusiripala v People's Bank

‘...the broad argument that the commercial/competitive interests of the PA is harmed by disclosure of salary details of its employees at senior management level cannot be sustained in view of the public interest in such disclosure as indeed, reflected in Regulation 20 (1) (ii) on Proactive Disclosure of the RTIC’s published regulations (vide Gazette No. 2004/66, 03.02.2017)’

Decision: The Appellant requested 1) total expenditure incurred from 2015 to the end of June 2018 for and in connection with the PA’s digitalization (IT) project and particulars of salaries, wages, *ex-gratia* payments, bonuses (including performance bonus) expenditure incurred by the bank for overseas trips and details of all other perks provided by the PA and; 2) salaries and emoluments of contract employees from the years 2000 to 2018 with details of their designations. The IO and DO denied the information citing exemptions relating to commercial confidence and professional communication. Dissatisfied with the response of the PA, the Appellant preferred an appeal to the Commission. At the appeal hearing, information was directed to be released on the basis that this involved the expenditure of public funds by the PA.

Keywords: *Commercial confidence, Trade secrets, Intellectual Property and Competitive interests of Third-Party (Section 5 (1) (d))/ Communication between a professional and the PA (Section 5 (1) (f))/Definition of ‘Public Authority’ (Section 43)/Information requestor not required to show reasons for filing request (Section 24 (5)(d))/Personal information (Section 5 (1) (a))/ Proactive Disclosure under Regulation 20 of the RTI Regulations/ Public Funds/ Public interest (Section 5 (4))/Salary details*

Brief Factual Background¹

By information request dated 19.06.2018, the Appellant requested the following items of information.

1. Total expenditure incurred from 2015 to the end of June 2018 for and in connection with the Bank's digitization (IT) project with a breakup of hardware, software system installation & testing, consultants' fees, reimbursement, part payments in advance made during this period.
2. The particulars of salaries, wages, *ex-gratia*, payment, bonus (including performance bonus) expenditure incurred by the bank for overseas trips and details of all other perks provided by the bank – vehicle allowance, special allowance, entertainment expenses, travelling grants incurred by the bank on account of contract employees from 2000 to 2018 June with details of positions held by each contract employee during the period including the particulars of any change in positions, grades or level of employment in respect of each employee separately.

The IO by letter dated 20.06.2018 rejected the information under Sections 5(1) (a), (d) and (f) of the RTI Act. Dissatisfied with the response of the IO the Appellant lodged an appeal with the DO on 13.07.2018. The DO responded on 17.07.2018 rejecting the provision of information under Sections 5 (1) (a), (d) and (f) of the RTI Act, affirming the decision of the IO. Dissatisfied with the response of the DO the Appellant preferred an appeal to the Commission on 05.10.2018.

Matters Arising During the Course of the Hearing

When item 1 of the information request was taken into consideration, the PA submitted that the requested information is commercially important

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1. RTIC Appeal (In-Person) 774/2018 heard as part of formal meetings of the Commission on 30.04.2019, 02.07.2019, 21.01.2020, 10.03.2020 and 20.10.2020. *Appearance for the parties*; T. Rusiripala for the Appellant; Manoli Jinadasa AAL and W.T.I. Ambepitiya, Legal Officer – Compliance, Lasantha Thiranagama AAL, N.G.T. Kalpani, Assistant Manager – Compliance, for the PA (Peoples Bank). See, https://www.rticommission.lk/web/images/pdf/01122020/774_18eng.pdf

information to continue the ongoing digitization process and that the Bank is bound by contract to a Third-Party in this regard. The Appellant in his response submitted that the contract referred to by the PA has come to an end and that the PA cannot call upon the information requestor to cite reasons for requesting information under the RTI Act.

The PA further stated that the Bank is not a monopoly and is in competition with 24 other banks and that providing such information to the public would be detrimental to the Bank's competitiveness...

...Regarding item 2 of the information request, the Appellant had, in his Written Submissions, addressed the Bank's refusal to provide information based on the contention that the nature of the information being requested by the Appellant amounted to 'personal information' as encompassed by Section 5 (1) (a) of the RTI Act.

The Appellant further stated that the salaries of the lower-level permanent employees were determined by circulars or collective agreements and that it was reasonable to disclose the salaries and other details of the higher-level employees who were on contract. In response, Counsel for the PA stated that the salary information of general employees may be provided to the Appellant as such employees are not in a competitive environment, but that the PA is relying on Section 5 (1) (d) in order to withhold such information in relation to Central Managers in the higher grades.

Counsel for the PA pointed out that if the salaries of top-ranking employees were made public, it would be detrimental to the Bank's ability to bargain on new hires. In addition to the privacy concerns associated with the disclosure of salaries of high-level employees, the PA contended that their commercial competitiveness can also be significantly affected.

With regard to the Appellant's request for information in regard to expenditure incurred in respect of the installation and testing of software and hardware from 2015 to the end of June 2018 for and in connection with the Bank's digitization (IT) project with a breakup for hardware, software system installation & testing, consultants fees, reimbursement,

part payments in advance made during this period, it was clarified by the Commission that what has been requested is a breakdown of the costs as per each category rather than minute particular details of payments within each category. In response, Counsel for the PA undertook to consult with the PA and respond on the same.

Interim Order²

Where item 1 of this information request is concerned, the Appellant has requested the total expenditure in the installation and testing of software and hardware as per each category listed therein. On the facts as presented before us, the provision of this information does not appear to be precluded by any of the exemptions contained in Section 5 (1) of the RTI Act. In fact, the public interest in disclosing this information is demonstrably high as the matter involves the expenditure of public funds.

The PA was queried whether the cumulative amount with respect to item 1 of the information request can be provided. The PA submitted that after the proceedings of the Committee on Public Enterprises (COPE), the said information has been made public. The Appellant was queried whether he agreed with this submission of the PA, to which the Appellant responded that the information pertaining to his request was not released and the information released before the COPE was limited to certain specific financial irregularities and does not encompass the information requested in relation to this Appeal. The Appellant further submitted that he is in possession of the records and reports of the COPE proceedings of the said date and was willing to furnish the same before the Commission.

Interim Order³

The Appellant cited excerpts of the COPE report on 29.01.2020 and stated that only information in relation to the General Manager's salary particulars had been released and not the information pertaining to the

2. Order delivered on 02.07.2019.

3. Order delivered on 21.01.2020.

present information request as alleged by the PA. The Appellant had submitted Written Submissions dated 29.01.2020 indicating the exact information which was in the public domain as a result of the COPE inquiry. The COPE report contains evidence of irregularities in relation to service extensions, vehicle payments, payment of arrears to certain contract employees, accordingly, the public interest resulting from the disclosure of this information is clear. The said COPE report by no means covers the entirety of the information requested under item no 02.

The PA, by its Written Submission dated 07.02.2020 has submitted that there is no public interest in the disclosure of information and that the Appellant had not disclosed the reason for which the information was sought.

The PA had further relied on Indian precedents [*Canara Bank v C.S. Shyam* (Civil Appeal No 22 of 2009 dated 31.08.2017), *Vijay Prakash v Union of India* (W. P. (C) 803/2009), *Ritu Namdeo v Central Railway* 27.03.2018 CIC/CRAIL/A/2017/195502] to substantiate its position that the purpose for which the information is sought should be considered. It was noted that in the said cases the Court had considered whether there was a reason or purpose for the public interest to provide such information. In this context, it was the position of the PA that the Commission has an inherent duty and responsibility to consider the purpose for which information is sought.

The PA further noted that item 2 of the information request is of a broad scope given that there are many contract employees at the Bank serving at different levels. The Appellant submitted that what he seeks is information pertaining to contract employees who are entitled to the benefits as described in item 2, i.e., vehicle allowance, special allowance, entertainment expenses, travelling allowances. The Appellant stated that it is not a large number of employees that receive these benefits, and that the bank is merely putting forth this contention to delay and deny the provision of the information.

Accordingly, it was decided that the information sought by the Appellant be limited to officers recruited to the Senior Management Level between 2010 and 2018.

Final Order⁴

Summary of the Submissions of the Parties

- a. Summary of the Written Submissions of the Appellant dated 11.02.2019
Prior to the first hearing of this Appeal held on 20.02.2019, the Appellant filed Written Submissions dated 11.02.2019 stating that the PA as a ‘fully owned state enterprise with the entire capital invested by the Treasury’ and is required to disclose all information except that which is prohibited by law. Further ‘salaries and other emoluments paid in a public institution is public funds and a public institution has no legal or ethical right to conceal any information related to such payments from the public knowledge by rationalizing it as an invasion of privacy.’ The Appellant relied on a previous decision of the Commission (RTIC Appeal 99/2017, Order dated 12.06.2018) where the release of salary details pertaining to permanent and contract employees was directed.
- b. Summary of the Written Submissions of the PA dated 01.04.2019
The PA denied the provision of this item of information on the basis that Sections 5 (1) (a), 5 (1) (d) and 5 (1) (f) of the Act were applicable. The PA had further submitted that it is a banking institution engaged in commercial banking in a highly competitive industry where it ‘has to compete with the private banking sector to recruit, retain and maintain, efficient and highly skilled staff in specialised areas, in order to remain competitive in that sector,’ and as such the PA is ‘duty-bound to ensure that the monthly salary details of their contract staff who are retained for their specialisation, are kept confidential and not disclosed, against the wishes of these officers, as such disclosure is likely to *inter alia*, jeopardise the interests of the Bank.’

4. Order delivered on 01.12.2020.

It was the Bank's contention that in view of certain decisions of the Supreme Court where the Bank was recognised to have been 'performing commercial functions in a competitive commercial environment' and as such in respect to these functions could not be considered a public body performing a public duty. The PA cited *Piyasiri v People's Bank* ([1989] (2) SLR 47) and *Wijeratne v People's Bank* ([1984] 1 Sri LR) in support of this contention.

The PA further contended that they were exempt from disclosure on the basis that it did not expend funds from the Government Treasury, but their funds generated through the banking business for the payment of salaries. It was argued that 'employment issues and employment conditions of the People's Bank and such similar public business entities are within the realm of private law and are not in the realm of public law' i.e., the relationship between the PA and the contracted employee is purely contractual. The PA cited *Chandradasa Jayaweera v Wijeratne* ([1982] 1 SLR 413) and *Jayaweera v Wijeratne* ([1985] 2 SLR 413) where Writs/ administrative law remedies were sought in relation to employer-employee disputes, in support of this contention.

The PA further submitted (*vide* paragraphs 2.12 and 2.13) that,

2.12 Furthermore, Sri Lankan Airlines Limited is the sole National Carrier in the Country and has a monopoly in Sri Lanka, unlike the People's Bank, whose business is in one of the most competitive fields of commerce.

2.13 Further, in that case of Sri Lankan Airlines, the Commission may not have been invited by the parties, to consider the adverse aspects of such disclosure, that the PA has now invited the Commission to consider, in making this present order and as such they are not bound by a previous decision.

The PA also submitted that in relation to 'expenditure relating to overseas trips of the contract employees' that,

...Any overseas trips which have been made at the expense of the Bank has been made for official banking business, the details of which are

confidential in nature. The disclosure of such information reveals to the public information pertaining to the commercial business of the Bank, which are confidential in nature. It is most respectfully submitted that all expenditures incurred are subject to audit and is accessible to the relevant Bank supervision authorities. There is no requirement for such information to be disclosed to the public.

c. Summary of the Written Submissions of the Appellant dated 06.06.2019 in response to the PA's WS dated 01.04.2019

In response to the Written Submissions of the PA, the Appellant stated that the Bank is a PA coming with the definition of a 'Public Authority' as it has been established under and in terms of the People's Bank Act, No. 43 of 1973. The Appellant further submitted that 'even when performing its commercial functions (through private individuals or groups) as a state-owned banking institution, is performing an administrative or executive function and is not a mere corporate entity performing the business of banking' and is in effect a state agency albeit the commercial functions it performs.

In relation to item 2, the Appellant contended that there is a larger public interest in the disclosure of the information given the vital economic role played by the Bank when carrying out its functions as a government-owned business undertaking in the country. It was strongly presented to the Commission that the denial of the information on the basis that it will materially affect the commercial competitiveness of the Bank is baseless and unjustifiable.

The Appellant further stated that the 2018 Annual report indicates the percentage increase of salaries and benefits given to employees at different levels but that these are not actual values but percentages. Therefore, the Appellant submitted that,

- i. The requested information is a clarification of the already publicly disclosed information as published in the 2018 Annual Report. It is a mere conversion of the disclosed percentages of actuals specifically limited to the cadres of corporate management executive management and officers (Grade 3 -111 to Grade 1).

- ii. There is no competitive value to the requested information as it is already in the public domain as per the Annual Report.
- iii. As indicated in the Annual Report, most salaries of all employees were revised due to the revision of the Collective Bargaining Agreement on 01.01.2018 valid until December 2020. Considering the period relevant it is of utmost public interest to disclose the scheme of the revision affected under the agreement.
- iv. Benefits listed in the Annual Report do not include foreign travel allowances. There is a mention of travel allowances which is indicative of day-to-day travel allowances as opposed to foreign travel awarded for performance appraisal. Therefore, it is of public interest to clarify foreign travel expenses which are deemed irrelevant to be disclosed in the Annual Report.

Non-disclosure of the information is contrary to the Bank's pledge of transparency in recruitment and customer service as indicated in the Annual report 2018. Disclosure would emphasise the Bank's commitment to implement the transparency policy in real-time dealings rather than restricting it to a document.

Accordingly, it is the Appellant's submission is that 'the information sought by the Appellant relating to specialised contract basis employees' is not necessarily aimed at disclosing salaries of individuals but rather a disclosure of the expenditure of the Bank on these officials using taxpayer money, in the public interest.

d. Summary of the Written Submissions of the PA dated 07.02.2020

The PA citing *Girish Ramchandra Deshpande v CIC* (Order dated 03.10.2012) states that the position in the same applies and as such personal details of Third-Parties or employees are exempted under Section 8 (1) (j) of the Indian RTI Act. Furthermore, it contended that the purpose for which the information is sought ought to be considered and if there is no public purpose or interest and the information is sought for the mere personal benefit a requestor is not entitled to receive the same.

e. Summary of the Written Submissions of the PA dated 17.09.2020

The Appellant responded to the Written Submissions of the PA dated 07.02.2020, reiterating his position at the hearing and further elaborating on how the COPE inquiry focused on the irregular practices in relation to the General Manager's remuneration / benefits. The Appellant submitted that while his information request (dated 18.06.2018) pertaining to the present Appeal and the Appeal itself predates the COPE inquiry (held on 5th September 2019) it was based on these irregularities revealed at the COPE inquiry that led to such a request. The proceeding before COPE thus demonstrates ample public interest in the release of the information.

The Appellant also responded to the PA's contention that the disclosure of the salary details of its top executive officers would impact the bank negatively in the context of the intense competition faced by the Bank, stating that this does not mean that the PA can disregard disclosure requirements. Furthermore, the CBSL has issued directives to all banks to maintain international standards laid down by the Bank for International Settlements (BIS). BIS requires that banks maintain standards commonly known as BASEL I, II and III. Of the 3 regulatory compliances under BASEL II is 'promotion of market discipline through prescribed public disclosures.' It is the Appellant's submission that disclosure under this pertaining to remuneration allow market participants to assess the quality of compensation practices and promote greater convergence and consistency of disclosure on remuneration.

A. *Preliminary Issues*

a. The PA's contention that reasons must be indicated as to why the information is being requested

This argument cannot stand due to reasons set out in the Order of 25.08.2020 as aforesaid.

b. Does the People's Bank fall within the purview of the Act?

It appears (*vide* the PA's Written Submission dated 01.04.2019) that the PA is contending that since the Courts have refused to

issue Writs/ administrative law remedies on the basis that the dispute is between an employer and an employee and as such the relationship is a contractual one which does not fall within the public law domain, this precludes the PA from falling within the ambit of the RTI Act as well when it comes to the disclosure of information pertaining to item 2.

In categorical rejection of this argument, this Commission is of the following view;

- i. The RTI Commission sits as an entity under the RTI Act, No. 12 of 2016 and will govern itself by the scope and ambit of that statute as differentiated from the constitutional jurisdiction exercised by the Courts.
- ii. Proactive disclosure of salaries in the context of Regulation 20 (1) (ii) on proactive disclosure (Gazette No. 2004/66, 03.02.2017) is a specific legal duty cast on the PA (the Bank).

It is our view that it is not within our purview nor necessary to determine whether or not the People's Bank in the present case performs an executive or administrative function or that of a commercial and contractual nature in order to ascertain whether it is a PA falling within the purview of the Act as this is not a question required to be answered in the legal context of Appeals filed to this Commission under Section 32 of the RTI Act. As aforesaid, this Commission operates within the purview of the powers conferred on it by the RTI Act and as such, this Commission is only required to;

1. Ascertain whether the Bank falls within the definition of a PA
2. Ascertain whether the information requested is in the possession, custody, or control of the PA
3. Assess whether the same falls within one or more of the exemptions laid down in Section 5 of the Act
4. And in the event that it is established one/or more exemptions do apply, to assess whether the public interest in the disclosure surpasses

the harm brought about by disregarding any one or more of those exemptions.

In terms of the following definition in Section 43 of the RTI Act, the PA (People's Bank) is clearly a PA. In the present instance, the People's Bank has been established under and in terms of the People's Bank Act, No. 3 of 1973 which constitutes 'written law' as contemplated above and as such, clearly falls within the definition of a PA in Section 43 of the RTI Act.

c. The PA's attempt to distinguish itself from Sri Lankan Airlines Ltd

The PA has sought to distinguish itself from Sri Lankan Airlines Ltd. and thereby exempt itself from the applicability of the decision of this Commission in *Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd* (RTIC Appeal (In-Person) 99/2017, Order dated 12.06.2018) on the basis that the Sri Lankan Airlines Ltd. has a monopoly in Sri Lanka versus the Bank 'whose business is in one of the most competitive fields of commerce.'

This position cannot be sustained as the manner in which the Bank's competitive advantage in a market operates is not an exemption covered by the Act. The only Section in the Act which deals with competition and competitive advantage is Section 5 (1) (d) which exempts information that will harm the competitive position of a Third-Party. As dealt with more extensively below, the applicability of Section 5 (1) (d) has not been established.

Consequently, the impact on the competitive position of a PA against whom an Appeal is lodged cannot be a consideration of this Commission, unless linked to an exemption under Section 5 of the RTI Act. The PA in the present instance has failed to establish such a link.

B. Item 1 of the Information Request:

1. Total expenditure incurred from 2015 to the end of June 2018 for and in connection with the Bank's digitization (IT) project with a breakup for hardware, software system installation & testing,

consultants fees, reimbursement, part payments in advance made during this period.

The Commission by Order dated 02.07.2019 noted that the

...the Appellant has requested the total expenditure in the installation and testing of software and hardware as per each category listed therein. On the facts as presented before us, the provision of this information does not appear to be precluded by any of the exemptions contained in Section 5(1) of the RTI Act. In fact, the public interest in disclosing this information is demonstrably high as the matter involves the expenditure of public funds.

The PA is directed to revert on the total expenditure details in relation to the digitization of the PA by breakdown as per each category as requested by the Appellant on the next date on which this Commission's ruling on item 2) of the said information request will also be considered in the wake of the submissions made by both parties.

Accordingly, the PA submitted a summary prepared by the Assistant General Manager Banking Support and Administration dated 06.08.2019, of the payments made and balance payments to be made in respect of the Digital Banking Project to two companies, for the perusal of the Commission. In the circumstances and with the concurrence of the Appellant, this is ruled that this provision of information satisfies the information requested in item 1 of the information request.

C. Item No 2 of the Information Request:

- 2 The particulars of salaries, wages, ex-gratia, payment, bonus (including performance bonus) expenditure incurred by the bank for overseas trips and details of all other perks provided by the bank – vehicle allowance, special allowance, entertainment expenses, travelling grants incurred by the bank on account of contract employees from 2000 to 2018 June with details of positions held by each Contract Employee during the period

including the particulars of any change in positions, grades or level of employment in respect of each employee separately.

e. Applicability of Section 5 (1) (a)

In the instant Appeal, the Commission, on a consideration of Section 5 (1) (a) itself, is of the view that the public interest outweighs the claim of unwarranted invasion into the privacy of an individual and Section 5(4) containing the general public interest override will apply to support the release of the information requested.

f. Applicability of Section 5 (1) (d)

The attention of the PA is drawn to *Verite Research (Pvt.) Ltd. v Central Bank of Sri Lanka* (RTIC Appeal /26/2018, Order dated 27.11.2018) wherein the Commission noted the singular importance of the phrasing of this paragraph indicating the legislative intent of Parliament at the time that the RTI Act was enacted, in reference to the Intellectual Property Act, No. 36 of 2003.

... the placing of the commas in that Section presents a cogent argument that what is deemed exempt under Section 5 (1) (d) is information (including commercial confidence, trade secrets, or intellectual property) which are protected under the Intellectual Property Act. Hence those that are not protected under the Intellectual Property Act do not fall within the ambit of Section 5 (1) (d). The comma inserted by the framers of the Act between the words “intellectual property” and the word “protected” leads to the two words being read as disjunctive, thus inferring with some force that the said Section applies only to information protected by the Intellectual Property Act.

Thus, the impact on the competitive position of a PA against whom an Appeal is lodged cannot be the consideration of this Commission unless linked to an exemption under Section 5 of the RTI Act. The PA in the present instance has failed to establish such a link.

In any event and in general, the broad argument that the commercial/ competitive interests of the PA is harmed by disclosure of salary details

of its employees at the senior management level cannot be sustained in view of the public interest in such disclosure as indeed, reflected in Regulation 20 (1) (ii) on proactive disclosure of the RTIC's published regulations (*vide* Gazette No. 2004/66, 03.02.2017) as dealt with more comprehensively below;

g. Applicability of 5 (1) (f)

The PA has relied on this exemption in the responses of the IO and DO as well as in its written submissions dated 01.04.2019. While the PA has cited this exemption, it has failed to demonstrate how the information is a communication that has passed between a professional and the PA 'to whom such professional provides services, which is not permitted to be disclosed under any written law.'

This Commission considered the applicability of Section 5 (1) (f) in RTIC Appeal 58/2018 *Ceylon Bank Employees' Union v People's Bank* (Order dated 22.05.2018) and stated that,

In consideration of the submission made by the PA before us that the requested information is exempted by reason of Section 5 (1) (f) of the RTI Act, it is reiterated that this Section does not automatically apply purely for the reason that documents are communications between PA and an Attorney. In accordance with earlier order by this Commission in this Appeal, if the exemption is pleaded it must be shown how the information is privileged and as to the manner in which it is 'not permitted to be disclosed under any written law' as expressly stipulated by that Section.

Accordingly, in the present Appeal, the PA has failed to demonstrate how the information requested, even if being communication between a professional and a PA is 'not permitted to be disclosed under any written law.'

Consequent to hearings before this Commission, the PA on 17.09.2020, submitted a list of contract employees recruited between 2010 and 2018 in the Senior Manager Grade and above including their Designation, Name, Contract No, Contract w.e.f. Date, Contract Termination Date and certain

additional remarks pertaining to each employee as to the status of the contract. It is noted that this information does not contain particulars of salaries, wages, *ex-gratia* payment, bonus (including performance bonus) expenditure incurred by the bank for overseas trips and details of all other perks provided by the bank – vehicle allowance, special allowance, entertainment expenses, travelling grants incurred by the bank on account of contract employees.

As in *Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd*, where the information request pertained, *inter alia*, to salaries and other allowances and/or benefits of three senior officials of the PA, the attention of the PA is drawn to the fact that,

... in terms of the RTI Regulations gazetted in Regulation 20 (1) (ii) on proactive disclosure (Gazette No. 2004/66, 03.02.2017), there is a duty on the PA to disclose certain information proactively to the Public.

Regulation 20 (1) (ii) states as follows:

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;

... (ii) “Organizational information: Organizational structure including information on personnel, and the names and contact information of executive grade public officials, their remunerations, emoluments and allowances.”

Further, it is stated that this Regulation,

imposes a voluntary duty on Public Authorities which relates to the lowest standard possible in respect of information disclosure. However, the process of reactive disclosure detailed in Sections 24 to 25 of the Act signifies a much higher level of information disclosure, in consonance with the principle of maximum disclosure subject to narrowly defined exceptions set out in Section 5 (1) and its various sub-sections and subject also to the public interest override contained in Section 5(4) of the Act.

In *Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd*, this Commission was accordingly of the view that the information (i.e., that pertaining to salaries and other allowances and/or benefits of three senior officials of the PA),

must be disclosed for the reason that this is, by its very definition, information that directly relates to the financial accountability and transparency of the Public Authority in the expenditure of public funds. This is all the more so by virtue of the pre-eminent position that it holds as the country's national air carrier and in the context of widespread public concerns in regard to financial management of the Public Authority, which this Commission is duty-bound to take cognizance of. This is quite apart from the fact that the information in Request No 1 is anyway encompassed within the ambit of Regulation 20 (1) (ii) on proactive disclosure (Gazette No. 2004/66, 03.02.2017).

The Commission relied on several precedents of other jurisdictions where similar information was released. The Commission stated that,

Precedents from elsewhere also support the general principle that disclosure of salaries does not constitute 'personal information' that comes within an applicable privacy exemption. In Uzoegwu FOC Esq v Central Bank of Nigeria & Attorney General of the Federation (FHC/ABJ./CS/1016/2011, 5 July 2012), the Federal High Court of Nigeria ruled that salaries of high-level officials at the Central Bank must be disclosed under freedom of information provisions, observing that "where the interest of the public is in clash with the individual interest . . . the collective interest must be held paramount." In Kariuki v Attorney General (Case No. 403 of 2006, 8 July 2011), the High Court of Kenya held that salaries of Armed Forces personnel are not private.

Further and on specific consideration of the facts in this Appeal, the contention of the PA that the disclosure of salaries of its contract employees in the higher management level will be inimical to its competitive position is unsustainable when assessed against comparative legal developments. In a recent decision handed down by the UK Information Commissioner's Office (Dated 10.07.2018; Ref: FS50713237) the University of Bristol

similarly resisted an application made to obtain *inter alia* its senior-level employees' salaries (including that of Pro Vice-Chancellors). The University took that position on the grounds that it would harm its competitive advantage in three ways, that is,

- (i) increase in costs of recruitment and retention as competitor universities will increase their salaries upon disclosure.
- (ii) impede salary negotiations by encouraging future candidates to demand higher salaries and
- (iii) disclosure could result in damaging the reputation of the university, both in relation to donors and research grants, as well in relation to students.

However, in considering whether the commercial interests of the PA will be prejudiced as envisaged in Section 43 of the UK Freedom of Information Act 2000. Section 43 states that,

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the Public Authority holding it).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with Section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

The Commissioner adopted the reasoning that between the higher ("would occur") and lower ("likely to occur") thresholds of the likelihood of prejudice to commercial interests, it is the higher threshold that is applicable in the instant matter, and that, the PA has failed to adduce any compelling evidence to substantiate the claim that the disclosure of salaries would result in prejudice to its commercial interests. The Commissioner refuted all three grounds pleaded above by the PA by finding that, briefly, the PA has not established any premise to support the position that the disclosure of salaries would result in the PA losing prospective candidates (and therefore its competitive advantage) to other universities (*vide* paragraphs 58 to 67 of the Order dated 10.07.2018).

Further, it is evident that Public Authorities in India are under a statutory obligation to release *inter alia* the remuneration details of their employees *suo moto* (*vide* Sections 4(1)(b)(x), 4(2) and 4(3) of India's Right to Information Act No 22 of 2005). The proposition that where salaries are drawn from public funds, there is a right to know such salary details for the purposes of accountability and transparency of the PA, has found favour in the Central Information Commission's rulings, as well (*vide Amit Pande v Small Industries Development Bank of India* (SIDBI) Order dated 20 December 2011). Interpreting Section 4 (1) (b) (x) of the Indian Act in *Manisha v Integrated Headquarter of Army, MOD* (10th December 2008), the Central Information Commission ruled that,

"It is evident from the above that the details of remuneration etc., of an employee were to be disclosed by the Public Authority as a part of suo moto disclosure under Section 4(1) (b) of the RTI Act. In other words, information in respect of the salary and other remunerations of an employee are not privileged information and will have to be placed in the public domain. If the Public Authority concerned has not done so yet, it must immediately place such details in the public domain."

In *Jyoti Seherawat v Home (General) Dept., GNCTD* (7 January 2014), the Central Information Commission held,

"The salary paid to the public servant by the Public Authority is sourced from the tax paid by the people in general. The scale of salary is also fixed by the Public Authority based on certain reasonable fixation in an open exercise by Pay Revision Commissions which later would be generally approved by the Government, which is the representative of the people. Thus, the information belongs to the public and they have a right to access to it as per RTI Act. It has to be disclosed under Section 4 voluntarily by the Public Authority and if a member of public seeks it, it cannot be denied." (emphasis added)

The PA has made repeated reference to *Girish Ramchandra Deshpande v Central Information Commission* (Order dated 03.10.2012) in its Written Submissions. It is our view that the said judgment is unsupported by

prior judgments and does not subjectively evaluate the applicability of the *proviso* when interpreting the exemption granted under Section 8 (1) (j) of the Indian Act, which appears to be the touchstone of understanding the exemption. In any event, the said legal provisions have differently been reflected in this country's RTI Act and that in any event, there is no duty on this Commission to follow the said precedent in question.

Applying domestic and comparative principles as aforesaid to the facts and circumstances of this case, the PA in the present instance, being a leading public bank in Sri Lanka, functions on public funds and expends the same for the payment of the salaries and emoluments requested by item 2. The Commission has in several instances in addition to *Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd* (RTIC Appeal (In-Person) 99/2017 quoted above directed the release of the information when public funds were involved in the processes of the PA. (*Independent Employees Union v Ceylon Fisheries Harbour Corporation* (RTIC Appeal 112/2018); *Ceylon Bank Employees' Union v People's Bank* RTIC Appeal (In-Person) 58/2018 order delivered on 17.07.2018; *O.W.K. Gnanadasa v Bank of Ceylon* RTIC Appeal (In-Person) /131/2017 23.02.2018).

In view of the public interest demonstrated during the proceedings of the instant Appeal justifies the disclosure of the information, this Commission directs the release of the 'particulars of salaries, wages, *ex-gratia*, payment, bonus (including performance bonus) expenditure incurred by the bank for overseas trips and details of all other perks provided by the bank – vehicle allowance, special allowance, entertainment expenses, travelling grants incurred by the bank on account of officers recruited to the Senior Management Level' from the year 2010-June, 2018 as affirmed by the Appellant in the Proceedings and Record of this Commission on 25.08.2020.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

Whether information in the possession, custody and control of a State bank relating to the use of public funds (variously as expenditure on projects and payments to its employees) constitutes information that may be legitimately released under the RTI Act, especially in terms of its public interest override.

Reflections on the Propositions Established in the Order of the Commission

The Appellant's 1st information request being in regard to the total expenditure of the digitalization process, the Commission saw no impediment to the disclosure of such information under Section 5 (1) of the Act. Therein the Commission noted that the matter involved the expenditure of public funds which justified that disclosure. This is in accordance with the position taken generally by the Commission that where the expenditure of public funds is involved, Section 5 (1) considerations must yield to the public interest override.⁵

The second interim order was in the nature of seeking clarification from both parties as to whether the specific information requested has been released to the COPE, and if so to submit a copy of the COPE proceedings to the Commission for its perusal.

It was held that in terms of Section 43 (b) of the Act, the PA (People's Bank) is clearly a PA. A misconceived argument on the part of the PA, a bank established by Statute, that it was entitled to its institutional autonomy, was dismissed.

In the context of the rival contentions made on behalf of the parties, the Commission applied Section 5 (1) and its subsections, read with Section

5. Order delivered on 01.12.2020.

32 and Regulation 20 (1) (ii) on the principle of Proactive Disclosure (per Gazette No. 2004/66 of 3rd February 2017). The proposition which finally stood established is that the PA was cast a specific legal duty to disclose the information sought, there being no link to any exemption against such disclosure.

As the Commission observed: “In any event and in general, the broad argument that the commercial/competitive interests of the PA is harmed by disclosure of salary details of its employees at senior management level cannot be sustained in view of the public interest in such disclosure as indeed, reflected in Regulation 20 (1) (ii) on Proactive Disclosure of the RTIC’s published regulations (*vide* Gazette No. 2004/66, 03.02.2017)”.

The second proposition relates to the use of public funds, arising in the context of two issues raised by the PA, *viz.*,

- (a) That the refusal to disclose the salary particulars etc. is because the matter lies in a contractual relationship.
- (b) The intense competition faced by the Bank could be affected through prescribed public disclosures.

In arriving at its Final Order, the Commission is seen interpreting the applicability and relevance of Sections 5 (1) (a), (d), (f), 5 (4), 32, 43 of the Act and RTI Regulation 20 (1).

Concluding Comments

The upshot of the Final Order is that, whenever a PA has dealt with public funds, information relating to the same (without any qualification) needed to be disclosed and placed before the citizen seeking such information. This reasoning emphasizes a warning which the PAs may well be advised to take heed of. If not, ought not there be vested in the Commission to make an order for costs, if not to be paid to an information requestor, at least to the State? Of course, that would be a matter for Parliament should it think so to take cognizance of. Such a measure would put PAs under scrutiny, not to take their public responsibilities and duties lightly.

Verité Research v Comptroller General's Office, Ministry of Finance

‘The Commission notes that Circular 01/2017 states that the non-availability of valuation of assets belonging to the government has given rise to “complicated public accountability issues with regard to government assets.” Therefore, in keeping with the public accountability purpose of the Asset Management Circular, the Commission is of the view that it is legitimate to seek information in the public interest regarding government assets. The Commission is of the view that administrative burdens of the PA is not considered a ground to deny information under the RTI Act.’

Decision: The Appellant requested the complete list of vehicles owned by the Government of Sri Lanka as recorded in the central assets register as at the latest available date in the manner in which it had to be maintained according to Annexures 1 and 2 of Circular 01/2017, the circular governing the compilation of such information. Whereas the IO failed to respond, the DO responded by providing a summary report of the vehicles owned by the government which are in good running condition. Dissatisfied with the response, the Appellant preferred an appeal to the Commission. At the appeal hearing before the Commission, taking into consideration the importance of the information and the voluminous nature of the information sought in the information request and the administrative limitations of the PA, the Commission directed the PA to provide only certain categories of information, with the consent of both parties, viz., name of the PA, total no. of vehicles, type of vehicles, purpose of use and purchase price.

Keywords: *Administrative burdens of the PA not a ground to deny information under the RTI Act/Assets Management Circulars/Central Assets Register/Duty to give reasons/ National security (Section 5 (1) (b))/Public Funds*

Brief Factual Background¹

An Asset Management Circular No. 01/2017 issued by the Ministry of Finance and Mass Media stated that the role of the Comptroller General's Office (established with the approval of the Cabinet of Ministers on 22.02.2017) is to maintain a central database recording all non-financial assets belonging to the government. As per Circular 01/2017, it was made mandatory for all state agencies to submit information regarding their vehicles, to be entered into the Central Assets Register by 31st August 2017 per the forms given in Annexes I and II.

By information request dated 28.08.2018, the Appellant requested the latest available information on all vehicles owned by the Government of Sri Lanka as recorded in the Central Assets Register. The Appellant requested the information to be provided in the format mentioned in Annexure I and II of the said circular and also stated that the following information is expected regarding the vehicles owned by the government.

- a) Name of the Organization/Institution
- b) Type of the Vehicle
- c) Country of Manufacture
- d) Model
- e) Year of Manufacture
- f) Year of Registration in Sri Lanka
- g) Purchased Price (Rs.)
- h) Engine Capacity
- i) Fuel Type
- j) Transmission
- k) Passenger Capacity

1. RTIC Appeal (In-Person Hearing)/1226/2019 heard as part of the formal meeting of the Commission on 27.08.2019. *Appearance for the parties:* Malsirini de Silva, AAL and Anushan Kapilan, Researcher for the Appellant; K.A.Ramya Kanthi-Comptroller General, C.H.S. Dangalla- Assistant Director and A.K.D.D. Arandara – Director/ Legal for the PA (Ministry of Finance. *See*, <https://www.rticcommission.lk/web/images/pdf/12012020/rtic-1226-2019-en-12012020.pdf>)

- l) Current Condition
- m) Purpose of use
- n) Basis (own, rent, lease)
- o) Date of hire/lease (if applicable)
- p) Monthly premium/rent (RS). (if applicable)
- q) Lease/rent period (Months) (if applicable)
- r) Reason for disposal (if applicable)
- s) The current condition of the vehicle (if applicable)

As the IO failed to respond within the time period stipulated under the RTI Act, the Appellant on 14.11.2018 lodged an appeal with the DO. The DO of the Comptroller General's Office on 14.12.2018 responded by providing a summary report of the vehicles owned by the government which are in good running condition. Unsatisfied with the response, the Appellant preferred an appeal to the Commission on 11.02.2019.

Matters Arising During the Course of the Hearing

The PA stated that it had already provided the information requested by the Appellant in a concise report. The PA further stated that the report provided to the Appellant includes information related to the type of vehicle, the type of institution/organisation and the total number of vehicles in running condition. The PA submitted that it cannot release further information as it would be prejudicial to national security. The PA relied on Section 5 (1) (b) (i) in the RTI Act which states as follows:

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

(b) disclosure of such information–

(i) would undermine the defence of the State or its territorial integrity or national security.

The PA stated that the Comptroller General's office is merely an agency that collects and maintains information, and that the database that

it compiles is based on information submitted by different government departments/ ministries and so on. Therefore, this includes information on vehicles used by high-ranking officers of the Tri-forces, Supreme Court judges, police officers and so on. Therefore, the PA contends that if information regarding vehicle model, passenger capacity, the purpose of the use is indicated it is possible to identify the user of the vehicle. The PA further stated that although it can be expected that the Appellant will use this information in good faith for a credible purpose, as the information released by the RTI Act becomes public information, there is a possibility that this information is used for targeted attacks. The PA submitted that once the information is made public, there is no possibility to ascertain who will use the information and for what purpose.

In response, the Appellant stated that he was not requesting vehicle numbers or chassis numbers that could be used to identify such vehicles. And that the information requested in his application was limited to the classifications mentioned in Annexure I and II of the Asset Management Circular 01/2017.

Regarding the request (a) and (b) about the name of the organisation/ institution and the type of the vehicle, the Appellant stated that the information provided in the summary report only indicates the cumulative value of the type of vehicles under the various organisation. The PA stated that it can provide a breakdown of the total number of vehicles categorised under each institution.

Concerning request (g) on the purchase price of the vehicles, the PA stated that not all government institutions have provided this information to the Comptroller General's Office. However, the PA was agreeable to release the total value of the vehicles purchased categorised according to the institutions. The Commission observed that the relevant information should be issued to the Appellant as the funds used to purchase these vehicles are public funds.

Regarding request (m) on the purpose of use, the Appellant stated that the purpose of use requested is in accordance with Circular 01/2017,

which categories vehicle purpose as commercial/non-commercial and so on. In response, the PA stated that it is uncertain if data provided by different Public Authorities have been categorized in this manner.

The Appellant further stated that he requires the information requested from (n)-(s) in the information request. The PA submitted that some of the information that is in their possession in this regard could be outdated.

Responding to request (n), the PA stated that it cannot provide information based on separate categorisation for each vehicle rent/ lease. The Appellant queried whether the PA stores information as per the categorisation in the Asset Management Circular 01/2017. In response, the PA stated that it is still in the process of compiling the central database as some institutions have provided information through soft copies while others have provided through hard copies. Therefore, the Comptroller General's office is still in the process of entering data into the system. Furthermore, the PA stated that some institutions provide information on the categorisation in the Circular while others do not. As a result, some columns are not filled, and they do not have all the information categorised as per the Circular.

Concerning request (o) and (q) relating to the lease of vehicles, the PA submitted that in certain instances the categorization of 'assigned lease' is indicated. However, as hard copies are still being included in the database, the PA stated that it will take a considerable amount of time to provide this information.

Final Order ²

As per Circular 01/2017, the Comptroller General's Office is required to maintain a central database of all non-financial assets belonging to the government. Therefore, the information requested in the format mentioned in Annexure I and II of the Circular should be in the possession, custody or control of the Comptroller General's Office.

2. Order delivered on 27.08.2019.

In terms of Section 3 (1) of the RTI Act “... every citizen shall have a right of access to information which is in the possession, custody or control of a Public Authority.” However, if certain information has not been received by the Comptroller General’s Office, the RTI Act does not cast a burden on the PA to further analyse or seek information that is not in its possession, custody or control.

The Commission notes that Circular 01/2017 states that the non-availability of valuation of assets belonging to the government has given rise to “complicated public accountability issues with regard to government assets.” Therefore, in keeping with the public accountability purpose of the Asset Management Circular, the Commission is of the view that it is legitimate to seek information in the public interest regarding government assets. However, the Commission takes cognizance of the position of the PA that all details of the information request cannot be entertained given the probable security concerns.

Taking into consideration the voluminous nature of the information that is sought in the information request and the administrative limitations of the PA, with the consent of both parties the Commission directs the PA to provide the following information:

- I. Name of the Public Authority / Organization / Institution.
- II. Total number of vehicles (*vis-à-vis* each institution)
- III. Breakdown of the type of vehicles (jeep / car / van etc.)
- IV. The purpose of use (in instances where PA have disclosed this information), the Commission directs to disclose the purpose of use based on the categorisation stipulated in the Annexure to the circular.
- V. The total purchase price, if available.

The Commission is of the view that administrative burdens of the PA is not considered a ground to deny information under the RTI Act. However, it was suggested by the Appellant that if the information is provided in a spreadsheet, certain columns can be omitted while disclosing information stated in the remaining columns. The PA stated that it can provide the

information that has already been entered into the database, removing the categories that were not agreed upon. As such the Commission directs the release of information based on the aforesaid categorisation stated in I-V.

The Commission further directs the release of information in stages to ease the burden of the PA. Accordingly, information that can be provided in two weeks should be given immediately while the remainder may be progressively released.

Appeal Allowed

Legal Commentary

Matter for Determination by the Commission

Though in terms of Section 3 of the RTI Act which states that “... *every citizen shall have a right of access to information which is in the possession, custody or control of a Public Authority,*” this right is qualified to the extent to which such information exists with the PA, are there further duties cast on the PA in that regard?

Reflections on the Propositions Established in the Order of the Commission

On the main issue before it, the Commission took the view that, if certain information has not been received by the CGO, the RTI Act does not cast a burden on the PA to further analyse or seek information that is not in its possession, custody or control.³

3. RTI Act, Section 3.

Failure to Give Reasons for a Decision Exercising Statutory Power

The RTI Act recognizes the duty to give reasons in Section 35,⁴ reflecting the progressive approach of the Supreme Court in the case of *Unique Gemstones v Karunadasa*⁵ where an administrative duty in this regard was recognized. Indeed, the RTI Act being part of the present constitutional regime,⁶ the same position now stands as part of the RTI jurisprudence. Applying those precedents and reasoning, the mere *ipse dixit* of the PA that it had not sought reasons from the CGO for certain details in the information sought (citing “security concerns”) cannot be accepted.

What is Information as Contemplated in the RTI Act?

Section 3 (1) read in conjunction with Section 35 of the RTI Act leaves no room for any form of dissection as to what “access to information” means. It is *prima facie* “a citizen’s right to access” subject to the specified statutory exemptions, which are in turn subject to the “public interest override”. Some questions remain to be addressed as follows:

- (a) Do the questions posed by the Appellant constitute “information” that can be sought in terms of Section 43?”
- (b) Could not much of the said questions been pruned down to “how government vehicles paid for had been used and for what purpose?”
- (d) Should the PA be faced with the allegation that it is “suppressing” some aspects of the information sought and if so, would an information requestor be required to identify such information (documentation specifically)?

4. Section 35: “Every officer in any public authority giving a decision which affects any person in any way, shall be required on request made in that behalf by the person concerned, to disclose to that person in writing the reasons for arriving at such decision”

5. [1995] 2 SLR 357.

6. Through the 19th Amendment to the Constitution (2015).

Concluding Comments

For the reasons articulated above, although it could perhaps be said that a conservative approach had been adopted by the Commission to the issue before it, it would be fair to conclude that the information requestor's request had been balanced to the best extent possible as against considerations of public accountability, purpose and duties cast on Public Authorities. That said, the Commission may have more forcefully reminded the PA of its duty in terms of Regulation 20 of the RTI Regulations (issued in Gazette No. 2004/66, of 03.02.2017) to proactively disclose its non-financial assets register and further, to maintain its records in a manner that satisfies Section 7 (1) of the RTI Act.

Sri Lanka Red Cross Society v Ministry of Home Affairs

‘The PA is required to establish an exemption under Section 5 (1) in order to refuse the information and also required in terms of Section 32(4) to satisfy the burden of proof in regard to why the harm in disclosure is greater than the public interest.’

Decision: The Appellant Society requested the inquiry report in relation to an inquiry conducted subsequent to a complaint made by the Appellant Society in 2016. The IO refused the information on the basis that its disclosure would affect the privacy of the parties who had provided statements at the inquiry, and further that the recommendations of the inquiry are yet to be implemented. The DO affirmed this response upon appeal. The Appellant Society thereafter preferred an appeal to the Commission. At the appeal hearing before the Commission, apart from the “privacy argument”, the PA pleaded two further exceptions namely, that the Appellant had not averred citizenship as required by Section 43 of the RTI Act, and the impugned report has been handed over to the subject Minister. The Commission rejected several arguments advanced by the PA and ordered the release of the report. As the PA failed to comply with the said order within the time imposed by the RTI Act, the Appellant made a complaint to the Commission. The Commission brought to the attention of the PA, the consequence it would have to face in terms of possible prosecution for non-compliance with its order in terms of Section 39 of the Act. Consequently, the PA made available the report to the Appellant.

Keywords: Burden of proof (Section 32 (4))/ Offences (Section 39))/ Personal information (Section 5 (1) (a))/ Proof of citizenship

Brief Factual Background¹

By information request dated 15.06.2017, the Appellant Society had requested the inquiry report in relation to an inquiry conducted subsequent to a complaint made by the Appellant Society on 15.08.2016 and the recording of evidence at length on 11.01.2017. The complaint was in relation to the alleged fraudulent transfer of the land on which the Appellant Society's Gas Station is located.

By response dated 04.08.2017, the IO denied the information on the basis that the report submitted by the inquiry division contained statements by the relevant parties which would result in an invasion of privacy if provided and further because it had not carried out the recommendations of the said inquiry. Dissatisfied with this response, the Appellant lodged an appeal with the DO on 14.08.2017. The DO responded on 08.12.2017 reiterating the response of the IO. The Appellant Society thereafter preferred an appeal to the Commission on 28.12.2017.

Matters Arising During the Course of the Hearing

As the Appellant Society had not averred citizenship, it was notified that it needs to, as of record, aver citizenship to the effect that its membership falls within the definition of a citizen as defined in Section 43 of the RTI Act.

The Appellant Society reiterated the information request and the background to it seeking the said inquiry report. The DO, in his Written Submission to the Commission, reiterated the response to the appeal made to him.

As the PA relied on the privacy exemption, the Commission queried from the PA as to the manner in which the said exemption was contended

1. RTIC Appeal (In-Person) 113/2018 heard as part of the formal meeting of the Commission on 20.04.2018, 05.06.2018, 31.07.2018, 18.09.2018, 17.12.2018, 08.04.2019 and 19.08.2019. *Appearance for the parties*: Hemal Waravita and Palitha Yaggahawita AAL for the Appellant; D.R.B.N.B. Karunathilaka- IO, K.G.Dharmathilaka, Additional Secretary Administration, W. Ariyaratna, J.A.C. Harini Jayasinghe and D.P.K. Hewapathirana for the PA (Ministry of Home Affairs). See, <https://www.rticcommission.lk/web/images/pdf/rticappeal-113-2018/rtic-113-2018-en-29122019.pdf>

to apply in the circumstances of the case and as to who had given evidence at the said inquiry, to which question, the PA responded stating that officers of the PA, as well as those of the Appellant Society, had given evidence at the said inquiry.

Interim Order²

The refusal of the IO/DO to disclose the information requested on the ground that the recommendations of the inquiry report have not been carried out is unacceptable under and in terms of the RTI Act. Further, the PA has failed to demonstrate the manner in which the statements affect the privacy of the parties giving statements in evidence as it is an inquiry conducted by the PA in its official capacity.

The attention of the PA is drawn to Section 32 (4) of the Act which states that 'on appeal, the burden of proof shall be on the PA to show that it acted in compliance with this Act in processing a request.' The rationale provided by the PA in refusing the information is clearly not in accordance with the Act. The PA is directed to file Written Submissions specifying the precise manner in which the privacy exemption applies in the circumstances of the case...

...The Commission questioned the PA with regard to its position on submitting the requested report and its findings.³ The PA stated that the particular investigation concluded on 31.05.2017 and the report had been submitted to the PA on 01.06.2017. The PA further noted that the report was handed over to the Additional Secretary of the Ministry of Home Affairs and it is presently in the custody of the subject Minister. In explaining its position regarding the refusal to submit the requested information, the PA stated that though the investigation had concluded, no action had been taken with regard to the matter to date and hence, the report cannot be submitted.

2. Order delivered on 20.04.2018.

3. At the hearing before the Commission on 05.06.2018.

Expressing its concerns regarding the response of the PA, the Appellant stated that this was not sufficient justification for refusing the information under the RTI Act. The Appellant also stated of record that it had filed its membership to establish citizenship within the meaning of Section 43 of the Act by way of a document dated 05.06.2018 which stated, *inter alia*, that the Appellant Society was established in Sri Lanka under the Royal Charter in 1952.

Interim Order⁴

The PA is required to establish an exemption under Section 5 (1) in order to refuse the information and also required in terms of Section 32(4) to satisfy the burden of proof in regard to why the harm in disclosure is greater than the public interest.

It is evidenced that the justification for refusing to release the information as contained in the responses of the IO and the DO through letters to the Appellant respectively dated 04.08.2017 and 08.12.2017 (*viz*; invasion of privacy presumably under Section 5 (1)(a) and on the basis that the recommendations of the said inquiry have not been carried out) have now been varied to the extent of claiming that the reason is that the file has been submitted to the subject Minister and that a directive is awaited in that regard. The attention of the PA is strictly directed to the fact that the same is not a legal basis to refuse information under and in terms of the RTI Act.

The PA is directed to file a written response before this Commission, signed by the DO, affirming the above ground as the basis for the failure to submit the requested information. The Appellant is directed to submit minutes of the ongoing case in relation to this matter before the Court of Appeal...

...The IO stated that the DO (the Secretary to the Ministry of Home Affairs) has requested further time to respond and produced a letter

4. Order delivered on 05.06.2018.

dated 24.07.2018 to this effect.⁵ In the aforesaid letter the DO states that the requested preliminary inquiry report has been sent to the Minister of Home Affairs and although an inquiry was made into obtaining the report through the administration branch, the Minister has requested further time. Accordingly, the DO has requested a further grace period in order to enable the PA to produce the report.

Interim Order⁶

As requested by the PA, further time is given for the purposes of ascertaining the status of the matter. The Appellant is again directed to submit minutes of the ongoing case in relation to this matter before the Court of Appeal which is of direct relevance for the issuance of an Order of the Commission in this Appeal...

...The Appellant submitted that the matter is in relation to a land which was leased to the Red Cross Society where a petrol shed was established and later it was transferred to another individual. The Red Cross Society Branch in Hambantota had been serving the people around the area out of the income from this petrol shed. The Appellant stated that it had been providing constant income for the Society for a considerable period. It was further stated on behalf of the Appellant that the Branch Chairman then has attempted to lease out the said land for his personal gains consequent to which the Appellant filed a Writ Application against him in the Court of Appeal. The Appellant has then complained to the PA to hold an inquiry. As a result of this inquiry, these wrongful acts were revealed.

The Appellant is requesting for that particular inquiry report. However, the PA refuses to release the inquiry report based on the fact that the recommendations of the said inquiry report have not been implemented yet by the Ministry and further since the statements of the parties are included in the report. The Appellant submitted that these two reasons of the PA are not legally valid and is not in accordance with the RTI Act.

5. At the hearing before the Commission on 31.07.2018.

6. Order delivered on 31.07.2018.

The PA has thereafter, *via* letter, informed the Commission that the procedure followed at the said inquiry is wrong and the findings of the inquiry were scrapped. Therefore, the Inquiry Report cannot be released. The Appellant submitted that the aforesaid decision has affected many people. The PA stated that it had held an inquiry. However, the inquiry had then been called off by the PA stating that the inquiry report does not carry sufficient information that can be released to the Appellant.

Final Order ⁷

The Commission orders a copy of the “preliminary investigation conducted with regard to the transferring of the land which belongs to the filling station to another party” to be provided to the Appellant. A certified copy of the above document is to be released to the Appellant by the PA within two weeks upon the receipt of the order.

Appeal Allowed ⁸

Legal Commentary

Matters for Determination by the Commission

Re: Procedural Objections

Is the failure of the Appellant to aver citizenship as required by Section 43, fatal to the Appeal of the Appellant as alleged by the PA?

7. Order delivered on 19.08.2019.

8. NB: Due to non-compliance by the PA with Order dated 19.08.2019, the Appellant lodged a complaint with the Commission on 04.10.2019. Accordingly, the Commission sent out a Notice dated 25.10.2019 directing the PA to comply failing which a prosecution in terms of Section 39 of the RTI Act may be warranted. Consequently, the Report which was the subject matter of the information request dated 15.06.2017 was released to the Appellant on 13.11.2019. Therefore, the Commission deemed that a prosecution in terms of Section 39 (4) need not be instituted.

Re: Substantive Matters

Would the release of the inquiry report amount to an unwarranted invasion of the privacy of the persons whose statements form part of such inquiry report, in terms of Section 5 (1) (a), thereby precluding the disclosure of the inquiry report?

Reflections on the Propositions Established in the Order of the Commission

Re: Procedural Objections

The Alleged Failure by the Citizen to Aver Citizenship

With regard to the alleged failure by the Appellant to aver citizenship, the Commission held that the Appellant had submitted of record, documentary evidence to establish its citizenship, *viz.*, as being a society established under the Royal Charter of 1952. It is clear therefore that if an Appellant fails to aver “citizenship” in a preferred Appeal, such failure would not be a ground to reject an Appeal if that lacuna is corrected before the Commission.⁹ This approach reflects the application of the RTI Act having regard to its philosophy and intent without allowing technical objections to become a determining factor.

Re: Substantive Matters

On the basis of the proceedings and the ensuing Orders made by the Commission, the propositions established by the Commission may be construed as follows:

- i. When a PA pleads an exception in refusing disclosure of information on the ground of “privacy concerns” under Section 5(1) (a), it would not suffice to claim so by mere *ipse dixit* but would be incumbent upon such a claim as statutorily decreed by Section 32(4) and Section 5 of the Act to be duly established in terms of the burden of proof as envisaged in those provisions.

9. TISL v Presidential Secretariat, RTIC Appeal 06/2017, dated 04.12.2018.

- ii. Where such statutory duty is imposed on a PA, it is its responsibility to provide information to an information requestor without taking on an argument that the said information has been handed over to another PA.¹⁰

In circumstances where the Commission makes an Order requiring due compliance with time limits imposed by the statute, the failure to comply with such order would entail the prosecutory process under the Act in terms of Section 39.

The Public Interest Element and the Impact of a Threat of Prosecution

The Appellant Society, based in Hambantota, had been serving the people around the area out of the income from the gas station in question when its Chairperson had attempted to lease out the land on which the gas station was located.

After a couple of days of hearing at which the PA had failed to make an application initially, the PA had subsequently entered an appearance arguing that the inquiry report cannot be released as the inquiry itself has been contested for its validity.

The Commission, having rejected the PA's decision, made Final Order directing that, a copy of the "preliminary investigation" conducted with regard to the transferring of the land to another party "be provided to the Appellant" within two weeks of the Order. Thereafter, in consequence of a complaint made by the Appellant to the Commission that the PA had failed to comply with the said Final Order and upon the Commission putting the PA on notice of prosecution for non-compliance, the report which was the subject matter of the information request was released to the Appellant. This resulted in the Commission deeming that prosecution in terms of Section 39 (4) of the Act need not be instituted.

10. Note: in contrast with a situation where the information sought is not in its hands but in the hands of a Third-Party as per Section 29 of the RTI Act.

The Privacy Argument vis – a – vis the Burden of Proof

In responding to a denial of information based on Section 5 (1) (a) of the Act,¹¹ the Commission noted that in order to take refuge under that provision, a PA was required to satisfy the burden of proof as envisaged in Section 32 (4) of the Act as to how the harm in disclosure is greater than the public interest. The PA's initial reason that the recommendation in the inquiry report had been carried out was at variance with the claim that the subject Minister had retained the file and therefore information cannot be given. In this regard, the Commission made a short shift of the matter when it held that it did not see any legal claim for the PA's said extraordinary claim as to why the information was denied.

Concluding Comments

The principal objective of the RTI Act is to put in the hands of an information requestor, the information that is sought, and not to put behind bars public officials who have been used to a culture of administrative defiance. Nevertheless, it must be noted that, in contrast with other Commissions appointed by the government of the day, the RTI Commission is vested with powers of launching prosecution for non-compliance with its orders.¹² This is an aspect that stood illustrated where the PA eventually complied with the Commission's Final Order in releasing the inquiry report concerned.

11. See RTI Act, Section 5 (1) (a) which the Commission noted.

12. A progressive initiative taken by the drafting committee of the RTI Act.

Tharindu Jayawardena v Ministry of Industry and Commerce

‘Our task as statutorily mandated is to ascertain if the former IO was subjected to any form of pressure when releasing the information in relation to item 08 and consequently whether the PA deliberately issued incorrect information in violation of Section 39 (1) (a) of the RTI Act. It was also incumbent on the Commission to ascertain if there had been a violation of Section 39 (2) of the Act.’

Decision: The Appellant requested several items of information relating to vehicles available with the Ministry. This included information such as types of vehicles available, their registration numbers, persons using vehicles, drivers, fuel expenses and such other related information. The IO, albeit responding partially to the Appellant’s request, provided inconsistent answers to the same points of information. The DO failed to respond upon appeal, and the Appellant preferred an appeal to the Commission. At the appeal hearing, the RTIC sought to ascertain if the former IO was subjected to any pressure when releasing information in relation to item 08. The Commission ruled that the IO had neither deliberately obstructed the provision of the information, nor had he intentionally provided incorrect, incomplete or inaccurate information. The IO submitted that the difference in his responses was due to administrative lapses within the PA.

Keywords: *Deliberate obstruction or providing incorrect information (Section 39 (1) (a))/Destroys, invalidates, alters or totally or partially conceal information (Section 39 (1) (b))/Offences (Section 39)/Officer fails without reasonable cause to provide assistance to an Information Officer (Section 39 (2))/Protection of Information Officers*

Brief Factual Background¹

By information request dated 09.07.2018, the Appellant requested the following information:

1. The number of vehicles available in the Ministry pool.
2. Types of vehicles available in the Ministry pool and their registration numbers.
3. List of names of persons using vehicles in the pool and the type and registration number of the vehicle assigned to each person.
4. Drivers attached to the Ministry pool and their respective vehicles.
5. Fuel expenses and maintenance expenses for the vehicles maintained in the Ministry pool for the year 2015.
6. Fuel expenses and maintenance expenses for the vehicles maintained in the Ministry pool for the year 2016. (annually)
7. Fuel and maintenance costs incurred in 2016 and 2017 for each vehicle (individually).
8. The number of vehicles and drivers provided to the Minister of Industry and Commerce (indicating the registration numbers of the vehicles separately).

The IO responding on 03.08.2018 provided the information requested above from 1 to 6 and 8 and requested a further two weeks to respond to item no. 7. Subsequently, two letters signed by the IO were hand-delivered to the Appellant's residence on 16.08.2018 through the Ministry's Media Unit. Both the responses the Appellant received regarding information request number 8 above were not only contradictory to each other but were also different to the initial answers provided by the IO.

1. RTIC Appeal (In-Person) Hearing 545/ 2018 heard as part of the formal meetings of the Commission on 04.12.2018, 29.01.2019, 02.04.2019, 09.04.2019 and 04.06.2019. *Appearance for the parties:* Tharindu Jayawardena for the Appellant; N.G. Panditaratne Additional Secretary Administration and T.D.S.P. Perera for the PA (Ministry of Industry and Commerce). See, <https://www.rticcommission.lk/web/images/pdf/rticappeal-545-2018/rtic-545-2018-en-06072019.pdf>

Dissatisfied with the responses he received, the Appellant appealed to the DO on 28.08.2018. He stated that in response to the information requested under item no. 8, the letter dated 03.08.2018 stated that the number of vehicles was 10, however, on 16.08.2018 the Ministry Secretary, via telephone, had informed the Appellant that the Minister was given only 2 extra vehicles. Subsequently, by a letter bearing number 102/04/01/191 dated 16.08.2018 handed over to the Appellant by the Media Unit of the Ministry, it was informed that the information provided previously was inadvertently provided and that the Minister was only provided 5 extra vehicles.

After receiving the said letter, Ministry Secretary again informed the Appellant, *via* phone, that the second letter may result in a miscommunication therefore even the said letter needs to be amended. On the same day, the PA informed the Appellant in writing that the Minister was using 3 vehicles. As such, the basis for the Appeal was that the Appellant received three different answers at three instances for the same question and it appeared that the IO was under some pressure to change the information given in the first instance. An appeal was preferred to the Commission on 20.09.2018 as the DO failed to respond within the stipulated time period.

Matters Arising During the Course of the Hearing

At the appeal hearing, the Appellant informed that through two information requests, dated 12.11.2017 and 23.10.2017, information was sought relating to the vehicle usage of the Ministry. As there was no response to the said requests, the Appellant made a further request on 09.07.2018. The IO then acknowledged the receipt of the information request and responded to the same on 03.08.2018. The Appellant, a journalist, prior to a publication of an article written based on the information he received contacted the relevant Minister to verify the information. Upon which the Appellant was directed to the Media Director of the Ministry and then to the Secretary to the Ministry. The Secretary stated that if the IO released

the information, it should be accurate. Thus, upon this confirmation, the Appellant published the article.

Subsequently, when the Appellant spoke to the Ministry Secretary again, the Secretary informed the Appellant that the number of vehicles as informed by the IO is not 10 but 5 and that the same should be corrected in the Newspaper. He further informed the Appellant that extra vehicles were provided to the Minister as he is required to travel outstation for official duties. Later, the IO had also called the Appellant and informed that 10 vehicles were not in use and handed over the phone to the Media Secretary. Minister's private Media Unit had then come to Appellant's workplace, which is the Lankadeepa office situated at Hunupitiya crossroad and handed over a letter on 16.08.2018. The said letter indicated that the Minister was allocated only 5 vehicles out of which 2 are used to travel in the North and North Central provinces.

The Appellant further informed the Commission that soon after this he was attacked on Twitter for being a racist. On the same day, the Media Unit hand-delivered another letter written by the IO, to the Appellant at his residence which stated that the previous letter (dated 16.08.2018) had inadvertently stated that 5 vehicles were allocated to the Minister where in reality only 3 vehicles were allocated to the Minister. The Appellant emphasized to the Commission that he felt that the IO had been pressurized to change the information several times.

The PA in response stated that the IO has been transferred and stated that the Minister has 3 vehicles for his use and another 2 vehicles that are used for projects. It was further stated that about 8 vehicles have been allocated for additional projects and these vehicles are also under the control of the Minister due to the absence of any other officer. The PA further informed that it amended the information several times to ensure that it provided the Appellant with accurate information.

At which point the Appellant inquired as to how 5 vehicles could be converted into 3 in one day, adding that it was problematic to change the answer in this manner from time to time. The Appellant also said that

an information request had been made requesting the driving records of these vehicles to know the true status of these conflicting responses.

The Appellant further said that if such incidents are normalized, the likelihood of such incidents happening again within the PA would also increase. When inquired from the PA as to whether the IO was intimidated, the Additional Secretary representing the PA said that there was no such influence and that it was an attempt to give a clearer and more accurate answer. When the Commission inquired from the PA, as to what steps were taken by the PA to inquire into this matter it was communicated that the IO can present himself before the Commission.

Interim Order²

At this stage, the question that arises is whether the IO was intimidated considering the events that had taken place, such as the initial letter dated 16.08.2018 signed by the IO containing different information to that released at the outset, the said letter although signed by the IO being handed over to the Appellant by the Minister's Media Unit and the Appellant being contacted *via* phone by the Media Unit and not the IO.

Therefore, the PA was directed to hold an inquiry and find out reasons as to why contradicting statements were issued on different occasions and whether the IO was compelled to change the information. The Commission further directed the PA to submit a report after conducting the inquiry...

... The PA, in its letter dated 28.01.2019, informed that the inquiry was being conducted by Additional Secretary (Policy) Ms. K. Piyarathne and requested a further two weeks to conclude the inquiry and submit the report as there were difficulties in obtaining IO's statement.

Interim Order³

As no action has been taken so far by the relevant officials of the PA to conduct the inquiry, it was decided to summon the two relevant IOs on the next day and conduct the inquiry before the Commission...

2. Order delivered on 04.12.2018.

3. Order delivered on 29.01.2018.

...When the Commission questioned about the inquiry conducted by the PA, the PA informed that as per the letter dated 08.01.2019 Ms. K. Priyarthne was directed to hold an inquiry to find out why contradicting statements were issued and if the IO was intimidated to change the information. Accordingly, the report on the inquiry was forwarded to the Commission by way of a letter dated 28.03.2019.

In relation to the inquiry report, the PA informed the Commission, that at the first instance Additional Secretary (Administration) T.D.S.P. Perera (IO) had inquired regarding the relevant information from the officers in charge of the subject matter and released the information on their advice. However, the same officers were not made aware of the second and third responses issued by the IO.

The Appellant emphasized that the inquiry should look into whether the Minister's media team's involvement in releasing the information to the Appellant and responding to Appellant's phone queries was tantamount to intimidation on the IO, as directed by the Commission on 04.12.2018.

When the Commission raised concerns pertaining to observation numbers 6 and 7 in the inquiry report, the PA responded saying that it was their finding that the IO had failed to conduct himself with a proper understanding as laid down in the Act.

Interim Order⁴

Observations 6 and 7 of the Inquiry Report are as follows:

6. IO failed to act properly.

IO appointed to release the information was Additional Secretary (administration) T.D.S.P.Perera and has failed to execute his professional duties responsibly.

7. IO failing to execute his duties with a proper understanding as per the RTI Act.

The Commission notes that the basis for the above-mentioned observations is unclear.

4. Order delivered on 02.04.2019.

When the Commission further questioned the basis for observations number 6 and 7 of the inquiry reports dated 02.04.2019, the PA agreed to further look into the issue and obtain advice from the Secretary of the PA and report back to the Commission.

Interim Order⁵

The Commission directs the PA to hold an inquiry to ascertain whether provisions of the RTI Act were violated. Especially if the following provisions were violated.

Section 39 (1) Every person who–

(a) deliberately obstructs the provision of information or intentionally provides incorrect, incomplete or inaccurate information;

Section 39 (1)

(b) destroys, invalidates, alters or totally or partially conceal information under his or her custody, or to which he or she has access to or knowledge of due to the exercise of his or her employment in such public authority;

Section 39 (2)

Any officer whose assistance was sought for by an information officer under section 23 (3) and who fails without reasonable cause to provide such assistance, shall commit an offence under this Act, and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding ten thousand rupees.

Offences committed under the aforementioned Sections can carry a punishment of a fine not exceeding Rs. 50,000/= or two years imprisonment or both once convicted by the Magistrate's Court.

This inquiry was initiated to find out whether the IO was under any intimidation or pressure when providing the information to the Appellant. The Attention of the PA was drawn to the complaint made by the Appellant to the effect that he was aware of certain persons who were attempting to change and/or amend the information released by the IO at the initial

5. Order delivered on 09.04.2019.

stage. Accordingly, the inquiring officer is bound to obtain statements from these identified individuals as well. Further, the inquiring officer is bound to disclose the findings which allowed him to arrive at a conclusion to say that the IO had failed to execute his duties responsibly. The report merely states that the IO, Additional Secretary (Administration) T.D.S.P. Perera, had failed to conduct himself responsibly. Since this conclusion is not backed with rationalized findings, the Commission finds the conclusion problematic.

It was further stressed that the second recommendation, which states that IO must take necessary steps to issue the information with the knowledge of the Secretary, is contradictory to the provisions of the RTI Act. Although attempts have been made to justify the above conclusion on the ground that the above procedure should be followed under the Establishments Code, Section 4 of the RTI Act, prevails over the Establishments Code. As per Section 23 of the RTI Act, the IO is bound to act independently in releasing or rejecting information requested under the Act.

As noted above, there have been serious omissions by the PA in relation to the inquiry that was conducted. The investigating officer is, therefore, directed to rectify the deficiencies in the report and inform the Commission. Additional Secretary (Administration) T.D.S.P. Perera is to be summoned before the Commission on the next date to face an inquiry...

...During the inquiry before the Commission,⁶ when the former IO was queried as to whether three contradictory responses were provided due to some pressure being exerted on him, the former IO, T.D.S.P. Perera stated the following:

1. The IO vehemently denied that he had been pressured into making conflicting statements and stated that it was due to confusion and misconception at the administrative level that these different answers to the Appellant's information request were given. He also denied that any officer had refused to provide him assistance when asked for in the carrying out of his duties.

6. At the appeal hearing before Commission on 04.06.2019.

2. Concerning item no.8, namely, the number of vehicles and drivers given to the Minister of Industry and Commerce, the information was initially given as 10 vehicles, then 5 vehicles and finally 3 vehicles.
3. The information was initially given as 10 vehicles, and this included 3 vehicles owned by the Minister in charge of the Ministry, 5 vehicles belonging to the Minister's staff and the 2 vehicles assigned to him by the Secretary in relation to the other activities/projects of the Minister.
4. The IO stated that he mentioned 5 vehicles in the second letter along with 2 vehicles allocated for projects and emphasized that the Minister uses 3 vehicles only.

In response, the Appellant submitted that,

1. That he requested for a definitive answer with regard to item no.8 in the request.
2. In the IO's second response it is stated that 'accordingly I inform you that since the North-East area falls within the Minister's area of duty, he has been allocated 2 extra vehicles however this Ministry does not provide drivers or fuel for the said vehicles.' However, although the change in the number of vehicles to 3 is being clarified by the IO as an 'additional clarification' this cannot be accepted.

The Commission's attention was also drawn to the fact that the information in relation to the Appellant's information request was released to social media before being provided to him and the information was provided to him *via* the Media Officers. In response, the former IO stated that he was not made aware of the information being released on social media.

The PA and the Appellant were apprised of the fact that the instant Appeal hearing was mainly to ascertain as to whether the former IO was pressured to make conflicting statements and as to whether the PA deliberately issued incorrect information in violation of Section 39 (1) (a) of the RTI Act or if there had been a violation of Section 39 (2) of the Act.

The Appellant stated that although he repeatedly stated that he had received conflicting responses to his information request, he nonetheless appreciated the fact that he had been able to obtain information under the RTI Act at the time that T.D.S.P. Perera (the former IO) had been acting as the IO of the PA.

Final Order⁷

The Ministry of Industry and Commerce is a PA that comes within the purview of the RTI Act and therefore has a statutory duty to strictly abide by its provisions.

Our task as statutorily mandated is to ascertain if the former IO was subjected to any form of pressure when releasing the information in relation to item no.8 and consequently as to whether the PA deliberately issued incorrect information which in violation of Section 39 (1) (a) of the RTI Act. It was also incumbent on the Commission to ascertain if there had been a violation of Section 39 (2) of the RTI Act.

Section 39 (1) (a) states as follows,

39. (1) Every person who–

(a) deliberately obstructs the provision of information or intentionally provides incorrect, incomplete or inaccurate information.

commits an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding fifty thousand rupees or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Section 39 (2) of the RTI Act states as follows,

Any officer whose assistance was sought for by an information officer under section 23 (3) and who fails without reasonable cause to provide such assistance, shall commit an offence under this Act, and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding ten thousand rupees.

7'. Order delivered on 04.06.2019.

At the inquiry before the Commission, the former IO denied that any influence had been exerted on him and confirmed that his transfer from the PA was a normal administrative transfer. He stated that the various responses given to the Appellant's information requests were due to misunderstandings by him and other officials at the administrative level.

The Commission is empowered to institute prosecution under Section 39 of the RTI Act only if the PA has deliberately provided false information contrary to Section 39 (1) (a) of the Act. In the instant matter, confusion and administrative bungling appear to have been the reason as to why differing information was given in this manner. Further, the IO has testified that no other officer declined or refused to provide information to him on his request. As such, it is determined that this could not form a basis on which the Commission is enabled to embark on a prosecution under Section 39 (1) (a) or 39 (2) as aforesaid.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

Was the IO subject to influence from his peers and/or superior(s) in arriving at his decision, and if so, whether the staff of the PA can be held guilty of an offence under and in terms of Section 39 (1) (a) to (g) and Section 39 (2) of the RTI Act.

Reflections on the Propositions Established in the Commission's Order

Exercise of the Commission's Jurisdiction in terms of Section 15

Unlike the vast majority of Appeals filed before the Commission, where the Commission hears and determines appeals made from the decision or failure of the DO to respond, the Commission exercised its inquiry

powers in this Appeal. The RTI Act confers the RTI Commission with a wide range of supervisory and enforcement powers under Section 15. Amongst these is the Commission's power to,

15 (a) to hold inquiries and require any person to appear before it

The Commission called upon the IO to examine whether the discrepancies in the information provided was influenced by any other officer at the PA and whether he had to face retaliation in the form of a transfer.

In terms of Section 39 (2), the failure to assist the IO with his duties under the RTI Act is an offence punishable with a fine up to Rs. 10, 000.

39 (2) Any officer whose assistance was sought for by an information officer under Section 23 (3) and who fails without reasonable cause to provide such assistance, shall commit an offence under this Act, and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding ten thousand rupees.

This provision imposing obligations on all the staff of the PA, is not merely directive, but mandatory, as it is listed as a punishable offence. This provision appears to be unique to the Sri Lankan Act, as comparative RTI legislation do not impose such an obligation with a penalty attached.

It is important to note that these supervisory and enforcement powers of the Commission are not merely supplementary to its Appellate powers. Rather, these supervisory and enforcement powers render the Commission's Appellate jurisdiction effective and impactful.

In the absence of enforcement powers, the Appellate jurisdiction of the Commission, although significant, may be rendered ineffective and meaningless. Thus, powers of inquiry in Section 15 (a) and powers to call for and inspect documentation in Section 15 (c)⁸ are significant.

While Section 15 confers these powers, Section 39 contains the reinforcement of these powers, by empowering the Commission to take

8. Section 15 (c) to inspect any information held by a public authority, including any information denied by a public authority under the provisions of this Act.

steps in the event of a breach of observance of these provisions. Section 39 details offences under the RTI Act, gives powers to initiate prosecution to the Commission and sets out penalties in the form of the imposition of a fine or imprisonment. Among the punishable offences defined in Section 39 are,

39 (1) (a) deliberately obstructs the provision of information or intentionally provides incorrect, incomplete or inaccurate information;
(f) resists or obstructs the Commission or any officer or other employee of the Commission, in the exercise of any power conferred on the Commission or such officer or employee, by this Act.

Powers comparable to Section 15 of Sri Lanka's RTI Act are vested with the Indian Central Information Commission through Section 18 of the Indian RTI Act. Similar to the above-cited Sections, Section 18 provides that,

18 (1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person,—
(e) who believes that he or she has been given incomplete, misleading or false information under this Act; and
(f) in respect of any other matter relating to requesting or obtaining access to records under this Act.

(2) Where the Central Information Commission or State Information Commission, as the case may be, is satisfied that there are reasonable grounds to inquire into the matter, it may initiate an inquiry in respect thereof.

Concluding Comments

In sum, Sections 15 and 39 can be considered the “teeth” of the RTI Act, conferring holistic powers on the Commission to fulfil what is envisaged in the Preamble of the Act;

WHEREAS the Constitution guarantees the right of access to information in Article 14A thereof and there exists a need to foster a culture of transparency and accountability in public authorities.

From the point of view of public servants employed in PAs, these measures ensure that they carry out their duties and functions under the RTI Act without fear or favour and that in the event of breach, they have recourse to appropriate mechanisms. While it is unlikely that the employees of the PA may themselves invoke these powers of the Commission, the Appellant too can invoke these powers (as evidenced in this instance) to ensure that the IO arrives at his decisions *sans* influence, pressure or intimidation. *Jayawardena v Ministry of Industry and Commerce* illustrates one such instance.

W. A. Dhammika Fernando v People's Bank

In previous decisions of the Commission (vide G.G.C. Keerthirathna v Department of Examination RTIC Appeal (In-Person Hearing) 987/2019, O.W.K. Gnanadasa v Bank of Ceylon RTIC Appeal (In-Person) 131/2017, T.P. Wickrama Arachchi v Department of Examination, RTIC Appeal (In-Person) 1170/2019 the Commission released information of a similar nature, considering the duty incumbent on the PA in the larger public interest to maintain transparency and accountability in its recruitment procedures and practices.

In view of the above and in line with the Orders that have been previously handed down by this Commission in several similar Appeals in compliance with Sri Lanka's RTI Act, the Commission directs the PA to release the final list of marks requested under item 13 and finds that the exemption pleaded by the PA viz., Section 5 (1) (a) does not apply in relation to this item of information.'

Decision: The Appellant and 7 others requested several items of information in respect of the promotions pertaining to the Manager Grade (3-1) of the People's Bank (PA) which was advertised by the Circular no 7860/2017 dated 02.01.2017. The IO provided some items of information and rejected the remaining under Section 5 (1) (a) and 5 (1) (g) of the Act. Dissatisfied with the response of the IO the Appellant lodged an appeal with the DO. The DO responded stating that the information cannot be provided on the basis that it falls within the exemptions in Sections 5 (1) (a) and 5 (1) (g) of the RTI Act. Dissatisfied with this response, the Appellant preferred an appeal to the Commission. At the appeal hearing, the Commission directed the release of the information pertaining to final marks, cut – off marks and the issuance of promotion letters to selected applicants, holding that Sections 5 (1) (a), 5 (1) (g) and 5 (1) (l) are not applicable to final marks and cut-off marks

leading to the selection of applicants. This decision of the Commission was based on the need for accountability and transparency to appointments in PAs functioning on public funds. However, the Commission upheld the decision of the PA to withhold the information in relation to the remainder of the information request, that is, those relating to interim marks issued at various stages of the promotion process.

Keywords: *Fiduciary (5 (1) (g))/ Integrity of an examination being conducted by the Department of Examination or a Higher Educational Institution (Section 5(1) (l))/Marks at interviews/ Personal information (Section 5 (1) (a))/Promotions/Public Authority permitted to raise new exemptions during the pendency of the appeal/Public Funds/ Public Interest (Section 5 (4))*

Brief Factual Background¹

By information request dated 05.10.2018, the Appellant and 7 others requested the following in respect of the promotions pertaining to the Manager (3-1) Grade of the Bank which was advertised by the Circular bearing no 7860/2017 dated 02.01.2017. The Appellant had faced the written examination held by the Department of Examinations on 18.03.2018 and was called for the interview based on marks received for service, educational and professional qualifications. Although some candidates were promoted, the Appellant was not. The Appellants also stated that he was not clear whether the issuance of promotion letters for manager (3-1) grade vacancies had been completed. Therefore, it is in this context that the following information was requested.

1. Is the issuing of letters of promotion concluded?
 2. The number of candidates who have submitted their applications to the Department of Human Resources for the said promotion?
 3. The number of candidates who faced the written examination.
1. RTIC Appeal (In-Person Hearing) 1193/2019 heard as part of a formal meeting of the Commission on 08.06.2019, 09.10.2019, 03.10.2020, 08.25.2020, 09.29.2020 and 24.11.2020. *Appearance for the parties:* W.A. Dhammika Fernando, Chathura Warnasuriya AAL, and Pasindu Silva AAL for the Appellant; U.M.J. Indrajith AAL for the PA (People's Bank). See, <https://www.rticommission.lk/web/images/pdf/1193-2019/1193-2019.pdf>

4. The number of candidates who have passed the written examination under the conditions of the said examination?
5. The complete list of marks issued by the Department of Examinations to the Bank (PA) in respect of the candidates (The marks for the first question paper, second question paper and whether passed/ failed).
6. The following in respect of all the candidates who applied for Manager Grade 3-1.
 - a. Service marks sheet
 - b. Educational qualifications marks sheet
 - c. Professional qualifications marks sheet
7. Marks sheet containing the marks obtained by each candidate prior to the interview.
8. The cut-off mark for the interview and the basis on which the said cut off mark was decided.
9. The number of candidates who appeared for the interview.
10. Interview criteria and the marks allotted for each criterion.
11. How the marks were calculated for each candidate at the interview.
12. (i) The marks obtained by the Appellant and (the 7 other persons who submitted the information request along with the Appellant)
 - (ii) Marks given by the Interview Board to all the candidates called for the interview
 - (iii) An original copy of the marks list signed by the interview board
13. List of final marks including written test, service marks, professional qualification marks, marks for educational qualifications and complete marks obtained by each candidate in the interview.
14. The cut-off mark of the promotions
15. List of candidates who have been issued promotion letters.

The IO had by response dated 26.10.2018 provided information in relation to items 1, 2, 3, 4, 9, 10, and 11 and had denied information in relation to item 5, 6, 7, 12 (ii), 12 (iii), 14 citing Section 5 (1) (a) and 5

(1) (g). In relation to item 8, the IO had stated that the cut off mark is determined based on the marks received by the employees who participated in the interview. In relation to items 13 and 15, the IO had stated that the cut-off mark/ minimum mark on which the letters of promotion are issued is determined based on the total marks obtained and the number of vacancies. Dissatisfied with the response of the IO in relation to items 5, 6, 7, 8, 12 (ii), 12 (iii), 13, 14 and 15, the Appellant lodged an appeal with the DO on 05.11.2018. The DO responded on 26.11.2018 stating that the information cannot be provided on the basis that it falls within Sections 5 (1) (a), 5 (1) (g) and other relevant exemptions. Dissatisfied with this the Appellant preferred an appeal to the Commission on 14.01.2019.

Matters Arising During the Course of the Hearing

At the appeal hearing, counsel representing the PA maintained the applicability of the exemptions 5 (1) (a) and 5 (1) (g). Further, the PA submitted a letter dated 30.10.2019 from the Chief Manager, Human Resources addressed to the Additional Chief Legal Officer, which indicated the basis on which the cut-off mark requested therein was decided. Accordingly, it was stated that the number of candidates corresponding to the number of vacancies in Circular No. 7860/2017 is selected and the total mark assigned to the candidate who has obtained the lowest mark (which are marks obtained for the written examination, service and educational qualifications) along with the variance possible through the 10 marks allocated at the interview is taken into consideration and that the cut-off marks have been determined taking into account the variations in the available marks. Accordingly, the candidates who have obtained this mark or higher are selected from the interview.

The PA at the hearing on 25.08.2020 further submitted that the information cannot be provided on the basis that there is an agreement between the Department of Examinations and the PA. On being asked to produce the relevant agreement for the perusal of the Commission, the PA on 29.09.2020 submitted that there was no such agreement, and it was the position of the Board of Directors of the PA that the information

cannot be provided on the basis that the information is exempted under Sections 5 (1) (a) and 5 (1) (g) of the RTI Act.

Written Submissions of the Appellant dated 06.03.2020.

The Appellant submitted *inter alia* that the denial of the information items 5, 6, 7, 8, 12 (ii), 12 (iii), 13, 14 and 15 on the basis that it falls within the exemptions in Section 5 (1) (a) and 5 (1) (g) is arbitrary, unjust, irrational and incorrect. The Appellant was of the view that the information sought was necessary to ascertain whether he had been unfairly prevented from obtaining the promotions and that the PA should ensure that his rights were protected.

Written submissions of the PA dated 10.03.2020.

It is the position of the PA that Section 5 (1) (a) and Section 5 (1) (l) of the RTI Act applies in deciding whether the cut-off mark can be disclosed. Further, it is the contention of the PA that cut off mark or examination marks are not included in the definition of information in Section 43 of the RTI Act.

Final Order²

On consideration of the aforesaid matters, the Commission enters into Final Order in this Appeal. At the outset, the Commission notes, that it has been the accepted practice of the Commission to permit the PA to raise exemptions at the appeal stage before the Commission, (*Vide page 9 in Verite Research (Pvt.) Ltd. v Central Bank of Sri Lanka RTIC Appeal (In-person) 25/2018 and RTIC Appeal (In-person) 26/2018*).

Considering the points raised by both parties, it appears that the information in dispute between the parties is on the disclosure of items 5, 6, 7, 8, 12 (ii), 12 (iii), 13, 14 and 15. It appears that the PA has referred to

2. Order delivered on 09.29.09.2020. This Order has been appealed against by the Public Authority to the Court of Appeal under Section 34 of the RTI Act. The Appeal is pending at the time of this publication.

Sections 5 (1) (a), 5 (1) (g) and 5 (1) (l) of the RTI Act (in its responses at different stages of the appeal process). The Appellant, however, contends that the said exemptions do not apply to the instant Appeal and secondly that there is a larger public interest that this information is disclosed to maintain, *inter alia*, the transparency and accountability of the functioning of the PA.

Applicability of Section 5 (1) (a) of the Act.

In examining the rationale for refusing to provide information about a candidate's final score on the grounds that it would harm the privacy of the candidate, it appears that privacy under the Right to Information Act of India No. 22 of 2005 does not apply in such instances under the (comparable) Section 8 (1) (j).

In previous decisions of the Commission (*Vide G.G.C. Keerthirathna v Department of Examination* RTIC Appeal (In-Person) 987/2019, *O.W.K. Gnanadasa v Bank of Ceylon* RTIC Appeal (In-Person) 131/2017, *T.P. WickramaArachchi v Department of Examination* RTIC Appeal (In-Person) 1170/2019 the Commission released information of a similar nature, considering the duty incumbent on the PA in the larger public interest to maintain transparency and accountability in its recruitment procedures and practices.

In view of the above and in line with the Orders that have been previously handed down by this Commission in several similar Appeals in compliance with Sri Lanka's RTI Act, the Commission directs the PA to release the final list of marks requested under item 13 and finds that the exemption pleaded by the PA *viz.*, Section 5 (1) (a) does not apply in relation to this item of information.

The Commission further sees no objection to the release of the information requested in items no. 8 and 14, as these relate to cut-off mark and the basis for determining such cut off mark does not harm the privacy of the candidates. The Commission is not inclined to accept the argument of the PA that such cut-off marks do not fall within the

definition of information in Section 43 of the Act given that, such marks are a matter of substantive documentation.

On the same basis, the Commission ordered the release of information in item 15. The Commission is of the view that the provisions of Section 5 (1) (a) does not apply in this regard and that information relating to selected candidates are in the public interest, reflecting the institutional transparency shown in the preamble.

In so far as the public interest in the release of such information is concerned, even where exemptions have been made to the disclosure of such information, an overriding public interest would effectively trump the applicability of such exemptions as stipulated in Section 5 (4) of the RTI Act. The larger public interest in disclosing information that ensures the transparency of selection procedures for the post of a public officer has been emphasized, including by the Indian Central Information Commission in *Amarjeet v Union Public Service Commission*.

Further inquiring into the matter, the Commission further stated that even if one or more exemptions were to apply, in terms of Section 5 (4) of the RTI Act, the Commission can order the release of such information if there is a larger public interest in the disclosure. The attention of the PA is drawn to *Transparency International Sri Lanka v Presidential Secretariat* RTIC Appeal 06/2017 (Order dated 04.12.2018) where it was stated by this Commission that,

“In instances where Section 5 (1) (a) is urged to deny information, it is an important factor that this Section contains the public interest embedded within the exemption itself.”

In this Appeal, the Commission is of the view that as the PA is an institution operating on public funds and the vacancies in question are related to a public post, there is a clear public interest in maintaining the transparency and accountability of the PA in granting such promotions.

However, the Commission is of the view that Section 5 (1) (a) of the Act may be deemed to be relevant in respect of items 5,6,7,12 (ii) and (iii). By providing information relevant to those items, assessments relevant

to other candidates may also be issued to the public and disclosure of matters not relevant to public interest may harm the candidate's privacy.

The Commission further states that the larger public interest in Section 5 (1) (a) read with Section 5(4) is, in any event, served by the release of information in items 8, 13, 14 and 15 in the instant Appeal. As such the decision of the PA in respect of items 8, 13, 14 and 15 is reversed and the PA's decision in respect of items 5, 6, 7, 12 (ii) and (iii) is upheld.

Applicability of Section 5 (1) (g) of the Act.

While noting the above precedents, the Commission is of the view that relevance of Section 5 (1) (g) of the RTI Act, in the instant Appeal, is only in relation to items 12 (ii) and (iii). However, the Commission does not see the need to comment on the relevance of Section 5 (1) (g) as such information has already been rejected under Section 5 (1) (a).

Applicability of Section 5 (1) (l) of the Act.

Section 5 (1) (l) of the Act states as follows;

Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where... disclosure of the information would harm the integrity of an examination being conducted by the Department of Examination or a Higher Educational Institution.

It is further important to note that the Sinhala version of the Act states as follows;

(2) වන උපවගන්තියේ විධිවිධානවලට යටත්ව- විභාග දෙපාර්තමේන්තුව හෝ උසස් අධ්‍යාපන ආයතනයක් විසින් පවත්වනු ලබන යම් විභාගයකට අදාළ තොරතුරු රහසිගතව තබා ගැනීමට නියමිත වන්නා වූ අවස්ථාවක දී... මේ පනත යටතේ ඒ තොරතුරුවලට ප්‍රවේශ වීම ප්‍රතික්ෂේප කළ හැකි ය.

It is clear, on a reading of the above, that the Sinhala text categorically includes examinations conducted by the Department of Examinations or a Higher Educational Institution where a decision has been made to keep

the information confidential and is not confined to ‘ongoing examinations’ as implied by the English text of the Act.

Section 44 of the Act states,

‘In the event of any inconsistency between the Sinhala and ‘Tamil texts of this Act, the Sinhala text shall prevail.’

Accordingly, the PA was asked as to whether there is any such decision by the Department of Examinations indicating that the results of this particular examination which comprises part of the information request, were of a confidential nature. It was the submission on behalf of the PA during the proceedings on 25.08.2020 that there was an agreement between the Department of Examinations and the PA which prevented it from disclosing the information.

The PA was accordingly directed to produce the same before the Commission. However, the PA on 29.09.2020 stated that there was no such agreement and that the Board of Directors continued to be of the view that the information in issue cannot be released on this basis that it falls within the exemptions cited by the PA in the responses of its IO and DO i.e., Section 5 (1) (a) and 5 (1) (g). Therefore, the Commission is not in a position to comment on this matter or its validity.

Conclusion

On consideration of the foregoing discussion of facts, and applicable legal positions the Commission is of the view that the exemptions pleaded by the PA viz., Sections 5 (1) (a), 5 (1) (g) and 5 (1) (l) cannot be considered applicable to the release of information in items no. 8, 13, 14 and 15. As such, the Commission directs the release of information related to items no. 8, 13, 14 and 15. The Commission upholds the decision of the PA not to release information regarding Items 5,6,7,12 (ii) and 12 (iii).

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

Re: Procedural Objections

The Appellant raised the objection that the PA was estopped from raising further exemptions under the RTI Act during the course of the hearing of the Appeal.

Re: Substantive Matters

The crux of the information request was the marks obtained by the candidates at various stages of the shortlisting and selection process for promotions in the PA's Human Resources Department. The matter for determination by the Commission was to ascertain which of these 15 points of information could be withheld under the statutory exemptions pleaded by the PA, viz., Sections 5 (1) (a), 5 (1) (g) and 5 (1) (l). It was then incumbent upon the Commission to order the release of the points of information which did not subsume under these exemptions, where so determined. As such, the Commission was called upon to assess the information sought against the substantive exemptions pleaded by the PA, to wit,

- (i) Does the information constitute personal information which has no relation to public activity or cause an unwarranted invasion of privacy, with the absence of any larger public interest? (Section 5 (1) (a))
- (ii) Is the information required to be kept confidential by virtue of the existence of a fiduciary relationship? (Section 5 (1) (g))
- (iii) Would the release of the information impinge upon the integrity of an examination conducted by the Department of Education or a Higher Education Institution? (Section 5 (1) (l))

Reflections on the Propositions Established in the Order of the Commission

The issue of Estoppel raised by the Appellant

This objection was dismissed on the basis that, in accordance with the Preamble to the RTI Act and the legislative philosophy that is reflected therein, transparency and accountability required that the information sought to be disclosed must be released without technicalities standing in the way.

Limited Application of the Exemption in Section 5 (1) (a)

The Commission directed the release of only the (a) cumulative final mark list and the (b) cut-off marks of the relevant applicants requested in items 8, 13, 14 and 15 and not the detailed breakdown of mark requested in items 5, 6, 7, 12 (ii) and (iii), stating that the release of details of the assessment of other candidates to the public sphere may result in the unwarranted invasion of the privacy of the said candidates in a manner that has no relationship to the public interest.

How could a qualitative distinction have been drawn? Could “institutional transparency” contemplated in the Preamble have been dissected in that way? The Commission took the view that in any event, the wider public interest in Section 5 (1) (a) read with Section 5 (4) is served by the release of information in items 8, 13, 14 and 15. The overriding public interest as stipulated in Section 5 (4) of the Act requires disclosure even where *prima facie* an exemption may be pleaded in as much as Section 5 (1) (a) contains the public interest embedded within the exemption itself. Given that the PA is functioning on public funds and given that the vacancies in issue are to public posts, there is a clear public interest in maintaining transparency and accountability in the processes of the PA.

Applicability of Section 5 (1) (g) – the Fiduciary Exemption

The Commission noted that if at all, this consideration could have arisen only in regard to items 12 (ii) and (iii) of the information request and as the same has already been exempted on the basis of Section 5 (1) (a), the Commission saw no reason to enter into a ruling.

Applicability of Section 5 (1) (l) of the Act – Affecting the Integrity of an Examination Being Conducted by the Department of Examination

In this context, the PA had been asked by the Commission whether there was any decision by the Department of Examinations indicating that the results of this particular examination which comprise part of the information request, were of a confidential nature. The PA initially contended that there was an agreement between the Department of Examinations and the PA which prevented it from disclosing the information. However, such an agreement was not forthcoming. Nevertheless, the PA had argued that the Board of Directors was of the view that the information cannot be released.

Iipse Dixit of the PA (Board of Directors)

The point to be made here is that even if there had been such agreement, one cannot see how it could have stultified the Commission's power to have perused the same and come to its own decision whether or not to disclose the information in question.

Concluding Comments

What are the duties incumbent on the Commission to monitor the performance and ensure the due compliance by the PA of the duties cast on them under the Act? Should the PA be found to be errant and acting in non-compliance under the Act,³ ought not the Commission take steps to prosecute under Section 39? Does the Act make provisions (including

3. As required by Section 14(a) of the RTI Act.

financial means) to initiate required action to seek due compliance of its Orders/determination as aforesaid? If not, what steps should the Commission take to make recommendations to the Government in pursuance of Section 14 (b) of the Act, lest its Orders be rendered a dead letter? These are questions that will become increasingly relevant in the future as Sri Lanka's RTI Act and its Appellate and policy-making body, the RTI Commission will be called upon to face formidable obstacles to the right to know of citizens posed by the country's volatile political environment.

Wasantha Samarasinghe v Department of Inland Revenue

‘...this Commission is of the view that the consent from such companies in respect of or against disclosure under Section 29 (1) is not applicable because the information sought, namely, the information in relation to income tax, VAT and NBT paid by registered steel manufacturing companies in Sri Lanka for the last five years separately, cannot be classified as confidential information given by a Third-party under and in terms of Section 5 (1) (i) of the RTI Act.’

In any event, there is sufficient public interest in the disclosure of the information under and in terms of Section 5 (4) of the RTI Act given that the Appellant alleges that there is tax evasion amounting to over LKR 25 billion on the part of the companies. As such it concerns monies owed to the Department of Inland Revenue the key public institution responsible for the collection of revenue on behalf of the State...’

Decision: The Appellant requested information in relation to the amount of income tax, VAT and NBT paid by 17 iron/steel producing registered companies in Sri Lanka from 2013 to 2018, separately. The IO refused the information on the basis of personal information, and prejudice to the Sri Lankan economy caused through the premature disclosure of taxation policies. On appeal, the DO affirmed the IO’s decision. Dissatisfied with the DO’s response, the Appellant preferred an appeal to the Commission. At the appeal hearing, the PA further pleaded that the disclosure of tax paid would also enable competitors to calculate the profit margin of the companies, thereby harming their competitive interests (Section 5 (1) (d)). The PA’s main argument was the information was precluded in terms of the provisions of the Inland Revenue Act. The Commission ruled that the RTI Act supersedes any contravening provisions in the Inland Revenue Act relied

on by the PA, by virtue of Section 4. The Commission further ruled that the tax compliance documentation furnished by these companies cannot be held to be information provided by the said companies in 'commercial confidence' in terms of the RTI Act, and that the overriding public interest in this Appeal mandates the disclosure of the information. The Commission further ruled that Sections 5 (1) (a), 5 (1) (c) (iii) and 5 (1) (d) are inapplicable to the facts of this Appeal.

Keywords: *Competitive interests of Third-Parties (Section 5 (1) (d))/Confidential information given by a Third-Party (Section 5 (1) (i) read with Section 29)/Personal information (Section 5 (1) (a))/Prejudice to the Sri Lankan economy caused through the premature disclosure of taxation policies (Section 5 (1) (c) (iii))/Priority of RTI Act (Section 4)/Public interest (Section 5 (4))*

Brief Factual Background¹

The Appellant by request dated 17.08.2018 requested information in relation to the following entities;

Ceylon Steel Corporation Ltd. (Ceylon Steel)

Ceylon Steel Corporation Ltd.

GTB Ceylon Steel Corporation (Pvt.) Ltd. (GTB)

Melva Rolling(Pvt.) Ltd. (Melva)

Captain Steel (Pvt.) Ltd. (Captain)

(CN) Confab Steel (Pvt.) Ltd. (CN)

(SR) Steel (Pvt.) Ltd. (SR)

Melbourne Metal(Pvt.) Ltd. (Melbourne)

Melbourne Metal (Pvt.) Ltd. (Shakthi)

1. RTIC Appeal (In-Person) 747/2018 heard as part of the formal meetings of the Commission on 20.02.2019, 15.10.2019, 14.01.2020 and 03.03.2020. *Appearance for the parties:* Wasantha Samarasinghe for the Appellant; M. D. S. M. Devapriya, Senior Commissioner, Sanath Karannagoda, Y. S. R. P. A. Kehelkattuwa for the PA (Department of Inland Revenue). See, https://www.rticommission.lk/web/images/pdf/08022021/747_2018.pdf

Ashok Steel Industries(Pvt.) Ltd. (Ashok)

Ashok Steel Industries (Pvt.) Ltd. (Sunstar)

Kaylas (RS)

IWW Industries (Pvt.) Ltd. (IWW)

Bolka Industries(Pvt.) Ltd. (බෝල්කා)

Mocow Lanka Steel(Pvt.) Ltd. (DSI)

Moscow Lanka Steel(Pvt.) Ltd. (3 STAR)

Jetmore Steel(Pvt.) Ltd. (JET)

Information in relation to the amount of income tax, VAT, and Nation Building Tax (NBT) paid by the above iron/steel producing companies registered in Sri Lanka in the last 5 years, to be provided separately.

The IO responded on 04.09.2018 stating that the information cannot be provided in terms of Section 5 (1) (a) and 5 (1) (c) (iii) of the RTI Act. Dissatisfied with the response the Appellant lodged an appeal on 07.09.2018. The DO responded on 17.09.2018. As Appellant was dissatisfied with this response as well, he lodged an Appeal with the Commission on 01.10.2018.

Matters Arising During the Course of the Hearing

When inquired about the response given to the information request by the PA, the PA responded stating that the IO had responded to the request by a letter dated 04.09.2018. Further, a letter dated 07.09.2018 has been sent to the IO of the PA informing him that no action has been taken regarding the requested information and that action should be taken promptly. It was noted that Appellant had addressed the letter dated 07.09.2018 to the IO and the PA was inquired as to whether it will raise any objection in this regard.

The PA responded by stating that it tries to provide information as far as possible and thus has no objections in relation to the same. The PA further stated that the PA responded to the Appellant by letter dated 17.09.2018.

In response, the Appellant stated that he had not received the response letters dated 04.09.2018 and 17.09.2018. The letters were handed over to the Appellant at the appeal hearing.

The PA, referring to the direction of the RTIC in RTIC Appeal 229/2017 *M. Hemapala v Department of Inland Revenue*, where the Appellant requested information on Madolsima Plantation Ltd's tax return, noted that the Commission had taken into account that the information requested pertained to personal information in terms of Section 5 (1) (a) of the RTI Act, subject only to release if an overriding public interest was established. The Appellant responded in counter, stating that he had the right to know this information as a taxpayer and notwithstanding the provisions of subsection 5 (1) (a), under and in terms Section 5 (4) the information in question should not be refused as the public interest in disclosing the information outweighs the harm that would result from its disclosure.

The PA further stated that summary information on tax payments have been included in the PA's Annual Report, but the tax payments paid by the above-mentioned companies in the information request are not included in the said report. The PA also stated that the Annual Reports contain only a summary of taxes paid each year.

Interim Order²

On consideration of the submissions made by both parties, it is of note that there is a significant difference between the information requested in RTIC Appeal 229/2017 and this information request. That is, in RTIC Appeal 229/2017, the Appellant had requested letters that were exchanged between Madolsima Plantation Ltd and the Inland Revenue Department which attracted the privacy interests of individuals named in those letters.

However, in this Appeal, the Appellant had requested the amount of tax paid by the above-mentioned companies. Such information should be in the public records of the PA. This Commission may direct the disclosure

2. Order delivered on 20.02.2019.

of such information to the public if there is any public interest in it, even though the person (Third-Party) has not consented in writing to the disclosure of such information under Section 5 (1) (a) of the RTI Act.

In *Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd* (RTIC Appeal 99/2017)

this Commission ordered the information requested to be disclosed on the ground that it is in the public interest even where the relevant Third-Party has not consented to release of the same.

The function of the Commission is to ascertain whether the information requested can be legitimately and in law, be made available to the Appellant, after a consideration of whether the information falls under the exemptions set out in Section 5 (1) of the RTI Act. And if the information falls within the purview of an exemption in Section 5 (1), whether the public interest override in Section 5 (4) is found to apply.

Given the above circumstances, the attention of the PA is drawn to the fact that the information sought, namely, the information in relation to income tax, VAT and NBT paid by registered steel manufacturing companies in Sri Lanka for the last five years separately, the consent from such companies for or against disclosure under Section 29 (1) is not applicable as this information cannot be classified as confidential information given by a Third-Party under and in terms of Section 5 (1) (i) of the RTI Act.

It is also noted that Section 5(1)(c)(iii) of the RTI Act is not applicable as it relates to ‘premature’ disclosure of financial and economic policies relating to taxation...

...On 20.02.2019, as the PA had requested for further time to apprise the Commissioner-General (DO) of the facts transpiring before the Commission and to obtain appropriate/necessary instructions, the Commission queried whether the PA was now amenable to the release of the information.

The PA stated that it had awaited a written communication by the Commission in relation to the same in order to submit to the

Commissioner-General. Although the relevant Minute/Order had not been communicated to the PA, the PA clarified that it had placed the matter before the Commissioner-General informing him of the status of the Appeal and the events transpiring before the Commission. The PA produced a copy of the unsigned letter addressed to the Commissioner-General as evidence of the same.

Excerpts of the relevant content are reproduced below;

... it is felt that clarifications on the legality and provisions of the Department as well as the rights of taxpayers need to be obtained.

Further, it is felt that the DO in terms of the RTI Act is the Commissioner-General of Inland Revenue and in a situation where there is no appeal to the DO from a decision of the IO a conclusion/ decision of this nature being provided by the RTI Commission is contrary to the laws and procedures.

It is felt that as this gives rise to a legal issue it is appropriate to forward this to the Attorney-General's Department for advice

As the DO under the Act, this is forwarded to you for information and a decision on this matter.

The PA, at the previous hearing, submitted that it is not taking up the objection that the Appellant had not directed his letter complaining of non-response to the DO but rather to the IO.

The Appellant contended that the PA is intentionally delaying the release of the information and noted that the said letter provided before the Commission is unsigned and of no validity. He, therefore, contended that it's not evidence of the fact that the PA has taken any steps subsequent to the previous hearing to apprise the Commissioner-General of the matter.

Interim Order³

On the previous hearing in this Appeal, it was the view of this Commission that the requested information (i.e., the payment of tax by an entity liable

3. Order delivered on 15.10.2019.

to pay tax) relates to information that pertains to the collection of public funds/tax monies. The PA has not contended that the payment thereto has been disputed or is the subject of any controversy. As such, it was our thinking that this information may legitimately come within the scope of information released under the Act, subject to an overriding exemption put forward by the PA in terms of Section 5(1) of the RTI Act.

No such exemption has yet been established by the PA. Disclosure of the amount of tax paid by an entity to the state coffers cannot amount to 'serious prejudice' being caused to the economy of Sri Lanka by 'prematurely' disclosing economic or financial policies regarding taxation (Section 5(1) (c) (iii)). Nor does this amount to an instance where information has been supplied in confidence to a Third-Party (Section 5(1) (i)) as what is requested here are not the private and confidential documents tendered to the PA by the entities.

Further, it is noted that, as the information relates to taxation (i.e., the amount contributed by the said entity to the state coffers), the above reasoning in this Appeal and relevance to the circumstances of the matter in question is limited to the immediate factual context of this Appeal and may not be taken as a general precedent in relation to information pertaining to details of taxation.

In the circumstances, we issue this Order to enable the relevant officials of the PA to apprise the Commissioner-General and to place its response before the Commission in this regard on or before the next date of hearing which will be the final date in this Appeal...

...The PA was queried as to the response of the Commissioner-General once apprised of the proceedings and Order of the Commission⁴. The PA noted that unless there is a public interest it was of the view that private information exempted by Section 5 (1) (a) could not be provided. The PA contended that a company would fall within this exemption given that a company is a legal entity.

4. At the hearing before the Commission on 14.01.2020.

The Commission is of the view that a company does not fall within the purview of Section 5 (1) (a) of the RTI Act, and it was limited to individual persons. Nevertheless, the fact that the information request concerns monies due to a public fund establish that there is a public interest in the disclosure of the information.

The PA further stated that in a previous Appeal i.e., *M.G. Hemapala v Department of Inland Revenue* (RTIC Appeal 229/2017) the Commission permitted the relevant company to be inquired as to whether it consents to the disclosure of information and held that the information could be released after the consent was given.

The Commission was of the view that this was limited to the facts of the said case, where the information request concerned correspondence between the Company and the PA and not the amount of tax paid by the Company and is therefore distinguished from the present case...

...The PA noted that in terms of Section 209 of the Inland Revenue Act No 10 of 2006⁵, (provision relating to secrecy) it is prevented from disclosing the information except to the CIABOC, upon Court order, to the Ministry of Finance or in any other manner laid down in the said Section. The Commission noted that the said Inland Revenue Act No. 10 of 2006 had been replaced by 24 of 2017 and accordingly queried from the PA the status in terms of the new Act. The PA tendered that it was relying on the old Act as the information requested concerns a period during which Act No. 10 of 2006 was in operation. Upon being queried as to the status under the new Act the PA submitted that the circumstances in which

5. Editor's Note: Section 209 of Act, No. 10 of 2006 states that: "Except in the performance of his duties under this Act, every person who has been appointed or is deemed to be appointed under or who has been employed in carrying out or in assisting any person in carrying out the provisions of this Act, shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person that may come to his knowledge in the performance of his duties under this Act, and shall not communicate any such matter to any person other than the person to whom such matter relates or his authorized representative or to the Minister or the Secretary to the Ministry of the Minister in charge of the subject of Finance, nor suffer or permit any person to have access to any records in the possession, custody or control of the Commissioner-General."

the information can be released are even more stringent.⁶ The PA stated that the disclosure of the details requested will enable anyone to calculate other figures in relation to the said companies which the companies will perceive as being prejudicial to their functioning. The Commission noted that the new Act could be applicable from the perspective of the Right to Information and as such submissions in terms of the said Act too would be necessary.

The Appellant stated that there was a grave need for this information to be disclosed as this will reveal that the companies in relation to whom the information is being sought have engaged in tax evasion amounting to over LKR 25 billion. Furthermore, it is in the interest of the public that the said information is disclosed.

Interim Order⁷

The PA is directed to file Written Submissions, *inter alia*, substantiating its position *vis-à-vis* the Official Secrecy clauses contained in the Inland Revenue Act No 24 of 2017. The Appellant may respond within two weeks of the receipt of the PA's Written Submissions...

...The PA had by Written Submissions dated 28.01.2020 (in response to the Order of the Commission dated 14.01.2020) submitted that it was denying the information under and in terms of Sections 5 (1) (a) and 5 (1) (c) (iii) of the Act. The PA further stated that the relevant secrecy provisions in the Inland Revenue Act No 06 of 2010 is Section 209 and in the Inland Revenue Act No 24 of 2017 which has replaced the 2010 Act with effect from 01.04.2018 are Sections 100 and 191.

The PA submitted that the Inland Revenue Act has established various limitations on the disclosure of tax details pertaining to exports. Furthermore, the provision of the information requested enables other parties to calculate the declared income of the parties concerned.

6. Editor's Note: Sections 100 and 191 of Act, No. 24 of 2017 are reproduced in this Order later.

7. Order delivered on 14.01.2020.

Furthermore, in terms of Section 5 (1) (d) of the RTI Act, this can affect the commercial competitiveness of the Third-Party concerned and as there is no public interest in the disclosure of the said information, the PA has denied the information.

Final Order⁸

Sections 5 (1) (a), 5 (1) (c) (iii) and 5 (1) (d) of the RTI Act state that,

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...

(c) the disclosure of such information would cause serious prejudice to the economy of Sri Lanka by disclosing prematurely decisions to change or continue government economic or financial policies relating to...(iii) taxa...

(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.

Section 209 of the Inland Revenue Act, No. 6 of 2010 pertains to the protection in respect of official secrecy that the PA is relying on. However, in view of the fact that the Inland Revenue Act No 24. of 2017 replaced the same with effect from 01.04.2018, the 2017 Act will be considered to govern the present case. The relevant Sections are Sections 100 and 191 of the said Act.

8. Order delivered on 03.03.2020.

Section 100 of the Act which concerns confidentiality *vis-à-vis* details provided by taxpayers to the PA states as follows:

- (1) *Except as provided for in subsection (3), (4), (5) or (7) every person having a duty under this Act or being employed in the administration of this Act, shall regard as secret and confidential all information and documents the person has received in an official capacity in relation to a specific taxpayer, and may disclose that information only to the following persons:-*
- (a) the employees of the Department and of the Customs Department in the course, and for the purpose, of carrying out their duties;*
 - (b) the Minister in charge of the subject of Finance in the course, and for the purpose, of carrying out supervision of the Department;*
 - (c) the Auditor-General or any person authorised by the Auditor-General, only when such disclosure is necessary for the purposes of official duties;*
 - (d) tax authorities of a foreign country, in accordance with an international agreement entered into with a specific authority;*
 - (e) the Attorney General for the purpose any criminal proceedings or civil proceedings where actions are instituted by the State or actions filed against the State or where the opinion or advice of the Attorney General has been sought in writing by the Department of Inland Revenue;*
 - (f) a court, in a proceeding to establish a taxpayer's tax liability or responsibility for an offence;*
 - (g) the Land Reform Commission, only when such disclosure is necessary for the purposes of official duties; (h) the Controller of Exchange for the purpose of prosecuting violations of the Exchange Control Act;*
 - (i) a Commission appointed under the Commissions of Inquiry Act, in an investigation into the affairs of any person or any person's spouse or child; and*

- (j) *the Commission to Investigate Allegations of Bribery or Corruption established under the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994.*
- (2) *person who is permitted to disclose information under subsection (1) shall maintain secrecy except to the minimum extent necessary to achieve the object for which disclosure is permitted.*
- (3) *A person who receives information under subsection (1) shall maintain secrecy except to the minimum extent necessary to achieve the object for which the information was received.*
- (4) *The Commissioner-General may disclose information concerning a taxpayer's affairs to the taxpayer or the taxpayer's authorised representative only after obtaining reasonable assurance of the authenticity of the claim.*
- (5) *Information concerning a taxpayer may be disclosed to another person with the taxpayer's written consent.*
- (6) *The obligation as to secrecy imposed by this section shall continue to apply in respect of any person notwithstanding that the person ceases to be appointed under or employed in carrying out the provisions of this Act.*
- (7) *The Commissioner-General may publish a list of the names of taxpayers–*
 - (a) who are in default of tax under section 152;*
 - (b) who have failed to file a return as required; or*
 - (c) on whom an understatement penalty has been imposed under Chapter XVII.*

Section 191 states as follows;

A person who contravenes subsection (2) or (3) of section 100 shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one million rupees or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.

While the PA's citation of the aforesaid Sections is an attempt to exempt itself from the provisions of the RTI Act it has been the view of this Commission that the RTI Act would apply. The attention of the PA is drawn to Section 4 of the RTI Act and this Commission's view in RTIC Appeal 6/2017 *TISL v Presidential Secretariat* (Order dated 04.12.2018).

Section 4 of the RTI Act states that,

The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.

This Commission in RTIC Appeal 6/2017 *TISL v Presidential Secretariat* (Order dated 04.12.2018) agreed with the views expressed by the Indian CIC in *M.R. Misra v the Supreme Court of India*, (CIC/SM/A/2011/000237/SG) where the CIC specifically dealt with laws that conflict with the Indian RTI Act in the context of Section 22 of the said Act:

...where there is any inconsistency in law as regards the furnishing of information, such law shall be superseded by the RTI Act. Insertion of a non-obstante clause in Section 22 of the RTI Act was a conscious choice of Parliament to safeguard the citizens' fundamental right to information...If the PIO has received a request for information under the RTI Act, the information shall be provided to the applicant as per the provisions of the RTI Act and any denial of the same must be in accordance with Sections 8 and 9 of the RTI Act only.

Given the above, the Commission envisaged two scenarios:

1. *An earlier law/rule whose provisions pertain to the furnishing of information and is consistent with the RTI Act: Since there is no inconsistency between the law/rule and the provisions of the RTI Act, the citizen is at liberty to choose whether she will seek information in accordance with the said law/rule or under the RTI Act. If the PIO has received a request for information under the RTI Act, the information shall be provided to the citizen as per the provisions of the RTI Act and*

any denial of the same must be in accordance with Sections 8 and 9 of the RTI Act only; and

2. *An earlier law/rule whose provisions pertain to the furnishing of information but is inconsistent with the RTI Act: Where there is an inconsistency between the law/rule and the RTI Act in terms of access to information, then Section 22 of the RTI Act shall override the said law/rule and the PIO would be required to furnish the information as per the RTI Act only.”*

We find these sentiments to be entirely applicable in the context of Sri Lanka’s RTI Act. Otherwise, as this Commission observed during the course of the hearing of this Appeal, (Minute of the Record 31/10/2018), allowing the existing range of special laws to supersede provisions of the RTI Act would ultimately render the RTI Act futile. This is a consideration that must anxiously weigh with us.

It is, therefore, our view that the spirit and letter of the RTI Act brought into Sri Lanka’s statute books in 2016 with the modern objective of ‘combating corruption and promoting accountability and good governance’ (vide preamble to the RTI Act) cannot effectively operate if Section 8(1) of the DALL continues to be concurrently valid. It was precisely to address this situation that Section 4 of the RTI Act provides that; “The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.” This, we find, falls within the four corners of the caution that, the generalia maxim will not apply if there is “...something in the nature of the general one making it unlikely that an exception was intended as regards the special Act.” (Ceylon Coconut Producers Co-operative Union v C. Jayakody, supra)

Applying Section 4 to its fullest extent is important because of what the RTI Act undertakes to achieve through fostering ‘a culture of transparency and accountability (vide preamble to the Act)

Considering the applicability of the exemptions cited by the PA this Commission is of the view that Section 5 (1) (d) is inapplicable given

that it requires that the information be intellectual property under and in terms of the Intellectual Property Act No 36 of 2003. In this instance, the attention of the PA is drawn to RTIC Appeal 26/2018 *Verite Research (Pvt.) Ltd. v Central Bank of Sri Lanka* (Order dated 27.11.2018) wherein the Commission was of the view that,

It is relevant to note in this regard that the placing of the commas in that Section presents a cogent argument that what is deemed exempt under Section 5(1)(d) is information (including commercial confidence, trade secrets, or intellectual property) which are protected under the Intellectual Property Act. Hence those that are not protected under the Intellectual Property Act do not fall within the ambit of Section 5(1)(d). The comma inserted by the framers of the Act between the words “intellectual property” and the word “protected” leads to the two words being read as disjunctive, thus inferring with some force that the said Section applies only to information protected by the Intellectual Property Act.

In relation to Section 5 (1) (c) (iii) the PA has failed to firstly demonstrate how the disclosure of income tax, VAT and NBT of the named companies amounts to a premature disclosure of ‘decisions to change or continue government economic or financial policies relating to...(iii) taxation...’. Second even in the unlikely event that tax amounts paid can be considered economic or financial policy the ‘serious prejudice to the economy of Sri Lanka’ has to be established. As such the PA has failed to establish the applicability of this exemption.

Vis-à-vis the applicability of Section 5 (1) (a), the information requested is that which pertains to a company and not an individual. As such *prima facie* this Commission is not of the view that the exemption applies to the present case.

During the course of the hearings, the PA also argued that this information concerns a Third-Party and as such, it cannot be provided in the event that the Third-Party refuses to consent. However, this Commission is of the view that the consent from such companies in respect of or against disclosure under Section 29 (1) is not applicable because the information

sought, namely, the information in relation to income tax, VAT and NBT paid by registered steel manufacturing companies in Sri Lanka for the last five years separately, cannot be classified as confidential information given by a Third- Party under and in terms of Section 5 (1) (i) of the RTI Act.

In any event, there is sufficient public interest in the disclosure of the information under and in terms of Section 5 (4) of the RTI Act given that the Appellant alleges that there is tax evasion amounting to over LKR 25 billion on the part of the companies. As such it concerns monies owed to the Department of Inland Revenue the key public institution responsible for the collection of revenue on behalf of the State.

In the context of the above reasoning, the DO's decision to deny the information is reversed and the DO is directed to disclose the information to the Appellant within 2 weeks of the receipt of the order.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

Were the substantive exemptions pleaded by the PA applicable to tax filings of more than 15 companies in the iron/steel industry (information sought by the Appellant)? In addition to assessing the statutory exemptions pleaded by the PA against the information request, what were the provisions in the Inland Revenue Act which militated against disclosure?

As such, the Matters for Determination before the Commission were,

- (i) Is the information sought by the Appellant “personal information” in terms of Section 5 (1) (a)?
- (ii) Would the release of the information amount to prejudice to the Sri Lankan economy caused through the premature disclosure of taxation policies, as provided for in Section 5 (1) (c) (iii)?

- (iii) Would the disclosure of taxes paid by these companies enable their competitors to calculate the profit margin of the companies, thereby harming their competitive interests which are protected in Section 5 (1) (d)?
- (iv) Which of the two Acts, that is, the RTI Act or the Inland Revenue Act, supersedes the other in the event of contravention between the two when it comes to disclosure of taxes paid by the companies?

Reflections on the Propositions Established in the Commission's Order

The RTI Act vis à vis the provisions of the Inland Revenue Act (IRA)–application of the “Generalia Specialibus” principle

In this regard, the Commission is seen resolving the issue by employing a well-settled principle of statutory interpretation *viz.*, a later “Special Act” shall take precedence over an earlier enacted “General Act”, the said principle of interpretation being “*generalia specialibus non derogant*”.⁹

The Value Judgments Which the Commission Took into Consideration

It is trite jurisprudence that value judgments in legislation and judicial decisions do impact as secondary sources of law. Without a doubt, the Commission being a statutory quasi-judicial body, (its decisions/orders being amenable to an appeal to the Court of Appeal under the RTI Act) it could take into consideration the said secondary source of law as well. This consideration appears to be in the mind of the Commission in its application of Section 191 of the IRA.

The factors that weighed upon the Commission's reasoning in making the aforesaid determination were threefold.

- (i) The PA's contention on the concept of confidential information
- (ii) The PA's argument based on Third-Party interest
- (iii) The PA's concern on the applicability of the criterion of public interest.

9. Roy Wilson and others, *Maxwell on the Interpretation of Statutes* (11th edn, Sweet & Maxwell 1962). This is reflected on pages 9 to 10 of the Commission's Final Order.

It is these factors that the Commission is seen rejecting on the basis of the public interest override (Section 5 (4) of the RTI Act) and in light of the preamble of the RTI Act,¹⁰ in a matter involving a company's liability to pay taxes, that the Appellant sought in the instant Appeal on the allegation that the said companies have "evaded taxation" (which allegation the said companies had failed to refute).

Concluding Comments

One reservation remains however on account of the fact that the Commission in its conclusion states that:

"Taking into account, the Public Authority's strongly expressed concern regarding this Appeal being used as a precedent for others to flood the Public Authority with similar requests, we stress that the order in this Appeal is limited to the facts of the Appeal and should not be taken as of general application in relation to information requests of similar nature under and in terms of the RTI Act."

Several questions arise for reflection – viz.,

- (a) If there are information requests of similar nature, why should not the Commission's Order in ordering disclosure be of general application?
- (b) Why should "the PA's strongly expressed concern regarding this Appeal being used as a precedent for others to flood the PA with similar requests" be a factor that should stultify the Commission's approach in the future?
- (c) Would not, in qualifying its Order in those terms, the Commission devalue its Order in the instant case as a precedent?
- (d) Is it because, in the present case, the allegation of tax evasion by the companies involved had not been refuted?

10. Preamble to the RTI Act states: "WHEREAS the Constitution guarantees the right of access to information in Article 14A thereof and there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in public life through combating corruption and promoting accountability and good governance."

- (e) If in a future case, if such allegation is refuted, would it then mean that the Commission would have been stultified by the CIABOC, the Ministry of Finance or the views of the Attorney General?

These are the questions to which answers are not immediately provided in this Order. This is perhaps one reservation that arises in regard to an otherwise commendable Order of the Commission which gives effect and material content to the concept of “sovereign power of the people”.¹¹ The impact therein of such Orders has resulted in the further enhancement of Article 14 A of the 19th Amendment to the Constitution guaranteeing the constitutional Right to Information of the citizenry, as acknowledged globally.¹²

11. Constitution of Sri Lanka, Articles 3 and 4.

12. See *‘From Promise to Practice: Access to Information for Sustainable Development’* 2020 UNESCO Report on the Monitoring and Reporting of SDG Indicator 16.10.2 (Public Access to Information) <https://ifap.ru/pr/2020/n201207b.pdf>

Chamara Sampath v Parliament of Sri Lanka

‘...the legislative intent of Parliament in bringing in the three limbs of Section 3 (1) using the disjunctive ‘or’ in that connection was to emphasize an expansive reading of Section 3(1) to underscore the retention of information at an institutional level and not merely at an individual level (viz., a particular officer or post in that PA). To suggest otherwise would mean to accept that Public Authorities can deny information by claiming that it is under the custodianship of a different branch, division, agency or individual under its own aegis. Thus, the Public Authority (Sri Lanka Parliament) cannot refute that it has institutional possession, custody or control over the List of Names of MPs who submit Declarations to the Speaker of Parliament...

...The Commission is of the view that it is the Parliament that corresponds to the definition of a “Public Authority” within the RTI Act, and the administrative and/or internal divisions or units within the Parliament are immaterial as far the RTI regime is concerned.’

Decision: The Appellant requested the list of names of Members of Parliament (MPs) who have handed over their respective Declarations of Assets and Liabilities in 2018 and the list of names of MPs who have handed over their Declarations from 2010 to date. At the appeal hearing, the following matters were raised: (1) Is there a distinction between the Speaker and Secretary-General of the Parliament to sustain the claim of the PA that the Secretary-General is not in the “possession, custody or control” of the information requested as envisaged in Section 3 (1) of the Act? (2) The applicability of the DALL, and RTI Act (3) the applicability of Section 5 (1) (a) of the RTI Act (4) the applicability of the exemption of Parliamentary Privilege in Section 5 (1)(k) read with Section 3(2). The Commission concluded the matter as follows: the threshold requirement of the PA being in possession, custody

or control of the requested information is satisfied to the extent that the Secretary-General holds institutional possession, custody or control over the impugned information which is an administratively maintained list; that the 'lists of names' requested by the Appellant does not fall under DALL but under the RTI regime, and Section 5(1)(a) does not apply to deny the release of the information in the first instance and that, in any event, Section 5(4) operates as a public interest override to enable such release. Accordingly, the information requested by the Appellant was directed to be released.

*This order was delivered in the context of an earlier appeal filed by the Office of the President in 2019 to the Court of Appeal against the Commission order directing the release of the Prime Minister's Declaration of Assets and Liabilities (TISL v Presidential Secretariat, CA/No1/2019). The appeal is currently pending.

Keywords: *Assets Declarations/Declaration of Assets and Liabilities Law No 01 of 1975/ 'Institutional Possession'/Information in 'Possession, custody or control of information' (Section 3 (1))/Parliamentary privileges (Section 3 (2) and Section 5 (1) (k))/Personal information (Assets Declarations do not amount to) (Section 5 (1) (a))/ Priority of RTI Act (Section 4)/ Public interest (Section 5(4))*

Brief Factual Background¹

By information request dated 21.06.2018, the Appellant requested the following items of information;

1. The list of names of Members of Parliament (MPs) who have handed over their respective Declarations of Assets and Liabilities in 2018
2. The list of names of MPs who have handed over their Declarations from 2010 to date

1 RTIC Appeal (Documentary/In-Person) 719/2018 heard as part of formal meetings of the Commission on 12.02.2019, 21.05.2019, 25.06.2019, 10.09.2019, 08.10.2019, 22.10.2019, 05.11.2019, 03.12.2019, 14.01.2020 and 15.12.2020. *Appearance for the parties:* Chamara Sampath and Tharindu Jayawardene for the Appellant; Tikiri K. Jayathilake, Assistant Secretary-General and P.K.D.S.W. Wijegunathilake, Deputy Principal Officer for the PA (Parliament of Sri Lanka). See, <https://www.rticommission.lk/web/images/pdf/08022021/719-2018.pdf>

The IO responding on 21.08.2018 stated that in order to obtain details in relation to Declarations of Assets and Liabilities of Members of Parliament, a request has to be made to the Speaker of Parliament in terms of the Declaration of Assets and Liabilities Law Act 1, of 1975.

Dissatisfied with the response of the IO and on the basis that the Appellant is not requesting the contents of the Declarations of Assets and Liabilities but a list of names of the MPs who have submitted their Declarations of Assets and Liabilities, the Appellant filed an appeal with the DO on 30.08.2018. The DO responded on 07.09.2018 stating that,

- a) Except in the limited instances laid down in the Declaration of Assets and Liabilities Law (DALL) No. 01 of 1975, in all other instances, the confidentiality of the Declarations of Assets and Liabilities must be protected,
- b) In any event, the relevant authority in relation to the Declarations of Assets and Liabilities of Members of Parliament is the Hon. Speaker and as such any query *vis-à-vis* the same must be directed to the Speaker.
- c) And in terms of Section 11 of the DALL when in conflict with any other given law, the DALL would prevail over such conflicting law.

Dissatisfied with the response of the DO, the Appellant preferred an appeal to the Commission on 11.09.2018.

Matters Arising During the Course of the Hearing

Preliminary Question: Submissions of Parties

Is the Public Authority (Sri Lanka Parliament) in “Possession, Custody or Control” of the Information Requested as Envisaged in Section 3 (1) of the Act?

The DO, whose decision was in issue in the instant Appeal before this Commission, primarily based his stand that he could not release the requested information due to the fact that the Declarations of Assets and Liabilities made by Parliamentarians are with the Speaker and not the

Secretary-General, and that the Secretary-General is not in a position to “issue directions” to the Speaker and that the Speaker of Parliament and the Secretary-General of Parliament are distinct positions.

The Constitution, Standing Orders and the Speaker’s Ruling on the Divineguma Bill

At the outset, it must be noted by this Commission that the position taken up by the PA is at divergence with the Determination of the Supreme Court in the aforesaid Divineguma Bill (Special Determination on the Bill titled “Divineguma”(SC.SD 01/2012 – 03/2012).

As will be dealt with in detail in the succeeding paragraphs of this Order, the Court declined to hold with a preliminary objection that two Petitions challenging the Bill, SC.SD 02/2012 and SC.SD 03/2012, must be dismissed *in limine* for non-compliance with *inter alia* the stipulation in Article 121 (1) of the Constitution to the effect that a copy of the Petition must be delivered to the Speaker. The objection was based on the fact that such delivery had instead been made to the Secretary-General of Parliament. The Supreme Court ruled that delivery to the Secretary-General instead of the Speaker is sufficient compliance with Article 121 (1) of the Constitution.

The PA contended however that, the Declaration of Assets and Liabilities Law No. 1 of 1975 (hereinafter, sometimes, “DALL”) stipulated as follows;

“Section 4 (b) of Declaration of Assets and Liabilities specifies that the Declaration of Assets and Liabilities by all the Members of Parliament other than the Ministers of the Cabinet of Ministers, other Ministers and Deputy Ministers shall be made to the Speaker.

Accordingly, considering the above facts and the Ruling of the Speaker the Secretary-General does not possess the authority under any law to release the information in the possession, custody and control of the Speaker.”

Drawing on this argument, the PA further stated that though the Secretary-General is aware of the place where such Declarations are kept in custody,

the ‘control’ over the same is in the hands of the Speaker (Minute of the Record of Proceedings 08.10.2019). Further, in its oral submissions before this Commission, the PA emphasized that the administration of Parliament is not in a position to “give directions to the Speaker” (Minute of the Record of Proceedings 12.02.2019).

Moreover, in the context of the nomination of the Deputy Secretary-General by Parliament as the DO of the Parliament (Minute of the Record of Proceedings before the Commission, 10.09.2019), it was the contention of the PA that under the DALL, the Speaker was the custodian of the impugned information, and as such, a formal request must be made to the Speaker instead of the Secretary-General.

It was asserted that in any event, the Office of the Secretary-General is not obligated under any written law to maintain records or registries of MPs who have declared their assets. The PA, while maintaining that the Speaker and the Secretary-General are two distinct and independent bodies, further noted that the Speaker is better equipped to protect the rights and privileges of MPs.

The PA further reiterated that there is constitutional recognition of the posts of Speaker and the Secretary-General, and furthermore, that there is a separate Act that governs the staff of the Secretary-General. It was further submitted on behalf of the Secretary-General that he sees no impediment to the appointment of an IO and DO by the Speaker himself in view of the fact that the Leader of the House and the Leader of the Opposition have appointed separate IOs and DOs for their respective offices (Minute of the Record of Proceedings 05.11.2019).

The PA also reiterated that, under and in terms of Sections 3(2) read with 5(1)(k) and Section 5 (1)(a) of the RTI Act, the information cannot be provided as it would impact Parliamentary Privileges and the privacy of the MPs concerned (Minute of the Record of Proceedings 22.10.2019).

In response, the Appellant’s representative stated that, while the contention of the PA that the two posts in issue are distinct cannot be accepted, even so, and if this was the position of the PA, the Secretary-

General was under an obligation to forward the information request to the Speaker in terms of Regulation 4 (6) of the RTI Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017). However, in the instant case, this had not happened, thus indicating that these were merely evasive tactics adopted by the PA as a ruse to deny the information asked for, which was of public importance. It was also noted that the PA in this instance (and/or the Honorable Speaker, if the distinction of the two posts is to be accepted), could provide the information requested with a "reasonable effort" as stipulated in Regulation No 4 (7) of the RTI Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017), given the nature of the information requested (Minute of the Record of Proceedings 08.10.2019).

Correspondence between the Commission, Secretary-General and Speaker.

Consequent to the ruling of the Commission of 08.10.2018 being discussed with the Speaker, at a meeting held between the Office of the Secretary-General and the Speaker, the Speaker requested the Commission to directly communicate with him regarding the aforesaid.

Thereafter, the Commission directed that the Order be forwarded to the Speaker (through the Office of the Secretary-General) for his perusal, upon the request of the Office of the Secretary-General (Minute of the Record of Proceedings 22.10.2019). At the proceedings of the Commission on 05.11.2019, the Appellant noted that he had met with the Speaker and the Secretary-General and that he had provided the previous Order of the Commission. The Appellant stated that the Speaker had maintained that the Speaker and Secretary-General are the same PA to which the Secretary-General had responded by saying that they are separate offices. He further contended that the attention of the Speaker had been drawn to the fact that the information request in issue had merely asked for a list of names to which the Speaker said that this can be provided and had asked the Secretary-General to provide the same.

The Secretary-General had however stated that the information cannot be provided. It was stated on behalf of the Secretary-General that the statements by the Appellant cannot be relied on and as of now, his instructions are that the Secretary-General will revert subsequent to obtaining legal advice. The PA explained that it had queried from the Attorney General as to whether the PA can release a list of names of the MPs who have submitted their Assets.

The response of the Attorney-General's Department dated 27.11.2019, was received on 03.12.2019, which was to the effect that the Secretary-General is not the relevant officer but the Speaker. This is on the basis that in terms of the DALL, Declarations of Assets and Liabilities have to be submitted to the Speaker and not to the Secretary-General.

On consideration of the same, it was noted by the Commission that there had been no intimation in the correspondence that the Attorney General had been apprised of the fact the Speaker does not have a separate IO and DO functioning under him. The Office of the Secretary-General was provided with two weeks to apprise the Attorney General's Department of the fact that the Speaker has not appointed a separate IO and DO and in this context to obtain advice once again on the matter regarding the provision of the information requested (Minute of the Record of Proceedings 05.11.2019).

At the proceedings of the Commission on 14.01.2020, the PA noted that subsequent to the last hearing it had written to the Attorney General's Department on 13.12.2019 querying whether the Speaker can provide the requested information. The Attorney General's Department had responded on 19.12.2019 stating that it cannot advise on the same as there is a related matter pending before the Court of Appeal. The PA further reiterated the contents of the letter dated 27.11.2019 by the Attorney General wherein it was stated that in terms of Section 4 (b) of DALL read with Section 43 of RTI Act, the citizen is enabled to approach the Speaker to obtain information relating to Declarations of Assets and Liabilities of Parliamentarians, that the functions of the Secretary-General and

Speaker are distinct and that accordingly, a proper request has not been made in law to the Speaker in terms of the RTI Act and DALL read together.

The PA submitted that it would be better if the matter is postponed until a determination in that Appeal is made, in which event the PA may follow the precedent set by the Court of Appeal regarding the information requested. The Commission noted that while it is not barred from making an Order in the present case, however, in view of the fact that the appeal to the Court of Appeal contains disputed substantive questions of the applicability of Section 4 of the RTI Act *vis-a-vis* the Declaration of Assets and Liabilities Law No. 1 of 1975 (as amended), this Appeal may be adjourned until after the date of conclusion of that Appeal. The Appellant requested that the Order be delivered irrespective of the pending Appeal in the Court of Appeal. Following further deliberations, it was agreed by parties that a reasonable time may be given for the matter in the Court of Appeal to be concluded (Minute of the Record of Proceedings 14.01.2020).

Questions of Law: Submissions of Parties

The primary contention of the PA is that the governing statute on the subject of Declarations of Assets and Liabilities of Parliamentarians is the DALL (*vide* Written Submissions of the PA dated 05.02.2019). Section 2 (1) (a) states;

“2 (1) The provisions of this Law shall apply to every person belonging to any one of the following classes or descriptions of persons—

(a) Members of Parliament...”

The DALL contains therein a unique procedure for the submission of Declarations of Assets and Liabilities and identifies a responsible authority to preside over the subject, *viz.*, in this case of Members of Parliament, the Speaker of Parliament. Sections 4 (3) and 5 (b) of the DALL read together stipulate the procedure for obtaining information.

Sections 4 (a) and 4 (b) state that,

“The Declaration of Assets and Liabilities shall be made in the following manner;

(a) to the President

(i) by the Speaker of Parliament,

(ii) by Ministers of the Cabinet of Ministers, other Ministers and Deputy Ministers,

(iii) by Judges and other public officers appointed by the President;

(b) to the Speaker of Parliament, by all other Members of Parliament not referred to in paragraph (a)”

Section 5 (3) states that,

“Any person shall on payment of a prescribed fee to the appropriate authority have the right to call for and refer to any Declaration of Assets and Liabilities and on payment of a further fee to be prescribed shall have the right to obtain that Declaration.”

The PA has raised several arguments stemming from its postulation of the DALL as the governing statute on the subject of Declarations of Assets and Liabilities of Parliamentarians.

The PA's contention is that the DALL supersedes the RTI regime. Although both the DALL and the RTI Act contain similar overriding provisions *vis-à-vis* conflicting clauses in other laws in Section 11 and Section 4 respectively, the PA's position is that the DALL ought to prevail over the RTI regime. This is mainly due to two reasons. The PA has characterized the DALL as a special law, and the RTI regime (together with the Act and Regulations), as the general law. According to the PA, the DALL stipulates that “it is mandatory for certain specified categories of persons to make periodic Declarations of their Assets and Liabilities in and outside Sir Lanka, making it a special law applies [sic] only to an identified category of persons” (*vide* Written Submissions of the PA dated 21.05.2019). In addition, the DALL specifies a distinct procedure and recognises responsible authority, as opposed to the general procedure contained in the RTI regime for the release of information. Moreover,

the PA's contention is that the DALL militates against provisions in the RTI Act and Regulations, in that the former specifies limitations on the usage of the information obtained.

In its Written Submissions dated 05.02.2019, the PA has cited Sections 7 (4), 8(1) and 8 (3) of the DALL to contend that, respectively, it is an offence for 'any person' to make public, the contents of such Declarations and that the Law compels secrecy to be preserved regarding the same, except in specified legal proceedings thereto. The PA has hence submitted that in view of the specific regime set out in the DALL, the maxim of interpretation, "*generalia specialibus non-derogant*" must apply and that provisions of a general law must yield to those of a special one.

The PA has also proceeded to cite Article 16 (1) of the Constitution to bolster its argument that the DALL ought to prevail over RTI laws. Article 16 (1) states that "*All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter*".

In counter-response to the objections raised by the PA in relation to the DALL, the Appellant submitted that the DALL makes no provision for the release of the information requested in the immediate instance (*vide* Written Submissions (undated) submitted by the Appellant in response to the submissions of the PA). The information requested is of a list of names (not the contents of the Declarations of Assets and Liabilities), and the DALL does not provide for the release of such a list (Minute of the Record of Proceedings 12.02.2019). Therefore, the Appellant's position is that it is the RTI Act that must apply to his information request, and that the refusal of information must be under and in terms of Section 5 (1) of the RTI Act, and that the PA has failed to make reference to a specified exemption under Section 5 (1), and where it has in fact referenced, has not substantiated the same.

On the matter of the applicability of the substantive exemptions under and in terms of Section 5(1) of the RTI Act, the PA pleaded that the information requested is exempted by virtue of parliamentary privilege

in its submissions before the Commission (*vide* Written Submissions dated 21.05.2019; Minute of the Record of Proceedings 12.02.2019 and 22.10.2019). The PA also cited Section 3 (2) of the RTI Act, which provides that the provisions of the Act shall not be in derogation of the powers, privileges, and practices of Parliament.

The Appellant, in counter-response, stated that although the PA has repeatedly raised the objection of parliamentary privilege preventing the PA from releasing the requested information, it has at no point demonstrated a discernible nexus between the requested information and the precise manner in which its release would violate any parliamentary privilege. The Appellant has also submitted that the release of a list of names could not affect the status quo of parliament or any of the particular assemblies.

The PA also insisted that, apart from pleading the applicability of Sections 3 (2) read with 5 (1) (k) and Section 5 (1)(a) of the RTI Act, the information cannot be provided as it would be an unwarranted invasion of the privacy rights of Parliamentarians in terms of Section 5 (1) (a) with no corresponding public interest factor. The Appellant contended that he was merely asking for a list of names of parliamentarians who had submitted Declarations of Assets and Liabilities and as such, no privacy concerns arose.

Final Order ²

Upon consideration of the aforesaid matters, the Commission enters into Final Order in this Appeal.

QUESTION 1: Is the Secretary-General of Parliament in “Possession, Custody or Control” of the Information Requested as Envisaged in Section 3 (1) of the Act in view of the Distinction drawn by the PA between the positions of the Speaker and the Secretary-General?

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2. Order delivered on 02.02.2021. This Order has been appealed against by the Public Authority to the Court of Appeal under Section 34 of the RTI Act. The Appeal is pending at the time of this publication.

The PA to whom the Appellant filed the information request is the Parliament of Sri Lanka. The Parliament has appointed the Assistant Secretary-General as its IO and the Chief of Staff/Deputy Secretary-General as its DO (<https://www.parliament.lk/en/get-involved/right-to-information>). It is then evident that the Parliament is the PA for the purposes of the RTI Act, and that a distinction within its departments cannot be maintained, in view of the fact that the IO and DOs are responsible for the information sought with regard to the PA, *viz.*, the Parliament.

Although their specific functions and duties are distinctly spelt out, (as would be the case with any institution's internal departments), the two posts perform their functions in conjunction to ensure that the overarching institution, that is, the Parliament, is run smoothly. In fact, as we have found, the two posts are often cross-referenced with regard to their appointment, duties, and functions, reinstating the fact that the two Offices are very much part of the same institution, carrying out their duties in conjunction with one another. The Commission is therefore of the view that the position of the PA that the offices of the Speaker and the Secretary-General are independent and separate is not tenable, and an institutional distinction between the two cannot be maintained, either in terms of the law or in fact. It is clear therefore that artificial lines cannot be drawn between the post of the Secretary-General of Parliament, from which the IO and DO have been nominated by the Parliament itself as the PA, and the post of the Speaker.

We hold that in full consideration of the constitutional positions of the Speaker and Secretary-General derived through the Parliament and the respective duties and functions in that regard, it is the Parliament which is the overarching institution for the purposes of the RTI Act and further, that the posts of the Speaker and the Secretary-General of Parliament are inextricably interlinked and intertwined therein.

Further, the Appellant has requested a "list" of names of Members of Parliament which, as the executing or administrative arm of the Sri

Lanka Parliament, is indisputably within the administrative functions of the Secretary-General of Parliament (DO). The further submission of the DO/IO was that it is not obligated under any written law to maintain records or registries of Members of Parliament in this manner. However, Regulation No 4 (7) of the RTI Regulations gazetted on February 3rd, 2017 (Gazette No 2004/66) calls upon a PA to give information which may be, with a 'reasonable effort', be produced from information held within one of the three limbs contemplated in Section 3 (1) of the RTI Act, namely, 'possession', 'custody' or 'control'. Thus, although the PA might not have a "list", it is manifest that it can nonetheless collate such a list with the information within its reach or 'awareness', based on its submissions.

The PA is reminded that the object of the RTI regime is to facilitate the disclosure of information and that the Act (particularly Sections 23 (3), 27(2), together with the Regulations and Rules of the Commission (particularly Regulation 4 (7)) contains various stipulations to ensure that technical objections do not obstruct the larger objects of the law. This is in line with RTI regimes world-over, where disclosure is the rule, and exempting information, the exception. This onus becomes heightened where there is an overriding public interest in the disclosure of information as detailed in Section 5 (4) of the Act.

"Institutional Possession"

In *TISL v Presidential Secretariat* [(RTIC Appeal 06/2017), Order dated 04.12.2018] a distinction was sought to be drawn by the PA in that Appeal, between the Presidential Secretariat and the President with whom the Declarations of Assets and Liabilities are deposited, in terms of the DALL. Having considered the institutional receipt of the Declarations of Assets and Liabilities, as opposed to an individual receiving the Declarations, the Commission ruled that the Presidential Secretariat had sufficient possession, custody and control over the Declarations. It was ruled that institutional possession (emphasis ours) of the impugned information is adequate compliance with Section 3 (1) of the Act,

Section 3 (1) of the RTI Act; viz., “Possession,’ ‘Custody’ or ‘Control’

Section 3 (1) of the RTI Act states that;

“Subject to the provisions of section 5 of this Act, every citizen shall have a right of access to information which is in the possession, custody or control of a Public Authority.”

It is moreover relevant to note that the three limbs in Section 3 (1) of the Sri Lankan Act, i.e., “possession, custody or control” are to be read disjunctively and not conjunctively as is clearly the legislative intent there-to, by the use of ‘ or’. It is sufficient that one of the three are satisfied, to infer or impute access to the information by the PA as envisaged under Section 3 (1) and/or the three terms are read cumulatively in the context of a particular factual circumstance.

For the purposes of this Appeal, we state this to underscore the fact that the legislative intent of Parliament in bringing in the three limbs of Section 3 (1) using the disjunctive ‘or’ in that connection was to emphasize an expansive reading of Section 3(1) to underscore the retention of information at an institutional level, and not merely at an individual level (*viz.*, a particular officer or post in that PA). To suggest otherwise would mean to accept that Public Authorities can deny information by claiming that it is under the custodianship of a different branch, division, agency or individual under its own aegis. Thus, the PA (Sri Lanka Parliament) cannot refute that it has institutional possession, custody or control over the List of Names of MPs who submit Declarations to the Speaker of Parliament. To hold otherwise on the part of this Commission would be to defeat the very purposes of the RTI Act and indeed, the objectives with which it was established.

The Commission is of the view that it is the Parliament that corresponds to the definition of a “Public Authority” within the RTI Act, and the administrative and/or internal divisions or units within the Parliament are immaterial as far the RTI regime is concerned. As is amply evidenced through the Constitutional provisions, Standing Orders and definitions furnished by the website of the Parliament itself, the posts of the Speaker

and the Office of the Secretary-General are interlinked and intertwined. As stated, aforesaid, we find that, contrary to the contentions of the Respondent PA, the Determination of the Supreme Court lends a supportive stance to the position that an institutional distinction between the two posts in question cannot be maintained in fact or in law.

In view of the above, the Commission overrules the preliminary objection that the distinctiveness of the offices of the Speaker and the Secretary-General of Parliament precludes the Secretary-General from having possession, custody or control as envisaged under Section 3 (1) of the RTI Act, and finds that the threshold requirement of the PA being in possession, custody or control of the requested information is satisfied to the extent that the Secretary-General holds institutional possession, custody or control over the impugned information.

QUESTION 2: *The Applicability of the DALL and RTI Act*

This Commission has on the previous occasion exhaustively considered and ruled on the matter of the overlap between the provisions of the DALL and the RTI Act, in its Order dated 04.12.2018 in *TISL v Presidential Secretariat* [RTIC Appeal/06/2017, Order dated 04.12.2018]. In that matter, the relevant PA and Appellant raised arguments in a similar vein to the instant appeal and the Commission decided that the RTI Act prevails over DALL.

The PA has simultaneously taken up the contradictory positions that the governing statute over the subject matter of the requests is the DALL, while at the same time stating that the DALL makes no provision for the maintaining of a “list of names”. The Appellant’s position is that the information requested is a list of names and does not, therefore, fall under the DALL, but under the RTI regime. We find this to be a more acceptable stance. The nature of the information envisaged to be requested under the DALL and the present information request, which relates to a List of Names in essential form cannot be considered in *parimateria* and a basic distinction arises between the DALL and RTI regimes in this regard.

QUESTION 3: *Applicability of Section 5 (1) (a)*

If the PA's contention that the information is of a personal nature is to prevail, it would, in essence, be to deem the fact of whether or not an MP has submitted his Declaration of Assets and Liabilities, as personal information prohibited from release by Section 5(1)(a). This cannot be so as firstly an MP is taking on a public role and as such has accepted a higher level of public scrutiny which was recognized by this Commission in *TISL v Presidential Secretariat* [RTIC Appeal 06/2017, Order dated 04.12.2018].

The disclosure of the requested information would only result in the Appellant (and subsequently the public at large, as information released under the RTI Act becomes public information) obtaining the names of the MPs who have disclosed their Declarations of Assets and Liabilities. The requested information would provide crucial insight into the compliance with the DALL by Members of Parliament who hold elected office and are financed by public funds. As such, there is an overriding public interest in the disclosure of the information as per Section 5(4) of the Act. In *TISL v Presidential Secretariat* [RTIC Appeal 06/2017; Order dated 04.12.2018] this Commission stated as follows, where the Declarations of Assets and Liabilities of the Prime Minister *per se* was in issue,

“The fact that stringent duties of transparency in regard to Declarations of Assets applies without exception to elected public officials (politicians) is a standard commonly accepted for long elsewhere as evidenced very well in a 2002 judgment of the Supreme Court of India (Union of India (UOI) v Respondent: Association for Democratic Reforms and Another; with People's Union for Civil Liberties (PUCL) and Another v Union of India (UOI) and Another, Decision: 2 May 2002, 2002 AIR 2112; 2002 (3) SCR 294).”

Given that this Appeal concerns information that will indicate compliance with the DALL the aforesaid reasoning is more so of relevance. Moreover, in examining the applicability of Section 5 (1) (a) in *TISL v Presidential Secretariat* [RTIC Appeal 06/2017, Order dated 04.12.2018], the Commission ruled that the exemption must yield to an overarching public interest most

evident in a matter such as the Declarations of Assets and Liabilities of elected representatives of the people;

This Commission holds that Section 5 (1) (a) does not apply to deny the release of the information in the first instance and that, in any event, Section 5 (4) operates as a public interest override to enable such release.

QUESTION 4: The Applicability of the Exemption of Parliamentary Privilege.

The Order of the Commission dated 22.10.2020 is reiterated wherein we noted that pleadings in the Written Submissions of the PA do not indicate the ‘privilege’ that is so violated. It is not discernible as to what ‘peculiar right’ of Parliamentarians is violated by the release of the information requested as the privileges thereto are conferred for the conducting of the special business of the House and related to conduct therein (Order dated 22.10.2019). The privileges thereto are conferred for the conducting of the special business of the House and related to conduct therein. The nexus between this and disclosure of statistics of the nature that the Appellant has requested is demonstrably unclear. Neither was the PA amenable to explaining further as to how and the manner in which the violation of a privilege is attracted therein.

In any event, the overriding public interest under Section 5 (4) of the Act would apply for similar reasons as stated before under Section 5 (1) (a).

Conclusion

In view of the foregoing factual and legal positions and the recapitulation of the same, we reiterate the following;

Matters in Agreement

1. It was the common ground of both parties to this Appeal that Declarations of Assets and Liabilities are forwarded by Members of Parliament in terms of Section 4(b) of the Declaration of Assets and Liabilities Law (1975) to the Speaker of Parliament.

2. It was also commonly agreed that the Secretary-General of Parliament is the administrative arm of the PA (Sri Lanka Parliament) as borne out by the relevant Standing Orders of Parliament.
3. Further, it was of consensus that what the Appellant had asked for, was a List of Names of MPs who have submitted their Declarations of Assets and Liabilities from 2010 to date, and in the year 2018.

Matters in Dispute and Summary of Rulings thereto

4. Threshold Question of Applicability of Section 3(1) of the RTI Act
 - i. Section 3(1) of the RTI Act specifies that information must be released by a PA if the said information is in its ‘possession,’ ‘custody’ or ‘control,’ subject however to the exemptions detailed in Section 5(1).

The threshold question for determination in this Appeal is limited to whether the Secretary-General of Parliament, from which post, the Parliament has seen fit to appoint the DO and IO in accordance with Section 23 of the RTI Act, has institutional possession, ‘custody or ‘control’ over the LIST of Names (emphasis ours) of Declarations of Assets and Liabilities supplied by Members of Parliament for a particular year/years as specified in the information request.

- ii. We hold that Section 3(1) applies to the institutional entity which is the Sri Lanka Parliament, that it is with regard to the Parliament which is the PA, that the question of ‘possession, custody or control’ arises *vis-à-vis* that body rather than different departments or posts within the body, and it is indisputable that Parliament, as the PA for all intents and purposes under this Act, does indeed have institutional ‘possession, custody and control’ of the List of Names of MPs who submit Declarations of Assets and Liabilities of Members of Parliament to the Speaker, as contemplated by Section 3(1) of the Act.
- iii. We are fortified in this ruling by the reasoning of the Supreme Court in the aforesaid “Divineguma” Bill (Special Determination

on the Bill titled “Divineguma”(SC.SD 01/2012 – 03/2012) where the Court declined to hold with a preliminary objection that two Petitions challenging the Bill, SC.SD 02/2012 and SC.SD 03/2012 must be dismissed *in limine* for non-compliance with *inter alia* the stipulation in Article 121 (1) to the effect that a copy of the Petition must be delivered to the Speaker. The objection was based on the fact that such delivery had instead been made to the Secretary-General of Parliament. The Supreme Court ruled that delivery to the Secretary-General instead of the Speaker is sufficient compliance for the purposes of Article 121 (1) of the Constitution.

- iv. Thus, it is our view that the Secretary-General of Parliament (DO) is not called upon to await directions from the Speaker to provide the information requested and that the contention of the IO/DO that they can only ‘execute’ a direction given by the Speaker has no relevance to the matter in issue.
- v. Further, the Respondent DO and IO argued in hearings before this Commission that they had no ‘control’ over the Declarations as they are by law, (Declaration of Assets and Liabilities Law, 1975) handed by MPs to the Speaker of Parliament, even though they are ‘aware’ of the place where the Declarations are kept. We hold that, ‘awareness’ speaks to the fact of ‘institutional possession’ and/or ‘institutional custody’ and/or ‘institutional control’ of the said information. In any event, as aforesaid, the Secretary-General of Parliament has accepted that it is the administrative agency of Parliament and as such, it is axiomatic that the LIST OF NAMES of Parliamentarians who have filed Declarations of Assets and Liabilities for the relevant years, (i.e., the information asked for by the Appellant) is within its ‘institutional’ possession, custody and control.
- vi. This Commission emphasizes that it is a primary statutory duty of the PA under Section 23 of the RTI Act, as buttressed by Article

- 14A of the Constitution, (brought in by the 19th Amendment and retained in the 20th Amendment), to bring itself to conform to the RTI Act in the administrative arrangements that it makes thereto. We are constrained to point to a distinct administrative anomaly arising thereto in the fulfilment of that statutory duty.
- vii. Presently, the PA (Sri Lanka Parliament) has nominated the Information and Designated Officers from the staff of the Secretary-General and/or the Secretary-General, but with the result that the said DO/IO contended that they do not have ‘custody, possession and control’ over information that is by law, given to the Speaker of Parliament. The Commission expended much effort to rectify this administrative anomaly, as detailed in the Matters Arising under this Appeal but with little success.
 - viii. Consequently, what results is a manifest absurdity in fact as the Appellant is left with no remedy with either the DO/IO of Parliament (Secretary-General of Parliament) or the Speaker, to whom an identical request in issue in this Appeal was submitted by the Appellant, as stated by him during the hearing of this Appeal, but was not responded to on the basis that the Speaker is not the IO/DO of Parliament.
 - ix. Moreover, the submission of the Respondent DO/IO that they are not obligated under any written law, to maintain records or registries of Members of Parliament who submit Declarations of Assets and Liabilities is rebutted by Regulation No 4 (7) of the RTI Commission’s Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017), which states that a PA is called upon to give information which may be, with a ‘reasonable effort’, be produced from information held within one of the three limbs contemplated in Section 3(1) of the RTI Act, namely, ‘possession’, ‘custody’ or ‘control’, which, we hold, has been satisfied in the circumstances of this Appeal;

Substantive Objections Raised by the PA

5. Where the substantive objections raised by the PA are concerned, we reiterate our position in *TISL v Presidential Secretariat* (RTIC Appeal 06/2017; Order dated 04.12.2018) that the DALL is subordinate to the RTI Act given Section 4 of the Act and that the principle of *generalia specialibus non-derogant* is not applicable in this regard.
6. The ‘confidentiality’ of the information requested has been strongly contended by the DO of the PA to be an issue if the information is released. This contention is untenable, in our view, as what has been requested is the List of Names of MPs who have submitted the Declarations of Assets and Liabilities to the named authority under the relevant law, which is a statutory duty. Further, it has been our decided view in *TISL v Presidential Secretariat* (RTIC Appeal 06/2017, Order dated 04.12.2018) that the release of the Declaration of Assets and Liabilities of the elected representative in issue, (the Prime Minister), subject to the redaction under Section 6 of the RTI Act of the private details of any other person related to the said elected representative, would not attract privacy/confidentiality concerns under Section 5 (1)(a) of the RTI Act.
7. We also hold that neither Section 3 (2) nor Section 5 (1) (k) which states that information which infringes the ‘privileges of Parliament,’ applies as exemptions to prevent the information in issue being released under the RTI Act. The ground of parliamentary privilege, it is held, is inapplicable in the first instance in regard to the release of the List of Names of MPs who have submitted their Declarations of Assets and Liabilities to the Speaker in terms of the DALL.
8. Further, it is manifest that the information requested is of high public importance and public interest given the need for accountability and transparency of elected representatives. The submission of Declarations of Assets and Liabilities by parliamentarians to the Speaker of the Parliament is a legal duty specially secured by the DALL. As such, this information request relates to the carrying out of a legal duty by

elected representatives. We record our considerable puzzlement as to why such a high degree of secrecy needs to be maintained about this data.

9. As a body established under and in terms of the RTI Act to 'foster a culture of transparency and accountability in Public Authorities' which includes the Parliament of Sri Lanka, this Commission is cognizant of its public duty regarding the same. That duty is rendered all the more imperative in that the information requested by the Appellant, *viz.*, a List of Parliamentarians who have adhered to the law, cannot be called for and obtained under the DALL in any event, unlike the said Declarations themselves.
10. Thus and without prejudice to this Commission's afore declared position that the RTI Act overrides the DALL by virtue of Section 4 of the RTI Act, we opine that if the argument of the PA that the Appellant may apply for and obtain the instant information using procedures stipulated in that Law rather than using the RTI Act, despite the fact that the said Law does not allow for such information be either asked for or given, is taken at face value, the Appellant would be effectively left without a remedy. This would be a comprehensive rebuttal of the information regime that the RTI Act seeks to establish. Thus, we hold that Section 5 (4) of the RTI Act pertaining to the public interest secured by the release of the information, which this Commission is duty-bound to uphold, prevails over the objections raised by the respondent PA, including, *inter alia*, Sections 3(2), and 5(1) (a) and (k).

Accordingly, the decision of the DOs is reversed in this Appeal and the information requested by the Appellant is directed to be released. It is further noted that the considerable period of time taken in issuing this ruling was owing to a decision taken upon the consensus of parties in the hearing of the Appeal, that time may be taken to allow an appeal being heard by the Court of Appeal upon the Office of the President contesting an earlier decision of this Commission ordering release of the Declaration

of Assets and Liabilities of the Prime Minister (CA/RTI/01/2019) to be concluded. However, as close to two years and three months have lapsed since the Appellant lodged this Appeal to the Commission, this Order is issued hereto.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

The PA in this Appeal raised objections relating to the Asset Declarations of Parliamentarians. In this Appeal, the Commission carried out an exhaustive analysis of the applicability of these exemptions. The main distinction in this Appeal is that it pertained to a “list of Parliamentarians” who had filed their Declarations of Assets, and not the substantive content of such filing. Below were the questions for determination before the Commission:

- (i) Can a distinction between the Offices of the Secretary-General of Parliament and the Speaker of Parliament be maintained to the extent of claiming that the information is deposited with the Office of the Speaker and that therefore the Secretary-General cannot provide the information? (It is important to note that the PA in this Appeal is the Parliament and no individual office within the Parliament)
- (ii) Based on the above, can the PA (the Parliament) be said to not have the information under its “possession, custody or control” under Section 3 (1)?
- (iii) Where the Declaration of Assets and Liabilities Law and the RTI Act both contain provisions and procedures for disclosure, which is the applicable law under which a request for the release of Asset Declarations must be made?
- (iv) Are the Asset Declarations of Parliamentarians “personal information” under Section 5 (1) (a), the disclosure of which, in terms of the Act, would have no relationship to any public activity or interest, or which

would cause unwarranted invasion of the privacy, while also lacking in public interest? Or do the people have the right to know if they are complying with the disclosure requirement or not on the principle that ‘lawmakers must not be lawbreakers’?

- (v) Does Parliamentary Privilege as protected under Sections 3 (2) and 5 (1) (k) of the Act preclude the release of the information?
- (vi) Do the above exemptions and objections raised by the PA, apply specifically to a “list of Parliamentarians” who have filed their asset declarations?
- (vii) Notwithstanding the above, is there an overriding public interest which warrants the disclosure of the information in terms of Section 5 (4) of the Act?

Reflections on the Propositions Established in the Order of the Commission

Institutional as Opposed to Individual Accountability

Applying Section 3 (1) of the Act where “possession, custody, or control” is in the disjunctive, the RTI Commission emphasized that only one of the enumerated requirements must be met. The manner in which the Commission interpreted the words ‘or’, demonstrated that the words contained in Section 3 (1) of the Act were meant to be used in the disjunctive and not in the conjunctive, as noted earlier.

As Maxwell observes,

“Substitution of conjunctions, however, has been sometimes made without sufficient reasons, and it has been doubted whether some of the cases of turning ‘or’ into ‘and’ vice versa, have not gone to the extreme limit of interpretation”³

3. Roy Wilson and others, *Maxwell on the Interpretation of Statutes* (11th edn, Sweet & Maxwell 1962)

The Application of the Maxims “generalia specialibus non-derogant” and “leges posteriores priores contrarias abrogant”

The maxim “*generalia specialibus.....*” broadly means that a general later law does not abrogate an earlier special one by mere implication.⁴ But which statute is to be regarded as ‘general’ and which one as ‘special’?

In *Seward v The Vera Cruz*⁵, Lord Selborne C, explaining the meaning of the maxim stated, “where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.”⁶

However, if the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the latter.

The DALL is admittedly the earlier Act. The DALL requires all MPs to declare their assets and liabilities. What then is the inconsistency, that the two cannot stand together?

- (i) Here is a statute (the DALL) passed by Parliament (National State Assembly – as per the 1972 Constitution) that calls upon all MPs to declare their assets and liabilities.
- (ii) Then, those very MPs seek “privilege” not to disclose the fact of their filing the said declarations of assets and liabilities.

In this regard, the Preamble to the DALL which reveals the legislative intention thereto and the Preamble to the RTI Act must be read together. It does not require an exercise in semantics to conclude that MPs, as representative of the people, required to declare their assets and liabilities

4. Maxwell on the Interpretation of Statutes 168, the genesis of which maxim goes back to the 3rd Century.

5. [1884] 10 App. Case. 59, page 106.

6. *Ibid* page 68, per Lord Selborne.

under the DALL are then required, under the Preamble to the RTI Act, to disclose information as to the filing of their assets and liabilities.

Furthermore, the DALL was enacted under the 1972 Constitution. Although Section 3 of the 1972 Constitution declared that sovereignty is in the people, this was not a justiciable concept at the time. In contrast, under the present 1978 Constitution ⁷, that concept has become justiciable. It may also be said that there has been little public evidence as to the adherence of specified politicians and public officials to the mandatory clauses of the DALL. It is a virtual rendering of a dead letter that has been given new life and vitality through the RTI Act.

Concluding Comments

This Order was delivered in the context of an earlier Appeal filed by the Office of the President in 2019 to the Court of Appeal against the Commission's Order directing the release of the Prime Minister's Declaration of Assets and Liabilities.⁸ The Appeal is still pending. However, that Appeal may be differentiated from the instant Order which was concerned only with the (administrative) list of Parliamentarians who have submitted their Declaration of Assets rather than the contents of those Declarations. That distinction is crucial to the ruling in the instant Order.

7. *Ibid.*

8. TISL v Presidential Secretariat CA/No1/2019.

W.K.W. Deshapriya v Information and Communication Technology Agency (ICTA)

‘The attention of the PA is drawn to that part of Regulation 20, “....salary scales pertaining to the emoluments and related allowances of officers and employees of executive rank and above” in regard to which, all PAs must adhere to.

Consequently, the PA is called upon to update the link in its official website in regard to proactive disclosure under Regulation 20 as aforesaid in relation to making public all relevant information in regard to the applicable salary scales of employees of ICTA. This is of particular importance as, given its nature and function, ICTA must serve as a role model for other Public Authorities in Sri Lanka’

Decision: The Appellant requested salary details of the staff employed by ICTA from December 2019 to August 2020. The PA raised the objections that (i) the employees are subject to a confidentiality clause as part of their employment contract which precludes disclosure of salary details (ii) the salaries requested were those of highly skilled employees, and that there may be a differentiation of salaries within the same salary band, and that (iii) once released, the information may not be used by the Appellant in a *bona fide* manner. The PA also raised the objection that salary details of employees were exempt under Section 5 (1) (a) of the Act. The Commission directed the release of the information, in view of the salaries of the employees of the PA being paid out of public funds and the consequent public interest in this Appeal. The Commission also premised its Order upon the PA’s duty to proactively disclose salary scales in terms of Regulation 20 of the RTI Regulations

Keywords: Confidentiality clauses in employment contracts/ Personal information (Section 5 (1) (a))/ Proactive Disclosure (RTI Regulation 20)

Brief Factual Background¹

By information request dated 15.10.2020, the Appellant requested the following:

“Salary details of the staff employed by ICTA from December 2019 to August 2020”.

By email dated 02.11.2020, the IO replied as follows:

1. *“This is to inform you that in accordance with Section 25 (1) of the Act we have decided not to provide you with the information requested by you via application dated 15-10-2020 bearing registration number of ICTA/RTI/OCTOBER/2020/54 (the said application).”*
2. *We have decided not to disclose the information requested by you for the reason that the said information is considered exempt from being disclosed under & in terms of Section 5 (a) of the RTI Act.”*

Dissatisfied with the response of the IO the Appellant lodged an appeal with the DO on 11.02.2020. As the DO failed to respond within the time period stipulated under the RTI Act the Appellant preferred an appeal to the Commission on 09.12.2020.

Matters Arising During the Course of the Hearing

The PA is absent.

As per the Written Submission of the PA dated 18.02.2021, the DO responded after the Appellant had appealed to the Commission. Thus, the DO has responded *via* email dated 22.12.2020 confirming the decision of the IO.

1. RTIC Appeal (In-Person)169/2021 heard as part of the formal meetings of the Commission on 02.03.2021 and 16.03.2021. *Appearance for the parties:* W.K.W. Deshapriya for the Appellant; Mahinda B. Herath, CEO/ICTA, Hafeel Farisz, AAL and Jagath Seneviratne, IO for the PA (Information and Communication Technology Agency). See, https://www.rticommission.lk/web/images/pdf/0169-2021/RTIC_169_2021.pdf

Interim Order²

By email dated 22.12.2020, the PA has responded (the response of the DO) to the request of the Appellant but in so responding, has failed to adhere to the time frames stipulated under and in terms of the RTI Act. The Commission drew the attention of the PA to the fact that the Information and Communication Technology Agency comes within the purview of the RTI Act and therefore has a statutory duty to abide by its provisions, including responding within the timelines specified by the Act. Persistent failure to do so may result in this Commission having to take appropriate steps under and in terms of the RTI Act.

The attention of the PA and the Appellant was drawn to the fact that the function of the Commission is to ascertain whether the information requested can be legitimately and in law, be made available to the Appellant, after considering whether the information falls within the purview of the several exemptions detailed in Section 5 (1) of the RTI Act and in the event that the information falls within the purview of an exemption is Section 5 (1), whether the public interest override in Section 5 (4) is found to apply.

The PA by letter dated 25.02.2021 has requested further time to submit Written Submissions in relation to the information request. Thus, the PA is directed to produce a comprehensive response before the next hearing date...

...On 16.03.2021, upon being queried as to the reasons for the denial of the release of the information requested, the Attorney-at-Law representing the PA submitted the following;

- That the information is confidential to the extent that the PA is the main digital service body in Sri Lanka.
- That each employee is subjected to a confidentiality clause in their respective employment contract.
- That a salary offered to each employee of the PA differs based on the specialization of each employee. For example, two employees

2. Order delivered on 02.03.2021.

in the same level and division will have different salaries due to this differentiation.

- That the PA is cognizant of the risk that this information asked for, once released, may not be used in a *bona fide* way including replication in different forums (such as social media) which would cause disruption to the activities of the PA.
- Of consent that the PA is agreeable to provide the information requested, namely, '*Salary details of the staff employed by ICTA from December 2019 to August 2020*' in the spirit of transparency and good business practices if the Appellant is willing to enter into an undertaking that the Appellant will use the said information in a *bona fide* manner.

Further, the PA elaborated on the position taken in the letter dated 09.03.2021 by Eng. Mahinda B. Herath CEO/DO of ICTA to Director-General of the RTI Commission as follows;

“...The request is as follows;

“Salary details of the staff employed by ICTA from December 2019 to August 2020”

As Mr. Deshapriya has been a member of the Board of Directors of ICTA during the above-mentioned period, we are advised that he is entitled to the requested information. In addition, he was also Secretary to the Ministry of Digital Infrastructure and Telecommunications, during which period “Remuneration of Consultants” hired by ICTA has been provided to him. (see attached letters dated 02.05.2017 and 01.11.2017) Therefore, notwithstanding the provisions of Section 5 (1) (a), which would cause an “unwarranted invasion of the privacy” of the individual consultants having fixed-term contracts, we have decided to provide this information to Mr. Deshapriya based on such legal advice.

Providing such information is in the spirit of transparency and good business practices. We are aware that the Appellant may not be bona fide in his claims and accordingly reserve the right to pursue available

legal remedies in the event the information is used for purposes which would violate the Act and/or other Law of the Republic.”

In consequence thereof, the PA provided the following documents to the Commission for perusal:

1. Documents named ‘ICTA pay bands - Basic Salary’ and ‘ICTA pay bands - Basic Salary & fixed allowances’ containing the salary scales and job positions and;
2. A document named ‘ICTA Remuneration Details’ includes details of all active employees as of 31st August 2020.

In response to the above, the Appellant submitted the following:

- There should not be any secrecy in relation to remuneration paid to the public servants as such remuneration is paid from public funds.
- That the Appellant should have been aware of the salaries of the ICTA employees for the duration he was part of ICTA as an employee as well as a member of the Board of Directors but that he had been unable to obtain those details.
- That the PA has failed to adhere to the proactive disclosure requirement under Regulation 20 as its official website link does not provide information relating to the salary scales of the executive officers of the ICTA.
- That Article 169 of Articles of Association of the ICTA must be amended or removed as it contemplates that the directors of the ICTA have no right to access the expenses of the ICTA.

Final Order ³

In response to the information request of the Appellant which has come before this Commission on appeal, Counsel representing the PA placed documents titled ‘ICTA pay bands- Basic Salary’ and ‘ICTA pay bands- basic salary & fixed allowances’, containing the salary scales and job

3. Order delivered on 16.03.2021.

positions before us. The said document titled 'ICTA pay bands- Basic Salary' was handed over to the Appellant at the RTI Commission today (16.03.2021) as of record.

It is however also relevant that under RTI Regulations in terms of Section 41 (2) of the RTI Act (Gazette No. 2004/66, 03.02.2017) certain minimum disclosure requirements are imposed on the PA in Regulation 20 thereof;

Regulation 20 relates to the proactive disclosure of Budget information: Projected budget, actual income and expenditure (including salary scales pertaining to the emoluments and related allowances of officers and employees of executive rank and above).

The attention of the PA is drawn to that part of the said Regulation,

"...salary scales pertaining to the emoluments and related allowances of officers and employees of executive rank and above" in regard to which, all PAs must adhere.

Consequently, the PA is called upon to update the link in its official website in regard to proactive disclosure under Regulation 20 as aforesaid in relation to making public all relevant information in regard to the applicable salary scales of employees of ICTA. This is of particular importance as, given its nature and function, ICTA must serve as a role model for other PAs in Sri Lanka. We note the agreement of the PA to update the relevant link on its official website.

With regard to the release of the document named 'ICTA Remuneration Details' including details of all active employees as of August 31, 2020, the below is stated;

- In principle, confidentiality clauses in agreements do not, *per se*, constitute a ground under the RTI Act where the release of information can be denied. However, if the information is given on a confidential basis by a Third-Party to the PA at the time of providing such information that will amount to an exemption under Section 29 read with Section 5 (1)(i) of the RTI Act to deny release of information if the public interest override in Section 5(4) is held not to apply;

- The release of information under the RTI Act cannot be subjected to any undertaking and the RTI Commission cannot enforce or compel the Appellant to give an undertaking as to what purposes he or she may or may not use the information provided to him/her;
- In the circumstances of this case, notwithstanding the provisions of Section 5(1) (a), which may operate as a ground to deny the release of information on the basis of ‘unwarranted invasion of privacy’, the Commission is of the opinion that the public interest in releasing of the details of remuneration paid from public funds to State Officers of the PA overrides any privacy concerns that may arise from individual employment contracts, in terms of Section 5 (4) of the RTI Act.
- This Commission has, in furtherance of the aims and objectives of the RTI regime established in Sri Lanka by the RTI Act, read together with Regulations and Rules gazetted under Sections 41 and 42 of the Act as aforesaid, been particularly conscious of the need to enforce transparency and accountability in regard to the expenditure of public funds. In that regard, several rulings issued by the Commission under Section 32 of the RTI Act have directed the release of salaries and associated benefits of employees in consequence to which, the said information has been released (*vide Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd. RTIC Appeal (In-Person) 99/2017, RTIC Minute, 12.06.2018*).
- In the foregoing circumstances, the information pertaining to salary details of the staff employed by ICTA from December 2019 to August 2020 is released taking into account the position of the PA as reflected in the letter dated 09.03.2021 by Eng. Mahinda B. Herath CEO/DO of ICTA to Director-General of the RTI Commission in the context of the Appellant serving as a member of the Board of Directors of the PA during the above-mentioned period.

In consequence thereof, the following documents are released to the Appellant as of record;

1. The letter dated 09.03.2021 by Eng. Mahinda B. Hearth CEO/DO of ICTA to Director-General of the RTI Commission;
2. Documents named 'ICTA pay bands- basic salary' and 'ICTA pay bands- basic salary & fixed allowances' envisaging the salary scales and job positions and;
A document named 'ICTA Remuneration Details' containing details of all active employees as of August 31, 2020

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

- (i) Can a confidentiality clause in contracts entered between the employer and employee be held to preclude salary details from disclosure?
- (ii) Are salary details of the employees of the PA, who are public servants, 'personal information' protected under Section 5 (1) (a)?
- (iii) Can post-disclosure obligations be imposed on the information requestor, where the PA was apprehensive that the information thus disclosed may not be used in a *bona fide* manner?

Reflections on the Propositions Established in the Order of the Commission

Personal Information and the Public Interest Override

The IO objected to the release of the information on the basis that it was exempted under Section 5 (1) (a) of the Act⁴. In the letter issued by the DO to the RTI Commission, agreeing to the release of information, the

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4. Under Section 5 (1) (a) where "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", it is exempted.

release of the information was however termed an “unwarranted invasion of privacy” in terms of Section 5 (1) (a).

In its decision, the Commission overruled any privacy concerns that may arise in view of the overriding public interest. In examining this stance, it is important to note that Section 5 (1) (a) is unambiguous in defining the personal information that it seeks to protect. In order to enlist the protection of Section 5 (1) (a), the information must have (i) no relationship to any public activity or interest, or (ii) cause unwarranted invasion of the privacy of the individual. Even where the information in question is so deemed ‘personal’, Section 5 (1) (a) itself provides for the information to be disclosed if the larger public interest warrants its release⁵.

This *proviso* to Section 5 (1) (a) is in addition to the public interest override in Section 5 (4) of the Act, emphasizing the clear legislative intent to not confer immunity upon the mere citation of privacy. Certainly, the disclosure of public officials’ salary details has been a bone of contention in the public-private divide. While the information pertains to private individuals, the nature of their public office demands that the salaries paid out of public finances are made available for public perusal. As the subject straddles private interest and public interest, a sound balance would provide for a proper safeguarding of data protection *vis-a-vis* the right to information.

The Sri Lankan RTI Act provides for the two-fold test of (i) absence of a relationship to any public activity or interest, or the (ii) causation of unwarranted invasion of privacy. Even where the information is qualified to be considered ‘personal’, it is then held to the yardstick of the larger public interest. The salaries of public officials attract a high public interest on at least two grounds. Firstly, the nature of the office held is public and has a direct bearing on the accountability and efficiency of the public service. Secondly, the salaries are paid out of public funds, and is vital to establish financial transparency and proper utilization of public resources.

5. Section 5 (1) (a) of the Sri Lankan RTI Act closely reflects the personal information exemption in Section 8 (1) (j) of the Indian RTI Act.

Hence, although the salaries of public officials are information that is ‘personal’ in some manner, the overriding public interest in disclosure outweighs any private interest that may be thus protected. The determination of salary scales and individual salaries within each scale cannot be shrouded in secrecy when such salaries are paid to public officials serving in an official capacity, and out of the public purse. The rationale of the RTI Commission in decisions directing the disclosure of salaries of employees has been that salaries paid out of public funds must be accountable and transparent before the public⁶.

Confidentiality Clauses in Contracts and Agreements

In previous decisions of the Commission, the inapplicability of confidentiality clauses in contracts *per se* to the release of information has been considered exhaustively. Within the RTI regime, the question of confidentiality arises in the context of Section 5 (1) (i) and Section 29. These Sections provide for the ambit of the exemption based on confidentiality. While Section 5 (1) (i) lays out the substantive exemption, Section 29 provides for the procedure to be followed when claiming the exemption under Section 5 (1) (i). Both Sections are subject to the overriding public interest clause contained in Sections 5 (4) and the *proviso* to Section 29.

The touchstone of the confidentiality exemption in the RTI Act, is that the information must have been supplied in confidence to the PA by the Third-Party.⁷ Consequent to this stipulation, the procedure has been set out in Section 29 where the representations of the Third-Party must be obtained by the PA before refusing information on the basis of confidentiality. It is untenable to argue that salaries and emolument details of employees are “supplied in confidence to the PA by Third-Parties.” The PA instead sought to rely on the confidentiality clause present in the employment contracts entered into with employees. In *Airline Pilots Guild*

6. See *Rusiripala v People's Bank* (RTIC Appeal 774/2018, Minute of the Record of Proceedings dated 01.12.2020.); *Airline Pilots Guild v Sri Lankan Airlines* (RTIC Appeal 99/2017; Minute of the Record of Proceedings dated 12.06.2018).

7. RTI Act, Section 5 (1) (i)

*v Sri Lankan Airlines*⁸, the Commission concluded that the mere existence of a confidentiality clause cannot be relied upon to refuse information. This interpretation of confidentiality clauses by the Commission expands the fostering of transparency and accountability as envisaged in the RTI Act. It stands to reason that an entity seeking to veil its affairs in a cloud of secrecy can include a confidentiality clause in agreements, and thereafter withhold information on this basis.

In a more recently handed down Order of the Commission, where a broad range of employee salaries and benefits were requested, the Commission held that the same cannot be protected under the cover of confidentiality⁹. In *Deshapriya v ICTA* the PA submitted that the employees are highly skilled and specialized and that even within the same salary band, each individual employee's salary may differ. In *Rusiripala v People's Bank*¹⁰, too, the PA submitted that the salaries requested were of employees who were highly specialized. The Public Authorities in both *Rusiripala* and *Deshapriya* relied on this reasoning to state that the release of information may be inimical to the interests of the PA. The Commission overruled these objections in view of the high public interest in disclosing the salary scales of public officials.

Proactive Disclosure and Regulation 20

In *Deshapriya v ICTA*, the Commission highlighted the PA's obligations under Regulation 20. In seeking to withhold the information by citing exemptions, the PA was looking to refuse information that should have

8. RTIC Appeal 99/2017, Minute of the Record of Proceedings dated 12.06.2018.

9. *Rusiripala v People's Bank* RTIC Appeal 774/2018, Minute of the Record of Proceedings dated 01.12.2020. The second point of information requested was, "the particulars of salaries, wages, *ex-gratia*, payment, bonus (including performance bonus) expenditure incurred by the bank for overseas trips and details of all other perks provided by the bank – vehicle allowance, special allowance, entertainment expenses, travelling grants incurred by the bank on account of contract employees from 2000 to 2018 June with details of positions held by each Contract Employee during the period including the particulars of any change in positions, grades or level of employment in respect of each employee separately."

10. *Ibid.*

been released proactively, under and in terms of the RTI Regulations. The PA was directed by the Commission to update its website with the information regarding salary details which it had placed before the Commission, to which the PA was amenable¹¹. It was noted by the Commission in its Order that,

“This is of particular importance as, given its nature and function, ICTA must serve as a role model for other Public Authorities in Sri Lanka.”

The principle of proactive disclosure is enshrined in Regulation 20 of the RTI Regulations¹². Proactive disclosure normatively changes the nature of government and is a core feature of the Sri Lankan RTI Act¹³. There are at least three ways in which the principle of proactive disclosure changes the understanding of the Right to Information.

Firstly, the public disclosure of information in the hands of the government and related institutions will no longer be at the will of the government. Such information must be disclosed as a matter of legal or statutory obligation. This moves the nature of government from being closed and inscrutable to open and transparent. Secondly, people ought to have access to such information as a matter of right. This flows from recognizing the Right to Information as a Fundamental Right in the Constitution of Sri Lanka in 2016¹⁴. The principle of proactive disclosure buttresses the idea that access to information in the hands of Public Authorities is a right of the people and not a privilege subject to the caprices of public officials. Thirdly, the principle of public disclosure also contributes to the understanding that disclosure is the norm and withholding the exemption.

Apart from its conceptual rewards, proactive disclosure also benefits Public Authorities in an administrative sense. Disclosing information

11. *Deshapriya v ICTA* pages 5-6.

12. RTI Regulations promulgated under the RTI Act (Gazette No. 2004/66, dated 03.02.2017).

13. Public interest override can be considered the other principle which centrally informs the RTI Law of Sri Lanka.

14. Article 14A introduced by the 19th Amendment to the Constitution of Sri Lanka, 1978.

proactively, either because the information is routinely requested or because it is organizational/structural information, reduces the administrative load on Public Authorities to process and respond to information requests. Public Authorities are relieved of processing routine requests, which may help re-direct their time and resources to processing information requests that are of significance and high public interest.

Likewise, the ordinary citizen has access to information disseminated by Public Authorities without having to undergo the procedure of making an information request. In other words, the Right to Information regime is streamlined and prevented from being clogged with requests for information that could have been disseminated by the Public Authorities prior to a request. Salaries, travel expenses, and emoluments of public officials are among the most frequently requested information¹⁵.

Post – Disclosure Obligations on the Requestor

One of the objections raised by the Public Authority in *Deshapriya v ICTA* is that the information, upon release, may not be used in a *bona fide* manner by the requestor. Similar apprehensions were raised by the PA in *Rusiripala v People's Bank*¹⁶. Issuing Order in this regard, the Commission held in the instant Appeal that, “*the release of information under the RTI Act cannot be subjected to any undertaking and the RTI Commission cannot enforce or compel the Appellant to give an undertaking as to what purposes he or she may or may not use the information provided to him/her.*”¹⁷ It is a salient feature of the Sri Lankan RTI Act that a requestor is not obligated to place before the Commission the purpose for which the information is sought, in terms of Section 24 (5) (d). This caveat is consistent with the aim of the Act to foster transparency and accountability. It shifts the obligation from the requestor to defend the purposes of requesting the information, and places the onus on the PA to legitimize the refusing of

15. Asia Disclosed: A Review of the Right to Information Across Asia (Article 19, 2015) page 23.

16. *Ibid.*

17. W.K.W. Deshapriya v ICTA page 6.

information. This principle too, resonates with the earlier propositions adduced in this analysis, that a citizen is entitled to information as a matter of right, and it is up to the PA to substantiate the non-disclosure of information.

Concluding Comments

Propositions emanating from *Deshapriya v ICTA* are an unequivocal continuation of the precedent established in *Airline Pilots Guild*¹⁸ and *Rusiripala*¹⁹ that salaries of public officials cannot be subject to the cover of personal information as there is an overriding public interest in its disclosure. Citation of a confidentiality clause in the employment contract was reiterated as not being ground *per se* to block information.

Moreover, there is a larger issue here which needs to be emphasized. RTI is a Fundamental Right. Neither laws nor executive actions can be used in a manner as to curtail the scope of Fundamental Rights except in accordance with the reasonable restrictions listed in the Constitution. Therefore a contractual obligation of secrecy cannot be shown as a check on the exercise of the Fundamental Right.

The decision also buttresses the principle of proactive disclosure of salary details, or at the very minimum, salary scales within an organization. Post-disclosure obligations as to the manner in which that information may be used cannot be placed on the requestor. Doing so, would also defeat the spirit of transparency and accountability that the RTI Act seeks to safeguard and foster.

18. *Ibid.*

19. *Ibid.*

Shermal Hemaka Jayasuriya v National Olympic Committee of Sri Lanka

‘During the hearing, it was evident that Sri Lanka’s National Olympic Committee (NOC) is established under and in terms of Section 18 of the Sports Law... The NOC is strictly called upon to answer the question as to whether the said Section 18 does not bring the NOC within the ambit of Section 43 of the RTI Act, given that Section 43 includes in its definition of a Public Authority, “Public Authority” means... (b) any body or office created or established by or under the Constitution, any written law, other than the Companies Act, No. 7 of 2007, except to the extent specified in paragraph (e), or a statute of a Provincial Council.’

Decision: The Appellant requested the list of athletes sent for accreditation to the Asian Games in 2018 held in Indonesia and several other related information. At the appeal hearing before the Commission, the PA’s preliminary objection was that the National Olympic Committee (NOC) did not fall under the definition of a “Public Authority” in terms of Section 43, consequent to which it was called upon by the Commission to strict proof of that contention under Section 32 (4) given that public funds were expended on the NOC. At the final hearing of the matter, the PA agreed to the release all documentation called for by the Appellant on Order of the Commission.

Keywords: *Burden of Proof (Section 32 (4))/Definition of ‘Public Authority’ (Section 43)/Public funds/Selection of athletes*

Brief Factual Background¹

By information request dated 13.08.2018, the Appellant requested the following;

1. List of athletes sent for accreditation for the Asian Games 2018 in Indonesia.
2. Correspondence made to the Asian Games 2018 organising committees to include Savini Disanka Jayasuriya as a member of the Sri Lanka Tennis team to Asian Games 2018 on or after 06 August 2018.
3. Correspondence received for the Asian Games 2018 organising committees to include Savini Disanka Jayasuriya as a member of the Sri Lanka Tennis team to Asian Games 2018 on or after 06 August 2018.
4. List of athletes included for the Asian Games 2018 after 30 June 2018.
5. The final list of athletes for the Asian Games 2018.

As the IO failed to respond within the time period stipulated under the Act, the Appellant on 29.09.2018 lodged an appeal with the DO. As the DO failed to respond with the time period stipulated under the Act, the Appellant preferred an appeal to the Commission on 20.09.2018.

Matters Arising During the Course of the Hearing²

Prior to the date of the hearing, the PA had, by letter dated 09.04.2019, informed the Commission that the National Olympic Committee is not a government entity and is an autonomous organisation with its own legal status. However, this matter was not heard on 23.04.2019 due to

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1. RTIC Appeal (In-Person) 1013/2019 heard as part of the formal meetings of the Commission on 06.08.2019, 29.10.2019 and 23.02.2021. *Appearance for the parties:* Shermal Hemaka Jayasuriya for the Appellant; Maxwell de Silva- Secretary General, National Olympic Committee, Shanaka Cooray, AAL and M.M. Wijayasena, Additional Secretary, Ministry of Provincial Councils, Local Government and Sports for the PA (National Olympic Committee of Sri Lanka). See, <https://www.rticcommission.lk/web/images/pdf/rticappeal-1013-2019/rtic-1013-2019-en-07112019.pdf>
 2. Heard as part of the meeting of the Commission on 06.08.2019.

the unforeseen security situation prevalent in the country. Thereafter, the Appeal was re-fixed for hearing on 06.08.2019. As the Appellant had lodged a similar appeal in RTIC 745/2018 both matters were considered together.

Counsel for the National Olympic Committee (hereinafter the NOC) took up the preliminary objection that it is not governed by the RTI Act as the NOC does not come within the definition of a PA. He contended that the NOC is a private entity governed by a constitution which is subject to the International Olympic Charter. He stated that the NOC consists of members of the National Association of Sports (e.g., SLTA, Badminton Federation etc). He further stated that members of the NOC are associations and are not members of the public.

The Counsel for NOC submitted that Section 43 (g) defines a ‘Public Authority’ to be:

“(g) a private entity or organisation which is carrying out a statutory or public function or service, under a contract, a partnership, an agreement or a license from the government or its agencies or from a local body, but only to the extent of activities covered by that statutory or public function or service”

Accordingly, the counsel for the NOC stated that, as it does not have a contract or partnership with the government, it does not come within the purview of Section 43 (g) of the RTI Act.

It was contended on behalf of the NOC that as a body set up under its own Constitution, it is not governed by the Sports Law No. 25 of 1973 (hereinafter Sports Law). It was stated that the Constitution of the NOC states that it is an organisation belonging to the Olympic movement. According to the Counsel representing the NOC, the function/ role of the NOC is to coordinate between national sporting bodies/ associations and the International Olympic Committee in the event of international sporting games.

Responding to the sources of funding received by the NOC, the Counsel for the NOC stated that part of its funding is received nationally while part is received from the International Olympic Committee as well. However, he stated that NOC does not fall within the definition of Section 43(i) of the Act which states that “non-governmental organisations that are substantially funded by the government or any department or other authority established or created by a Provincial Council or by a foreign government or international organisation, rendering a service to the public in so far as the information sought relates to the service that is rendered to the public,” constitutes a PA.

Counsel for the NOC argued that since the NOC does not provide a ‘service to the public’ and merely liaises between the International Olympic Committee and local sporting bodies, it does not come within this definition. Thus, the duty and service of the NOC is not to the public but rather to the International Olympic Committee. It was further submitted that the NOC is not the body that engages in selecting sportsmen/sportswomen to participate in international sporting games and that this function is carried out by the National Selection Committee.

Responding to the query on the composition of the National Selection Committee, the Appellant stated that according to the Sports Law, the President and Secretary of NOC are included in the National Selection Committee. Furthermore, three other members are selected at the discretion of the Minister. The Ministry confirmed that the National Selection Committee consists of the President and Secretary of the NOC.

It was noted that the presence of the National Selection Committee is required to ascertain the relevant PA that is in the possession, custody or control of the information sought by the Appellant.

It was brought to the notice of the Commission that the *ex-officio* member of the National Selection Committee, Mr Maxwell De Silva, was present before the Commission. As the Secretary-General of the NOC that sits on the National Selection Committee, he was instructed to take notice of the next date of the hearing.

Interim Order³

Mr. Maxwell De Silva, the Secretary-General of the NOC, is directed to take notice on behalf of the National Selection Committee (NSC) of the direction that the NSC is required to be represented before the Commission on the next date of hearing...

...The Appellant contended that the issue was whether the NOC was a PA falling within the RTI Act.

During the hearing it was evident that Sri Lanka's NOC is established under and in terms of Section 18 of the Sports Law, which states as follows;

- 1) *There may be established a Committee which shall be called "The National Olympic Committee of Sri Lanka"*
- 2) *Such Committee shall consist of*
 - a) *the Director of Sports appointed under section 3, who shall be an ex-officio member;*
 - b) *members, if any, of the International Olympic Committee in Sri Lanka, who shall be ex-officio non-voting members, unless they have been appointed under paragraph (c);*
 - c) *two representatives of each of the National Associations of Sports registered in accordance with the succeeding provisions of this Law, provided, however, that each such National Association is affiliated to, or is a member of its respective International Federation and the sports it represents are included in the programme of the Olympic Games.*

The Committee may co-opt delegates of other registered National Associations of Sports or persons who have rendered or can render exceptional service to the Olympic movement, provided that such co-opted members do not constitute the voting majority in the Committee.

The Appellant further stated that the NOC was audited by the Auditor-General's Department as indicated by its Annual Report and the government had allocated LKR 100 million from the budget to the NOC.

3. Order delivered on 06.08.2019.

Interim Order ⁴

The NOC is strictly called upon to answer the question as to whether the said Section 18 does not bring the NOC within the ambit of Section 43 of the RTI Act given that Section 43 includes in its definition of a Public Authority,

“Public Authority” means... (b) any body or office created or established by or under the Constitution, any written law, other than the Companies Act, No. 7 of 2007, except to the extent specified in paragraph (e), or a statute of a Provincial Council;...

Matters Arising During the Course of the Hearing⁵

...On 23.02.2021 Counsel appearing for the NOC submitted that the parties are in agreement for the release of the information without a determination by the Commission whether the NOC is a “Public Authority” under and in terms of Section 43 of the RTI Act.

The Appellant was in agreement to receive the information thus provided and did not wish to further pursue the question as to whether the NOC is encompassed within the definition of a ‘Public Authority’ in terms of aforesaid Section 43.

Final Order⁶

On the agreement of both parties, the NOC submits the following information to the Appellant, covering all points of information of the information request, as of record before this Commission.

1. *List of athletes sent for accreditation for the Asian Games 2018 in Indonesia*
2. *Correspondence made to the Asian Games 2018 organizing committees to include Savini Disanka Jayasuriya as a member of the Sri Lanka Tennis team to the Asian Games 2018 on or after 06 August 2018*

4. Order delivered on 29.10.2019.

5. Heard as part of the meeting of the Commission on 23.02.2021.

6. Order delivered on 23.02.2021.

3. *Correspondence received for the Asian Games 2018 organizing committees to include Savini Disanka Jayasuriya as a member of the Sri Lanka Tennis team to Asian Games 2018 on or after 06 August 2018*
4. *List of athletes included for the Asian Games 2018 after 30 June 2018*
5. *The final list of athletes for the Asian Games 2018*

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

- (i) What is the definition of a ‘Public Authority’ under Section 43? Can the grounds on which the National Olympic Committee seeks to be exempted from such definition be maintained in law or in fact?
- (ii) Can correspondences between Public Authorities constitute information that may be legitimately requested and released under the RTI Act?
- (iii) Are all components of the information requested within the “possession, custody or control” of the National Olympic Authority in terms of Section 3 (1)?

Reflections on the Propositions Established in the Order of the Commission

In a connected Appeal, *Shermal Hemaka Jayasuriya v National Selection Committee, Ministry of Provincial Councils, Local Government and Sports*⁷, the Appellant had requested for details regarding the selection of Squash and Kabaddi players for the 2018 Asian Games. The two Appeals were heard and disposed of together. In the Appeal against the National Selection Committee, part of the information was provided, and the remainder was held to not be within the possession, custody or control of the PA in

7. RTIC Appeal 745/2018, dated 23.02.2021.

terms of Section 3 (1) of the Act. In the connected Appeal, too, wherein it was in contest whether the National Selection Committee was a 'Public Authority' within the RTI Act, the Secretary of the National Selection Committee acceded that it was a Public Authority⁸.

What is a "Public Authority"?

Whether or not an institution is a public authority for the purposes of disclosure regimes, has been a contentious issue in most jurisdictions where there is a functional Right to Information law. Right to Information/Freedom of Information laws have formulated criteria or guidelines to identify Public Authorities, for this purpose. There is surely little doubt as to whether a government instrumentality or statutory creature would be considered a Public Authority. The contention would typically arise with (i) private institutions that perform public functions, (ii) state entities that perform commercial or contractual functions, but not public functions (e.g., State-Owned Enterprises), or (iii) entities that straddle both public and private realms through their composition, nature of functions, or finances. A few yardsticks have been developed to resolve whether an entity is a Public Authority or not,

- (i) Execution of a function that is public in nature
- (ii) Composition of the governing authority of the entity
- (iii) Financing and financial reporting or accountability
- (iv) Regulation, oversight or administrative control by the government

The National Olympics Committee, making submissions before the Commission adduced the above grounds when contesting that it was a Public Authority. It is worth considering how each of these criteria has been adopted and reasoned in decisions from different jurisdictions.

8. Minute of the Record of Proceedings dated 29.10.2019.

(a) India

Section 2 (h) of the Indian RTI Act defines Public Authorities. While the first part of the Section is clear in recognizing constitutional and statutory bodies as Public Authorities, the second part is more open-ended and provides for the recognition of both public and non-governmental entities which are government-owned, controlled or financed.

In *Electronics and Computer Software Export Promotion Council v Central Information Commission*⁹, the Appellant, an Export Development Council, sought to dispute the finding of the Central Information Commission that it was a Public Authority, before the Delhi High Court. The Indian Act defines Public Authority in Section 2 (h) of the 2005 Act: “public authority” means any authority or body or institution of self-government established or constituted—

- (a) by or under the Constitution;*
- (b) by any other law made by Parliament;*
- (c) by any other law made by State Legislature;*
- (d) by notification issued or order made by the appropriate Government, and includes any—*
 - (i) body owned, controlled or substantially financed;*
 - (ii) non-government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government*

The Appellant contended that it was an ‘autonomous body’, and that its administrative expenses were not paid out of government financing. The Court disagreed with the Appellant on two grounds. Firstly, Court held that a financing of 6.8 crores out of 11.8 crores amounted to ‘substantial financing’ by the government, and it was immaterial whether the government grant was used to meet administrative expenses, projects or promotions. Secondly, Court went on to hold that Section 2 (h) must be

9. LPA 1802/2006 & CM 11865/2006; Judgment dated 01.09.2008 [The Appellant appealed before the Supreme Court as well, in a case that was pending as at 2020].

construed in line with the aims of objects of the Act as stated in its Preamble.

In *The Registrar v The Registrar*,¹⁰ the Madras High Court held that an autonomous private engineering college was a PA under the RTI Act. The Court arrived at this decision on the basis that the imparting of education was a public activity, that the College was subject to governmental control and regulation, and that it received government grants to conduct some courses. Importantly, Court held that once an institution discharges a public function, public interest considerations become relevant and that the College can be brought within the definition of ‘Public Authority’.

(b) South Africa

Decisions from South Africa seem to indicate a broad and purposive interpretation. It appears that judicial reasoning has hinged on whether the documents in question are public or not, rather than the nature of the entity.

In *M & G Media v 2010 FIFA Soccer World Cup Organizing Committee, South Africa*,¹¹ the Appellant called for procurement and tender-related documents in organizing the 2010 Soccer World Cup. The Johannesburg High Court held that although the Organizing Committee cannot be held a PA for all intents and purposes, that it was a PA to the extent that it was discharging a public function in calling for tenders. The South African Promotion of Access to Information Act (2000), in its Section 8, recognizes that an institution may be considered a PA in respect of some records, and a private authority in respect of other records. The Court took into account factors such as government control and regulation, disbursement of public funds, and the decision-making authority within the entity in arriving at its decision that the tender documents are public documents which can be legitimately requested. In an earlier judgment, *Mittalsteel South Africa Ltd. v Hlatshwayo*¹², the South African Supreme Court held

10. W P1253/2015 (Decided on 30.04.2013).

11. Case No 09/51422 (Decided on 08.06.2010).

12. Case No 326/05 (Decided on 31.08.2006).

that the successor company of a State-owned Company should disclose the documents in question, as at the time such documents were created, the government exercised control over the predecessor State-Owned Enterprise (SOE). Court held that *“In an era in which privatization of public services and utilities has become commonplace, bodies may perform what is traditionally a government function without being subject to control by any of the spheres of government and may, therefore, despite their independence from control, properly be classified as public bodies.”*¹³

(c) Sri Lanka

The Sri Lankan Act, in contrast to some RTI laws, does not lay out criteria or guidelines for qualification as a PA. Instead, it names 12 clearly defined categories of institutions which are considered Public Authorities, and the purposes and extent to which they will be subject to the RTI Act. These categories include Ministries, Local Government institutions, Companies, Higher and Private Educational Institutions, NGOs, Courts and Tribunals¹⁴. The enumeration of these categories is commendable as it may avoid the above-discussed ambiguities that arise with vague, broadly-defined guidelines. Out of the 12 categories identified by the Sri Lankan Act, the only open-ended definition is contained in Section 43 (g),

43 (g) a private entity or organisation which is carrying out a statutory or public function or service, under a contract, a partnership, an agreement or a license from the government or its agencies or from a local body, but only to the extent of activities covered by that statutory or public function or service;

Another seminal feature of the Sri Lankan Act's definition is that it recognizes that some of these institutions (that is, NGOs and private entities) are governed by the RTI Act to the extent that their functions are relevant to the public. It, therefore, provides for an institution to be defined as a 'Public Authority' for specified purposes, and not for others.

13. Paragraph 22.

14. RTI Act, Section 43 (a) – (l).

The Sri Lankan Airlines, a State-Owned Enterprise (SOE) raised a preliminary objection in *Airline Pilots Guild v Sri Lankan Airlines*¹⁵ that it was not a PA in terms of Section 43 (e) of the Act, as it would not fall under the definition of “a company incorporated under the Companies Act, No. 7 of 2007...” The PA’s position was that it merely re-registered as a company under the 2007 Act, and was not incorporated in terms of it. The objection was overruled in view of the fact that the RTI Act applies to companies in which “the State, or a public corporation or the State and a public corporation together hold twenty-five per centum or more of the shares or otherwise has a controlling interest”, and that the PA has acted in compliance with the RTI Act hitherto.

In *Rusiripala v People’s Bank*¹⁶, the Bank sought to exempt itself from the definition of a ‘Public Authority’ in three ways. Firstly, it was the Bank’s contention that it performs ‘commercial functions in a competitive commercial environment’ and that in the respect of these functions it cannot be considered a PA executing public functions. As the subject of the Appeal was the digitization costs and salary details of employees, the Bank further relied on the argument that these salaries were paid not paid out of government funds. Thirdly, the Bank also contended that employment is governed by contract and that a writ or administrative action does not lie where there is a contract. Overruling the objections raised by the PA, the Commission held that the understanding of a ‘Public Authority’ before the Commission stems from the ambit of the RTI Act. The Commission held that the Bank was a statutory body established under ‘written law’ in terms of Section 43 (b)¹⁷, as it was established and is governed by the People’s Bank Act, No. 43 of 1973.

15. *Airline Pilots Guild v Sri Lankan Airlines* RTIC Appeal 99/2017, Minute of the Record of Proceedings dated 12.06.2018.

16. *Rusiripala v People’s Bank* RTIC Appeal 774/2018, Minute of the Record of Proceedings dated 01.12.2020.

17. Section 43 (b): “Any body or office created or established by or under the Constitution, any written law, other than the Companies Act, No. 7 of 2007, except to the extent specified in paragraph 6, or a statute of a Provincial Council.”

In this instant Appeal, it is relevant to note that as per the Appellant's submissions, the NOC was audited by the Auditor General's Department and further, that the Government has allocated a sum of Rs. 100 million to the NOC, according to its Annual Report.¹⁸

Another consideration which the Commission has taken into account when ordering the release of information is the prevalence of public interest. It stands to reason that a PA in whose possession, custody or control information of public interest lies, cannot claim the exemption that it is not a 'Public Authority' discharging public functions. In an ongoing Appeal before the Commission, a Ministry claimed that a report relating to Sri Lanka Cricket was conducted by the then Minister in a 'private capacity'. While the Commission was hesitant to accept this view, it made an Interim Order directing that the relevant financial officers "ascertain in writing before the Commission, whether any expenses were incurred by the Public Authority in the preparation and finalization of the report requested for."¹⁹

A clear nexus exists between the expenditure of public funds, a resultant public interest, and consequently, whether the information ought to be released. This approach is also in keeping with the Indian decision in *Registrar v Registrar* where the presence of a public interest weighed in on the Court's decision of whether the College was a 'Public Authority'. The South African approach is also quite similar in that it considers whether the documentation themselves are matters of public interest, as opposed to whether the PA can be strictly brought under a definition of a PA. The presence of public interest is an overriding consideration in terms of Section 5 (4) of the Sri Lankan RTI Act, "*Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.*"

18. Minute of the Record of Proceedings dated 29.10.2019.

19. *Transparency International Sri Lanka v Ministry of Sports* RTIC Appeal 2291/2020, dated 27.04.2021.

Concluding Comments

The core issue in contest in this Appeal was whether the National Olympics Committee is a ‘Public Authority’ under and in terms of Section 43 of the RTI Act and whether it can be subjected to be governed by the RTI Act. It is noteworthy that this Appeal was concluded without a pronouncement on whether the National Olympics Committee was a PA governed by the RTI Act, as the PA was amenable to release the information without a determination on this issue²⁰. However, the objections raised by the National Olympics Committee (hereinafter ‘NOC’) and the counter-objections submitted by the Appellant are worth considering in view of the definition of Public Authorities. It is evident that the NOC is well-encompassed within the meaning of a “Public Authority” in terms of Section 43 (b), as its establishment is provided for in Section 18 of the Sports Law,²¹

43 (b) any body or office created or established by or under the Constitution, any written law, other than the Companies Act, No. 7 of 2007, except to the extent specified in paragraph (e), or a statute of a Provincial Council.

Furthermore, there is a substantial disbursement of government funds to the NOC. Another consideration that the Commission would have taken into account were it to arrive at a ruling, is the financial accountability and reporting of the NOC to the government, as it is a body which was audited by the Auditor General’s Department. As the apex body for determining who will represent Sri Lanka in international sports events, the NOC essentially has a statutorily guaranteed monopoly over decision-making. No other body may compete with the NOC in this area. This is all the more reason why it must be transparent under the RTI Act as an agency of the State.

20. Minute of the Record of Proceedings, dated 23.02.2021.

21. Section 18

***P. Hewamanne v Human Rights
Commission of Sri Lanka***

“The Commission rules that the information requested by the Appellant is information that may be legitimately released in terms of the RTI Act and Regulations. The information requested by the Appellant is institutional information, which the PA must have made available as a matter of course in terms of Regulation No 20 of the Regulations of the RTI Act (Gazette No. 2004/66, 03.02.2017). The PA is reminded of its duty to adhere to the said Regulation”

Decision: The Appellant requested several items of information concerning the procedure followed by the Human Rights Commission of Sri Lanka (the PA) when inquiring and investigating into complaints alleging violation of fundamental rights. As the IO and DO both failed to respond within the stipulated time period, the Appellant preferred an appeal to the Commission. The PA did not respond to the notice issued by the Commission. At the appeal hearing, the Commission directed the PA to release the information requested by the Appellant and noted that if the Appellant is not in receipt of the information within one month of the receipt of the Order, the Appellant may inform the Commission of the same in writing. The Commission reminded the PA that the failure to comply with the Order of the Commission is a punishable offence in terms of Section 39 (1) (e) of the RTI Act. Further that non-compliance with an order of the Commission is an offence under and in terms of the Act can result in a prosecution in terms of Section 39 (4) of the RTI Act.

Keywords: *Failure of the PA to respond to notices issued by the Commission/ Institutional process/Offences under the RTI Act (Section 39)/Proactive Disclosure (Regulation 20 of the RTI Regulations) /Public Interest (Section 5 (4)) /Time limits (Sections 25 (1), 31 (1) & (3))*

Brief Factual Background¹

By information request dated 13.12.2019, the Appellant requested the following:

Please provide me with the information requested below concerning the procedure followed by the Human Rights Commission of Sri Lanka (hereinafter HRC) when inquiring and investigating into complaints alleging violation of fundamental rights:

1. Does the HRC have any regulations and/or internal rules and/or procedures it follows when inquiring and investigating into complaints alleging violations of fundamental rights?
 - a) If so, where are such regulations/internal rules/ procedures published?
 - b) Copies of any regulations/internal rules/ procedures followed by the HRC when inquiring and investigating into complaints alleging violations of fundamental rights
 - c) If no such regulations/internal rules/ procedures exist, how does the HRC ensure uniformity in its decisions?
2. Has the HRC formally or informally reached any decision and/or ruling and/or other similar conclusion or resolution regarding its mandate *vis-à-vis* fundamental rights?
 - a) Has the HRC formally or informally categorised specific incidents/ factual matters as those coming within the mandate of the HRC? (for example arrest/school admission)
 - b) Copies of any decision and/or ruling and/or other similar conclusion or resolution of the HRC that has defined or set out the HRC's mandate
 - c) Copies of any decision and/or ruling and/or other similar conclusion or resolution of the HRC that has categorized specific

1. RTIC Appeal (Documentary) 2322/2020 heard as part of a formal meeting of the Commission on 13.07.2021. See, <https://www.rticommission.lk/web/images/pdf/2322-2020/2322-2020-P.-Hewamanne-v-HRCSL-1.pdf>

incidents/factual matters as those coming within the mandate of the HRC

- d) If no such decision/ruling/conclusion exists, how does the HRC ensure uniformity in its decision-making process and its decisions?
- 3. Has the HRC formally or informally reached a decision and/or ruling and/or other similar conclusion or resolution that employment matters do not form the subject matter of fundamental rights
 - a) If so, who has reached such a decision?
 - b) Who is authorized at the HRC to inform prospective complainants that such employment matters do not come within the mandate of the HRC?
 - c) Copies of any decision and/ruling of the HRC that has held or found employment matters to fall outside their mandate
 - d) If no such decision has been reached, on what authority officers of the HRC refuse to accept complainants of prospective complainants when such complaints are based on employment matters?
 - e) The number of employment-related complaints accepted by the HRC for 2016, 2017, 2018 and 2019 (as of the date of this letter)
 - f) The number of employment-related complaints rejected by the HRC for 2016, 2017, 2018 and 2019 (as at the date of this letter) at the submission stage
 - g) The basis for the rejection of such employment-related complaints at the submission stage
- 4. Does the HRC have any regulations and/or internal rules and/or procedures by which complaints can be rejected at the point of submission of the complaint prior to inquiry?
 - a) If yes a copy of such regulations and/or internal rules and/or procedures by which complaints can be rejected at the point of submission of the complaint prior to inquiry

- b) Does the HRC require the officers to notify such rejected complainants of the reasons for rejection in writing?
 - c) If yes to 4(b), a copy of such decision and/or ruling and/or other similar conclusions of resolution?
 - d) If no to 4(b), under what authority can the HRC reject complaints in the first instance without inquiry without assigning reasons in writing?
 - e) And, if the answer to 4(b) is no, under what authority, does the HRC purport to violate a basic tenant of Natural Justice, tantamount to abuse of discretion?
 - f) And if the answer to 4(b) is no, does the HRC acknowledge that the failure to give reasons may amount to procedural unfairness?
 - g) And if the answer to 4(b) is no, does the HRC further acknowledge that the failure to provide adequate reasons may render a decision irrational?
 - h) If the answer to 4(f) and 4(g) is yes, does the HRC have in place any rules/procedures/regulations which protect such rejection from being rendered procedurally unfair and irrational?
 - i) If the answer to 4(f) and 4(g) is no, does the HRC acknowledge, in the light of recent developments in the law, that they are required to provide reasons for the rejection of complaints?
 - j) If the answer to 4(i) is no, what is the basis and/or justification for such answer?
 - k) If the answer is 4(i) is yes, what are the measures the HRC is taking to rectify the same?
5. The authority under which inquiring officers purport to inform the complainants that their rights under Article 12 cannot be investigated or inquired into by the Commission.
 6. Any specific criteria followed by the Commission for rejecting complaints alleging violations of fundamental rights.

As the IO failed to respond within the time period stipulated in the Act, the Appellant appealed to the DO. As the DO too failed to respond within the time period stipulated in the Act, beyond an acknowledgement of the Appeal, the Appellant preferred an appeal to the Commission on 26.03.2020.

Matters Arising at the Hearing

The PA did not respond to the notices issued by the Commission.

The Appellant filed Preliminary Written Submissions dated 11.07.2021, highlighting the failure of the IO and DO to adhere to the statutory timelines stipulated within the RTI Act, and stating further that the PA has not responded to the notices issued by the Commission. The Appellant in his Written Submissions pointed out that the failure of the IO and the DO to comply with statutorily mandated timelines is tantamount to a violation of the provisions of the RTI Act. In his Written Submissions, the Appellant further noted that although Notices have been issued by the Office of the Commission, notifying the PA of the filing of the Appeal, the Appellant had not received any information or refusal to release the same, from the PA as of date.

Final Order²

Upon consideration of the foregoing facts and applicable legal and regulatory provisions in this Appeal, the Commission enters into Final Order in the below manner.

(1) Failure of the PA adhere to statutory timelines in the RTI Act.

On consideration of the facts arising in this Appeal, it is evident that the PA has failed to adhere to the mandatory timelines laid down for responses of the PA in relation to information requests as contained in Sections 25(1), 31 (1) and 31 (3) of the RTI Act. The PA is under a statutory obligation to provide the information in its possession, custody or control under and in terms of Section 3 of the Act unless

2. Order delivered on 13.07.2021.

the PA is of the view that it is exempted under Section 5 of the Act, in which event the PA must refuse the information stating the specific exemption relied upon by the PA, under Section 5 of the Act.

The PA has failed to respond in any manner whatsoever to the information request of the Appellant beyond an acknowledgement by the DO. This is in blatant violation of the timelines laid down in the RTI Act. The Commission is empowered in terms of the RTI Act to raise the failure of the PA in this regard as a disciplinary issue against the respective IO and DO, in terms of Section 38 of the Act.

(2) *Failure of the PA to Respond to Notices Issued by the Commission.*

Furthermore, the PA has also failed to respond to the notices issued by the Commission. The Notices of the Commission have been issued in the first instance on 29.01.2021, and thereafter on 05.04.2021 [and by email notification dated 19.03.2021]. This Appeal has already been postponed without a hearing on two prior occasions viz., 16.03.2021 and 01.06.2021. The PA has not made submissions before this Commission on any of these instances.

(3) *Definition of Information under Section 43 of the Act*

The Appellant is reminded of the definition of information in Section 43 of the Act. As such it is envisaged that the Appellant's information request should consist of that which falls within this definition. Information requests in the nature of questions *per se* are not envisaged under the Act unless there is specified documentation that exists in relation to such question/s.

(4) *Overriding Public Interest in this Appeal*

Notwithstanding the above in (2), and in view of the fact the information requested for by the Appellant is in fact to ascertain the existence of specified documentation in relation to the issues raised, the Commission sees that this Appeal is of public interest. The RTI regime in Sri Lanka is centrally informed by the overriding public interest clause contained in Section 5 (4) of the Act.

(5) *The Information requested by the Appellant is Institutional Information*

The Commission rules that the information requested by the Appellant is information that may be legitimately released in terms of the RTI Act and Regulations. The information requested by the Appellant is institutional information which must be made available as a matter of public record in terms of Regulation No 20 of the Regulations of the RTI Act (Gazette No. 2004/66, 03.02.2017). The PA is reminded of its duty to adhere to the said Regulation.'

(6) *Final Order entered into by the Commission in this Appeal and Failure to Comply*

In consideration of the foregoing facts, the complete failure of the PA to respond to the Appellant's information request at any stage, the overriding public interest evident in this Appeal and the duty incumbent on the PA to have proactively disclosed the information requested by the Appellant, the Commission enters into Final Order as below.

The Commission directs the release of the information requested by the Appellant in his information request dated 13.12.2019.

The Appellant is informed that if he is not in receipt of the information thus ordered to be released by the Commission from the PA within one month of the receipt of this Order, the Appellant may inform the Commission of the same in writing.

The PA is reminded that the failure to comply with the Order of the Commission is a punishable offence in terms of Section 39 (1) (e) of the RTI Act. Accordingly, non-compliance with an order of the Commission is an offence under and in terms of the Act can result in a prosecution in terms of Section 39 (4) of the Act. Alternatively, the PA can appeal from a decision of the RTI Commission in terms of Section 34 of the RTI Act.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

- (i) Is the information sought by the Appellant that which ought to have been released proactively by the PA, as provided for in the RTI Regulations?
- (ii) In the event of the persistent failure of the PA to respond to the Appellant's information request and to the notices of the Commission, and in view of the information requested by the Appellant being information which ought to have been proactively disclosed by the PA in terms of the RTI Regulations, can a decision be entered into, ordering the release of the information?

Reflections on the Propositions Established in the Order of the Commission

Public Interest and Proactive Disclosure

The Commission ordered the release of the information in view of the overriding public interest evident in the Appeal, emphasizing the fact that the information requested should have been released proactively by the PA, as well as the failure of the PA to respond to the information request at all points hitherto.

The public interest in this Appeal stems from both the nature of the PA and the nature of the information requested. The PA is a statutorily established Commission in terms of the Human Rights Commission Act, No. 21 of 1996 and receives its mandate, powers and functions thereby. It is authorized to *inter alia* enquire into violations and imminent violations of human rights. Considering the impact and responsibility of an organization like the PA to the people of Sri Lanka, the public interest in the information regarding the internal procedures of the PA becomes heightened.

Significantly, in formulating the information request, the Appellant went beyond a mere inquest into the internal procedures of the PA. The Appellant's questions under each point of information can be categorized in at least three ways. Firstly, the Appellant's question attempts to ascertain the existence of any documentation in relation to the internal procedures. Secondly, the Appellant queries the decision-making process, or the process that led to the arrival at such an internal procedure. Thirdly, the Appellant raises a deeper and more substantive probe as to whether the PA does not observe irregularities in the functioning of the PA without written standards, in an *ad hoc* manner.³ It is important to note that the questions raised in the information request strike at the heart of whether the PA, an organization overlooking human rights, dispenses administrative justice in its internal procedures. The information requested, therefore, surpasses more than one category of information which must be proactively disclosed in terms of Regulation 20 of the RTI Regulations.⁴

Violation of Statutory Timelines

Furthermore, another ground that the Commission considered when entering into Final Order is the violation of statutory timelines laid out in the RTI Act by the PA. The PA had failed to respond to the information request to the IO, appeal to the DO, and to the notices issued by the Commission. This is in blatant violation of several statutory obligations as highlighted in the Commission's Order.⁵ In addition, although the PA never responded to the information request, there is no ground under Section 5 (1) of the Act, through which the PA may have legitimately claimed an exemption. As the information pertains to the documentation in relation to the internal procedures of the PA, there is no reprieve in citing Section 3 (1) either, as this information ought to be within the possession, custody or control of the PA. However, as the PA did not respond to the

3. *Ibid.*

4. RTI Regulations promulgated under the RTI Act (Gazette No. 2004/66, dated 03.02.2017).

5. Order dated 13.07.2021, pages 4-5.

information request by citing any of the substantive grounds in Section 5 (1) or under Section 3 (1), there was never an opportunity to engage with the PA on any of these grounds.

Definition of Information

In its Order, the Commission also ruled that the definition of information contained in Section 43 of the RTI Act, does not include questions *per se*.⁶ However, this did not preclude the release of information as requested by the Appellant, as they were not questions *per se* but questions raised “to ascertain the existence of specified documentation in relation to the issues raised.”⁷ Appeals, where the information request consists of questions alone, have been disallowed by the Commission unless there were documentation that existed in relation to such question(s). However, in this Appeal, the questions raised by the Appellant were regarding whether documentation exist in relation to the questions raised. Upon this distinction, the Appeal was allowed, and the information was ordered to be released.

Concluding Comments

Although a brief Appeal, the decision handed down by the Commission in *Hewamanne v Human Rights Commission* is of significant public interest, given the duty and functions of the PA. The information requested related to the internal procedures in place to consider and investigate into complaints, which the Commission held was information that ought to be proactively disclosed in the public interest.

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6. “Information” includes any material which is recorded in, in any form including records, documents, memos, emails, opinions, advices, press releases, circulars, orders, log books, contracts, reports, papers, samples, models, correspondence, memorandum, draft legislation, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, Video tape, machine readable record, computer records and other documentary material, regardless of its physical form or character and any copy thereof;”
 7. RTIC Appeal (Documentary) 2322/2020 page 6.

S. Rubatheesan v Sri Lanka Parliament

‘The right of the citizenry to know, inter alia, the qualifications and criminal charges and/or convictions of their elected representatives is part of the freedom of expression, information and franchise as this information furthers the ability of a constituency to make an informed decision at elections.’

Decision: The Appellant requested several items of information relating to Members of Parliament (MPs) and the Parliament. This included information relating to the cost of parliamentary sittings, MPs turn out during the last 10 years, criminal charges against MPs and so on. Dissatisfied with the response of the IO and DO, the Appellant preferred an appeal to the Commission. The Appeal before the Commission was limited to information relating to two points of information, viz., on educational qualifications of and criminal charges against MPs. Taking into considering the overriding public interest in disclosure of the said information, the Commission directed the PA to take requisite steps to obtain the said information from elected representatives of the Sri Lanka Parliament on details regarding educational qualifications and criminal charges against MPs and to make the same available of public record.

Keywords: *Articles 90 and 91 of the Constitution/Educational qualifications and details of criminal charges relating to Members of Parliament/Information in ‘Possession, custody or control’ (Section 3 (1))/Personal Information (educational and personal information of politicians not amounting to),(Section 5 (1) (a))/Public Interest (Section 5 (4))*

Brief Factual Background¹

By information request dated 05.01.2021, the Appellant requested the following:

1. How much does a day of parliamentary sitting cost the taxpayer?
2. What has been the MPs' turnout during the last 10 years or so? Please provide details of Parliament sittings from 2010.
3. How long is an MP required to be in his seat or at committee meetings?
4. What action is taken against the MPs who scoot away or do not turn up in Parliament without applying for leave?
5. Will the MPs be allowed to import duty-free vehicles? Any decisions have been taken in this regard?
6. How much is the duty concession an MP is entitled to?
7. How much do the MPs get by way of bank loans for importing their vehicles?
8. What is the interest rate as well as the payback period?
9. Have the members of previous Parliaments (2010, 2015) paid back their vehicle loans in full?
10. How many MPs have sold their duty-free vehicle permits and how much have they raised therefrom?
11. What are the educational qualifications of the members of the current Parliament, especially the ministers?
12. How many MPs have criminal charges against them?
13. There were allegations that some elderly MPs sexually harassed their female counterparts in the last Parliament (2015). The then Speaker Karu Jayasuriya promised to look into them and requested the victims to make formal complaints. Was an inquiry held?

1. RTIC Appeal (In – Person) 369/2021 – Heard as part of the formal meeting of the Commission on 20.07.2021. Appearance for the parties: S. Rubatheesan (via Zoom) for the Appellant; G. Thatchanarany, Head, RTI Section and Deputy Director – Administration and P.K.D.S.W. Wijegunawardhana, Deputy Principal Officer for the PA (Sri Lanka Parliament). See, <https://www.rticommission.lk/web/images/pdf/0369-2021/369-2021.pdf>

14. If yes, give us a copy of the report in English or Sinhala?
15. Provide details of the meal prices offered to MPs
16. Is this the same meal provided to others, including media persons, workers and staff?
17. How many visitors can an MP bring to Parliament and entertain them inside Parliament, including meals?
18. Provide full details of allowances and benefits provided to MPs.
19. Are there any sitting MPs who informed the Parliament that they do not need the personal security guard (PSD)? If yes, please provide details of them.”

The IO replied on 19.02.2021, providing the below information:

The information requested by you is given below

1. The average cost of a sitting day cannot be calculated as the cost for month varies monthly due to many reasons
2. According to a business Committee decision, the attendance of members can be obtained through the minutes of parliament website from 01.09.2015.(<http://www.parliament.lk/en/business-of-parliament/minutes-ofparliament?start=420>)
3. There is no such requirement. but according to Article 66 of the Constitution, a member’s seat can be vacant. In addition, Article 127(7) of the standing Order sets out some requirements for attending committee meetings for MPs.
4. Please refer the article 66 (f) in the Constitution 1978.
5. The requested information is not in the possession, custody, or control of Parliament of Sri Lanka. Please forward your request for information to the Parliamentary Affairs Division under the Ministry of Public Service Council and Local Government in this connection.
6. The requested information is not in the possession, custody, or control of Parliament of Sri Lanka. Please forward your request for

information to the Parliamentary Affairs Division under the Ministry of Public Service Council and Local Government in this connection.

7. The requested information is not in the possession, custody, or control of the Parliament of Sri Lanka. Please forward your request for information to the Parliamentary Affairs Division under the Ministry of Public Service Council and Local Government in this connection.
8. The requested information is not in the possession, custody, or control of the Parliament of Sri Lanka. Please forward your request for information to the Parliamentary Affairs Division under the Ministry of Public Service Council and Local Government in this connection.
9. The requested information is not in the possession, custody, or control of the Parliament of Sri Lanka. Please forward your request for information to the Parliamentary Affairs Division under the Ministry of Public Service Council and Local Government in this connection.
10. The requested information is not in the possession, custody, or control of the Parliament of Sri Lanka. Please forward your request for information to the Parliamentary Affairs Division under the Ministry of Public Service Council and Local Government in this connection.
11. Educational Qualifications relate 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. Further, according to Article 90 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, the only qualification to be elected as a member of parliament is that the person is qualified to be an elector. No references had been made to the education qualification of an MP in Articles 90 and 91 of the Constitution

12. The requested information is not in the possession, custody, or control of the Parliament of Sri Lanka
13. Please provide sufficient details about the mentioned statement made by Hon. Karu Jayasuriya.
14. Please provide sufficient details about the mentioned statement made by Hon. Karu Jayasuriya.
15. Rs.200
16. Yes. Additional dishes will be provided on request
17. 12 visitors per day – an extra cost to be paid for meal 18. Annex 1
19. The requested information is not in the possession, custody, or control of the Parliament of Sri Lanka. Please forward your request for information to the Ministry of Public Security in this connection”

Upon appeal to the DO, the DO replied as below;

Question 11

Educational Qualifications of Member of Parliament have not been recognized in terms of the provisions stipulated in Articles 90 and 91 of the Constitution of the Democratic Socialist Republic of Sri Lanka. Therefore, I kindly inform you that I have no grounds to interfere with the decision given by the Information Officer.

Question 12

I kindly inform you that I have no grounds to interfere with the decision given by the Information Officer.

Question 13 and 14

There was no such inquiry held.”

Thereafter, the Appellant preferred an appeal to the Commission on 30.04.2021.

Matters Arising at the Hearing

The Appeal before the Commission proceeded on points of information no. 11 and 12 listed in the information request to which the Appellant stated that he was limiting himself to.

The PA had filed Written Submissions dated 16.07.2021, stating that Articles 90 and 91 of the Sri Lankan Constitution sets out the qualifications and disqualifications for election as Members of Parliament and that in accordance with the said Articles, Members of Parliament are “not bound to provide any such information to the Parliament.”

Further, due to the large volume of information requests received by the PA regarding the educational qualifications of Parliamentarians, it was informed to the Commission that by letter dated 10th May 2021, the Secretary-General of Parliament has taken steps to write to all Parliamentarians, stating, *inter alia*, that “if you are willing to provide this information, you are kindly requested to furnish me your educational and professional qualifications on the attached specimen as early as possible enabling to disseminate such information to the requests of the citizens”.

In regard to details of criminal charges against MPs, the PA asserted that this information is not within the possession, custody or control of the PA in terms of Section 3 (1) of the RTI Act.

At the hearing before the Commission on 20.07.2021, the Appellant stated that the position of the PA that the educational qualifications and details of criminal charges have not been obtained by the PA is not acceptable as there is a duty incumbent on the Parliament of Sri Lanka to collect these details of elected members of Parliament as part of their portfolio. He reiterated that there is a high public interest in collecting and maintaining this information given that the people have a right to know about the educational qualifications and details of criminal charges against their representatives in Parliament, notwithstanding the absence of any mandatory legal stipulation which makes it compulsory for the Parliamentarians to submit these details to Parliament.

The representatives of the PA reiterated that there is no requirement on the part of the PA to obtain the educational qualifications of Parliamentarians in terms of Articles 90 and 91 of the Constitution. Even so, it was emphasised that the PA (the Parliament) had, under the hand of the Secretary-General, written to all Parliamentarians by letter dated 10.05.2021 requesting them to furnish such information in the light of information requests received by citizens. However, as at this date, the PA has not received a response to the aforesaid letter by any of the aforesaid Parliamentarians.

With regard to point of information no.12, pertaining to the number of MPs with criminal charges against them and upon the RTI Commission querying from the PA whether the PA does not see the relevance and importance of obtaining information regarding criminal charges, if any, lodged against MPs given the high public interest in this regard, the representative of the PA submitted that, if there is a Court case against an MP, a letter with the Case Number is given to Parliament by said MP. Further, it was clarified that the PA does not implement an administrative mechanism to obtain this information from the MPs and that, therefore the information is not within the possession, custody or control of the Parliament within the terms of Section 3 (1) of the RTI Act.

Final Order ²

In consideration of the above facts, law and relevant public interest considerations, the Commission enters into Final Order as below:

Relevance of Articles 90 and 91 of the Constitution

The PA has pleaded before this Commission that in terms of Article 90 and 91 of the Constitution, no disqualification arises in terms of the educational qualifications of the MPs and that therefore they are not required to file such information before Parliament.

2. Order delivered on 20.07.2021.

The Appellant, in counter-response, argued that the people have a right to know about the educational qualifications of their representatives in Parliament, notwithstanding the absence of any mandatory legal stipulation which makes it compulsory for the Parliamentarians to submit these details to Parliament. The Appellant emphasized that, regardless of a legal duty arising on the PA in this regard, there is a distinct public duty on the PA, namely Sri Lanka Parliament, by virtue of the public interest therein to obtain such details.

Furthermore, it is of note that the Appellant's information request does not concern the question as to whether disqualification of any MP arises in terms of his/her educational qualifications (emphasis ours) in terms of the applicable law. Rather, the information that the Appellant has requested for is, simply, a question of what the educational qualifications of the MPs are (emphasis ours). Thus, it is our view that the PA's citation of Articles 90 and 91 is relevant only in so far as to justify its position that the said information is not within the possession, custody or control of the PA in terms of Section 3 (1) of the RTI Act.

Inapplicability of Section 5 (1) (a) of the RTI Act to the release of educational qualifications

It has been accepted on record that the PA does not have the above-said information in its 'possession, custody or control' under and in terms of Section 3 (1) of the RTI Act and consequently, is unable to act in terms of the said information request. As such, during the course of the hearing before us, the PA did not pursue the position taken in its Written Submissions dated 16.07.2021, that, "it is personal information covered by Section 5 (1) (a) of the RTI Act".

Notwithstanding the above, the Commission determines that reliance on Section 5 (1) (a) is inapplicable to the case at hand. The information requested concerns the educational qualifications and criminal charges of Members of Parliament. Section 5 (1) (a) is to the effect that,

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.

We rule that the said information does not come within the ambit of Section 5 (1) (a) in that firstly, it has a direct relationship to ‘public activity or interest’ within the meaning of that Section and secondly, as a consequence thereof that, there is no ‘unwarranted’ invasion of privacy thereby. It is of direct comparative interest that in *Union of India v Association for Democratic Reforms*³, the Indian Supreme Court held that constituencies have a right to know about *inter alia* the educational qualifications and criminal charges, if any, of elected representatives, as this is an exercise which furthers the citizens’ right to make an informed decision about who should represent them in Parliament.

The contention by intervening parties arguing that the citizen’s right to know about the affairs of the Government does not mean that citizens have a right to know the personal affairs of MPs or MLAs was dismissed by the Court as being ‘totally misconceived.’ The Bench pointed out that this was not a question of ‘knowing personal affairs’ of MPs but only amounted to ‘limited information’ that was essential for maintaining the transparency of a country’s Legislature.

Overriding Public Interest and the duty incumbent on the PA to obtain details regarding educational qualifications and criminal charges against MPs
In any event, the public interest in disclosure of the said information is paramount as envisaged in Section 5 (4) of the RTI Act,

5 (4) Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.

3. [2002] 3 SCR 294.

The right of the citizenry to know, *inter alia*, the qualifications and criminal charges and/or convictions of their elected representatives is part of the freedom of expression, information and franchise as this information furthers the ability of a constituency to make an informed decision at elections. In *Union of India v Association for Democratic Reforms* [Supra], the Court stressed as follows;

“One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations...A successful democracy posits an ‘aware’ citizenry.” [vide page 16 of the judgment]

Steps taken by the PA to obtain information relating to the educational qualifications of MPs

Proceeding on the basis that the requested information is not currently within the possession, custody or control of the PA in terms of Section 3 (1) of the Act, it is encouraging to note that the PA has taken the first steps in this regard by writing to all MPs by letter dated 10.05.2021 to obtain information on the relevant educational qualifications, citing requests for information made by citizens under the RTI Act. However, the PA has affirmed before this Commission that not a single MP had responded to the said request to date.

The absence of any response even after the lapse of more than two months since the aforesaid letter is undeniably a matter of concern in the context of the overriding public interest as referred to in this Order. The Commission directs the PA to apprise the Appellant forthwith of any responses to the above-stated letter, with a copy to the Commission. We further note that contingent on the said information being furnished, the PA has undertaken to update their website with the educational qualifications of MPs albeit without a specified timeline.

Information relevant to criminal charges of MPs

We emphasize the paramountcy of this information being available to the citizenry. As pointed out by the Indian judiciary, “a successful democracy posits an ‘aware’ citizenry” (*vide Union of India v Association for Democratic Reforms [Supra]*) for which purpose, the said information is of high public interest. As such, it is our view that it is incumbent on the PA to take requisite steps to obtain the said information from elected representatives of the Sri Lanka Parliament and to make the same available of public record.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

- (i) Could information pertaining to the educational qualifications of MPs and criminal charges and/or convictions against them be exempted under “personal information” in Section 5 (1) (a)?
- (ii) Does the absence of any constitutional or statutory obligations on the PA to obtain and retain this information, necessarily discharge the PA of its duty to do so? This is particularly so, in view of the fact that the information requested was of elected representatives, and the questions raised have a necessary bearing on their suitability and fitness to hold public office.
- (iii) In view of (ii), is there an overriding public interest in terms of Section 5 (4) in this Appeal?
- (iv) Is not the filing of such information a larger question of the freedom of expression and the meaningful exercise of the right to franchise of the citizenry?

Reflections on the Propositions Established in the Commission's Order

The Order of the Commission is in line with global trends where Courts have ordered Public Authorities to release information pertaining to educational qualifications and any criminal charges against the candidates running for office. This analysis delves into salient features of *S. Rubatheesan v Sri Lanka Parliament*.

Freedom of Expression, Information and Franchise vis-à-vis the Right to Know

The Commission placed the right of the citizenry to know the qualifications and criminal charges and/or convictions of MPs as part of their freedom of expression, information and franchise as this information furthers the ability of a constituency to make an informed decision at elections.⁴ This was supported by a reference to *Union of India v Association for Democratic Reforms*, where the Court stressed that a successful democracy posits an “aware citizenry.” The Indian Supreme Court pointed out that casting of a vote by a misinformed and non-informed voter or a voter having one-sided information only is bound to affect democracy seriously.⁵ Accordingly, the Supreme Court upheld a High Court order mandating the Election Commission to obtain and disclose to the public, background information of candidates running for office, including their criminal records and educational background.⁶ The right to vote and freedom of expression become meaningful and fully protected and strengthened only when the right to know about a candidate's educational background and criminal charges is upheld and details disclosed. Such information is critical for the public to formulate its opinion and vote at an election and ensure that only suitable candidates are elected, thereby also advancing democracy.

4. *Ibid* page 7.

5. *Ibid* page 16.

6. *Union of India v Association for Democratic Reforms and Another; with People's Union for Civil Liberties and another v Union of India and another* [2002] 3 SCR 294 <<https://globalfreedomofexpression.columbia.edu/cases/union-india-uo-i-v-respon-dent-association-democratic-reforms-another-peoples-union-civil-liberties-pu-cl-another-v-union-india-uo-i-another/>>

In *People's Union of Civil Liberties (PUCL) v Union of India*, Justice Reddi demonstrated the importance of the right to know the basic details of a candidate by stressing its importance in the voting process. The Supreme Court argued that the right to vote was two-fold which included firstly, the formulation of opinion about the candidates and secondly, the expression of choice by casting the vote for the preferred candidate.⁷ The Court pointed out that to formulate an opinion about a candidate, a citizen should know at least the basic information about the contesting candidate, such as his involvement in serious criminal offences.⁸

The Court further asserted that scuttling the flow of such vital information would affect the electorate's ability to evaluate the candidate. The Court stressed that if such information was to be made available it will promote freedom of expression by helping voters be informed and by facilitating the press and voluntary organizations impart information through publication and open debates, as well as preserve the integrity and fairness of the electoral process.⁹ Thus, in effect, the Court positioned the right to know about a candidate's educational background and criminal charges under the right to vote and under the broader right of freedom of speech and expression.

Transparency versus Privacy

Section 5(1)(a) of the RTI Act states that an information request can be refused where "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." The Commission stated that the information requested does not fall under this exception because it has a direct relationship to 'public activity or interest' within the meaning of that Section and because

7. *PUCL v Union of India* (2003) 2 SCR 1136.

8. *Ibid.*

9. *Ibid.*

there is no ‘unwarranted’ invasion of privacy thereby.¹⁰ The right to know about a candidate’s background has been stressed in light of the need for openness and transparency in the performance of public functions, thus overriding concerns pertaining to privacy. The *Rubatheesan* Order cited *Union of India v Association for Democratic Reform*, where the Indian Supreme Court dismissed the contention by intervening parties that the citizen’s right to know about the affairs of the Government does not mean that citizens have a right to know the personal affairs of MPs. The Bench pointed out that this was not a question of knowing the personal affairs of MPs but only amounted to “limited information” that was essential for maintaining the transparency of a country’s legislature.

In *K.S. Puttaswamy v Union of India*,¹¹ the Indian Supreme Court both recognized the ambit of the right to privacy and yet held that it cannot be legitimately extended to conceal matters of state interest. Holding further, Court was of the view that although the right to privacy is natural and inalienable to the human person, that it was not inviolable, and legitimate inroads can be made, for instance, in the wider public interest. In one of the most exhaustive expositions on the subject in modern-day jurisprudence, Court stated that “But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed.”

In the *Centre for Democracy and the Rule of Law v Ukraine*¹² the European Court of Human Rights held that the Applicant’s freedom of expression, encapsulated in Article 10 of the European Convention of Human Rights was violated when the Ukrainian authorities refused to give the NGO access to information about the education and work history of top politicians as contained in their official CVs, filed as candidates for Parliament. The Court stressed the importance of transparency on

10. *Ibid.*

11. Writ Petition (Civil) No.494 of 2012.

12. 10090/16 (2020).

matters of public interest and disagreed that the disclosure of such public information could warrant bringing Article 8 (right to respect for private and family life) into play.¹³ This demonstrates that the overriding public interest warrants disclosing the candidate's background, in order that there is transparency in public functions.

Duty on Political Parties

The Commission cited *Rambabu Singh Thakur v Sunil Arora and Ors*,¹⁴ where it was pointed out that obtaining details of criminal charges regarding candidates was a duty incumbent on political parties as well. Previously, the Supreme Court in *Public Interest Foundation v Union of India*,¹⁵ being cognizant of the increasing criminalization of politics in India, stated that political parties are obligated to publish on its website, print as well as electronic media, details pertaining to the criminal charges pending against their candidate. In the *Rambabu Singh* case, this obligation was further affirmed stating that it was “mandatory” for political parties to publish such information *via* print media and the social media platforms of the political party, alongside reasons for such selection and why individuals without criminal antecedents could not be selected. The information should be published within 48 hours of the selection of the candidate or not less than two weeks before the first date for filing of nominations, whichever is earlier.

Legislative Interventions

In *Union of India v Association for Democratic Reforms*, the Indian Supreme Court noted the lacuna in existing legislation on collecting vital information from candidates contesting elections and called for the

13. *Centre for Democracy and the Rule of Law v. Ukraine* 10090/16 (Global Freedom of Expression, Columbia University) <<https://globalfreedomofexpression.columbia.edu/cases/centre-for-democracy-and-the-rule-of-law-v-ukraine/>>

14. (2019) 3 SCC 224.

15. Writ Petition (Civil) No. 536 Of 2011 (25 September 2018) <https://indiankanoon.org/doc/146283621/?type=print&__cf_chl_jschl_tk__=pmd_XGeYvfSQr097pvi_kR0n6iwciF05qll5tTlp36wLt7c-1630518970-0-gqNtZGzNAiWjcnBszQfl>>

collection of information pertaining to criminal charges, assets, liabilities and educational qualifications.

As a result of this decision, in December 2002, Parliament amended the Representation of the People Act, 1951.¹⁶ Under Article 33A of the amended Act, a candidate should as part of his nomination paper furnish information as to whether he is accused of any offence punishable with imprisonment for two years or more in a pending case and whether he has been convicted of an offence and sentenced to imprisonment for one year or more. However, Article 33B states that no candidate shall be liable to disclose or furnish any information, in respect of his election which is not required to be disclosed or furnished under the Act or the rules made under the Act, despite a Court ordering to do so. This implies that a candidate cannot be held liable to disclose his educational qualifications.¹⁷

Articles 90 and 91 of the Sri Lankan Constitution

Article 90 of the Constitution states that every person “qualified to be an elector” is eligible to be elected as an MP unless disqualified under Article 91. Article 91 does not contain any requirement as to satisfying an educational qualification. It lays down the disqualifications to being elected an MP.

The Commission in its Order pointed out that the Appellant’s information request was not about whether an MP could be disqualified in terms of his/her educational qualifications, but about the educational qualifications of the MPs *simpliciter*. Therefore, the Commission contended that the PA’s citation of Articles 90 and 91 is relevant only in so far as to justify its position that the said information is not within the possession, custody or control of the PA¹⁸. Even though there is no constitutional duty under Articles 90 and 91 to release the requested information, one could argue that there is a “public duty” to do so. However, the question

16. The Representation of the People Act 1951 <https://legislative.gov.in/sites/default/files/04_representation%20of%20the%20people%20act%2C%201951.pdf>

17. *PUCL v Union of India*.

18. *Ibid*.

arises, as to whether when a MP does not release such information, whether a liability can be imposed on the relevant PA.

The Rubatheesan Order in Light of Past Commission Orders

Past Commission Orders reflect an inclination to hold Parliamentarians accountable by ordering disclosure, or in the alternative when barred by legislative provisions, by making a statement in favour of the accountability of Parliamentarians. In *TISL v Prime Minister's Office* as there was no explicit provision in the law stipulating the declaration of assets and liabilities by the Prime Minister, the Commission stated that the duty and the function of the Commission was to 'ensure the due compliance by Public Authorities of the duties cast on them under this Act.'¹⁹ In *TISL v Presidential Secretariat*,²⁰ while the Prime Minister was ordered to disclose his assets and liabilities, a similar order could not be made against the President.²¹

The Commission stated that given there was no law that required the President to make a declaration of his/her assets and liabilities, the information requested by the Appellant could not lawfully be in the possession, custody or control of the Presidential Secretariat or any other PA. However, the Commission noted an increasing trend among Heads of State to proactively declare their assets and liabilities to foster transparency and public accountability. It further emphasized how amending the law would "undeniably foster a culture of public accountability and good governance."²²

In *Chamara Sampath v Parliament of Sri Lanka*,²³ which concerned a request for a list of names of MPs who handed over their respective Declarations of Assets and Liabilities in 2018, as well as from 2010 to

19. RTIC Appeal 05/2017, RTIC Minute of 04.12.2018, page 5.

20. RTIC Appeal 06/07, RTIC Minute of 04.10.2018.

21. This is because the only point at which the individual who is the President of Sri Lanka is legally obliged to declare his/her assets and liabilities is under Section 4 (ia) (ii) of the same law when he/she is a presidential candidate. Once such an individual is elected as President, he/she is exempted from making such declaration during the tenure of the Presidency: RTIC Appeal 06/07,19.

22. *Ibid* pages 19 and 20.

23. RTIC 719/2018, RTIC Minute of 02.02.2021.

date, the Commission held that the PA should disclose the requested information. This was because MPs have assumed a public role and have accepted a higher level of public scrutiny, the requested information would provide crucial insight into the compliance of the Declaration of Assets and Liabilities Law and because of the overriding public interest in the disclosure of the information. In similar vein, in the *Rubatheesan* Order, the PA had written to all MPs requesting their educational qualifications and had undertaken to update their website with the educational qualifications of MPs albeit without a specified timeline. However, the Commission noted that there was an absence of any response even after the lapse of two months since the letter was sent, and it was a matter of concern considering the overriding public interest. The Commission urged the PA to take requisite steps to obtain the information from MPs and to make them publicly available. Such steps urging the PA to obtain the requested information reflect the tendency of the Commission to hold MPs accountable to the best of their ability within the available legal framework.

Concluding Comments

While the Commission is seen grappling with an intricate issue pertaining to the educational qualifications of MPs, it succeeded in reaching a *via media* between the MPs' obstinacy and the duty as evidenced in the public interest to release such information. By invoking the "paramountcy principle" of that information, being inspired by the Indian Supreme Court precedents, the Commission laid the responsibility, fairly and squarely, on the PA. Of course, there is the presumption of innocence in Criminal Law. Nevertheless, information regarding criminal charges is information that would amount to information enabling a voter to take an "informed decision" at a future poll.

In insisting on the duty of the PA to respond to the information asked for, the Commission laid bare the indifferent attitude of the so-called elected representatives (of Parliament) to the citizenry. That is a telling reflection on those sitting both in Government and Opposition benches in Parliament.

***K. Dileep Amuthan v Divisional Secretariat,
Uduvil***

‘...the Commission is of the view that the distribution of goods from public funds cannot be considered a matter exempted under Section 5 (1) (a)...’

Decision: The Appellant requested for the details of beneficiaries of COVID-19 relief goods distributed by the Divisional Secretariat of Uduvil. This disbursement was of goods received by the Divisional Secretariat of Uduvil from the District Secretariat of Jaffna. The objection raised by the IO and DO at the first hearing of this Appeal was that it had neither compiled a comprehensive list of beneficiaries nor retained the partial list compiled but had forwarded such list to the Jaffna District Secretariat. Thereafter, the Divisional Secretary of Valikamam South of Uduvil (Chunnakam) communicated to the Commission ahead of the second hearing, that the PA objects to the release of the information on the basis of Section 5 (1) (a). Ahead of the second and final hearing of the Appeal, the District Secretariat of Jaffna wrote to the PA, stating that the PA is bound by its statutory obligations under the RTI Act, and that necessary administrative procedures must have been in place to retain the requested information. In view of the PA writing to the District Secretariat of Jaffna making a formal request for the list of beneficiaries to comply with the information request, this Appeal was concluded. The Commission in its Order emphasized the high public interest in this Appeal together with the duty incumbent on Public Authorities to maintain records in compliance with its statutory obligations under the RTI Act

Keywords: *Beneficiaries (of covid-19 relief)/ Information in ‘Possession, Custody or Control’ (Section 3 (1)) /Public funds /Public Interest (Section 5 (4))*

Brief Factual Background¹

By information request dated 16.06.2020, the Appellant requested the following:

“Certified copy of the list of beneficiaries (including name, address, NIC number and signature of beneficiary), during the period 20.03.2020 to 20.04.2020, in relation to the distribution of COVID – 19 relief goods which were received by the Divisional Secretariat of Uduvil from the District Secretariat of Jaffna. Also, provide the list of dates and locations where distribution took place.”

The IO responding on 01.07.2020, stated the below,

- The distribution of COVID 19 relief goods was not documented as per dates.
- The goods were distributed among 30 Grama Sevaka Divisions on a need basis.
- A comprehensive list of beneficiaries was not maintained by us. Due to social distancing measures in place at the time, the list of beneficiaries obtained after the distribution was forwarded to the District Secretariat as and when such distribution took place. (This list can be obtained from the District Secretariat).
- During the same period, the PA was also in receipt of contributions of goods from numerous charity and welfare organizations, which were similarly distributed on a need basis.
- As we were working during a period of rapid infection with minimum staff on a rotation basis, and due to the difficulties in obtaining a list of beneficiaries, we did not maintain a list of the dates on which the distribution took place.

The Appellant appealed to the DO on 07.07.2020, to which the DO responded on 17.07.2020, reiterating the response of the IO, and stating

1. RTIC Appeal (Documentary) 2224/2020 heard as part of the formal meeting of the Commission on 19.01.2021. Appearance for the parties: K. Dileep Amuthan for the Appellant; DO, Divisional Secretariat, Uduvil for the PA. See, <https://www.rticommission.lk/web/images/pdf/2224-2020/2224-2020-K.-Dileep-Amuthan-v-Divisional-Secretariat-Uduvil.pdf>

that the original copy of the list of beneficiaries compiled in the aftermath of distribution was forwarded to the District Secretariat as and when such distribution took place and that copies of this list could not be maintained as the PA was working during a period of rapid infection with minimum staff on a rotation basis. The Appellant appealed to the Commission on 20.07.2020.

Matters arising at the Hearing

Responding to the notices issued by the Commission, the PA, by writing dated 23.12.2020, reiterated the responses provided by the IO DO.

Interim Order²

The Commission takes note of the proceedings in this Appeal. It is the position of the PA that while the original list of beneficiaries was forwarded to the District Secretariat, the PA did not retain copies of the same. The Commission notes that the explanation of the PA cannot be considered adequate, since the PA is expected to have maintained a list of the beneficiaries. Whether this list was compiled prior to or after the distribution is immaterial. It is incumbent on the PA to call for the original list of the beneficiaries from the Jaffna District Secretariat and respond to the information request of the Appellant.

Accordingly, the PA is directed to release the information requested by the Appellant or, if the PA is unable to provide the information due to said information falling under an exemption laid down in Section 5 of the Act, to deny the same indicating the exact exemption relied upon...

...The Divisional Secretary of the Divisional Secretariat, Valikamam South of Uduvil (Chunnakam) has, by writing dated 08.02.2021, has stated that the information requested by the Appellant is denied under Section 5 (1) (a) of the Act. ³

2. Order delivered on 19.01.2021.

3. At the hearing before the Commission on 23.02.2021.

The District Secretariat of Jaffna, by writing dated 09.02.2021 addressed to the PA (with copy to the Commission), has stated that the PA must comply with its statutory obligations under the RTI Act, and that necessary administrative procedures must be in place to retain the information. The District Secretariat of Jaffna has instructed the PA to duly obtain the information, which the PA has stated has been forwarded to the District Secretariat and provide the information to the Appellant before the next date of hearing (09.03.2021). Writing in response to the District Secretariat of Jaffna, the PA has made a formal request from the District Secretariat of Jaffna to provide the list of names requested by the Appellant, stating that the PA did not retain any copies of the documentation, as it forwarded the same to the District Secretariat of Jaffna as and when distribution took place.

The Appellant, on 11.02.2021, has also written to the Commission, stating that at the date of writing to the Commission he is not in receipt of any response from the PA and that the PA is misleading the Commission to the extent that during an inquiry held by the Elections Commission, the name list of the beneficiaries requested under the immediate information request has been perused by the Elections Commissions. The Appellant pleads that this list has also been submitted to the Elections Commission and that the position of the PA that a comprehensive list of beneficiaries has not been compiled or retained by the PA is incorrect.

Final Order⁴

This matter is being considered ahead of its previously scheduled hearing (i.e., 09.03.2021) on 23.02.2021, in view of the importance and urgency of the subject matter of the Appeal, and due to the fact that both parties have filed submissions as of the date of hearing.

The Commission notes that the PA has not substantiated the refusal of the information under Section 5 (1) (a) in its letter dated 08.02.2021 and that it has failed to establish how the release of the requested information

4. Order delivered on 23.02.2021.

would infringe upon the provisions of Section 5 (1) (a). This Commission is of the view that the distribution of goods from public funds cannot be considered a matter exempted under Section 5 (1) (a).

The Commission further notes that the refusal of information by the PA under Section 5 (1) (a) of the Act is contradictory to its previous positions (*vide* writings dated 01.07.2020, 17.07.2020 and 23.12.2020 from the PA) that a comprehensive list of beneficiaries was neither compiled nor retained by the PA.

Without prejudice to the above observations of the Commission, the Commission notes the steps taken by both the District Secretariat of Jaffna and the PA to facilitate the release of information. The matter is concluded on this basis. The Appellant is directed to inform the Commission within one month of the receipt of this Order if the PA has not complied with the direction thereto.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

- (i) Does the information constitute “personal information” under Section 5 (1) (a)?
- (ii) Can the PA plead that it is not in “possession, custody or control” of the information in terms of Section 3 (1), in light of the fact that it is the issuing agency of the list?
- (iii) Was there a statutory, regulatory, or administrative obligation on the PA to retain a copy of the information in its “possession, custody or control”?

Reflections on the Propositions Established in the Order of the Commission

Although the Appeal was not discussed in the context of Section 3 (1), if the objections raised by the PA were to be categorized into legal objections, this would be Sections 3 (1) and 5 (1) (a) respectively.

The PA did not retain a list of the beneficiaries

The PA cited several pragmatic issues as to why it had not retained a copy of the list of beneficiaries. Further, its position was that the list had been forwarded to the District Secretariat of Jaffna. Both in terms of the statutory as well as administrative obligations cast upon the PA under the RTI framework, this response given by the PA can be problematized on several grounds.

Section 3 (1) of the Act provides that,

Subject to the provisions of section 5 of this Act, every citizen shall have a right of access to information which is in the possession, custody or control of a Public Authority.

The threshold that must be met to guarantee the right of access to information, is that the information must be in the “possession, custody or control” of the PA. The Commission, in its Interim Order dated 19.01.2021, held that the PA’s position that it did not retain a list of the beneficiaries, but forwarded it to the District Secretariat is untenable. As the issuing agency, the PA ought to have retained a copy of the document. The PA was executing its duties as a government agency, reportable to a larger District Secretariat.

The subject matter concerned an issue where public funds were expended for the disbursement of relief goods. The Commission called upon the PA to adhere to its statutory and administrative duties, and formally request for the list of beneficiaries, as submitted by the PA to the District Secretariat, and issue it to the Appellant. The same proposition was highlighted by the District Secretariat in its writing to the PA ahead

of the second hearing. Thereafter, the PA did write to the District Secretariat, requesting for the details to issue to the Appellant.

The proposition that emanates from the directives of the Commission is that Section 3 (1) cannot be thoughtlessly invoked by PAs to claim that a given document does not exist within its possession, custody or control. The distinction between *de facto* and *de jure* possession, custody or control comes to mind when one studies this Appeal. In his writing to the Commission ahead of the second hearing, the Appellant has also stated that the position of the PA cannot be accepted, as the list of beneficiaries, as retained by the PA, has been produced before an inquiry by the Elections Commission. While it may not have been up to the RTI Commission to ascertain the veracity of the PA's position that it did not compile or retain a comprehensive list of beneficiaries, it stands to reason that the PA cannot responsibly argue that it did not compile or retain this list. In the event, as claimed by the PA, that it has forwarded this list, it is incumbent on the PA to call for this list in writing and retain a copy.

Section 5 (1) (a)

Section 5 (1) (a) exempts information from release where:

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.

Without prejudice to the Commission's ruling that the invocation of Section 5 (1) (a) cannot be maintained in law, the PA may have found a better footing in its reliance on Section 5 (1) (a), than on its position that it had not retained the list. As the Appellant's information request had asked for not merely the names, but NIC numbers, addresses and signatures of the beneficiaries, the PA may have made a more plausible case by pleading Section 5 (1) (a). However, the PA raised this objection only prior to the second hearing, and at the time, the PA had already

placed in writing (on three occasions) its objection that it had not retained a copy of the said list. At the time, the District Secretariat had also made communication with the PA, asking for the information to be released, subsequent to which the information was released.

Therefore, while the PA did not press the objection raised under Section 5 (1) (a), this may have been a better provision to cite, even if it could not ultimately withstand the public interest litmus. The issue with simultaneously raising the positions that the PA did not retain a list and that the information is denied under Section 5 (1) (a), is that these positions are untenable and incongruous. Reliance on its failure to retain the list would indicate that the PA did not object, in principle, to the release of the information, but that it was prevented from doing so by pragmatic issues. By contrast, reliance on Section 5 (1) (a) would indicate that the PA believed that the information was exempt under one of the substantive provisions in Section 5.

It is to be noted that due to the PA pleading procedural grounds of not retaining the information, this Appeal, could not proceed to a fuller consideration of the material facts and the substantive issues arising therein with regard to Section 5 (1) (a). While the list of names of beneficiaries may have been information that could be legitimately released, their addresses and NIC numbers may (arguably) be information that will attract the applicability of Section 5 (1) (a). However, the Appeal, heard *via* the documentary appeal process in terms of Rule 19 of the Commission's Rules on Fees and Appeal Procedure, did not advance to such stages, and was confined to a dismissal of the preliminary objections, subsequent to which information was released.

Public Interest and the Expenditure of Public Funds

Notwithstanding the contestations of the PA, and the presence or absence of any statutory or administrative framework which stipulated that the information must have been compiled and retained, the overriding public interest in this Appeal is evident. The relief goods were handed to the PA

for distribution by the District Secretariat of Jaffna, which is a PA and a state instrumentality of itself. This can be distinguished from relief goods received by charity or welfare organizations. The involvement of public funds immediately elevates the subject matter to be of public interest. This is how any reliance on Section 5 (1) (a) may also have been trumped, as Section 5 (4) is unequivocal in providing that,

Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.

It is important to take into account that the distribution of relief goods was ahead of the scheduled General Elections of 2020, held in August 2020 after postponement. While the political context is completely extraneous to the legal and factual issues that the Commission is guided by in its decisions, one cannot ignore the pertinent issue of transparency in the expenditure of public funds. This decision is in line with a long line of precedent of Commission decisions, where the expenditure of public funds was held as invoking public interest with a consequent higher duty on the relevant PA to release information.⁵

Concluding Comments

The list of beneficiaries of relief goods distributed by the Divisional Secretariat of Uduvil was ordered to be released in this Appeal, as the objections raised by the PA, *viz.*, that the information was not compiled or retained by the PA, and that it was exempted under Section 5 (1) (a), were held to be untenable and inapplicable to the subject matter. The decision narrows the scope of instances where the PA could rely on the information not being in its possession, custody or control, thereby imposing a greater onus on the PA to maintain relevant documentation. The decision also looks at public interest considerations relevant to this Appeal.

5. See recently, *Rusiripala v People's Bank* RTIC Appeal 774/2018; *W.K.W. Deshapriya v ICTA* RTIC Appeal 169/2021.

Nilan Fernando v Ministry of Health, Nutrition and Indigenous Medicine

‘Section 5 (4) of the RTI Act takes center-stage in the RTI regime in Sri Lanka. We are of the view that disclosure of this information in accordance with Section 5 (4) of the Act is in the public interest and not the personal interest of the Appellant as the disclosure of this information would confirm the quality of imported milk powder in the country...’

Decision: The Appellant requested information relating to the testing done in local laboratories relating to imported milk powder and its content. Dissatisfied with the responses of the IO and DO, the Appellant preferred an appeal to the Commission. At the appeal hearing, the PA agreed to provide the name of the local laboratory (including the date) and the personnel who carried out the tests but denied a copy of the test report under Section 5 (1) (i) read with Section 29 of the Act. The PA identified the relevant Third-Parties which had given the information confidentially, as the local laboratories, which conducted the tests, and Fonterra and Nestle, the owners of the dairy products. The Commission emphasized that Section 5 (1)(i) read together with Section 29 of the Act applies only when the information provided by the Third-Party is treated as confidential at the time it was supplied and further that, when a PA or agencies of the PA compile the impugned information, that cannot be treated as information coming from a Third-Party. The overriding public interest under Section 5(4) was held as warranting the disclosure of the said report.

Keywords: *Confidential information given by a Third-Party (Section 5 (1) (i) read with Section 29)/ Consumer rights/ Public Interest (Section 5 (4))/ Quality control*

Brief Factual Background¹

By information request dated 27.02.2019, the Appellant requested the following:

At a press conference held by the Ministry of Health on 19.02.2019, it was stated that testing done in local laboratories revealed that imported milk powder does not contain any other fat other than milk fat. As such, provide me with the following information;

1. *When was the test conducted?*
2. *In which laboratories?*
3. *By whom?*
4. *A copy of the full test report of that investigation*

The IO replied on 22.03.2019 stating that,

I refer to the above where you had on 27.02.1019, in terms of the RTI Act, requested from the Information Officer of the Ministry of Health, Nutrition and Indigenous Medicine, information concerning the revelations made at the press conference relating to the fat content in imported milk powder, held at the Ministry of Health, Nutrition and Indigenous Medicine on 19 February 2019. In order to confirm this, a request has been made to find out what the laboratory was, which carried out the tests and to provide reports on the tests.

Accordingly, this request has been referred to the RTI Commission for advice. I will kindly inform you after receiving the advice from the Commission.

Dissatisfied with the response, the Appellant lodged an appeal with the DO on 06.05.2019. As the DO failed to respond within the stipulated time period, the Appellant thereafter preferred an appeal to the Commission on 10.07.2019.

1. RTIC Appeal (In-Person) 1720/2019 heard as part of a formal meetings of the Commission on 2020.03.03, 2020.07.21, 2020.09.15, 2021.02.09, 2021.03.23, 2021.05.04, 2021.07.13, 2021.09.14, and 2021.09.24. *Appearances for the parties:* Nilan Fernando & P.R.S. Pinnaduwa for the Appellant; J.C. Gamlath (DDG) & S.A. Ileperuma (DO) for the PA. See, https://www.rticommission.lk/web/images/pdf/1720-2019/1720-19_--_concluded_REVISED.pdf

Matters Arising During the Course of the Hearing

Affirming that it was denying the requested information under Section 29 (2) (c) of the RTI Act (confidential information given by a Third-Party to a PA), the PA identified the Third-Parties as the laboratories, which conducted the tests, and Fonterra and Nestle, the owners of the dairy products. The Commission emphasized that the exemption in Section 29 (2) read together with Section 5 (1)(i) of the RTI Act applies only when the information provided by the Third-Party is treated as confidential **at the time** (emphasis added) it was supplied.

Therefore, the Commission inquired from the PA as to whether there was any indication that this report or document (item 4) was confidential at the point that this was sent by the relevant Third-Party to the PA, to which question, the PA answered in the affirmative.

The Commission then inquired from the PA whether the PA had sought the consent of the relevant Third-Party to disclose the information. The PA stated that the consent of the Third-Party had been sought on 19.12.2018 and that they had objected to the release. However, it was revealed during the hearings that the PA had sent the letter to the relevant Third-Party before the information request of the instant Appeal was filed and that the information requested there was different to the information requested by the Appellant...

...The Appellant also informed the Commission that the PA had not yet provided the other items of information (items 1, 2 and 3) sought by him in the information request (i.e., when was the test conducted? in which laboratories? by whom?). Responding, the PA stated that information relating to these items can be provided to the Appellant within three days.

Interim Order ²

If a PA refuses to provide information requested under Sections 5 (1) (i) and 29 of the RTI Act, the burden is on the PA to prove that the requested information falls under the said exemption.

2. Order delivered on 03.03.2020.

Further, as the PA has agreed to disclose information related to items 1, 2 and 3, the PA is directed to provide that information to the Appellant within two weeks.....

Interim Order³

....The Commission noted that according to the letter dated 17.08.2020, of the PA, information related to items 1, 2 and 3 has been provided to the Appellant. When a Third-Party provides confidential information to the PA, it is the responsibility of the Third-Party to consent to / reject the disclosure of such information. Further, under Section 29 (2) (c) of the RTI Act, if the Third-Party refuses to consent, the IO can no longer act at his discretion regarding the information request. Therefore, under and in terms of Section 5 (1) (i) of the RTI Act, such information can be released only if the Commission is of the opinion that the disclosure of such information is in the public interest.

The PA contended that the letter dated 04.11.2020 sent to the Commission by the Deputy Director-General of the PA (Environmental Health, Occupational Health and Food Safety Division) regarding information item No. 04, shows sufficient proof that Fonterra Brands Lanka (Pvt) Limited, the Third-Party in the instant Appeal has rejected giving permission to disclose the information....

Interim Order⁴

...The PA may assess whether certain parts of the investigation report that falls within the scope of the information relevant to a Third-Party can be excluded from it, in terms of Section 6. Accordingly, the PA is directed to inform the Commission before the next hearing, the possibility of releasing information relating to item 04, requested by the Appellant severing information relating to the Third-Party under and in terms of Section 6...

In response to the order of the Commission dated 09.02.2021, Dr. V.T.S.K. Siriwardena representing the PA reiterated that the term "confidential" is mentioned at the bottom of the report.

3. Order delivered on 15.09.2021.

4. Order delivered on 09.02.2021.

Further, in its letter dated 19.03.2021 the PA had stated that

"..... at the time of providing the information it was mentioned as confidential information and therefore no part of the report could be issued as all the facts in that report are confidential information"

Interim Order⁵

By letter dated 03.05.2021, the PA had apprised the Commission of the following matters;

"... The report was prepared by the Additional Approved Analyst / Chief Analyst of the Food Control Laboratory established at the National Institute of Health Sciences, Kalutara, an approved laboratory under the Food Act, No. 26 of 1980."

The Commission emphasizes the following points;

- At previous appeal hearings, the PA had refused to provide the information requested, pleading Sections 5 (1) (i) and 29 of the RTI Act. The third-parties referred by the PA were - laboratories which conducted the tests and the owners of the dairy products - Fonterra and Nestle. The burden of proving that information is exempted under the said Sections is on the PA in terms of Section 32 (4);
- The Commission has to ascertain whether the report has been prepared by the Ministry of Health or a Third-Party. That is, as per the letter issued by the PA dated 03.05.2021, as to whether the Additional Approved Analyst / Chief Analyst in the Food Control Laboratory established at the National Institute of Health Sciences, Kalutara is a Third-Party or not;

...In response to whether the National Institute of Health Sciences, Kalutara was a Third-Party, the PA reiterated the following;

"the reason why indication was made regarding a Third-Party was due to the subject of the investigation report being (Fonterra Brands Lanka Limited (Pvt) Limited)" and "confidential is mentioned at the bottom

5. Order delivered on 04.05.2021.

of the report, which means it is marked at the bottom of the report as confidential information”

Interim Order ⁶

After considering the above facts together with the relevant Sections of the RTI Act, the Commission emphasizes the following;

1. It is unreasonable to classify the laboratory as a Third-Party under Section 5 (1) (i) and Section 29 of the RTI Act

The PA refused to provide the information requested by item 4 under and in terms of Sections 5 (1) (i) and 29 of the RTI Act. The Third-Parties identified in the instant appeal were the laboratory institutions that conducted the tests.

Section 5 (1) (i) states that

“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..”

Section 29 (1) states that

“Where a request made to an information officer by any citizen to disclose information which relates to, has been supplied by a Third-Party and such information has been treated as confidential at the time the information was supplied”

Section 29 of the RTI Act applies only when a document/information is provided to a PA by a Third-Party and those documents/information are treated as confidential at the time the information was supplied.

In this context, the Commission noted that the Food Control Laboratory established at the National Institute of Health Sciences, Kalutara, where the relevant test report has been prepared, is an institution under the Ministry of Health. Further, as this laboratory had prepared the report under the direction of the Ministry of Health, the Commission noted that it is not logical to classify the laboratory as a Third-Party under the exemption in Section 5 (1) (i) and Section 29 of the RTI Act.

6. Order delivered on 13.07.2021.

2. Relevance of Section 5 (1) (g) of the RTI Act

Further, the applicability of Section 5 (1) (g) of the RTI Act to the facts of the case may be ascertained. Section 5 (1)(g) outlines the exemption as follows;

“the information is required to be kept confidential by reason of the existence of a fiduciary relationship.”

By letter dated 19.03.2021, the PA had stated that “... *at the time of providing the information it was mentioned as confidential information and therefore no part of the report could be issued as all the facts in that report are considered as confidential information*”. As stated hereinbefore, the PA has the responsibility of proving that the information requested falls within the purview of the exemption under Section 5 (1) (g) of the RTI Act if that exemption is so pleaded which burden has not been satisfied...

3. Information requested meets the requirements of Section 5 (4) of the RTI Act, that is, that the public interest outweighs the harm caused by the disclosure of this information.

As emphasized in previous orders in this Appeal, the Commission is of the view that the disclosure of this information in accordance with Section 5 (4) of the Act serves the public interest and not solely the personal interest of the Appellant as the disclosure of this information reveals the quality of the imported milk powder.

Although the PA had filed submitted written submissions dated 22.09.2021 in response to the Order of the Commission dated 14.09.2021 directing feedback on the relevance of Section 5 (1)(g), it is our opinion that this response is inadequate to meet the standard of proof required to justify the applicability of that exemption. The PA's response states:

“...The report mentioned in the proceeding of the Commission is given by a lab to the trader. The lab reports are confidential and the fiduciary relationship between the parties restricts issuing under sub-section 5 (1) (g).

However, if the content of the report is beneficial to the consumers it may be issued or the content may be revealed for the best interest of the public, Section 5 (4)”

Final Order ⁷

In the instant Appeal, the Commission's task is to determine whether the requested information can be legally granted to the Appellant after considering whether or not the request for information falls within the scope of several of the exemptions described in Article 5 (1). If the relevant information falls under the purview of Section 5 (1) of the RTI Act, such information can be released only if there is a public interest under Section 5 (4).

The letters dated 17.08.2020 and 03.03.2020 revealed information related to items 1, 2 and 3 (when was the test conducted? In which laboratories? By whom?) and more information was provided by letter dated 03.05.2021 (In which laboratories was the test conducted? By whom?). The Appellant has therefore been provided with information in the possession, custody or control of the PA in relation to items 1, 2 and 3.

Item no. 04 relates to the following;

At a press conference held by the Ministry of Health on 19.02.2019, it was stated that testings done in local laboratories revealed that imported milk powder does not contain any other fat other than milk fat. As such, provide me with the following information;

4. A copy of the full test report of that investigation

Despite the exemptions pleaded by the PA, the PA has, in its response to the Commission dated 22.09.2021 stated that “... *However, if the content of the report is beneficial to the consumers it may be issued or the content may be revealed for the best interest of the public, 5 (4).*” The Commission directs that a copy of that letter be sent to the Appellate with this Order.

7. Order delivered on 04.09.2021.

Section 5 (4) of the RTI Act takes centre stage in the RTI regime in Sri Lanka. We are of the view that disclosure of this information in accordance with Section 5 (4) of the Act is in the public interest and not the personal interest of the Appellant as the disclosure of this information would confirm the quality of imported milk powder in the country.

Section 5 (4) states:

“Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.”

The full investigation report in issue may legitimately be released under the RTI Act. Accordingly, the PA is directed to provide the Appellant with a copy of the same within two weeks of receipt of this Order.

Appeal Allowed

Legal Commentary

Matters for Determination by the Commission

In what manner does the Third-Party information exemption in Section 5 (1) (i) [read in tandem with Section 29 (2)] apply to the facts of the present case? :

- (i) Could Sections 5 (1) (i) and 29 (2) be held to be applicable to information which was not provided under confidential cover at the time of providing such information?
- (ii) Could the parties cited as Third-Parties by the PA, *viz.*, (a) the two dairy producing companies and; (b) the testing laboratories be rightly classified as ‘Third-Parties’ within the definition of Section 5 (1) (i)?
- (iii) Is there a fiduciary relationship formed between the testing laboratories and the PA, which prevents the disclosure of information in terms of Section 5 (1) (g)?

- (iv) Is there an overriding public interest in this Appeal which warrants the disclosure of the information in terms of Section 5 (4), notwithstanding the objections expressed by the relevant Third-Party?

Reflections on the Propositions Established in the Commission's Order

Relevance of the Order to Consumer Rights

This public interest appeal filed by a consumer rights activist against the Ministry of Health pinpoints several questions that are of significant importance to consumer protection. Firstly, this ruling recognized the rights of a consumer in accessing information related to the quality of imported products, the reports of tests conducted in regard to the same and sets a precedent that goes beyond the facts in issue relating to the quality of milk powder.

These are principles asserted in other jurisdictions as well. In the 'Sugary Drinks' decision, for instance, the Constitutional Court of Colombia found that prohibiting the NGO *Educar Consumidores* from broadcasting a commercial about the health risks of sugary drinks violated the consumers' right to receive information.⁸

Elsewhere, taking a step further, the Krasnogvardejsky District Court of St. Petersburg, Russia in *Scobin v Federal Agency for Technical Regulation and Metrology* held that the responsible agency must publish national consumer product standards on its official website.⁹ In fact, in India, in a landmark Order, the Ernakulam Consumer Disputes Redressal Forum stated that when information is denied to an RTI applicant, it will be

8. 'Significant Legal Ruling: 'Sugary Drinks' Decision (Decision T-543/17)' (Global Freedom of Expression, Columbia University) <<https://globalfreedomofexpression.columbia.edu/prizes/2018-columbia-global-freedom-expression-prize-winner-significant-legal-ruling/>>

9. *Scobin v Federal Agency for Technical Regulation and Metrology*, 2-583/2006 <<https://globalfreedomofexpression.columbia.edu/cases/scobin-v-federal-agency-technical-regulation-metrology/>>

considered as a deficiency in service and the applicant will be entitled to compensation under the Consumer Protection Act.¹⁰

Secondly, the Commission while upholding the public interest in disclosing the information, in fact, dealt with concerns pertaining to public health due to the quality of imported milk products. In *Ministry of Defense v Gisha Legal Center for Freedom of Movement* the Supreme Court of Israel recognized the public interest in the disclosure, “for reasons of maintaining public health.”¹¹ Thus, “public interest” was expanded to cover concerns pertaining to consumer protection.

Confidential Information Provided by a Third-Party

The *Nilan Fernando* Order is also significant for its interpretation of the application of Section 5(1)(i) read with Section 29. Under Section 5(1)(i) where the Third-Party does not consent to the disclosure of the information, the PA is *functus* and it is only the Commission that can order disclosure where the public interest outweighs the harm.

Generally, the Commission has applied a case-by-case approach in exercising its powers under these Sections. In *J.A.D.G.A. Jayakody v Pradeshiya Sabha Pannala / Department of Local Government (Wayamba)*, the Commission denied disclosure upholding the application of Section 29(2)(c) because there was an absence of public interest which was required to be established to overrule the Third-Party’s refusal to consent.¹² The Commission noted that it was a “private interest emanating from a dispute between two parties.” Hence it is only where public interest outweighs the harm that may ensue upon the release, that the RTI Commission has

10. K.C.Gopakumar, ‘Landmark order puts RTI applicants under Consumer Protection Act’ (The Hindu, 02 December 2013) <https://www.thehindu.com/news/national/kerala/landmark-order-puts-rti-applicants-under-consumer-protection-act/article5411420.ece>

11. *Ministry of Defense v Gisha Legal Center for Freedom of Movement*, AAA 3300/11 <<https://globalfreedomofexpression.columbia.edu/cases/isr-ministry-defense-v-gisha-legal-center-freedom-movement/>>

12. RTIC Appeal 45/2017, RTIC Minutes of 30.08.2017 <<http://www.rticommission.lk/web/images/pdf/jayakody-pradeshiya-sabha-pannala-draft.pdf>>

ordered disclosure, despite the fact that the Third-Party had refused consent.

A notable example of this was *Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd*, where agreements contained information given confidentially by overseas airline companies to the national carrier were in issue. The release was ordered of the agreements involving concluded negotiations as the matter was of unequivocal public interest concerning alleged financial irregularities.¹³

A further aspect is apparent in the Commission's deliberations in the *Nilan Fernando* Order. It was held that as the laboratory comes under the Ministry of Health, it could not be classified as 'a Third-Party' as required under Section 5(1)(i) read with Section 29. This is in accordance with the jurisprudence developed in the context of the RTI Act where the 'test' to determine whether an entity/official is a "Third-Party" is to examine whether the said entity/official is placed under the PA in question in terms of the administrative lines of authority. This prevents a PA from easily invoking Section 5 (1)(i) read with Section 29 to deny information emanating from a branch of its own authority.

In some instances, the Commission has indeed upheld the PA defence of 'Third-Party.' For instance, in *Asitha Abeygunawardena v Elections Commission of Sri Lanka* which involved information on an electoral register, the Commission noted that the office of the Grama Sevaka comes under a completely separate body and not within the PA, and that therefore that office of the Grama Sevaka is in fact a Third-Party within the definition of the Act.¹⁴

However, in this case, though the PA denied disclosure on the basis that the laboratories that conducted the tests into the milk powder imported by Fonterra and Nestle were Third-Parties, the Commission disagreed.

13. *Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd*, RTIC Appeal 99/2017, RTIC Minutes of 09.05.2018. <<https://www.rticommission.lk/web/images/pdf/16062018/airline-pilots-guild-of-sri-lanka-v-srilankan-airlines-ltd.pdf>>

14. RTIC Appeal 31/2017, RTIC Minute of 31.07.2017 <<http://www.rticommission.lk/web/images/pdf/10062018/asitha-abeygoonewardena.pdf>>

It was pointed out that the Food Control Laboratory established at the National Institute of Health Sciences, Kalutara, where the relevant test report had been prepared, is an institution under the Ministry of Health. Therefore, it was held that it was not logical to classify the laboratory as a Third-Party.

Thus, in determining whether an entity/official is a Third-Party for the purposes of Section 5(1)(i) it is necessary to evaluate as to whether the said entity falls under the PA from whom the information has been requested.

The Commission also noted that Section 29 applies only when the document/information provided to a PA by a Third-Party were *treated as confidential at the time the information was supplied* (emphasis added). The Commission asserted that the burden was on the PA to prove that the requested information falls under Section 5(1)(i) and Section 29. The PA affirmed that this report was confidential at the point it was sent by the relevant Third-Party to the PA and that the term “confidential” was mentioned at the bottom of the report.

However, that question became redundant in the wake of the Commission taking the position that the Third-Party cited by the PA, was not considered to be as such, for the purposes of Section 5(1)(i) read with Section 29.

Concluding Comments

The *Nilan Fernando* Order indicates that where consumer rights are engaged, the public interest may dictate the disclosure of the information in terms of Section 5(4), despite the application of any one or more of the exemptions in Section 5(1). The Order further elaborates on the application of Section 5(1) (i) read with Section 29, especially with regard to identifying as to who a Third-Party is and why, despite such refusal, information may be released in a context where public interest warrants the release.

***R.P. Lokuratna v Ministry of Internal & Home
Affairs and Provincial Councils and Local
Government***

‘The PA is reminded that since the PA is in possession of item No. 2, i.e., observations made by the Minister of Finance in respect of the Cabinet Memorandum, as per Section 3 of the RTI Act, there is no impediment to release the same. For the application of Section 3 (1), the PA does not necessarily have to be the issuing authority of the said information/document and having possession of the information/document is sufficient.’

Decision: The Appellant requested (1) a copy of the Cabinet Memorandum submitted by the PA to the Cabinet of Ministers in respect of the selection of Consultants for an infrastructure development project in emerging regions, (2) a copy of the observations made by the Minister of Finance in respect of the Cabinet Memorandum submitted by the PA and; (3) copy of the Cabinet decisions regarding the said Cabinet Memorandum, and the procurement of above consultancy services. The PA rejected the disclosure of information citing Section 5 (1) (d) of the Act. On appeal to the Commission, the PA provided a copy of the Cabinet decision but rejected the disclosure of the Cabinet Memorandum and observations made by the Ministry of Finance under Sections 5 (1) (d), 5 (1) (m) and 3 (1). The Commission directed the PA to submit a copy of the observations made by the Minister of Finance and the Cabinet Memorandum for inspection in the exercise of its powers under Section 15 (c). Consequently, it was ruled that the Cabinet Memorandum (item 1) and the Observations (item 2) do not contain any financial or technical information of the firms, information related to commercial confidence, trade secrets or intellectual property. As such, the Cabinet Memorandum along with Annexure 3 (i.e., Report of the

Procurement Appeal Board) and a copy of the Observations of the Minister of Finance, redacting those parts of the documentation that was protected by Section 5(1)(d) was ordered to be released

Keywords: *Cabinet decision /Cabinet Memorandum (Section 5 (1) (m)) / Commercial confidence, Trade secrets, Intellectual Property and Competitive interests of Third-Party (Section 5 (1) (d) /Commission's powers of inspection of information denied by PA (Section 15(c)) / Procurement/ Information in 'Possession, custody or control' (Section 3 (1)) / Severability (Section 6)*

Brief Factual Background¹

By information request dated 21.08.2019 the Appellant requested the following information:

1. A copy of the Cabinet Memorandum submitted by the Minister of Internal & Home Affairs and Provincial Council and Local Government to the Cabinet of Ministers in respect of the selection of Consultants for Contract package 1: Consultancy systems for an infrastructure development project in emerging regions. (Contract No. SL-P116/Con/2017/RRI-01)
2. A copy of the observations made by the Minister of Finance in respect of the Cabinet Memorandum submitted by the Minister of Internal & Home Affairs and Provincial Councils and Local Government to the Cabinet Ministers with regard to the selection of Consultants for Contract package 1: Consultancy services for improvement of rural roads and small and medium scale irrigation systems from an infrastructure development project in emerging regions. (Contract No. SL-P116/Con/2017/RRI-01)
3. A copy of the Cabinet decisions regarding the above Cabinet Memorandum, and the procurement of above consultancy services

1 RTIC Appeal (Documentary Proceeding)/2152/2020 – Order adopted as part of the formal meeting of the Commission on 16.02.2021, 04.05.2021, 27.07.2021, 14.09.2021, 24.09.2021 and 29.09.2021. The appeal was heard under documentary proceeding. See, https://www.rticommission.lk/web/images/pdf/1720-2019/1720-19_--_-----_concluded_REVISED.pdf

On 04.09.2019, the IO responded stating that “*according to Section 5(1)(d) of the RTI Act, the provisions are not available to fulfil your requirement of the Cabinet Memorandum submitted by the Minister of Internal & Home Affairs and Provincial Councils and Local Government and that the copy of observations made by the Minister of Finance is not an internal document of the Provincial Councils and Local Government*”. Dissatisfied with the response of the IO the Appellant lodged an appeal with the DO on 26.09.2019. The DO responded on 10.10.2019 reiterating the response of the IO. The Appellant preferred an appeal to the Commission on 29.11.2019.

Matters Arising During the Course of the Hearing

By the letter dated 22.10.2020 bearing No. PL/16/3/17/Proc-RIDEP (I) the PA (State Ministry of Provincial Councils and Local Government Affairs) informed the Commission that the Ministry has provided the Cabinet Decision to the Appellant (Item No. 03 in the Appellant’s information request). However, rejected the provision of the Cabinet Memorandum and Observations (Items No. 1 & 2 in the Appellant’s information request) made by the Ministry of Finance on the basis that the said documents contain attachments that are linked with commercial confidence, trade secrets or intellectual property, protected under the Intellectual Property Act, No. 36 of 2003 and further establishes the said rejection under Section 5(1)(d) of the RTI Act.

Letter dated 22.10.2020 bearing No. PL/16/3/17/Proc-RIDEP (I) is as follows:

The Ministry has provided Cabinet Decision as per the request made by Consulting Engineers and Architects Associated (Pvt) Ltd...However, the Cabinet Memorandum and Observations made by the Ministry of Finance included a number of attachments and information that link with commercial confidence, trade secrets or intellectual property, protected under the Intellectual Property Act, No. 36 of 2003 as follows:

- 1. Information on Financial Evaluation of all the Proposals of the Consultants*

2. *Information on Technical Evaluation of all the Proposals of the Consultants*
3. *Recommendations and Approval of the Procurement Committee with the information of all the Consultancy Firms*
4. *Internal Information provided by the Ministry of Finance.*

Accordingly, the Ministry provided all the information requested by the Consulting Engineers and Architects Associated (Pvt.) Ltd., except the information restricted under paragraph (d) of Subsection (1) of Section 5 of Part I of Act No 12 of 2016.

A representative on his behalf of the Appellant confirmed that the PA has provided the Cabinet Decision and that they are unsatisfied with the rejection of other requested information by the PA.

...The Commission notes that the PA has already provided information specified in item No. 3 of the information request.

The Commission queried from the PA whether the Cabinet has taken a decision with regard to the Cabinet Memorandum requested by the Appellant in the instant Appeal and the PA answered in the affirmative. The PA further informed the Commission that the Observations made by the Ministry of Finance in respect of the Cabinet Memorandum (item No. 2 in the information request) is a document issued by the Ministry of Finance and as such, the document can be obtained from the Ministry of Finance. The PA further submitted that it does not have authority to release the Observations.

In response, the Commission queried from the PA as to the exact exemption in the Act relied upon by the PA in rejecting the Observations and the Memorandum. The PA submitted that the information includes all the financial information, technical information, internal arrangements and recommendations of other firms who participated in the bid. As this information is protected under the Intellectual Property Act and cannot be released under Section 5(1)(d) of the RTI Act.

Interim Order ²

The attention of the PA is brought to Section 5(1)(m) of the RTI Act,

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

(m) the information is of a cabinet memorandum in relation to which a decision has not been taken;

Considering the submissions made by the PA that in this case, the Cabinet decision has already been made, the burden is on the PA to justify why the Cabinet Memorandum cannot be released... The PA tendered its submissions dated 09.09.2021 (with a copy to the Appellant) as directed by this Commission on 27.07.2021, which contains the following points:

- *Justifications for why the Cabinet Memorandum cannot be released –*

The Appellant's submission directly links with Sections 5(1)(d) and 5(1)(m) of the RTI Act, due to the reason that the Cabinet Memorandum includes information that would harm the competitive position of other consultancy firms which submitted bids (proposals) for this assignment. Further, the referred specific information includes financial and technical information of all the consultancy firms, which submitted bids (proposals) for this assignment.

Accordingly, the Ministry reconfirms that this Cabinet Memorandum included a number of attachments and information that links with commercial confidence, trade secrets or intellectual property, protected under the Intellectual Property Act, that directly links with Section 5(1)(d), in addition to the Section 5 (1)(m) of the RTI Act.

- *Regarding the release of Observations made by the Ministry of Finance –*

The said Observations is identified as a document passed between the Ministry of Finance and Secretary to the Cabinet, which is protected under Section 3(1) of the RTI Act, due to the reason that information is not in the possession, custody or control of the PA.

2. Order delivered on 27.07.2021.

...In counter-submissions tendered by the Appellant dated 18.09.2021,

- The submissions made by the PA are a repetition of what was stated earlier. The Appellant is not in a position to agree with the statement that the Cabinet Memorandum has a direct link with Section 5(1)(d) of the RTI Act, in addition to Section 5(1)(m) of the Act as there cannot be any confidential information included in the Cabinet Memorandum for which a decision has been taken, mainly because this is in respect of a procurement matter. Therefore, the statement of the PA that disclosure of such information would harm the competitive position of the other consultancy firms which submitted bids is not true. For instance, the Appellant's firm did not submit any confidential information with its bid. The only confidential information is the bid price which is disclosed at the bid opening to all bidders.
- The main reason why the Appellant is requesting the Cabinet Memorandum is that he strongly suspects that the recommendations of the Procurement Appeal Board (PAB) of the Presidential Secretariat have been ignored or not properly submitted by the relevant Ministry when preparing the Cabinet Memorandum, which is mismanagement of government tender procedure, thereby making a great injustice to the Appellant's firm in the evaluation of this tender.
- The PBA made its recommendations after hearing oral and written submissions of all the parties and studying the Technical and Financial information submitted by all of them. Even though four firms submitted proposals, only two were considered for financial evaluation. Therefore, it is a very strange and unbelievable statement that the said Cabinet Memorandum included a number of attachments and information that link with commercial confidence, trade secrets and intellectual property, protected under the Intellectual Property Act.
- Under the circumstances, the Appellant is unable to understand how and why other technical and financial information were included in the Cabinet Memorandum which they are reluctant to disclose assuming that such information will harm the competitive position of

the other consultancy firms, as such secret matters are not normally acceptable in a competitive bidding process.

- The last paragraph of the submission of the PA is not true, as the Appellant was only given the Cabinet Decision which is available in the public domain.

In response to the Appellant, the representative of the PA reiterated that the Cabinet Memorandum contains several attachments which consist of *'evaluations by the Cabinet appointed Consultant Procurement Committee, information about other companies, for instance, accommodation allowances, vehicle rental, details about communication, office operations, record preparations, supply and maintenance, etc.'* and that these fall within commercial confidence exempted by the RTI Act.

The PA is directed to consider if redaction of information falling under Section 5 (1)(d) of the RTI Act under and in terms of Section 6 of the RTI Act which states:

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 representative of the PA informed that he would discuss the same with the Legal Officer and the Secretary to the Ministry and inform the Commission of its stance regarding the same.

Interim Order³

The PA is reminded that since the PA is in possession of item No. 2, i.e., observations made by the Minister of Finance in respect of the Cabinet Memorandum, as per Section 3 of the RTI Act, there is no impediment to release the same. For the application of Section 3 (1), the PA does not necessarily have to be the issuing authority of the said information/document and having possession of the information/document is sufficient.

3. Order delivered on 27.07.2021.

Section 3 (1) of the Act;

3.(1) Subject to the provisions of Section 5 of this Act, every citizen shall have a right of access to information which is in the possession, custody or control of a Public Authority(emphasis added)

Further, under and in terms of Section 15 (c) of the RTI Act, the PA is directed to submit a copy of the Cabinet Memorandum on or before 27.09.2021 for the inspection of this Commission, in order to identify and decide on the factual dispute in relation to item No. 1 of the Appellant's information request.

The Commission also directs the PA to submit a copy of the observations made by the Minister of Finance in item No. 2 of the Appellant's information request for the inspection of this Commission.

Section 15 (c) of the RTI Act is as follows:

*“15. For the purpose of performing its duties and discharging of its functions under this Act, the Commission shall have the power-
(c) to inspect any information held by a public authority, including any information denied by a public authority under the provisions of this Act.”*

As agreed by the PA, it is directed to consider the possibility of releasing the Cabinet Memorandum, by severing the information which it considers falling within Section 5(1)(d) of the RTI Act ...i.e., (those) sections of the Cabinet Memorandum can be released after redacting information pertaining to commercial confidence and other aspects covered in Section 5(1)(d) pertaining to other companies.

...In compliance with the direction of the Commission dated 24.09.2021, the PA forwarded the following documents via e-mail dated 28.09.2021 for the inspection of the Commission:

- A copy of the Cabinet Memorandum No. 46/PC/2019 dated 30.05.2019
- A Sinhala translation of the Cabinet Memorandum No. 46/PC/2019 dated 30.05.2021

- Copies of the following Annexures to the aforementioned Cabinet Memorandum:

Annexure 1-Minutes of the Cabinet appointed Consultants Procurement Committee (CCPC), Development Partner's (JICA) letter dated 30.11.2018, Bid Opening Committee Minutes, Detailed Evaluation Report and a Summary sheet of ranking of bidders.

Annexure 2 – Letter issued by JICA dated 02.01.2019

Annexure 3 – Report of the Procurement Appeal Board

Annexure 4 – Letter issued by JICA dated 08.05.2019

- Observations of the Minister of Finance dated 17.06.2019

Upon inspection of the aforesaid documents, the Commission notes the following:

1. The Cabinet Memorandum No. 46/PC/2019 on its own does not contain any financial or technical information of the firms or any information linked to commercial confidence, trade secrets or intellectual property protected under the Intellectual Property Act, No. 36 of 2003.
2. However, the documents in Annexure 1 contains information pertaining to finances of two firms: i.e., Minutes of the Cabinet appointed Consultants Procurement Committee (CCPC) contains CCPC's scrutiny of financial proposals of two firms, Bid Opening Committee Minutes, Detailed Evaluation Report and a Summary sheet of ranking of bidders also contain financial details.
3. Annexure 1 (Development Partner's (JICA) letter dated 30.11.2018), Annexures 2 and 4 contain letters issued by JICA which is a Third-Party.
4. Annexure 3 - The report of the Procurement Appeal Board does not contain any financial or technical information of the firms, information related to commercial confidence, trade secrets or intellectual property.

Upon inspecting the Observations of the Minister of Finance dated 17.06.2019 in respect of the Cabinet Memorandum submitted by the PA, the Commission is of the view that there is no impediment to release the same to the Appellant. The Commission further noted that the said Observations also does not contain any financial or technical information of the firms, information related to commercial confidence, trade secrets or intellectual property.

Final Order⁴

Based on the foregoing, the Commission sees no objection to release the Cabinet Memorandum and Annexure 3 (i.e., Report of the Procurement Appeal Board) thereto.

The attention of the PA is drawn to the fact that it is under a statutory obligation to provide the information in its possession, custody or control in terms of Section 3(1) of the RTI Act. Therefore, a copy of the Observations of the Minister of Finance (item No. 2 in the Appellant's information request), being a document in the possession of the PA can be released to the Appellant.

As such, the PA is hereby directed to release the aforementioned documents to the Appellant within two weeks of receipt of this Order. The Appellant is also directed to inform the Commission in writing, if the PA does not release the information as directed by the Commission, within one month of receipt of this Order.

Appeal Allowed

4. Order delivered on 29.09.2021.

Legal Commentary

Matters for Determination by the Commission

- (i) Interpretation and applicability of Section 5 (1) (m) to Cabinet Memoranda in relation to which decisions have been arrived at.
- (ii) What is the relevance and applicability of Section 5 (1) (d) to the instant information request, and would the release of the information result in harm to the competitive interests of one or more Third-Parties?
- (iii) Can the information be supplied subject to redaction, in terms of Section 6 of the RTI Act?

Reflections on the Propositions Established in the Commission's Order

Open Government Principle

The public has a right to government-held information including information pertaining to government procurement processes. In *Sweden and Turco v Council of the European Union, Denmark, Finland, United Kingdom, and Commission of the European Communities*, the European Court of Justice stated that openness grants legitimacy to the institutions and increases the confidence of EU citizens towards these institutions.⁵ In fact, the Supreme Court of Philippines held that though there was no enabling law that imposed a duty on government bodies to publicly disclose information related to government projects and policies, its 1987 Constitution provides that there is a duty on the government to permit access to such information.⁶

Though the right to such information is not unfettered, a PA should have proactively attempted to disclose the requested information in order to maintain transparency. In *Rosen Bosev (Capital Weekly) v Director of the*

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- 5. *Sweden and Turco v Council of the European Union, Denmark, Finland, United Kingdom, and Commission of the European Communities* C-39/05 P and C-52/05 P <<https://globalfreedomofexpression.columbia.edu/cases/sweden-turco-v-council-european-union-denmark-finland-united-kingdom-commission-european-communities/>>
 - 6. *Chavez v National Housing Authority* G.R.No.164527 <<https://globalfreedomofexpression.columbia.edu/cases/chavez-v-national-housing-authority/>>

Government Information Service which involved a request for information about a contract for the procurement of software licenses signed between a Ministry and Microsoft, the Sofia City Court in Bulgaria held that the mere assertion that disclosure would harm commercial interests does not suffice. The Court went on to hold that its RTI legislation requires the government agency to seek the consent of the Third-Party to disclose the information, and even if the Third-Party does not consent, the government agency was obliged to disclose the information in the form and to the extent that it would not harm the Third-Party.⁷

In the *Lokuratna* Order, the PA repeatedly submitted that the release of the requested information would harm the competitive position of the consultancy firms that already submitted bids for the assignment in question. There was no attempt made to disclose the information that would not have jeopardized the interests of the Third-Party concerned. In denying the disclosure of Annexures 1, 2 and 4, the PA merely stated that they include information pertaining to the finances of two firms and contain letters by JICA which is a Third-Party. An attempt should have been made to look into whether the *information would have caused harm* to a Third-Party, and if it did, only such information could have been denied.

Furthermore, the information requested in this Appeal is the kind of information that is envisaged by Section 9 of the RTI Act, where the Minister has a statutory duty to publicly make available all relevant information pertaining to a project within the purview of his Ministry in a proactive manner.

7. *Rosen Bosev (Capital Weekly) v Director of the Government Information Service* 03528/2006 (Global Freedom of Expression, Columbia University) <<https://global-freedomofexpression.columbia.edu/cases/rosen-bosev-capital-weekly-v-director-government-information-service-close/>>

Cabinet Memorandum and Observations

It should be further noted that Section 5(1)(m) of the RTI Act justifies non-disclosure where the cabinet memorandum is in relation to which “a decision has not been taken.” However, the PA had released the cabinet decision regarding the Cabinet Memorandum. This in effect means that a cabinet decision had been taken with regard to the Cabinet Memorandum, and therefore Section 5(1)(m) is not a justifiable ground to deny disclosure.

The Cabinet does have the liberty to deliberate behind closed doors. However, as pointed out by the Nova Scotia Court of Appeal in *O'Connor v Nova Scotia*, a balance should be struck between a citizen's right to know what the government is doing and the government's right to deliberate behind closed doors.⁸ The Court, however, made a distinction between ongoing programs and closed programs, asserting that in the case of ongoing programs a final decision has not been implemented or made public, and that therefore they were not subject to disclosure.⁹

Public Interest

Although the RTI Act lays down grounds based on which information can be denied, it should be noted that where the public interest outweighs the concerns under Section 5, information should be released. This is in line with Section 5(4) which stipulates that, “a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.” In *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth*, the U.K Information Tribunal held that information communicated between government officials and lobbyists is subject to

8. *O'Connor v Nova Scotia* [2001] NSCA 132 <<https://globalfreedomofexpression.columbia.edu/cases/oconnor-v-nova-scotia/>>

9. *Ibid.*

disclosure as there exists a strong public interest in ensuring that bribery or corruption does not take place in such interactions.¹⁰

In *Muñoz v Chamber of Deputies*, the Constitutional Court of the Dominican Republic held that the names and income of congressional advisors working for the House of Representatives cannot be deemed confidential as they concerned matters of public interest because it reflected the use of public funds.¹¹ In fact, Sri Lanka's RTI Commission in *T. Nadesan v Office of the Cabinet of Ministers*¹² stated that even in instances where the exemptions are found to apply, an assessment should be made based on the public interest in disclosure and on whether the private harm in disclosure is outweighed by the public interest in disclosure. In similar vein, in the *Lokuratna* Order, the selection of consultants for a contract involved the use of public funds, thus engaging the public interest which overrides concerns under Section 5(1) grounds. Disclosure promotes transparency, avoids loopholes for bribery and corruption and garners the confidence of the public in the government decision making process.

Concluding Comments

The right to information should be interpreted liberally to include government-held information that serves the public interest. The release of information pertaining to procurement processes is important as it promotes transparency and accountability of government decisions. Further, the release of such information has the potential of upholding the integrity of the government's decision-making process. The *Lokuratna* Order is also indicative of the role of the Commission in proactively going through documents with the aim of balancing the interests of the PA, the Appellant and any Third-Parties involved with the aim of releasing the requested information to the best extent possible.

10. *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* EA/2007/0072 <<https://globalfreedomofexpression.columbia.edu/cases/u-k-department-business-enterprise-regulatory-reform-v-information-commissioner-friends-earth/>>

11. *Muñoz v Chamber of Deputies* TC/0042/12 <<https://globalfreedomofexpression.columbia.edu/cases/munoz-v-chamber-deputies/>>

12. RTIC Appeal 216/2018.

R.S. Hettiarachchi v Ministry of Health

“The PA should collect and submit all general information related to the awarding of the relevant tender and the date of the tender, as such information is and should be in the possession, custody and control of the PA under and in terms of Section 3 of the RTI Act. This information must be maintained as a basic requirement in accordance with the Regulations and relevant administrative Protocols by all Government Agencies...”

Decision: The Appellant requested several items of information relating to the disposal of clinical waste and acute infectious waste from hospitals. The PA had released general information as to how many hospitals came under the Ministry of Health but not the remainder, including the processes employed to dispose of clinical waste, the companies so involved, observance of procurement standards in the selection of the company and the funds paid. Rejecting the objection raised by the PA that information in regard to the tender process and funds provided/allocated for the disposal of waste does not fall within the definition of information in Section 43 of the Act, the Commission ruled that the PA is duty-bound to provide the information which is of direct public interest. The PA had claimed that information in regard to the tender process could not be traced. It was pointed out that this claim was unacceptable in view of the fact that this information must be maintained as of record in accordance with regulations and guidelines applicable to procurement and relevant administrative protocols by all Government Agencies.

Keywords: Definition of ‘information’ (Section 43)/Disposal of waste/ Information in ‘Possession, custody or control’ (Section 3 (1))/ Offences (Section 39)/ Procurement/Public Funds/Public Health/ Tender process

Brief Factual Background¹

The Appellant by request dated 22.10.2019 requested the following information;

1. How many hospitals are under the Ministry of Health?
2. What is the process followed to dispose of the clinical waste discharged by those hospitals?
3. If the clinical waste is given to a private company for disposal, the name of such company?
- 4-1. In relation to the third question (item no.3), how is the clinical waste obtained by the private company disposed of?
- 4-2. In which company and area does the disposal take place?
- 5-1. What is the method used for the disposal of acute infectious waste discharged from hospitals under the Ministry of Health?
- 5-2. What are the hospitals that have facilities for disposal of acute infectious wastes in hospitals under the Ministry of Health? Are the relevant equipment in those hospitals in working condition at present?
6. If the waste in the hospitals under the Ministry of Health is being handed over to a private company for disposal, what is the name of such a company? What is the method used and the area in which that company destroys that acute infectious waste?
7. If the disposal of acute infectious waste in hospitals under the Ministry of Health is given to a private company for disposal, does the Ministry of Health carry out proper supervision of the activities of that company? How is it done?
- 8-I. If all the above types of clinical waste and acute infectious waste are given to a private company for disposal, from what year was it implemented?

1 1. RTIC Appeal (Documentary Proceeding)/2169/2020. Order adopted as part of the formal meetings of the Commission on 16.02.2021, 23.02.2021, 16.03.2021 and 2021.04.06. Appeal was heard under documentary proceeding. See, <https://www.rticcommission.lk/web/images/pdf/2169-2020/2169-2020.pdf>

8-II. Was a call for tender made in assigning that responsibility to a private company? What other companies came forward to undertake this responsibility?

8.III. How much funds have been provided for the destruction of clinical waste and acute infectious waste from January 2017 to October 30, 2019? (or how much funds have been allocated for the same). Such information should be provided for each year separately.

The IO replied on 13.11.2019 stating that,

“You have asked us 8 questions related to clinical waste. However, Sections 27 (3) (1) (a), (b), (c) and (d) of the RTI Act, stipulates the manner in which information is to be provided of the above-mentioned information request. Thus, there is no reference to the fact that a person's opinion or questions should be answered. Also, the answers to your question number 1 can be found on the Ministry's website, health.gov.lk.”

Dissatisfied with the response, the Appellant lodged an appeal with the DO on 18.11.2019. The DO responded on 18.12.2019 stating that a response was sent to the Appellant regarding the same on 13.11.2019 by the IO. Dissatisfied with the response of the DO, the Appellant preferred an appeal to the Commission on 28.12.2019

Matters Arising During the Course of the Hearing

...The Commission observed that the PA by letter dated 13.11.2019 has provided a response only to item no. 01 of the information request.

Interim Order²

The information sought by the Appellant serves the public interest and not solely the personal interest of the Appellant.

The PA is directed to accurately cite the relevant link/s or Web Page/s containing the information requested in items no. 2 to 7, if the information

2. Order delivered on 16.02.2021.

pertaining to those items is recorded in any document, the PA is hereby directed to provide that information to the Appellant and to give further details in this regard.

... The PA submitted that although information pertaining to item no. 1 was released, the information related to item no. 2 is statistical data that may be in the possession of the IT unit of the PA. However, the PA contended that this information varies from hospital to hospital due to changes in procedures adopted by such hospitals and the variation in types of equipment provided to such hospitals annually. Therefore, the PA submitted that there is little possibility that even the IT unit is in possession of the said information.³

Interim Order⁴

In the foregoing circumstances, the PA is directed to take action to ascertain whether the relevant information is in possession, custody or control of the IT Unit of the PA

The Ministry does not appear to have a common policy in this regard. Therefore, the relevant information pertaining to items no. 2 to 7 should be clearly communicated to the Commission...

...In response to the direction of the previous hearing, the PA handed over the information pertaining to items no. 2 to 7 to the Commission.⁵ However, the Commission observed that information pertaining to item no. 8 had not been provided. The PA agreed to provide information pertaining to item no. 8 (i) of the information request. However, the PA raised a legal objection that questions raised by the Appellant in items no 8 (ii) and (iii) do not fall within the definition of *information* in Section 43 of the RTI Act.

3. RTIC Appeal (In-Person Hearing) 2169/2020 - matters arising during the course of the hearing on 23.02.2021.

4. Order delivered on 23.02.2021.

5. RTIC Appeal (In-Person Hearing) 2169/2020 - matters arising during the course of the hearing on 16.03.2021.

Interim Order ⁶

The relevant information pertaining to items no. 1-7 has been provided by the PA. The PA is directed to provide the information relevant to item no. 8 (i) to the Appellant within two weeks.

The Commission is of the view that the objection raised by the PA in relation to information requested by the Appellant in items no. 8 (ii) and (iii) is unsustainable. Information requested in items no. 8 (ii) and (iii) consists of that which falls within the definition of information in Section 43 of the Act. Therefore, the PA is duty-bound to provide the said information to the Appellant.

Pursuant to Section 43 of the Act, the Appellant may request information only on what is defined as information in that section. Thus, items no. 8 (ii) and (iii) are questions that can be linked to specified documentation that exists in relation to such questions

Section 43 of the Act states,

“Information” includes any material which is recorded in, in any form including records, documents, memos, emails, opinions, advices, press releases, circulars, orders, log books, contracts, reports, papers, samples, models, correspondence, memorandum, draft legislation, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, videotape, machine-readable record, computer records and other documentary material, regardless of its physical form or character and any copy thereof;”

The PA should collect and submit all general information related to the awarding of the relevant tender and the date of the tender, as such information is and should be in the possession, custody and control of the PA under and in terms of Section 3 of the RTI Act. This information must be maintained as a basic requirement in accordance with the Regulations and relevant administrative Protocols by all Government Agencies. Therefore, the Commission emphasizes that it cannot accept PA's contention that such information is not in its possession

6. Order delivered on 16.03.2021.

...In response to the direction of the Commission in the previous hearing, by letter dated 01.04.2021, the PA submitted the information requested in item no. 8 (i) to the Appellant.

Final Order⁷

Information relevant to items no. 1-8 (i) has been provided to the Appellant.

The PA is directed to provide information relating to items 8 (ii) and (iii), and all general information relating to the awarding of the relevant tender and the date of the tender to the Appellant on or before 18th May 2021 with a copy to the Commission, as such information is/should be in the possession, custody and control of the PA under and in terms of Section 3 of the RTI Act.

The PA is reminded that the failure to comply with the Order of the Commission is a punishable offence under Section 39 (1) of the RTI Act.

Section 39 (1) (e) states that,

Every person who...fails or refuses to comply with or give effect to a decision of the Commission... commits an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding fifty thousand rupees or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Accordingly, non-compliance with an order of the Commission in an offence under and in terms of the Act can result in a prosecution in terms of Section 39 (4) of the Act. Section

39 (4) states as follows:

A prosecution under this Act shall be instituted by the Commission.

The Appellant is informed that if he is not in receipt of the information thus ordered to be released by the Commission from the PA within two months of the receipt of this Order, the Appellant may inform the Commission of the same in writing.

Appeal Allowed

7. Order delivered on 06.04.2021.

Legal Commentary

Matters for Determination by the Commission

Re: Procedural Objections

- (i) Are information requests permitted to be made in the form of questions, under and in terms of the definition of information in Section 43?
- (ii) What is the threshold to differentiate questions *per se*, which are disallowed, and questions which the Commission has allowed?

Re: Substantive Matters

- (i) Is there an overriding public interest in terms of Section 5 (4) in this Appeal? What is the nature and impact of this public interest?

Reflections on the Propositions Established in the Commission's Order

Information Requests in the Form of Questions

The Commission has been consistent in its approach that information requested in terms of the RTI Act must correspond to the definition of information in Section 43,

“Information” includes any material which is recorded in, in any form including records, documents, memos, emails, opinions, advice, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, correspondence, memorandum, draft legislation, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, videotape, machine-readable record, computer records and other documentary material, regardless of its physical form or character and any copy thereof;

In accordance with this, the Commission has repeatedly emphasized in its Orders that information requested under the RTI Act cannot be questions *per se*. However, the Commission has also seldom disallowed an appeal

on the basis that the information request was made in the form of one or more questions. The litmus test that the Commission has applied, as evinced in its Orders, is whether there is pertinent documentation that exists in relation to such questions.⁸ In other words, the Commission has drawn a distinction between questions *per se* and questions asked in order to ascertain the existence of documentation. Even where questions are asked *per se* and where the PA does not raise a legal objection to answering the same, the Commission has facilitated that process.

In a recently concluded Appeal, *Hewamanne v Human Rights Commission of Sri Lanka*⁹ (HRCSL), the Appellant requested several points of information under six clusters. The information was in relation to the internal procedures, mechanisms and circulars in place to process complaints received by the Human Rights Commission of Sri Lanka, the existence of any internal review process to disallow complaints, and the mandate of the Human Rights Commission of Sri Lanka. However, the information was requested in the form of questions. In its Order, while taking note of the definition of information in Section 43, the Commission allowed the Appeal as the questions were asked to ascertain the existence of specified documentation which governed the internal procedures at the HRCSL.

This was the approach taken by the Commission in the instant Appeal as well. The Appellant raised two questions on whether (i) a tender procedure was followed prior to assigning the contract for the disposal of acute infectious waste (ii) the expenditure of funds for such disposal from January 2017 – October 2019. The objection of the PA that these questions would not subsume under Section 43 was overruled by the Commission.

This position of the Commission strikes an appropriate balance between functioning in terms of the Act, and not disallowing Appeals on

8. See recently, *Hewamanne v Human Rights Commission of Sri Lanka* RTIC Appeal 2322/2020 <<http://www.rticcommission.lk/web/images/pdf/2322-2020/2322-2020-P.-Hewamanne-v-HRCSL-1.pdf>>

9. *Ibid.*

technical grounds. To say that a document must be distinctly identified within an information request (e.g., through gazette number), when it is the very existence of such documentation that is sought to be ascertained, would result in a legal absurdity. In holding that questions *per se* are not envisaged, but questions raised to ascertain pertinent documentation are permitted, the Commission has highlighted that it is not the form in which an information request is made, but its substance that matters.¹⁰

Statutory and Regulatory Stipulations regarding Procurement Procedures

Public procurement is an aspect of budgetary expenditure which is regulated through an established procedure in the National Procurement Guidelines.¹¹ These Guidelines ensure impartiality and transparency in the evaluation process, and the selection of a tender proposal that best expends public funds. Particulars of this procurement procedure are stipulated by law and regulation to be made publicly available in Sri Lanka, in the below manner.

In the RTI Act, this stipulation is contained in the provisions of Sections 8 and 9;

Section 8 (2) The report referred to in subsection (1) shall contain-

(b) the following particulars pertaining to the Ministry and the public authorities referred to in paragraph (a):-

(v) the budget allocated, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

Section 8 (4) The reports referred to in subsections (1), (2) and (3) shall be-

(a) published in the official languages and be made available in electronic form; and

10. This position is concomitant with the definition of 'Information' in Section 43: "Information" includes any material which is recorded in, in any form including records, documents... **regardless of its physical form or character and any copy thereof**" (emphasis added)

11. Procurement Guidelines (2006) <<https://www.treasury.gov.lk/p/procurement-guidelines-and-manuals>>

(b) made available for public inspection and copies of the same may be issued to a citizen, on the payment of such fee as shall be determined by the Commission.

Section 9 (2) (a) The Minister shall, on a written request made in that behalf by a citizen, make available updated information about a project referred to in subsection (1), throughout the period of its development and implementation.

Consequent to Sections 8 and 9, the RTI Commission developed detailed guidelines on the nature and manner of filing information as required in the Act.¹² As per the instructions provided under Section 8 (2) (b) (v), the guidelines state that,

The intention of this clause is to foster a culture of fiscal transparency amongst public functionaries. Keeping in view of the technical nature of the government budgets, it is essential that Ministries/Public Authorities prepare simplified versions of their budgets, financial allocations, including proposed expenditure, and reports of disbursements, which can be understood easily by general public and place them in public domain.

Furthermore, information relating to public procurement must be proactively disclosed in terms of Regulation 20 of the RTI Regulations,¹³

vi. Budget information: Projected budget, actual income and expenditure (including salary scales pertaining to the emoluments and related allowances of officers and employees of executive rank and above,) and other financial information and audit reports

...

x. Public procurement information: Detailed information on public procurement processes, criteria and outcomes of decision making on tender applications; copies of contracts, and reports on completion of contracts.

12. *The RTI Commission, Guidance on Proactive Disclosure under Section 8 of the RTI Act* <<http://www.rticommission.lk/web/images/pdf/guidelines-section8-updated.pdf>>, *The RTI Commission, Guidance on Proactive Disclosure under Section 9 of the RTI Act* <<http://www.rticommission.lk/web/images/pdf/guidelines-section9-updated.pdf>>

13. RTI Regulations promulgated under the RTI Act (Gazette No. 2004/66, dated 03.02.2017).

The National Procurement Guidelines (2006) also contains a provision to the effect that the procedure followed must be available for public inspection, upon the award of the contract.

8.10 Publication of Contract Award

8.10.1 The PE (Procuring Entity) should publish promptly in its website (if available), the NPA website and/or any other appropriate media, the following particulars in regard to contracts on which awards have been made: (a) description of the items/Works for which bids were invited; (b) total number of bids received; (c) name of the successful bidder; (d) amount at which the contract was awarded; (e) in the case of a contract awarded to a foreign principal who has a local agent, the name of the local agent.

8.10.2 If the contract value exceeds SLR 250,000,000 (Sri Lanka Rupees Two Hundred and Fifty Million), publication of contract awards in at least one widely circulated national newspaper, the NPA website and government gazette is mandatory.

Public Interest

Section 5 (4) becomes relevant only when an exemption is legitimately invoked. If the requested information does not fall under any of the exemptions, then an evaluation of the applicability of Section 5 (4) falls out of the scope of the appeal.

The public interest in this Appeal is two-fold. Firstly, the information concerned the disposal of clinical waste and acute infectious waste, which is a matter of public health and safety. Secondly, the PA is a ministry, and its procurement procedures are a question of accountability in the expenditure of public funds, as discussed above.

The disposal of clinical waste and acute infectious clinical waste impacts public health and safety in different ways. The presence of a public interest is heightened in view of the need to dispose of medical waste in a manner that is not hazardous to humans or the environment. In this regard, such disposal also becomes a concern relating to pollution and

contamination. Adhering to the due procedure for awarding the tender, and a stringent evaluation of the tender proposals against the criteria for the award are crucial. Due to this, public procurement becomes relevant in more ways than the efficient expenditure of public funds in the instant Appeal. Here, the adoption of a sound procedure, and the award of the contract to the most apposite tender proposal, becomes important to the maintenance of public health and safety.

In that the PA is a governmental ministry and has outsourced the carrying out of clinical waste disposal to a private entity through procurement, this Appeal also straddles the public-private conundrum.

Concluding Comments

This Appeal is of wide public interest due to the question of medical waste disposal. While procurement procedures are themselves an issue relating to transparency, financial accountability and efficiency in the public sector, this Appeal contains a heightened public interest in that it pertains to public health and safety.

***M.F.A. Mansoor v Ministry of Urban Development,
Water Supply and Housing Facilities (Ministry of
Megapolis and Western Development)***



***Centre for Environmental Justice v Ministry of
Urban Development, Water Supply and Housing
Facilities (Ministry of Megapolis and Western
Development)***

“The information relating to public interest as identified by the Appellant...relate to statutory obligations that are imposed on the GOSL. These are clearances and preliminary approvals that must be obtained for the project to commence and proceed within the statutory framework in Sri Lanka. These clauses have not been varied between the 2014 and 2016 Agreements, as it stands to reason that these are clauses imposed under and in terms of statute. As such, there is no impediment to the release of this information.”

Decisions in RTIC Appeals 1108/2019 and 1114/2019: The Appellants in RTIC Appeals 1108/2019 and 1114/2019 requested copies of Tripartite Agreement together with all Appendixes and Annexures signed between the Secretary, Ministry of Megapolis and Western Development, Urban Development Authority and the CHEC Port City Colombo (Pvt) Ltd for the development of a new Colombo International Financial City replacing the Agreement signed by the GoSL in September 2014. Additionally, the Appellant in RTIC 1108/2019 requested all Environmental monitoring reports as specified in the Proposed Colombo Port City Development Project Supplementary Environmental Impact Assessments of December 2015;

All Environmental monitoring reports as specified in the Supplementary Environmental Impact Assessment for the Off-Shore Sand Extraction Project at Kerawalapitiya in December 2016.

Upon failure of the IO to respond in RTIC 1108/2019 and denying the information request in RTIC 1114/2019 by letter dated 16.10.2018, an appeal was respectively filed by both Appellants with the DO who affirmed denials in both Appeals respectively on 21. 12. 2018 and 21.11.2018. The core of the denials were that the Tripartite Agreement cannot be disclosed due to confidential clauses in the Agreement and invoking Section 29 (2) (c), as well as Section 5 (1) (c) on the basis that serious prejudice would ensue to the economy of Sri Lanka. Regarding the environmental monitoring reports asked for in RTIC 1108/2019, the Appellant was instructed to contact the Project Director of the Port City Project and the IO of the Sri Lanka Land Reclamation and Development Corporation (SLLRDC). Both Appellant appealed to the Commission respectively on 14/01/2019 and 21.01.2019,

Hearing the two Appeals together, several clauses of the Tripartite Agreement were released on the direction of the Commission considering the overriding public interest of such disclosure. Further, in RTIC 1108/2019 the Commission directed the PA to allow the Appellant to inspect and take copies of the items requested by items no. 2 and 3 relating to environmental monitoring reports in terms of Section 27 of the RTI Act which direction was complied with.

.....

In the pendency of the hearing and upon the request of the Presidential Secretariat and the PA, the Presidential Secretariat was added as a party respondent to the Appeal. Due to the strict lockdown prevalent in Sri Lanka at the time as a result of the global pandemic, the Commission reserved the consideration of the release of the remainder of the Tripartite Agreement of 2016 at a later point in the hearing consequent to the PAs making further submissions in both Appeals.

Keywords: *Commercial confidence, trade secrets, Intellectual Property and competitive interests of Third-Party (Section 5 (1) (d))/Commission's powers*

of inspection of information denied by PA (Section 15(c))/Confidential information given by a Third-Party (Section 5(1)(i) read with Section 29 (2) (c)/ confidentiality clauses/ Environmental Monitoring Reports/Information in 'possession, custody or control' (Section 3 (1))/International agreements or obligations under international law (Section 5(1)(b)(ii))/ Negotiations, ongoing negotiations/ Offences (Section 39 (1)/ Public interest (Section 5 (4))/ Severability (Section 6)/ Statutory obligations

Brief Factual Background^{1 2}

The Appellant in 1108/2019, by request dated 15.11.2018, requested the following;

1. *“A Copy of the Tripartite Agreement together with all Appendixes and Annexures signed by Secretary, Ministry of Megapolis and Western Development, Urban Development Authority and the CHEC Port City Colombo (Pvt) Ltd for the development of a new Colombo International Financial City replacing the Agreement signed by the GoSL and/or its representatives on 16th September, 2014 for the construction of a Port City*
2. *Copies of all Environmental monitoring reports as specified in the Proposed Colombo Port City Development Project Supplementary Environmental Impact Assessments of December 2015*

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1. RTIC Appeal (In – person) 1108/2019 heard as part of the formal meeting of the Commission on 25.06.2019 Appearance for the parties: M.F.A. Mansoor, N.A.R. Fernando, Fr. Nihal C. Fernando)for the Appellant; a DO of Ministry of Megapolis and Western Development for the PA. See,<http://www.rticommission.lk/web/images/pdf/1108-2019/Order-of-29.09.2021---M.-F.-A.-Mansoor-v-Ministry-of-Urban-Development-1108-2019-1.pdf>
 2. RTIC Appeal (In Person)/1114/2019 – Order adopted as part of the formal meeting of the Commission on 29.09.2021. Appearance for the parties: Hemantha Withanage (Senior Advisor) for the Appellant organization; Dr. Sugath Yalagama (Additional Secretary) and Anoja Herath (Director - Policy) for the PA. See,<https://www.rticommission.lk/web/images/pdf/1114-2019/Order-of-29.09.2021---Centre-for-Environmental-Justice-v-Ministry-of-Urban-Development.pdf>

3. *Copies of all Environmental monitoring reports as specified in the Supplementary Environmental Impact Assessment for the Off Shore Sand Extraction Project at Kerawalapitiya of December 2016.”*

As the IO had not responded to the substantive request, the Appellant made an appeal with the DO 05.12.2018. The DO responded on 21.12.2018 stating that the Tripartite Agreement cannot be disclosed due to confidential clauses in the Agreement, as informed by the Director Legal Services of the Urban Development Authority (vide letter dated 14.12.2018). The Director Legal Services, UDA, stated in his letter that, by virtue of the aforesaid Tripartite Agreement (Clause 42) strict confidentiality clauses exist and therefore the information is denied in terms of Section 29 (2) (c) and that in terms of Section 5 (1)(c), the disclosure of the information would cause “serious prejudice to the economy of Sri Lanka by disclosing premature decisions to change or continue government, economic or financial policies relating to; entering into overseas agreements.”

The PA therein further directed the Appellant to contact the Project Director of the Port City Development Project to inspect the other requested documents. The Appellant was informed that after inspection he can inform the PA of the required pages/ documents so that photocopies of the same can be made available to the Appellant. In relation to item No. 5 (II) (3) (i.e. Item 3 above) the Appellant was directed to contact the IO of the Sri Lanka Land Reclamation and Development Corporation (SLLRDC) as the request relates to the SLLRDC.

Dissatisfied with this response the Appellant lodged an appeal with the Commission on 14.01.2019.

The Appellant in 1114/2019, the Centre for Environmental Justice, by request dated 08.10.2018, requested the below:

“A copy of the Tripartite Agreement signed between the Ministry of Megapolis & Western Development, the UDA, and the CHEC Port City Colombo (Pvt) Ltd on the Colombo Port City Development Project in August 2016. This information will be used for study purposes.”

The Information Officer responded on 16.10.2018, denying the information, on the basis that the information is that which was provided or obtained by the Government or through an International Agreement. The IO also stated that the information has been supplied by a third party in confidence who has not provided consent to the provision of the information.

Dissatisfied with the response of the IO, the PA lodged an appeal with the DO on 14.11.2018. The DO denied the information on the basis that the Director (Legal Services) of the UDA has informed her that the Agreement cannot be disclosed due to the confidentiality clauses in the Agreement. A copy of the letter sent by the Director UDA was annexed to this response. Dissatisfied with this response the Appellant preferred an appeal to the Commission on 21.01.2019. The Appellant stated that there is significant public interest in the disclosure of the information.

The two Appeals were heard and considered together, due to the subject matter of the information requests being the same, *viz.*, the Tripartite Agreement entered into establishing the Colombo Port City.

Matters Arising at the Hearing³

At the outset, the PA was reminded by the Commission that in appeals concerning contested agreements of this nature, the procedure is that the PA is called upon to indicate what clauses they are proposing to withhold as assessed against the duty of the PA to release. This response is thereafter directed to the Appellants to indicate the public interest in the release of identified clauses. Consequent to these submissions, the Commission will evaluate the release of selected clauses of an agreement.

However, a clear indication about the contested clauses which the PA seeks to withhold has not been forthcoming from the PA. This Commission has been hampered by the absence of precise feedback from the PA on what specific clauses of the Tripartite Agreement are operational and ongoing, as well as those which cannot be released owing to commercial

3. Order delivered on 29.09.2021.

sensitivity, and the objection of the Third-Party (the Project Company, CHEC (Pvt) Ltd). There has been no clause-by-clause contestation in this Appeal, over two years from the filing of this Appeal.

The Appellant in RTIC Appeal 1108/2019, in addition to the Tripartite Agreement of 2016, requested for the ...environmental monitoring reports carried out in terms of the Supplementary Environmental Impact Assessments of December 2015 and December 2016 in relation to the Port City Project...Consequent to directions issued by the Commission, the PA, on 20.07.2021, wrote to the Department of Coast Conservation and Coastal Resource Management that the Appellant in RTIC Appeal 1108/2019, Mr. M.F.A. Mansoor be allowed to access environmental monitoring reports of the Colombo Port City Development Project carried out in terms of the respective Environmental Impact Assessment (EIAs). The Appellant was directed on 20.07.2021 to peruse the said monitoring reports by virtue of Section 27 of the RTI Act and to inspect and take copies of the same.⁴

Interim Order⁵

The 2016 Tripartite Agreement was handed over to the Commission by the original PA in RTIC Appeal 1108/2019 Appeal, the Ministry of Megapolis and Western Development on 03.03.2020 consequent to the direction of the Commission dated 25.02.2020 under Section 15 (c) of the RTI Act.⁶ The 2014 Agreement was handed over to the Commission at the hearing on 29.09.2021, by the Appellant in RTIC Appeal 1114/2019 by virtue of the said Agreement being released as a consequence of litigation in the Court of Appeal (CA/Writ/112/2015).

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4. The Appellant, in RTIC Appeal 1108/2019, confirmed with the Commission on 17.10.2021 that he had obtained access to peruse the environmental monitoring reports, and was able to collect copies of the same consequent to the Order of the Commission directing the PA to permit the same.
 5. Order delivered on 29.09.2021.
 6. The handing over of the Agreement was for the confidential scrutiny of the Commission in terms of Section 15 (c).

...Considering the public interest, the Commission embarked on a comparative examination of the 2014 Agreement (signed in 2014 between the Sri Lanka Ports Authority and CHEC Port City Colombo (Private) Limited) and the 2016 Tripartite Agreement (signed on 12.08.2016 to which the signatory parties as of record are the Secretary to the Ministry of Megapolis and Western Development, acting for and on behalf of the Government of the Democratic Socialist Republic of Sri Lanka, Dr. Jagath Munasinghe of the Urban Development Authority and Tang Qianlong, Chairman of the CHEC Port City Colombo Pvt Ltd.) to ascertain which segments of the 2016 Agreement may be released as evaluated against the points of public interest as set out by the Appellants. This was the approach adopted by the Commission in *T. Nadesan v Office of the Cabinet of Ministers* RTIC Appeal/216/2018; Order dated 02.04.2019, where the Commission made Interim Order stating that,

“Both parties agree to the said official report now under confidential cover being perused by this Commission for the purpose of checking if its contents correspond to the substance of the unofficial report in the public domain consequent to which a notification to that effect will be provided to both parties. It stands to reason that the release of information already in the public domain is of stronger force by that very fact. If there are segments that do not correspond, these will be assessed for release or not as against the exceptions provided for in Section 5(1) of the Act and the parties to this appeal will be required to provide arguments for and against the same...”

Severability of Clauses in an Agreement

...The PA in RTIC Appeal 1108/2019 the Ministry of Urban Development, has at no point, despite repeated directives of the Commission, presented the clauses of the Agreement, which it is amenable to release.

The PA is reminded that in appeals before this Commission where the subject matter concerns agreements, the approach taken between the PA, Appellant and the Commission has been to consider the provisions of an Agreement that may be released, and release the Agreement sub-

ject to redaction of commercially sensitive information. Section 6 of the RTI Act provides for the release of information subject to redaction and severability of information that may be legitimately exempted under and in terms of the RTI Act.

As stated in our Orders in this Appeal on 25.06.2019 and 24.09.2021, the existence of a general confidentiality clause in an agreement does not preclude the right of access to the whole of the agreement, as per the decision of this Commission in *Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd.* (RTIC Appeal (In-Person)/99/2017 Order delivered on 12.06.2018). Here PA was ordered to release information in relation to the Memorandum of Understanding dated 8 July 2016 with Pakistan International Airlines (PIA), the Wet lease agreement dated 4th August 2016 with PIA and the Wet lease extension agreement dated 2 November 2016 with PIA, but withheld in regard to the Agreement in issue between the PA and Airbus S.A.S as the negotiations were ongoing at the time.

Third-Party Objection under Section 29 (2) (c)

...On two occasions before this Commission, the Ministry of Urban Development cited the objections raised by the Project Company, CHEC Port City (Pvt) Ltd to refuse the release of the Tripartite Agreement under Section 29 (2) (c). The CHEC Port City (Pvt) Ltd. has by two writings (dated 20.12.2018, and 08.02.2021) objected to the release of the Tripartite Agreement...From a reading of the above correspondence and the points of information that the Appellant in 1114/2019 has submitted are of public interest, it is evident the...the price-sensitive information which the Project Company seeks to withhold on the grounds that it is commercially sensitive information may well be withheld while releasing the clauses which are of public interest to the Appellants in terms of Section 5 (4) of the RTI Act.

The Agreement of 2014 vis-à-vis the Tripartite Agreement of 2016

General Observations and Findings

...Having perused the Tripartite Agreement signed on 12.08.2016, provided to this Commission under confidential cover by the PA, and the Agreement signed in 2014 (which is now repealed and replaced), the Commission sees that many of the clauses in the 2014 Agreement are reproduced verbatim in the 2016 Agreement. We note that the Agreement of 2014 is in the public domain subsequent to litigation in the Court of Appeal (CA/Writ/112/2015).

As aforesaid, in view of the fact that the Agreement of 2014 is in the public domain, and several of its clauses have been reproduced in the now operative 2016 Agreement, the Commission finds no impediment to the release of those clauses, particularly where there is a public interest in the release of such information. Upon an evaluation of both the 2014 and 2016 Agreements before this Commission at the hearing, the clauses which may correspond to the public interest issues raised by the Appellant in RTIC Appeal 1114/2019 are as follows:

The information relating to the public interest as identified by the Appellant in RTIC Appeal 1114/2019, nos. 4, 5 and 6 relate to statutory obligations that are imposed on the GOSL. These are clearances and preliminary approvals that must be obtained for the project to commence and proceed within the statutory framework in Sri Lanka. These clauses have not been varied between the 2014 and 2016 Agreements, as it stands to reason that these are clauses imposed under and in terms of the statute. As such, there is no impediment to the release of this information.

The clause pertaining to the protection of archaeological and geological items corresponds to the public interest flagged by the Appellant in RTIC Appeal 1114/2019 in no. 7 of his points of information. This clause, too, is identical between the 2014 and 2016 Agreements. There does not appear to be any clause in the Agreement that directly corresponds to points of information nos. 3 and 10 highlighted by the Appellant in 1114/2019.

The increase in the extent of Reclaimed Land between the 2014 and 2016 Agreements is the main difference between the 2014 and 2016 Agreements. However, this cannot be held to be ‘commercially sensitive’ information in terms of Section 5 (1) (d) of the RTI Act. This information, together with the extent of land divided between the GOSL and Project Company in nos. 8 and 9 have been identified as information relating to the public interest by the Appellant in 1114/2019. In the 2014 Agreement between the Ports Authority and the Project Company (extents) of land allocated variously to the Ports Authority and Project Company are stated in terms of divisions of land referred to as “Marketable Land”, “Ports Authority Land (Marketable)” and, “Ports Authority Land” [*vide* page 25 of the 2014 Agreement, Clause 24.1].

We are apprised of the fact that these same divisions with the addition of the Marina area is reflected in the Tripartite Agreement of 2016 albeit in different extents due to the increase of the Reclaimed Land, which information has at different times been made available in the public domain as confirmed by the representative for the PA, Dr. Sugath Yalegama. Upon being asked by the Commission as to whether the PA objects to the release of broadly defined divisions of extents of land as detailed in the Tripartite Agreement of 2016, Dr. Yalegama confirmed that there is no objection. The Commission further notes that the clauses relating to the statutory obligations of the GOSL, clearances and approvals to be obtained, the preservation of archaeological items are identical between the 2014 and 2016 Agreements.

Specific Clauses in the Agreement of 2014 / Tripartite Agreement of 2016

Consequently, the clauses, as identified by this Commission that can be released in terms of the public interest pleaded by the Appellants, and in terms of the verbatim reproduction of the 2014 Agreement in the 2016 Agreement, are as below. Dr. Yalegama confirmed the non-objection of the PA as of record to the release of the below clauses during this Appeal hearing.

- i. Recital Clause (J)
 - ii. 2. Development Rights
 - iii. 13. Preliminary Clearances for the Development Masterplan
 - iv. 15. Archaeological / Geological items
 - v. 24. Reclaimed Land
 - vi. Schedule 9: GOSL Works and Services (6. Fisherman's Compensation)
13. Preliminary Clearances for the Development Masterplan [Pages 16 – 18] (nearly identical provision in the 2014 Agreement)
- 13.1. The Project Company and the GOSL shall both acting reasonably, as soon as reasonably practicable (and in any event within fifteen (15) Business Days of the Project Company submitting a final draft to the GOSL), agree the Development Masterplan which shall contain and/or such matters as are required pursuant to the Urban Development Authority Law No. 41 of 1978 as amended and any other details required by Applicable Law. The Development Masterplan shall, in any event, include the following (in sufficient detail to allow for approval by the relevant Governmental Authorities having an interest in the Developments):
- (a) the extent of the Marketable Land (which shall in no circumstances be less than 175 hectares excluding the Marina Area);
 - (b) the manner in which the land and buildings in the development area shall be used
 - (c) the allotment, reservation or zoning of land for different purposes;
 - (d) construction of any residential (including condominium), commercial, leisure, educational, or community-based developments and other similar developments on the Marketable Land together with proposed densities and building
 - (e) the Common Area; and
 - (f) access and egress to the Marketable Land

- 13.2. The GOSL shall, during the development of the Development Masterplan, facilitate such meetings with the Urban Development Authority (in its statutory capacity as a consenting body pursuant to the Urban Development Authority Act, No. 41 of 1978, as amended) as shall be necessary to ensure that the Development Masterplan shall be consistent with the “development plan” envisaged by the Urban Development Authority for the land area in question. The Development Masterplan agreed pursuant to Clause 13.1 shall seek, subject to Clause 24.6 and Applicable Law, to maximize the commercial benefits of the Project for both the Project Company and the GOSL including (for the avoidance of doubt) by seeking to increase the extent of Marketable Land realized from the Reclamation Works. In the event of any conflict between the interests of the Project Company and the GOSL in relation to the Development Masterplan the GOSL and the Project Company shall seek to resolve such disputes in good faith.
- 13.3. As soon as practicable after the agreement of the Development Masterplan between the GOSL and the Project Company pursuant to Clause 13.1, the GOSL shall submit the same to the relevant Governmental Authorities for their approval. The GOSL shall contemporaneously apply for the following Applicable Permits for the undertaking of the Developments in accordance with the Development Masterplan:
- (a) Environmental Impact Assessment from the Central Environmental Authority together with licenses for emissions, noise, water and waste disposal;
 - (b) Relevant approvals from the Municipality of Colombo including a Building Lines and Street Lines Certificate;
 - (c) Relevant approvals from the Urban Development Authority including a Development Permit pursuant to Section 8 (J) of the Urban Development Authority Law;
 - (d) Approval, if applicable, from the Roads Development Authority, Urban Development Authority and Municipality of Colombo in relation to the network;

- (e) Approval from the CCD including, if appropriate, a Coastal Conservation Major Permit;
- (f) Approvals in relation the disposal of waste and waste water from the National Water Supply and Drainage Board and any other Governmental Authority having jurisdiction in relation to the same;
- (g) Relevant approvals (if any) from the Sri Lanka Land Reclamation and Development Corporation.
- (h) Clearance from the Civil Aviation Authority and the Ministry of Defense;
- (i) Approval from the Ceylon Electricity Board; and
- (j) such other permits from relevant Governmental Authorities as shall be necessary in accordance with Applicable Law, to establish “in principle”, preliminary outline approval to undertake the Developmental in accordance with the Development Masterplan (subject always to such detailed consents and approvals as any Developer would ordinarily expect to obtain having regard to the detailed proposals for the relevant Development), hereinafter referred to together as the “Preliminary Clearances for Development” and individually as a “Preliminary Clearance for Development”.

...24. Reclaimed Land [Page 31 – 32]

24.1. The interest in the Reclaimed Land shall be allocated between the GOSL and the Project Company in accordance with the provisions of this Agreement. The total area of the Reclaimed Land shall be approximately two hundred and sixty-nine (269) hectares. Subject to Clause 24.3:

24.1.1. the Project Company shall be entitled to:

- (a) one hundred and thirteen point one (113.1) hectares of the Marketable Land; and

- (b) the Marina Area (approximately three (3) hectares)
(hereinafter together referred to as the “Project Land”)

24.1.2. the GOSL shall be entitled to:

- (a) sixty-two (62) hectares of the Marketable Land (the “GOSL land (marketable)”) and
- (b) approximately ninety point nine (90.9) hectares of land that is not allocated for development (together with beaches and the Breakwater)
(hereinafter together referred to as the “GOSL Land”.) The Project Land shall be held by the Project Company (or such other Person or Persons as the Project Company may nominate in writing) pursuant to Clause 24.8.

...Schedule 9: GOSL Works and Services

6.Fishermen’s Compensation [Page 151]

The GOSL shall ensure that fishermen will receive income support in respect of loss of income, if any, arising as a consequence of the Reclamation Works. The Project Company shall, as a gesture of goodwill contribute to the GOSL the sum of Rs. 500 million which GOSL shall use solely for the purpose of paying such income support to fishermen.

In regard to 6. of Schedule 9 above (which is not in the 2014 Agreement), the Commission queried specifically from Dr. Yalgama, the representative of the Ministry of Urban Development, as to what the objections may be in regard to the release of the same, as this pertains to a public interest obligation on the part of the GOSL with regard to the communities specifically affected by the Port City project activities. Following consultations had between the representatives, it was informed to the Commission that there is no objection in releasing this segment of Schedule 9.

The Commission is, however, reserving the consideration of the release of the remainder of the Tripartite Agreement of 2016 at a later

point in the hearing of this Appeal consequent to the PAs making further submissions, once the current lockdown period lapses.

Interim Conclusions

...In sum, the applicability of the exemptions pleaded by the PA in terms of Section 5 (1) of the RTI Act to the Tripartite Agreement remains to be adjudicated morefully across the Agreement and its schedules. That being the case, the Commission does not see an impediment to the release of clauses which are:

- (a) of public interest as indicated by the Appellant in 1114/2019 and therefore attract the application of Section 5 (4) of the RTI Act
- (b) are not of a commercially sensitive nature, and,
- (c) have already been released in *vis-à-vis* the 2014 Agreement and are therefore substantially in the public domain.

The enumeration of the above clauses is in no manner exhaustive and may be varied upon agreement between the parties that further clauses of the Agreement can be released.

As reiterated in the Commission's Interim Order of 24.09.2021, the Commission is cognizant of the fact that close upon two years have lapsed from the date of the Appellant's filing this Appeal before the Commission and approximately two months have lapsed after the added PA was added as a Respondent to this Appeal. We are mindful of our statutory duty to deliver our decisions on appeal within one month, under Section 32 (1) (a) of the RTI Act, which task has been made all the more difficult due to the indefinite nature of the lockdown currently in force as compelled by the global pandemic.

Recognizing the aforesaid concerns and having regard particularly to Section 5 (4) of the RTI Act, the Commission has determined the delivery of the instant Order.

Appeal Adjourned

Legal Commentary

Matters for Determination by the Commission

While the substantive exemptions pleaded by the PA remained to be adjudicated during the pendency of this Appeal, the Commission was called upon to determine the below questions in arriving at its decision on 29.09.2021:

- (i) Where the 2014 Agreement, now repealed, is in the public domain consequent to litigation, and where most of the provisions are identical between the 2014 Agreement and the Tripartite Agreement of 2016 (in dispute before this Commission), what is the impediment to the release of such identical clauses?
- (ii) Is there an overriding public interest in the release of selected clauses as submitted by the Appellants, and as determined by the Commission?
- (iii) Can some of the clauses which are of such public interest be released on the basis of severability, for which provision has been made in Section 6?

Reflections on the Propositions Established in the Commission's Order

Summarizing the positions taken by both parties in these Appeals, the competing arguments were as follows;

The PA pleaded four substantive exemptions under Section 5 (1) of the RTI Act, *viz.*, Third-Party information supplied in confidence (Sections 5 (1) (i) and 29 (2) (c)), prejudice to Sri Lanka's international relations (Section 5 (1) (b) (ii)), the premature disclosure of government decisions would cause serious prejudice to Sri Lanka's economy (Section 5 (1) (c) (v)), and the impact on commercial confidence (Section 5 (1) (d)).

The PA contended firstly that the Tripartite Agreement amounts to information confidentially given to the PA by a Third-Party and could not be released under Section 29 (2)(c) as it has been entered into with a private entity which is a Third-Party, CHEC Port City Colombo (Pvt)

Ltd (The “Project Company”) and further, that it is bound by commercial confidence and fiduciary relationship with the CHEC. As such, the PA has refused access to the information on the basis of Section 29 (2) (c) of the RTI Act.

Meanwhile, it was pleaded by the PA that should the Tripartite Agreement be impugned through litigation before Courts, this would result in losses “beyond measure” to the GOSL as well as have an impact on investor confidence.

The Appellant in 1108/2019 submitted in response that the Tripartite Agreement in question is not an ‘international’ agreement as it is an agreement between the Government of Sri Lanka (namely the Ministry of Megapolis and Western Development and the Urban Development Authority) and CHEC Port City Colombo (PVT) Ltd, a company incorporated in Sri Lanka, which is a subsidiary of China Communications Construction Corporation. Therefore, the Tripartite Agreement is between a Sri Lankan corporation and two agencies of the Government of Sri Lanka, and the PA cannot treat the said agreement as an international agreement in terms of Section 5 (1)(c)(v).

Further, it was contended that in any event, Section 5(1)(c)(v) only relates to “entering into” of overseas trade agreements and does not apply to instances where the agreement is signed and the commitment of all parties to the agreement is finalized.

The Appellants in both Appeals premised their case on the position that the public has a right to know what the Government of Sri Lanka has committed itself to in respect of the agreement, which is likely to bear consequences for all Sri Lankans.

Release of the Environmental Monitoring Reports

In RTIC Appeal 1108/2019, the Appellant requested for two further points of information, besides the Tripartite Agreement. These were the Environmental Monitoring Reports carried out in pursuance of the Supplementary Environmental Impact Assessments (SEIAs) of December

2015 and December 2016. The December 2016 SEIA was in relation to the Offshore Sand Extraction Project at Kerawalapitiya. This information goes a step further than the SEIAs themselves, as the request pertains to the Environmental Monitoring Reports that were to be carried out in terms of said SEIAs.

At the hearing before the Commission on 09.03.2021, the PA disputed whether it was in fact the correct ministerial agency that was responsible for the carrying out of, issuing/receiving and maintaining records of the Environmental Monitoring Reports. This position was however rejected by the Commission;

“In relation to items no. 2 and 3 of the information request, it was pointed out to the PA by the Commission that as the PA is the project proponent, it had a duty cast upon it by Supreme Court judgments, relevant environmental statutory and non-statutory guidelines, and the Tripartite Agreement itself (vide Clause 13.3.), to obtain the relevant environmental as well as the monitoring reports thereto.

The PA contended that the issuing agency of the monitoring reports would be able to provide the monitoring reports. It was pointed out to the PA by the Commission that under and in terms of Section 3 (1) of the Act, the PA was under an obligation to release information in its “possession, custody or control” and that, it is not only an issuing agency in relation to such information which comes within the ambit of Section 3(1). In this case, there was a duty on the PA as a party to the agreement to obtain such environmental and monitoring reports from the issuing agencies...” [vide Minute of the Record of Proceedings of 09.03.2021]

Consequently, the Commission was apprised at the hearing of the Appeal on 20.07.2021 that the PA, in coordination with the Department of Coast Conservation and Coastal Resource Management had arranged for the Appellant in RTIC Appeal 1108/2019 to peruse the Environmental Monitoring Reports in terms of Section 27 (3) and obtain relevant copies

thereto.⁷ Subsequent to this direction of the Commission, the Appellant in RTIC Appeal 1108/2019 received the environmental monitoring reports.

The carrying out of due Environmental Impact Assessments is a statutory duty imposed on statutory bodies as repeatedly emphasized by the Courts.⁸ This duty is enormously important in view of the many development projects in Sri Lanka which have been plagued by environmental irregularities and the failure to carry out due Environmental Impact Assessments. The Port City project, too, at its early stages, was widely scrutinized and impugned on environmental grounds.⁹

In its Order of 29.09.2021, where the Commission released certain selected clauses of the Tripartite Agreement, this statutory duty was highlighted in Clause 13 of the Agreement (which the Commission released),

“13.3. As soon as practicable after the agreement of the Development Masterplan between the GOSL and the Project Company pursuant to Clause 13.1, the GOSL shall submit the same to the relevant Governmental Authorities for their approval. The GOSL shall contemporaneously apply for the following Applicable Permits for the undertaking of the Developments in accordance with the Development Masterplan:

(a) Environmental Impact Assessment from the Central Environmental Authority together with licenses for emissions, noise, water and waste disposal;”

While the emphasis so far has been on carrying out proper Environmental Impact Assessments, this Order of the Commission goes further than

7. 27. (3) Subject to the provisions of subsection

(1), a citizen, whose request for information has been granted, is entitled to:-

- (a) inspect relevant work, documents, records;
- (b) take notes, extracts or certified copies of documents or records;
- (c) take certified samples of material;
- (d) obtain information in the form of diskettes, floppies, tapes, video cassettes or any other electronic mode or through printouts where such information is stored in a computer or in any other device.

8. *Kariyawasam v Central Environmental Authority* and others S.C (FR) 141/2015.

9. ‘Top Academic Claims Fundamental Flaws in Port City’s EIA Process’(Daily Mirror, 16.09.2019) <https://www.dailymirror.lk/business__main/Top-academic-claims-fundamental-flaws-in-Port-Citys-EIA-process/245-174545>

this statutory minimum, as the information in question here, which was released, is the Environmental Monitoring Reports carried out under and in terms of such Environmental Impact Assessments (EIAs)/SEIAs. The threshold for environmental accountability is much higher, here. Whereas the carrying out of EIAs/SEIAs would be the statutorily stipulated minimum, ensuring that monitoring reports are compiled in terms of such EIAs/SEIAs imposes an active and continuing obligation on the PA, until such time the project is completed.

Early dismissal of the PA's position that a confidentiality clause in an agreement is a blanket prohibition.

At the outset, the PA's invocation of Section 5 (1) (d) of the Act, pleading commercial confidence on the basis that Clause 42 which is a confidentiality clause in the Tripartite Agreement prevents the release of the entire Agreement, was firmly dismissed by the Commission at the hearing on 24.09.2019.¹⁰ The PA was reminded that the mere existence of a confidentiality clause does not *per se* bring into operation Section 5 (1) (d). In its even dated Order, the Commission held that,

"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."

Furthermore, the yardstick to invoke commercial confidence in terms of the Section is the harm caused to the competitive interests of a Third-Party, which burden the PA had failed to demonstrate when called upon to do so.¹¹

10. Minute of the Record of Proceedings of 24.09.2021.

11. Minute of the Record of Proceedings of 09.03.2021.

Release of Clauses of the Tripartite Agreement in the Public Interest

The Commission issued an Interim Order on 29th September 2021, releasing selected clauses in the Tripartite Agreement. These clauses were identified subsequent to calling upon the Appellants to enumerate the clauses which would be of public interest, and thereafter weighing the PA's objections *vis-à-vis* their applicability to said clauses. The Commission proceeded by assessing the clauses, the release of which the Appellants submitted would be in the public interest, against the objections raised by the PA. The Appellant in 1114/2019, in particular, had submitted a detailed list of clauses which would be of public interest.

When the Commission released six clauses (in full/partially) of the Tripartite Agreement on 29.09.2021, it based its decision on three grounds, *viz.*, the severability of information under Section 6, the 2016 Tripartite Agreement being largely similar to the 2014 Agreement which has been released consequent to litigation, and the public interest.

(i) Severability

From the outset of this Appeal, the *modus operandi* of the Commission was to call upon the PA to distinguish the clauses which it was opposed to releasing, and assess such clauses against those which the Appellants insisted on releasing. The PA, on three occasions in December 2019, February 2021 and July 2021, produced letters to indicate the ongoing aspects of the Port City project, the clauses relating to which cannot be released. However, as succinctly pointed out by the Commission, there was never a clause-by-clause contestation between the parties, due to the persistent failure of the PA to enumerate the specific clauses which it was not amenable to release. This has also been the approach taken by the Commission in previous decisions involving Agreements.¹²

Section 6 of the RTI Act states that,

“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

12. See *Airline Pilots Guild of Sri Lanka v Sri Lankan Airlines Ltd* RTIC Appeal (In-Person)/99/2017 dated 12.06.2018.

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.”

Therefore, the manner in which the Commission applied this Section to redact information in terms of Section 6, was to assess the PA's objections against the Appellants' submissions on clauses that would serve the public interest upon release.

(ii) Provisions of the 2014 Agreement reproduced in the 2016 Tripartite Agreement

Another consideration that weighed in heavily on the Commission's decision to release the six clauses, was the release of the 2014 Agreement, signed between the Ports Authority of Sri Lanka and the Project Company. The 2014 Agreement was released subsequent to litigation. The Commission exercised its powers in terms of Section 15 (c) to call for the 2016 Tripartite Agreement under confidential cover for its perusal. The 2014 Agreement was handed over by the Appellant in 1114/2019, who litigated in Court and obtained the same by order of Court. This approach had earlier been followed in *T. Nadesan v Office of the Cabinet of Ministers Order*.¹³

Three of the six clauses were identical between the two Agreements. Out of the three remaining clauses which were released, two pertained to the allocation of land between the Sri Lankan Government and the Project Company, and one pertained to the compensation paid to fishermen. The release of these three remaining clauses were premised on the public interest and the assent of the PA to the release of these clauses.

The Commission's approach in releasing this information was to proceed by way of comparison of both Agreements, clause-by-clause, ascertaining the position of the PA thereto.

Concluding Comments

Reflecting on the above, it must be kept in mind that when the Government of Sri Lanka, State agencies or State functionaries enter into contractual

13. RTIC Appeal/216/2018, dated 02.04.2019.

agreements with private entities, the State party cannot act as though it were a private citizen or private entity entering into contracts. When the State enters into contracts with private entities, the nature of the State, its agents or functionaries does not change in essence. The State remains the repository of public trust, whether it is discharging its statutory obligations or entering into private contracts. The State cannot act as a statutory body in executing its public functions, and then act as a private entity when entering into contractual agreements. In other words, the State must act in the interest of the public, when entering into such contracts.

When the Sri Lankan State enters into a contractual agreement, it does so on behalf of the people of Sri Lanka, and not in its own self-interest. The foremost contract that the State must be mindful of when entering into contractual arrangements, is that of the social contract it has with the people of Sri Lanka. A State cannot enter into a contract which it considers beneficial when the people such State represents could be adversely affected by the contract. Such a contract entered into in the public interest must be available for the people of Sri Lanka to peruse.

There are instances where information provided by Third-Parties to such State agencies must be legitimately protected, and the RTI Act gives due recognition to such grounds. However, the same cannot be said of an investment project of this magnitude entered into by two functionaries of the State of Sri Lanka with a locally incorporated subsidiary of a foreign company, regarding which distinct public concerns had been raised on the basis that due procedure had not been followed and that the negotiations, as well as the Agreement itself, were shrouded in secrecy. There is an unmistakable public interest in the Agreement entered into and the Port City project itself was promoted by its proponents as an investment undertaken in the interest of the public.

Consequently, the stance taken by the Commission in extracting and releasing information beneficial to the public interest as contained in the relevant Order is a stance that may be useful to follow in other contested appeals as well.

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An act to provide for the right of access to information; to specify grounds on which access may be denied; to establish the right to information commission; to appoint information officers; to set out the procedure and for matters connected therewith or incidental thereto.

Preamble

WHEREAS the Constitution guarantees the right of access to information in Article 14A thereof and there exists a need to foster a culture of transparency and accountability in Public Authorities by giving effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in public life through combating corruption and promoting accountability and good governance.

BE it therefore enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:-

Short Title

1. (1) This Act may be cited as the Right to Information Act, No. 12 of 2016.

PART I

APPLICATION OF THE PROVISIONS OF THE ACT

3. (1) Subject to the provisions of Section 5 of this Act, every citizen shall have a right of access to information which is in the possession, custody or control of a Public Authority.
(2) The provisions of this Act, shall not be in derogation of the powers, privileges and practices of Parliament.

4. The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.

PART II

DENIAL OF ACCESS TO INFORMATION

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;
 - (b) disclosure of such information—
 - (i) would undermine the defence of the State or its territorial integrity or national security;
 - (ii) would be or is likely to be seriously prejudicial to Sri Lanka's relations with any State, or in relation to international agreements or obligations under international law, where such information was given by or obtained in confidence;
 - (c) the disclosure of such information would cause serious prejudice to the economy of Sri Lanka by disclosing prematurely decisions to change or continue government economic or financial policies relating to—
 - (i) exchange rates or the control of overseas exchange transactions;
 - (ii) the regulation of banking or credit;
 - (iii) taxation;
 - (iv) the stability, control and adjustment of prices of goods and services, rents and other costs and rates of wages, salaries and other income; or
 - (v) the entering into of overseas trade agreements;

- (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;
- (e) the information could lead to the disclosure of any medical records relating to any person, unless such person has consented in writing to such disclosure;
- (f) the information consist 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;
- (g) the information is required to be kept confidential by reason of the existence of a fiduciary relationship;
- (h) the disclosure of such information would-
 - (i) cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders; or
 - (ii) expose the identity of a confidential source of information in relation to law enforcement or national security, to be ascertained;
- (i) 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;
- (j) the disclosure of such information would be in contempt of court or prejudicial to the maintenance of the authority and impartiality of the judiciary;
- (k) the disclosure of such information would infringe the privileges of Parliament or of a Provincial Council as provided by Law;
- (l) disclosure of the information would harm the integrity of an examination being conducted by the Department of Examination or a Higher Educational Institution;

- (m) the information is of a cabinet memorandum in relation to which a decision has not been taken; or
 - (n) the information relates to an election conducted by the Commissioner of Elections which is required by the relevant election laws to be kept confidential.
- (2) Notwithstanding the provisions of subsection (1), a request for information shall not be refused on any of the grounds referred to therein, other than the grounds referred to in paragraphs (a), (b), (d), (e), (f), (g), (h) and (j) of that subsection, if the information requested for is over ten years old.
 - (3) Any information relating to any overseas trade agreement referred to in subsection (1) (c) (v) of this Section, where the negotiations have not concluded even after a lapse of ten years shall not be disclosed.
 - (4) Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.
 - (5) An Information Officer may seek the advice of the Commission, with regard to an issue connected with the grant of access to any information which is exempted from being disclosed under subsection (1), and the Commission may as expeditiously as possible and in any event give its advice within fourteen days.
- 6. 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.

PART III

DUTIES OF MINISTERS AND PUBLIC AUTHORITIES

- 7. (1) It shall be the duty of every Public Authority to maintain all its records duly catalogued and indexed in such form as is consistent with its operational requirements which would facilitate the right of access to information as provided for in this Act.

- (2) In discharging its obligations under subsection (1), every Public Authority shall comply with any direction given by the Commission under Section 14(h)¹.
- (3) All records being maintained by every Public Authority, shall be preserved—
 - (a) in the case of those records already in existence on the date of coming into operation of this Act, for a period of not less than ten years from the date of coming into operation of this Act; and
 - (b) in the case of new records which are created after the date of coming into operation of this Act, for a period of not less than twelve years from the date on which such record is created.
- (4) No record or information which is the subject matter of a request made under this Act, shall be destroyed during the pendency of such request or any appeal or judicial proceeding relating to such request.
- (5) Notwithstanding the provisions of subsection (2), every Public Authority shall endeavor to preserve all its records in electronic format within a reasonable time, subject to the availability of resources.

PART 1V

ESTABLISHMENT OF THE RIGHT TO INFORMATION COMMISSION

15. For the purpose of performing its duties and discharging of its functions under this Act, the Commission shall have the power—
 - (a) to hold inquiries and require any person to appear before it;
 - (b) to examine such person under oath or affirmation and require such person where necessary to produce any information which is in that person's possession, provided that the information which is exempted from disclosure under Section 5 shall be examined in confidence;
 - (c) to inspect any information held by a Public Authority, including any information denied by a Public Authority under the provisions of this Act;
 - (d) to direct a Public Authority to provide information, in a particular form;

1. Section 14 (h), "The duties and functions of the Commission shall be, to issue guidelines for the proper record management for Public Authorities."

- (e) to direct a Public Authority to publish any information withheld by a Public Authority from the public, subject to the provisions of Section 5;
- (f) to hear and determine any appeals made to it by any aggrieved person under Section 32; and
- (g) to direct a Public Authority or any relevant Information Officer of the authority to reimburse fees charged from a citizen due to any information requested for not been provided in time.

PART V

APPOINTMENT OF INFORMATION OFFICERS AND PROCEDURE FOR GAINING ACCESS TO INFORMATION

23. (1)

- (a) Every Public Authority shall for the purpose of giving effect to the provisions of this Act, appoint, within three months of the date of coming into operation of this Act, one or more officers as Information Officers of such Public Authority and a Designated Officer to hear appeals.
 - (b) Until such time that an Information Officer is appointed under paragraph (a) the Head or Chief Executive Officer of the Public Authority shall be deemed to be the Information Officer of such Public Authority, for the purposes of this Act.
- (2) Every Information Officer shall deal with requests for information made to the Public Authority of which he or she has been appointed its Information Officer, and render all necessary assistance to any citizen making such request to obtain the information.
- (3) The Information Officer may seek the assistance of any other officer as he or she may consider necessary, for the proper discharge of the duty imposed on him under this Act, and where assistance is sought from any such officer, it shall be the duty of such officer to provide the required assistance.

24. (1) Any citizen who is desirous of obtaining any information under this Act shall make a request in writing to the appropriate Information Officer, specifying the particulars of the information requested for:

Provided that where any citizen making a request under this subsection is unable due to any reason to make such request in writing, such citizen shall be entitled to make the request orally and it shall be the duty of the appropriate Information Officer to reduce such request to writing on behalf of the citizen.

- (2) Where a citizen –
- (a) wishes to make a request to a Public Authority; or
 - (b) has made a request to a Public Authority which does not comply with the requirements of this Act, the Information Officer concerned shall take all necessary steps to assist the citizen, free of charge, to make the request in a manner that complies with this Act.
- (3) On receipt of a request, an Information Officer shall immediately provide a written acknowledgement of the request to the citizen.
- (4) Where an Information Officer is able to provide an immediate response to a citizen making a request and such response is to the satisfaction of the requester, the Information Officer shall make and retain a record of the request and the response thereto.
- (5) A citizen making a request for information shall:–
- (a) provide such details concerning the information requested as is reasonably necessary to enable the Information Officer to identify the information;
 - (b) identify the nature of the form and language in which the citizen prefers access;
 - (c) where the citizen making the request believes that the information is necessary to safeguard the life or liberty of a person, include a statement to that effect, including the basis for that belief;
- and
- (d) not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him or her.

(6) For the purpose of this Section –

“writing” includes writing done through electronic means; and “appropriate Information Officer” means the Information Officer appointed to the Public Authority from which the information is being requested for.

25. (1) An Information Officer shall, as expeditiously as possible and in any case within fourteen working days of the receipt of a request under Section 24, make a decision either to provide the information requested for on the payment of a fee determined in accordance with the fee schedule referred to in Section 14(e)² or to reject the request on any one or more of the grounds referred to in Section 5 of this Act, and shall forthwith communicate such decision to the citizen who made the request.
- (2) Where a decision is made to provide the information requested for, access to such information shall be granted within fourteen days of arriving at such decision.
- (3) Where the request for information concerns the life and personal liberty of the citizen, the response to it shall be made within forty-eight hours of the receipt of the request.
- (4) Notwithstanding the requirement made for the payment of a fee under subsection (1), the Commission may specify the circumstances in which information may be provided by an Information Officer, without the payment of a fee.
- (5) The period of fourteen days referred to in subsection (2) for providing access to information may be extended for a further period of not more than twenty one days where-
- (a) the request is for a large number of records and providing the information within fourteen days would unreasonably interfere with the activities of the Public Authority concerned; or
- (b) the request requires a search for records in, or collection of records from, an office of the Public Authority not situated in the same city, town or location as the office of the Information Officer that cannot reasonably be completed within the fourteen days.

2. Section 14 (e), “The duties and functions of the Commission shall be, prescribe the fee Schedule based on the principle of proactive disclosure, in regard to providing information”

- (6) Where a period for providing information is to be extended for any of the circumstances referred to in subsection (5), the Information Officer shall, as soon as reasonably possible, but in any case within fourteen days, notify the citizen concerned of such fact giving the following reasons:-
- (a) the period of the extension; and
 - (b) reasons for the extension.
- (7) A citizen who is dissatisfied with the reasons given under subsection (6) may lodge an appeal with the Designated Officer.
26. (1) Every Public Authority shall display in a conspicuous place within the official premises and on a website of such public Authority if any, a notice specifying-
- (a) contact details of the Commission and the members of the Commission;
 - (b) contact details of the Information Officer;
 - (c) contact details of the Designated Officer;
 - (d) fees to be charged for obtaining any information from such public Authority.
- (2) The fee referred to in subsection (1)(d), shall be determined in accordance with the fee scheduled formulated by the Commission under Section 14(e)³.
27. (1) Where decision has been made to grant a request for information, such information shall be provided in the form in which it is requested for, unless the Information Officer is of the view that providing the information in the form requested for would not be detrimental to the safety or preservation of the relevant document or record in respect of which the request was made.
- (2) Where an Information Officer is unable to provide the information in the manner requested for, it shall be the duty of such officer to consult the citizen and render all possible assistance to the citizen to determine an appropriate alternative means of providing access to the information and to facilitate compliance with such request.

3. (n 2)

- (3) Subject to the provisions of subsection (1), a citizen, whose request for information has been granted, is entitled to:-
- (a) inspect relevant work, documents, records;
 - (b) take notes, extracts or certified copies of documents or records;
 - (c) take certified samples of material;
 - (d) obtain information in the form of diskettes, floppies, tapes, video cassettes or any other electronic mode or through printouts where such information is stored in a computer or in any other device.
28. Where a request for information is refused by an Information Officer, such officer shall specify the following information in the communication to be sent under Section 25(1), to the citizen who made the request-
- (a) the grounds on which such request is refused; and
 - (b) the period within which and the person to whom an appeal against such refusal may be preferred under Section 32 of this Act.
29. (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.

30. No liability, whether civil or criminal, shall attach to any Public Authority or any Information Officer or any other officer of such Public Authority, for anything which in good faith is done by such officer in the performance or exercise of any function or power imposed or assigned to such officer under this Act.

PART VI

APPEALS AGAINST REJECTIONS

31. (1) Any citizen who is aggrieved as a result of—
- (a) refusing a request made for information;
 - (b) refusing access to the information on the ground that such information is exempted from being granted under Section 5;
 - (c) non- compliance with time frames specified by this Act;
 - (d) granting of incomplete, misleading or false information;
 - (e) charging an excessive fees;
 - (f) the refusal of the Information Officer to provide information in the form requested; or
 - (g) the citizen requesting having reasonable grounds to believe that information has been deformed, destroyed or misplaced to prevent such citizen from having access to the information, may, prefer an appeal to the Designated Officer within fourteen days of the refusal, act or date of becoming aware of the grounds on which the appeal is sought to be made, as the case may be:

Provided however, that the Designated Officer may admit the appeal after the expiry of the period of fourteen days if he or she is satisfied that the appellant was prevented by a reason beyond his or her control from filing the appeal in time.

- (2) The Designated Officer shall issue a receipt on the acceptance of the appeal, to the citizen making the appeal, and in any case within three working days.
 - (3) The decision on any appeal preferred under subsection (1), shall be made by the Designated Officer within three weeks of the receipt of the appeal and shall include the reasons for the said decision including specific grounds for the same.
 - (4) The right of a citizen to prefer an appeal under subsection (1) shall be without prejudice to his or her right to make an application to the Commission.
 - (5) The Designated Officer may where reasonable cause is given for failure to submit an appeal within a period specified by subsection (1) by the citizen making such an appeal may at his discretion hear the appeal notwithstanding such delay.
32. (1) Any citizen aggrieved by:-
- (a) the decision made in respect of an appeal under Section 31(1), may within two months of the communication of such decision; or
 - (b) the failure to obtain a decision on any appeal made within the time specified for giving the same under Section 31(3), may within two months of the expiry of the period so specified, may appeal against that decision or the failure, to the Commission and the Commission may within thirty days of the receipt of such appeal affirm, vary or reverse the decision appealed against and forward the request back to the Information Officer concerned for necessary action.
 - (2) The Commission may admit the appeal after the expiry of the period of two months if the Commission is satisfied that the appellant was prevented by a reason beyond his or her control from filing the appeal in time.
 - (3) The Commission shall give reasons for its decisions in writing, to the appellant, the Information Officer and the Public Authority concerned.
 - (4) On appeal, the burden of proof shall be on the Public Authority to show that it acted in compliance with this Act in processing a request.
33. Where the aggrieved party is unable due to any reason to make an appeal under Section 31 or Section 32, as the case may be, such appeal may be

made by a person duly authorized in writing by the aggrieved party to prefer the same.

34. (1) A citizen or Public Authority who is aggrieved by the decision of the Commission made under Section 32, may appeal against such decision to the Court of Appeal within one month of the date on which such decision was communicated to such citizen or Public Authority.
- (2) Until rules are made under Article 136 of the Constitution pertaining to appeals under this Section, the rules made under that Article pertaining to an application by way of revision to the Court of Appeal, shall apply in respect of every appeal made under subsection (1) of this Section.

PART VII

GENERAL

35. Every officer in any Public Authority giving a decision which affects any person in any way, shall be required on request made in that behalf by the person concerned, to disclose to that person in writing the reasons for arriving at such decision.
36. Nothing in this Act is intended to prevent or discourage information holders from publishing or giving access to information or prevent any person from seeking and obtaining information, which may be provided in due compliance with the law.
38. (1) Where—
- (a) any Information Officer willfully -
 - (i) refuses to receive an application for information from any citizen;
 - (ii) refuses a request made for information, without giving reasons for such refusal;
 - (iii) stipulates excessive fees in breach of the fee Schedule referred to in Section 14 (e)⁴;
 - (iv) otherwise fails to process a request in accordance with the provisions of this Act;

or

4. (n 2)

- (b) any Designated Officer willfully –
 - (i) under Section 31 refuses an appeal, made on any ground other than a ground specified in Section 5 of this Act;
 - (ii) failed without any reasonable cause to make a decision on an appeal, within the time specified under Section 31(3) for making such decision, the Commission shall, bring the matter to the notice of the appropriate disciplinary authority.
 - (2) The relevant disciplinary authority shall inform the Commission of the steps taken in respect of any matter brought to the notice of such disciplinary authority within a period of one month.
39. (1) Every person who–
- (a) deliberately obstructs the provision of information or intentionally provides incorrect, incomplete or inaccurate information;
 - (b) destroys, invalidates, alters or totally or partially conceal information under his or her custody, or to which he or she has access to or knowledge of due to the exercise of his or her employment in such Public Authority;
 - (c) fails or refuses to appear before the Commission when requested to do so by the Commission;
 - (d) appears before the Commission, and fails or refuses to be examined by the Commission or to produce any information which is in that persons possession or power or deliberately provides false information under oath or affirmation;
 - (e) fails or refuses to comply with or give effect to a decision of the Commission;
 - (f) resists or obstructs the Commission or any officer or other employee of the Commission, in the exercise of any power conferred on the Commission or such officer or employee, by this Act;
 - (g) discloses any information in contravention of the provisions of Section 12(7)⁵ of this Act, commits an offence under this Act and shall on conviction after summary trial by a Magistrate be liable

5. Section 12 (7), “A member of the Commission shall not disclose any information that cannot be disclosed under the provisions of this Act.”

to a fine not exceeding fifty thousand rupees or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

- (2) Any officer whose assistance was sought for by an Information Officer under Section 23(3) and who fails without reasonable cause to provide such assistance, shall commit an offence under this Act, and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding ten thousand rupees.
- (3) A fine imposed for the Commission of an offence referred to in subsection (1) or (2) of this Section, shall be in addition to and not in derogation of any disciplinary action that may be taken against such officer by the relevant authority empowered to do so.
- (4) A prosecution under this Act shall be instituted by the Commission.

43. In this Act, unless the context otherwise requires—

“citizen” includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens;

“Designated Officer” means a Designated Officer appointed under Section 23 of this Act;

“Higher Educational Institution” means a University, Campus or University College established or deemed to be established or made by the Universities Act, No. 16 of 1978 or acknowledged by the University Grants Commission or established under the provisions of any other Act;

“information” includes any material which is recorded in, in any form including records, documents, memos, emails, opinions, advices, press releases, circulars, orders, log books, contracts, reports, papers, samples, models, correspondence, memorandum, draft legislation, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound recording, video tape, machine readable record, computer records and other documentary material, regardless of its physical form or character and any copy thereof;

“Information Officer” means an Information Officer appointed under Section 23 of this Act;

“local authority” means a Municipal Council, Urban Council or a Pradeshiya Sabha and includes any authority created or established by or under any law to exercise, perform and discharge powers, duties and functions corresponding or similar to the powers, duties and functions exercised, performed or discharged by any such Council or Sabha;

“non governmental organisation” means any organization formed by a group of persons on a voluntary basis and receiving funds directly or indirectly from the Government or international organisations and is of a non governmental nature;

“Public Authority” means –

- (a) a Ministry of the Government;
- (b) any body or office created or established by or under the Constitution, any written law, other than the Companies Act No. 7 of 2007, except to the extent specified in paragraph (e), or a statute of a Provincial Council;
- (c) a Government Department;
- (d) a public corporation;
- (e) a company incorporated under the Companies Act, No. 7 of 2007, in which the State, or a public corporation or the State and a public corporation together hold twenty five per centum or more of the shares or otherwise has a controlling interest;
- (f) a local authority;
- (g) a private entity or organisation which is carrying out a statutory or public function or service, under a contract, a partnership, an agreement or a license from the government or its agencies or from a local body, but only to the extent of activities covered by that statutory or public function or service;
- (h) ny department or other authority or institution established or created by a Provincial Council;
- (i) non-governmental organisations that are substantially funded by the government or any department or other authority established or created by a Provincial Council or by a foreign government or

international organisation, rendering a service to the public in so far as the information sought relates to the service that is rendered to the public;

- (j) higher educational institutions including private universities and professional institutions which are established, recognised or licensed under any written law or funded, wholly or partly, by the State or a public corporation or any statutory body established or created by a statute of a Provincial Council;
- (k) private educational institutions including institutions offering vocational or technical education which are established, recognised or licensed under any written law or funded, wholly or partly, by the State or a public corporation or any statutory body established or created by a statute of a Provincial Council;
- (l) all courts, tribunals and institutions created and established for the administration of justice;

44. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

**The Regulations promulgated under the Right to Information Act, No. 12 of 2016, issued in Gazette No. 2004/66 on 02.03.2017 and the Rules of the Right to Information Commission (2017), can be viewed online at http://www.rticommission.lk/web/images/pdf/regulations-rti2004-66_E_feb.pdf*