The Right to Information Commission

N.Kodithuwakku,
No.99,
Subadrarama road,
Nugegoda.

-Appellant-

RTIC App/No : 476/2025

Vs.

Attorney General's
Department,
P.O.Box 502,
Colombo 12.

-Public Authority-

Before : 1. Mr. Dayaratne Lankapura - Chairman
.2Justice D.N Samarakoon (Rtd.) - Commissioner
.3Ms. Kishali Pinto-Jayawardena (Attorney-at-Law) - Commissioner
4. Mr. A.M Nahiya - Commissioner

Appearance : The Appellant is present.

The Public Authority is represented by Mr.Sanjeewa Dissanayake, Deputy Solicitor General

Written Submissions: The Appellant : - 19.06.2025, 14.07.2025

The Public Authority : - 02.07.2025

Dates of Hearing : 19.06.2025, 24.07.2025

Decided on : 25.02.2026

Decision of the Commission:

The International Federation of Journalists on 13th January 2009 published in their website an Editorial written by Mr. Lasantha Wickrematunga, Attorney at Law Editor "The Sunday Leader" newspaper which was published in that newspaper on 11th January 2009. By that time Mr. Wickrematunga was dead. According to that same website of IFJ Wickrematunga was killed in the outskirts of the City of Colombo, in broad daylight.

It was in the morning hours of Thursday 08th January 2009 Mr. Wickrematunga was killed on his way to work.

The Editorial on the following Sunday 11th January was one written by Wickrematunga himself. Having started that Editorial with the words "No other profession calls on its practitioners to lay down their lives for their art save the armed forces and, in Sri Lanka, journalism.." towards its end he quoted the poem composed by Nazi sympathiser who later turned against the Nazi government of Adolf Hitler and hence had been incarcerated from 1937 to 1945 German theologian, Martin Niem"ller that said

First they came for the Jews

and I did not speak out because I was not a

Jew.

Then they came for the Communists

and I did not speak out because I was not a

Communist.

Then they came for the trade unionists

and I did not speak out because I was not a

trade unionist.

Then they came for me

and there was no one left to speak out for me.

In the 16th year after the killing of Wickrematunge, in January 2025 a case in connection with the abduction of the driver of Mr. Wickrematunge connected to his assassination had not yet concluded. In that backdrop, the petitioner Mr. Nagananda Kodithuwakku wrote to the Attorney General on 24th February 2025 stating that

> "On 27th January 2025, you issued written instructions to the police to discharge three accused individuals namely … linked to the assassination of journalist Lasantha Wickrematunge. However, following significant public outcry, you have now reversed your stance through a subsequent directive dated 12th February 2025, instructing the police to disregard your previous decision.

This abrupt and contradictory change in your position raises serious concerns regarding your motives and the integrity of your decision-making process. It is evident that your actions have conferred an undue advantage upon the accused, amounting to a clear abuse of prosecutorial discretion. Such conduct falls within the definition of corruption in Section 70 of the Bribery Act, as it demonstrates an exercise of public authority to confer a favor to the accused that is arbitrary, improper, and inconsistent with the public interest.

……. Accordingly, you are requested to provide certified copies of both the 27th January 2025 and 12th February 2025 directives within 14 days from the date of receipt of this letter.

Please take notice that this' request is made pursuant to Article 14A of the Constitution read with Section 3, 23, and 24 of Right to Information Act No 12 of 2016…"

In the written submission that was filed in this appeal for the Department of the Attorney General dated 02nd July 2025, it is stated, that

(1) The Appellant by his letter dated 24th February 2025 sought certified copies of letters dated 27th January 2025 and 12th February 2025 issued from Attorney General's Department File Reference CR1/40/2020 which relates to advice given to the Magistrate of the Magistrate's Cour of Mount Lavinia case No. B 92/2009.
(2) The Information Officer by letter dated 05th March 2025 rejected the above request in terms of section 5(1)(f), 5(1)(g), 5(1)(h)(i) and 5(1)(h)(ii) of Act No. 12 of 2016.
(3) The Appellant made an appeal to the Designated Officer on 01st April 2025.
(4) It was rejected by the Designated Officer by letter dated 03rd April 2025 affirming the decision of the Information Officer.

Therefore what is to be decided now by this Commission in this appeal is

(i) Whether the Appellant has a right to obtain certified copies of either one or both of the above letters written by the Attorney General
(ii) Whether the provisions of any one or more of above sections of Act No. 12 of 2016 prevents that

Sections 5(1)(f) and 5(1)(g) of the Right to Information Act reads thus

"(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;.."

Sections 5(1)(h)(i) and 5(1)(h)(ii) of that Act reads thus

(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;…"

At a glance, it may appear that section 5(1)(f) directly applies to communications between the Attorney General or any officer assisting the Attorney General in the performance of his duties and a public authority. The Police and/or the Magistrate of the Magistrate's Court of Mount Lavinia in the above case No. B 92/2009 being such a public authority thus it may appear that on the provisions of that section alone the Appellant cannot obtain the information that he seeks.

But it is not so for the following reasons.

The main body of section 5(1)(f) does not relate only to the Attorney General.

It relates in the main to communications between a professional and a public authority to whom such professional provides services which is not permitted to be disclosed under any written law.

Hence the scope and the gamut of the section relate to

(a) Communications between a professional and a public authority

(b) to whom such professional provides services

(c) which is not permitted to be disclosed under any written law

The above is the main part or the core area of the sub section.

What is in (c) is of importance.

The communication must be one protected from disclosure under any written law.

The word "including" in the middle of the above section shows that the legislature intended to especially refer to the Attorney General and any communication between the Attorney General or any officer assisting the Attorney General in the performance of his duties and a public authority.

The word "including" shows two things

(1) that as it is accepted everywhere in interpretation the naming of the Attorney General is not exhaustive, that the section includes many other professionals, in fact any person who could be termed a professional and

(2) in as much as a communication between a professional and a public authority becomes protected from disclosure [according to this section] when it is not permitted to be disclosed under any written law, a communication

   (a) between the Attorney General and a public authority or

   (b) any officer assisting the Attorney General in the performance of his duties and a public authority

too becomes protected only when its disclosure is not permitted under any written law.

In regard to section 5(1)(f) the written submission for the Attorney General does not cite any written law which protects or prevents the disclosure of such communication, except three sections of the Evidence Ordinance.

That written submission has also broken that section into several parts. In respect of the part "which is not permitted to be disclosed under any written law" under footnote 05 it cites Rules 31 – 38 of the Supreme Court (conduct of an Etiquette for Attorneys at Law) Rules of 1988 published in the Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka No. 535/7 of 07.12.1988, Section 124, Sections 126(1), 126(2), Section 129 of the Evidence Ordinance No. 14 of 1895 and Paragraph 1.7 of Chapter XXXIII of the Establishments Code.

Apart from the above sections of the Evidence Ordinance the other references are not to any written law.

It is pertinent to examine those sections in the Evidence Ordinance.

> Official communications.
>
> 124. No public officer shall be compelled to disclose **communications made to him** in official confidence when he considers that the public interests would suffer by the disclosure.
>
> Professional communications. 126.
>
> (1) No advocate, proctor, or notary shall at any time be permitted, unless with his client's express consent, **to disclose any communication made to him** in the course and for the purpose of his employment as such advocate, proctor, or notary by or on behalf of his client, **or to state the contents or conditions of any document with which he has become acquainted** in the course and for the purpose of his professional employment, **or to disclose any advice given by him to his client** in the course of and for the purpose of such employment :
>
> Provided that nothing in this section shall protect from disclosure -
>
> > (a) any such communication made in furtherance of any illegal purpose;
> >
> > (b) any fact observed by any advocate, proctor, or notary in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.
>
> (2) It is immaterial whether the attention of such advocate, proctor, or notary was or was not directed to such fact by or on behalf of his client.
>
> Explanation
>
> The obligations stated in this section continues after the employment has ceased.

Illustrations

(a) A, a client says to B, a proctor, "I have committed forgery, and I wish you to defend me." As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, a proctor, "I wish to obtain possession of property by the use of a forged deed, on which I request you to sue". This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, a proctor, to defend him. In the course of the proceedings B observes that an entry has been made in A's account book charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Confidential communications with legal advisers.

129. No one shall be compelled **to disclose to the court any confidential communication which has taken place between him and his legal professional adviser**, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

None of the above sections of the Evidence Ordinance [*which is the same as that was enacted for India and regarded as the masterpiece of its maker Sir James Fitzjames Stephen, a prominent British legal reformer and member of the British Parliament; whose draft was preferred having rejected the one prepared by Sir Henry Maine as unsuitable for India*] refer specifically to the Attorney General.

Those sections refer to “a public officer” [section 124] “advocate, proctor or notary” [section 126] which in the present context would mean an Attorney at Law or a Notary Public and to any person [section 129]

Now section 5(1)(f) in its main part refers to a communication between a professional and a public authority.

What that sub section says is

> “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,..”

Hence there must be a “professional” and there must be a “public authority”. There must be a “communication” between them. It could be a communication the professional addresses to the public authority or vice versa.

The “professional” must be one that provides “services” to the public authority.

If a professional communicates to a public authority to which he does not provide a service, that communication is not covered by this sub section. Similarly, if a public authority communicates with a professional who does not provide a service to that public authority, that communication too is not covered by this sub section.

All the above conditions enumerated up to now, will not come within the purview of this sub section unless that communication is a one that is "not permitted to be disclosed under any written law".

The above are the basic tenets of this sub section in its main part or core area.

Now comes the other part of the sub section, which is separated from the main part or core area by the word "including".

This is a fringe area separated from the core area of the above sub section which refers to "any communication between the Attorney General or any officer assisting the Attorney General in the performance of his duties and a public authority".

The connecting word "including" signifies at least two things

(i) the specific reference to Attorney General and to his activities by himself or by any officer assisting him is not exhaustive

(ii) the part referred to above as the "fringe area" of the sub section that specifically relates to certain acts of the Attorney General also has a close affinity and thus governed by the main part or core area of the sub section

N. S. Bindra "Interpretation of Statutes" Thirteenth Edition LexisNexis (A division of RELX India Pvt Ltd) 2023 says at page 270

> "**'Including' is a term of extension. It imports addition. It adds to the subject matter already comprised in the definition**"

and cites AC Patel v Vishwanath, aIr 1954 Bom 204.

Just prior to that in the previous passage Bindra says

> "In **Calico Mills Ltd v State of Madhya Pradesh**, AIR 1961 MP 257, the petitioner claimed that section 2(b) of the Central provinces and Berar entertainments Duty act, 1936, that defined the expression 'entertainment' in an inclusive manner, did not apply to them as they were traders in fabrics and clothing. It argued that the expression could not be interpreted as widely as suggested by the State even with an inclusive definition. The Court agreed with the petitioner and held that the demand notice for duty issued on the petitioner was liable to be quashed. The Court expressed the following observation in regard to an inclusive definition:
>
> > **It is well-settled that the word 'include' is used in interpretation clauses; *where it is intended that while the term defined should retain its ordinary meaning*, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative**, and not exhaustive and when it is so used these words or phrases must be construed as comprehending, not only such thing as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. **Again, where a term is interpreted in a statute as 'including', *the comprehensive sense is not to be taken as strictly defining what the meaning of the word must be under all circumstances but merely as declaring what things should be comprehended* within the terms where the circumstances require that they should**.

The part Bindra refers to as "**the word 'include' is used in interpretation clauses; *where it is intended that while the term defined should retain its ordinary meaning*, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative"** means that

(i) ***term defined should retain its ordinary meaning***

Hence the reference to the communications between the Attorney General or any officer assisting him and a public authority will also have the same effect in law as the main part or the core area of the section. That is, that, there must be a communication between a professional and a public authority and it must be one that is not permitted by any written law to be disclosed.

(ii) ***the comprehensive sense is not to be taken as strictly defining what the meaning of the word must be under all circumstances but merely as declaring what things should be comprehended* within the terms where the circumstances require that they should**

Hence the part in the above section "**including any communication between the Attorney General or any officer assisting the Attorney General in the performance of his duties and a public authority**" does not mean what it would have ordinarily meant had not there been the main part or co area of the section. The meaning of the phrase stated in "bold" print in this passage [the fringe area of the section] must be taken as declaring something that should be comprehended within the terms and requirements of the main part or core area of the section.

The book "Legislation: Interpreting and Drafting Statutes, in Theory and Practice" by Jane C. Ginsburg and David S. Louk [dedicated to the memory of Ruth Barder Ginsburg[1]] University Casebook Series 2021 describes the basic rule of interpretation of the word "includes" in following terms at page 812.

> "The terms "means" and "includes" The basic distinction between these two terms is that "means" is exclusive while "includes" is not. If a definition says that "the term 'X' means A, B, and C", then X means only A, B, and C and cannot also mean D or E. If a definition says that "the term 'X' includes A, B, and C", then X must include A, B, and C, but it may also include D or E, or both. Thus, the phrase "includes, but is not limited to" is redundant. In fact, using it in some places out of an abundance of caution could cause a limitation to be read into places where it is not used".

The above also shows that the addition of the part referring to the Attorney General in section 5(1)(f) is only an extended unexhaustive description of the main part or the core area of that section.

It appears that by not observing the above facts, subsection 5(1)(f) has been misunderstood and misconstrued.

According to the breaking down of the above sub section to its component parts it appears that the subject matter of that sub section is a "communication".

The aforesaid sections of the Evidence Ordinance relied upon for the Attorney General [Sections 124, 126 and 129] comes within the Part CHAPTER XI "OF

[1] Joan Ruth Bader Ginsburg March 15, 1933 – September 18, 2020 was an American lawyer and jurist who served as an associate justice of the Supreme Court of the United States from 1993 until her death in 2020.

WITNESSES". The opening section of that Part, section 118 as per its "side note" is on "Who may testify" and section 120 is on "Competent witnesses". As per section 05 of the Evidence Ordinance, which says,

> "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others"

which could be regarded as the most important provision in that Ordinance, it is an Ordinance enacted to discern from every fact including irrelevant facts what could be classified as relevant only.

Hence it is a question whether those sections on the competence or otherwise of witnesses before courts or any tribunal, directly deal with the purview of sub section 5(1)(f) which has its subject matter communications between a professional and a public authority during the course of that professional providing a service.

For example section 124 of the Evidence Ordinance on which the Attorney General relies upon says "No public officer shall be compelled to disclose communications made to him in official confidence.." which is a matter of his or her competence or incompetence as a witness, before a tribunal that must assess, gauge and weigh his or her testimony. His competence or incompetence must be determined as per the directives contained in those provisions because the objective of the Evidence Ordinance as envisaged by its section 05 quoted above imposes a duty to discern what is relevant from what is irrelevant.

Therefore this Commission is of the view that the Evidence Ordinance is not a statute that directly come within the purview of sub section 5(1)(f) for the purposes of that sub section.

However subject to that will those sections relied upon for the Attorney General impose a negation on the disclosure of information the Appellant in this appeal seeks to obtain?

Section 124 is

> "No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure".

The officer referred to in section 124 has that "privilege" if he considers not to divulge the communication in the interest of the public.

It does not seem that the legislature intended a subjective test on the "public interest" here, in other words that officer's decision on that to be final and conclusive, for that would open an avenue to misuse the provision.

But in any event the Appellant in this appeal does not seek to obtain any communication made to the Attorney General in official confidence. The Appellants seeks to obtain a certified copy of a communication by the Attorney General not one made to him. Hence section 124 will not apply in any event.

Section 126 (1) is

> "(1) No advocate, proctor, or notary shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate,

> proctor, or notary by or on behalf of his client, or to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course of and for the purpose of such employment :…"

This section involves a lawyer and a client.

The initial part of the section is about any communication made to the lawyer.

As stated in regard to section 124 this appeal is not in regard to a communication made to the Attorney General.

Hence the initial part of section 126(1) will not apply.

What about the latter part which refers to "any advice given by him to his client"?

The written submissions of the Attorney General says that advice was given to the Magistrate of Mount Lavinia[2]. Can he be the client and the Attorney General the lawyer? Although there are several sections in the Code of Criminal Procedure Act No. 15 of 1979 where the Attorney General can direct the Magistrate to do or not to do something they never regard the latter as the client of the Attorney General. Whether it could be so regarded at any circumstance will be, as it appears to this Commission, has to be morefully considered in determining the applicability of sub section 5(1)(g) of the Right to Information Act.

There is a part in the middle of the above section too "or to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional employment".

But the letters of which the Appellant seeks copies are not of such a document but a document the "lawyer" created himself purporting to contain his own communication and this middle part of the section too would not apply.

Section 126(2) is an explanation of section 126(1)

Section 129 of the Evidence Ordinance says

> "No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others".

The position here is that no one is compelling anyone to disclose anything to the court.

As per the Attorney General's written submission itself the Attorney General has already "disclosed" [that is, communicated] the communication of which the Appellant seeks to obtain a copy to a Court. But that does not make the communication one comes within the purview of section 129 for section 129 covers "any confidential communication which has taken place between him and his legal professional adviser". Section 129 is relevant for a person who has been called or comes voluntarily as a witness for the question whether he could be compelled to

[2] Page 2 of the Written Submission, No. 3 under "Factual Position".

disclose “any confidential communication which has taken place between him and his legal professional adviser”.

This shows that section 129 is one that drafted and enacted to apply in an entirely different situation but not in the context of a “written law” referred to in sub section 5(1)(f) and also not in the situation in this appeal in which the Appellant seeks to obtain certified copies of Attorney General’s [a professional’s not of a “client’s] communications to the Police and/or the Magistrate’s Court of Mt. Lavinia.

It further shows the position of this Commission stated above that the above sections from Chapter XI “Of Witnesses” are not directly applicable for the question in this appeal under sub section 5(1)(f)

Prior to considering the next exception relied upon for the Attorney General [sub section 5(1)(g)] it is pertinent to note two cases of this Commission relied upon for the Attorney General in regard to sub section 5(1)(f)

One is W. K. Siribaddana vs. The Attorney General’s Department: RTIC Appeal No. 1705/2024 dated 05th February 2025.

It has been submitted that in the above appeal this Commission accepted that internal communications in the form of minutes, minute sheets and reports within the Attorney General’s department falls within the protection of section 5(1)(f) of the Right to Information Act.

The perusal of the above order shows that it was not exactly as described in the above passage referring to the submission for the Attorney General.

In the above appeal as per the appeal to this Commission the Magistrate of Kesbewa had convicted a defendant, a lady who was carrying on the business of a Spa and she had then [according to the Appellant in that appeal] had made an appeal to the High Court of Homagama in which that Appellant alleges that she submitted an affidavit containing false allegations. The Appellant who was of the view that a certain State Counsel who appeared in that appeal before the High Court derelicted his official duty in order to safeguard the above defendant, had made a complaint in that regard to the Attorney General and had sought to obtain under the provisions of the Right to Information Act the report of the investigation held by the Attorney General’s Department in respect of his complaint. The Attorney General’s department has refused to give information under section 5(1)(a) and section 5(1)(f)

The Commission as it was constituted then has agreed on 05th February 2025 that section 5(1)(f) applies.

As it appears the Commission then has not considered the provisions of sub section 5(1)(f) in its proper light that the part referring to the Attorney General is an extension of the core area of the section which requires a “written law” that does not permit the disclosure of the communications, but considered the part referring to the Attorney General as a stand-alone provision.

Furthermore the Commission in that appeal has, as it appears, stretched the meaning of a “public authority” referred to in that sub section. The reasoning had been as follows: At the very outset the Commission has said that although on the face of it, it appears as an internal communication of letters it is not. Therefore in any event the present statement made for the Attorney General in the written submission that this Commission [even as constituted on 05th February 2025]

accepted that internal communications [in whatever form] are covered by sub section 5(1)(f) is a wrong reading of that order. Having decided that it is not an internal communication, the Commission reasoned that, the complaint of the Appellant [in that case] was received by the Attorney General's Department as a public authority and then that public authority referred that complaint to a Junior Supervising State Counsel to obtain his information as to how that public authority should act on that complaint. Hence, it was reasoned, that the Junior Supervising State Counsel has provided his professional service to the public authority [his own Department] and sub section 5(1)(f) covers what that officer communicated to the Attorney General's Department.

With respect sub section 5(1)(f) does not envisage such an instance or such an unwarranted stretching of the meaning of a public authority to include the Attorney General advising himself.

Sub section 5(1)(f) in its extension after the word "including" takes the Attorney General or any officer assisting the Attorney General [which would include that Junior Supervising State Counsel] also as an officer exercising the power of the Attorney General on delegation and therefore the Attorney General himself on one hand and takes a public authority on the other. That sub section cannot be controverted to mean the Attorney General delegating his power to Junior Supervising State Counsel and totally abdicating his authority then to become the public authority referred to in that sub section.

Hence the above decision, with respect, is one made per incuriam. In any event the decisions of the Commission are not binding. The Commission in this appeal has explained its understanding of sub section 5(1)(f) which is contrary to the position in RTIC 1705/2024.

In the next appeal of this Commission relied upon for the Attorney General Ceylon Bank Employees' Union vs. Peoples' Bank RTIC 58/2018 it is stated in the written submissions that this Commission said

> "'Application of exemption under Section 5 (1) (f) of the Act - "professional privilege" it is reiterated that this Section does not automatically apply purely for the reason that documents are communicated between PA and an attorney. In accordance with the 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".

Despite not been an instance involving the Attorney General but an attorney, the above represents a correct view, that, the sub section "does not automatically apply purely for the reason that documents are communicated between PA and an attorney" and it is not in favour of the position of the Attorney General in the present appeal.

It must now be considered the objection under sub section 5(1)(g) which says

> "the information is required to be kept confidential by reason of the existence of a fiduciary relationship;.."

In paragraph 17 of the above written submission, without properly stating the source from which it is cited, however appears to be from another appeal that had been before this Commission, a passage on a general introduction of a fiduciary relationship has been given for the Attorney General.

It says

> ""here the citation of the exemption in Section 5(1) (g) is concerned, it bears emphasis that the traditional definition of 'fiduciary' is, a person who occupies a position of trust in relation to someone else, therefore requiring him/her to act for the latter's benefit within the scope of that relationship (P. D. Finn "Fiduciary Obligations" (1st Edition 1977) paragraph 465 – 466) Airline Pilots Guild of Sri Lanka vs. Sri Lankan Airlines Ltd RTIC Appeal (in person) 99/2017 dated 12th June 2018)

The question then is

(i) whether the Attorney General, the Public Prosecutor and the advisor of the state or the Government will be in the same position as any lawyer who advises his or her client or in other words

(ii) what alteration, if any, should there be in the position of the Attorney General or a Public Prosecutor in identifying who really is his "client"

The written submission for the Attorney General relying on the above quoted passage from Airline Pilots Guild of Sri Lanka vs. Sri Lankan Airlines Ltd RTIC Appeal (in person) 99/2017 reproduces the phrase

> "a person who occupies a position of trust in relation to someone else, therefore requiring him/her to act for the latter's benefit within the scope of that relationship.."

On whose benefit must the Attorney General act?

The written submission for the Attorney General cites the case **Land Reform Commission vs. Grand Central Limited 1981 [S. L. R.] Volume 1 page 250**.

That was a decision of 05 Judges of the Supreme Court of Sri Lanka including the incumbent Chief Justice on an appeal from the Court of Appeal which originated in the District Court of Colombo.

The above written submission cites a part of the "head note" of the above case from the law report. The "head note" is not a part of the judgment but prepared by the Editor of the law report and as it appears the part quoted in the written submission is made of unconnected parts of the judgment.

The question has been the right of the Attorney General to appear in private cases and the following part from that judgment is relevant.

> "The office of the Attorney-General is, as recognised by the Constitution, an exalted one. There is no doubt that there was a stage, many years ago, when **258** the Attorney-General engaged in private practice. This was the practice in England and was therefore adopted in this Country. The list of cases submitted by the Defendant ranging from1880 and ending in 1915 bear testimony to this. Since 1915 the Attorney General has not engaged in private practice. This has been the tradition built up over 60 years. No doubt it followed the English rule which was laid down by a Treasury Minute of June 29, 1894, forbidding the Attorney-General to engage in private practice and made at the instance of the then Prime Minister. This was a salutary rule in the interests of the administration of justice and justice itself. We have been informed that by a government fiat of 23rd July, 1980, the

Attorney-General and the Legal Officers of his Department have been granted permission to engage in private practice. But such arrangements between employer and employee cannot affect the issue if in fact there are legal constraints on the Attorney-General engaging in private practice.

Counsel for the Defendant readily and quite correctly conceded that there is such constraint in the field of criminal law and practice. **His powers in this field are vast. They extend even to quasi judicial functions. He is empowered to enter into and take over any criminal prosecution in the Island whether they be initiated by private plaint or by State Officer. He alone can enter a nolle prosequi in a criminal case**. I need not labour the point. The Attorney-General engaging in private practice in criminal cases is unthinkable.

What of the civil law? All actions by or against the State must be instituted by or against the Attorney-General (section 456 Civil Procedure Code Chapter 101). All process issued against the State must be served on the Attorney-General (section 457 Civil Procedure Code). He has the power to undertake the defence in actions against Ministers, Parliamentary Secretaries and Public Officers (section 463 Civil Procedure Code). Special powers are given to him to watch the interests of wards of Court such as persons of unsound mind (section 556(2), section 572(2), section 575(1)) and manors (section 589, section 591, section 592(2) Civil . Procedure Code). **He is the Chief Legal Officer and Adviser to the State and thereby to the Sovereign and is in that sense an officer of the public**. ***He is the watch-dog of public rights and can intervene in private litigation if public rights are in any way to be affected***. He is vested with power in respect of all public charitable Trusts and actions alleging breach of any charitable Trust can only be brought by the Attorney-General or by others with his permission (section 101 of Trust Ordinance Chapter 87). He it is who advises the State and the Speaker on every Bill that is to be presented to Parliament".

The 05 Judge Bench of the Supreme Court on 16th September 1981 said

> "**He is the Chief Legal Officer and Adviser to the State and thereby to the Sovereign... *He is the watch-dog of public rights..*"**

In his book "The Sleeping Sovereign, the invention of modern democracy" Richard Tuck of Harvard University starts the first Chapter on Jean Bodin in the following words

> "In his eighth Letter from the Mountain, written in1764 in defence of his Social Contract and Emile, against attacks made on them in Geneva, Rousseau declared that 'Up to the present the democratic Constitution has been poorly examined. All those who have spoken about it either did not know it, or took too little interest in it, or had an interest in presenting it in a false light. **None of them have sufficiently distinguished the Sovereign from the Government'**[3].

[3] Letter to Beaumont, Letters Written from the Mountain, and Related Writings (Hanover, NH: University Press of New England, 2001), p. 257.

"**Chief Legal Officer and Adviser to the State and thereby to the Sovereign..**"

According to Rousseau's eighth letter to Beaumont, the Sovereign is not the Government.

Under the 1978 Constitution of the Republic of Sri Lanka the "Sovereign" is the People.

Hence whoever lawyer may be having whatever fiduciary relationship with his or her client, the Attorney General's fiduciary relationship is with his "client" the Sovereign, the People of the Republic.

For the same reasons referred to above, as to the difference of the position and responsibilities of the Attorney General from an ordinary lawyer, the regulations pertaining to the Conduct and Etiquette of Attorneys at Law etc referred to in the written submission submitted for the Attorney General has no application, in addition to those regulations not coming within the term "any written law" in section 5(1)(f) which was already referred to.

It shall be pertinent at this stage to examine the English case of **Attorney General v Guardian Newspapers Ltd and others; and related appeals CHANCERY DIVISION COURT OF APPEAL, CIVIL DIVISION [1987] 3 All ER 316, [1987] 1 WLR 1248 and to the decision of the HOUSE OF LORDS**.

The facts of that case as per the summary was as follows.

> "W, a former member of the British security service, who had had access to highly classified and sensitive information, proposed to publish his memoirs in Australia but the Attorney General, claiming that in doing so W would be committing flagrant breaches of his duties of secrecy and confidentiality owed to the Crown, obtained an interim injunction in Australia restraining him from publishing there. In June 1986 two national newspapers, the Guardian and the Observer, published an outline of certain allegations made by W in the manuscript of his memoirs. **On 11 July the Attorney General obtained interlocutory injunctions in the Chancery Division restraining them from disclosing or publishing any information obtained by W in his capacity as a member of the British security service. The Attorney General intended to seek final injunctions in the same or similar terms, on the grounds that W owed to the Crown a life-long duty of confidentiality and non-disclosure relating to his work in the security service and would be in breach of that duty if he published his memoirs, that the newspapers were under the same duty and that publication would do great harm to the security service**. The interlocutory injunctions did, however, except publication of material which was disclosed in open court in the Australian proceedings. In April 1987 three more newspapers, which had not been parties to the injunction proceedings, published further material derived or taken from the manuscript of W's memoirs. The Attorney General subsequently brought proceedings for criminal contempt against those newspapers. In July W's memoirs were published in the United States and became freely available there. Under United States law it was not possible for the Attorney General to obtain an injunction restraining publication. W's book was not disseminated commercially in the United Kingdom but no attempt was made to ban its importation and individual copies could be obtained in the United Kingdom. At the same time another national newspaper, the Sunday Times,

published substantial extracts from W's book. Because of the changed circumstances arising from the publication in the United States, the availability in the United Kingdom of W's book and the disclosures in other newspapers, the Guardian and the Observer applied to have the interlocutory injunctions discharged. Meanwhile the Attorney General applied to commit the Sunday Times for contempt. The applications by the Guardian, the Observer and the Attorney General were heard together by the Vice-Chancellor who discharged the interlocutory injunctions made against the Guardian and the Observer and dismissed the application to commit the Sunday Times. On appeal by the Attorney General the Court of Appeal reversed the Vice-Chancellor's decision and reimposed the injunctions with variations. The newspapers appealed to the House of Lords. The Attorney General cross-appealed against the variation of the injunctions.

Held (Lord Bridge and Lord Oliver dissenting) - The appeals would be dismissed and the cross-appeals allowed.."

Although the facts differ from those in the present appeal and that the Court of Appeal and the House of Lords decided to maintain interlocutory injunctions until the matter is disposed by trial, what Sir Nicolas Brown – Wilkinson V. C. had pointed out as to the duty of the Attorney General is material for this appeal. It was said

"**There remains what counsel for the Attorney General urges is the persisting public interest**, namely to prevent general dissemination of the contents of this book through the press within the United Kingdom. By discouraging general dissemination those who are tempted to follow Mr Wright's example in the future and write their memoirs hot from the security service will not find it such a satisfactory or profitable business. I think there is force in that. I think that the ability to restrain the unauthorised use of confidential memoirs by those who do not mind abusing their confidence, so as to discourage others from doing it, is a real point. I do not think it can just be swept aside".

Hence the majority of the House accepted that the Attorney General in seeking those interlocutory injunctions was acting in the interest of the public.

As the Chief Justice who led the 05 Judge Bench of the Supreme Court in 1981 in the Grand Central Limited case very correctly said being the Chief Legal Officer and Advisor of the Sovereign, the Attorney General cannot have any other fiduciary relationship than what he has with the People. This would not mean that he has to divulge everything at every stage to People. As the Chief Justice himself also very correctly said in 1981 the powers of the Attorney General in criminal prosecutions "extend even to quasi judicial functions".

But in as much as the English Attorney General in **Attorney General v Guardian Newspapers Ltd and others ; and related appeals** had a right to obtain an interlocutory injunction to prevent harm to the public by the disclosure of highly classified information of security services by an ex security service personnel, the Sri Lankan Attorney General is having a duty to divulge not only the letter he sent in regard to "a nolle prosequi" in respect of three accused in the prosecution of a case which has a bearing to the assassination of an Editor of a Sunday News Paper but the letter for reversing his direction.

In the English case of **Attorney General v Guardian Newspapers Ltd and others ; and related appeals** the Court of Appeal as well as the majority of the House permitted the interlocutory injunctions to subsist for those courts considered that the disclosure of highly classified information of security services can cause harm to the public of the United Kingdom.

But on the contrary, in the present appeal, when three persons found suitable to be prosecuted before a court of law in proceedings linked to the murder of Mr. Wickremathunge, after 16 years from the date of the murder were directed to be released and more so, within a short period of time it was again directed to go back to the original position of charging them, it is in the interest of the Sovereign People of this country that they should know the form and the content of those directions. The same element of public interest the Attorney General must take into account, as referred to in that English Case demands here of the disclosure of the above actions of the Attorney General.

It is more so for the murder took place 16 years prior to 2025 in 2009 and as evident by the case No. B 92/2009 criminal proceedings were instituted in that year, but has not been concluded.

In another English case **Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others (On Appeal From a Divisional Court of The Queens Bench Division) ON 28 OCTOBER 1999** Lord Styen reproduced the following passage from the judgment of the Chief Justice, considering the judgment in the Divisional Court of the same matter which was decided by Lord Bingham of Cornhill, C.J., sitting with Laws L.J. and Sullivan J., where the Chief Justice had referred to the case of *Reg. v. Secretary of State for the Home Department, Ex parte Launder* [1997] 1 W.L.R. 839 at 867 decided by Lord Hope of Craighead (given with the agreement the other members of the House)

> “"Where the grant of leave to move for judicial review would delay or obstruct the conduct of criminal proceedings which ought, in the public interest, to be resolved with all appropriate expedition,..”

In the circumstances of this appeal there will be no harm to the public or the prosecution of criminal proceedings [as it will be referred to again hereafter] in releasing the copies of above letters by the Attorney General as well as divulging his reasons for his direction to discharge certain accused and then to reverse that decision, as the definition of an “information” under section 43 of the Right to Information Act includes “an opinion” too.

From the discussion on previous part regarding sub section 5(1)(f) in regard to section 126(1) of the Evidence Ordinance in which this Commission observed that there are three parts, the third part, “or to disclose any advice given by him to his client in the course of and for the purpose of such employment” was left to be morefully considered with the objection based on section 5(1)(g)

According to the 05 Judge Bench decision of the Supreme Court in 1981 referred to above and the reference that it is in the “public interest, to be resolved with all appropriate expedition,..” in regard to criminal prosecutions which the House of Lords observed in **Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others October 1999,** the Attorney General in this matter has advised the Sovereign, the People and there does not arise any other fiduciary relationship or any other obstacle by way of a written law to prevent the disclosure of the form and content of that advise.

Furthermore, whereas there is no public harm or impediment for the criminal prosecution that would be caused by the release of such information, the Commission as well as everyone concerned must be mindful of the provisions of section 5(4) of the Right to Information Act too which says

> "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 above is in addition to what was earlier stated in this Order for non-applicability of the provisions in sub sections 5(1)(f) and 5(1)(g)

It is therefore clear that the provisions of sub section 5(1)(h)(i) and 5(1)(h)(ii) which is also relied for the Attorney General would not apply.

"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;…."

In fact in regard to "apprehension or prosecution of offenders" what came as a bar for prosecution of three of the accused was the first letter of the Attorney General in question and the public and as a member of the public the Appellant has a right under Article 14A of the Constitution read with the provisions of the Right to Information Act No. 12 of 2016 discussed above to know the reason for that as well as the reason to reverse the same.

That is what the Appellant had referred to in his original request for information itself that "this abrupt and contradictory change in your position raises serious concerns regarding your motives and the integrity of your decision making process. It is evident that your actions have conferred an undue advantage upon the accused, amounting to a clear abuse of prosecutorial discretion".

In the article "THE ORGANIZATION OF PROSECUTORIAL DISCRETION" by William H. Simon[4] it has been said that

> "We generally think of democratic accountability in terms of elections or the more diffuse pressures of public opinion. There is some ambiguity about the range of prosecutorial activity that should be controlled democratically. In some respects, prosecutors resemble judges. They make decisions of great consequence that should be made disinterestedly and reflectively on the basis of general, public, and prospective norms. Since public pressure can be infected by considerations that prosecutors are obliged to ignore in these decisions, it risks compromising fairness. **At the same time, prosecutors are executive officials commanding resources and exercising discretion in ways that have broad impact on their communities. The public has a clear stake in the general efficiency and fairness of prosecutorial**

[4] From Prosecutors and Democracy: A Cross-National Study, edited by Maximo Langer and David Sklansky (forthcoming 2017) The Organization of Prosecutorial Discretion by William H. Simon :: SSRN

practice and in the ways prosecutors exercise discretion within the interstices of enacted law".

Although that article says

> "We have seen that the traditional conception puts great emphasis on character and qualifications because it assumes that individual judgments are difficult to assess. In addition, the traditional conception assumes that judgment is necessarily idiosyncratic and ineffable; so it resists efforts to cabin discretion through explicit rules or to measure its effects. Practice under these assumptions is necessarily opaque"

it has been added

> "**The post-bureaucratic trends in the organization of prosecutorial discretion have two broad implications for democratic control of prosecutorial power**. **First, the basic tendency of post-bureaucratic reform is to make the broader system transparent in a way that increases control and adaptive capacity by insiders and outsiders alike**. **These reforms potentially enhance both fairness and accountability**. Charles Sabel and I have argued that there is (or should be) a duty of responsible administration that requires administrators to adopt reforms to manage transparently so that courts and citizens can assess their compliance with substantive norms. We find this duty in convergent themes of constitutional, statutory and common law, as they have been applied to a range of public institutions, including, prisons, police departments, and welfare programs. **Courts have been reluctant to put such pressure on prosecution offices, in part because of the persistence of the traditional conception of prosecutorial judgment and the related assumption that accountability must take bureaucratic forms that would rigidify practice inappropriately**. **But initiatives from prosecutors themselves have demonstrated that there are ways of structuring discretion that enhance transparency without strait-jacketing practice**. Courts could draw on these efforts to induce reforms by recalcitrant offices".

In this appeal, as the Appellant too has noted in his original request for information and as it appears obviously, the prosecutor has responded to the public pressure by reversing his original discretion. Therefore, in addition to reasons given above in terms of the provisions of the Right to Information Act and Article 14A of the Constitution, it is nothing but fitting, that, he discloses the form and content of his decisions to the public.

Modern jurisdictions test prosecutorial decisions against the standard of whether the prosecutor acts 'reasonably', without malice or culpable ignorance or negligence. The South African Supreme Court of Appeal in *Zuma v Democratic Alliance* (2017) subjected the exercise of prosecutorial power to the constitutional principles of legality and rationality[5].

In the case of **Attorney General v Guardian Newspapers Ltd and others ; and related appeals** where interlocutory injunctions were granted by the House having been mindful of the fact that that decision may change at the end of the trail too, the right to know by the press and the people were highlighted in the following words in the speech of Sir Nicolas Brown-Wilkinson V. C.

[5] https://www.saflii.org/za/cases/ZASCA/2017/146.html

> "**I also think that the freedom of the press, and counsel for the Attorney General accepts this, is a matter of very great public importance in its own right**. It is true that it is not absolute. If there is a countervailing public interest, then the freedom of the press cannot prevail. **One of the safeguards of our country and our system is to have a press that can search matters out, disclose them, and give rise to informed public discussion**. ***In my judgment, in weighing the harm to the public by the discouragement of future memoirs by future members of the security services one has to bear in mind what to my mind is a very important factor, namely, that one should not restrain publication in the press unless it is unavoidable***".

Although appears in the above English case in one of the dissenting speeches, that of Lord Oliver of Aylmerton, as it agrees with the sentiments expressed in the above principal speech of Sir Nicolas Brown-Wilkinson V. C., the following passage is also quoted

> "Ideas, however unpopular or unpalatable, once released and however released into the open air of free discussion and circulation, cannot for ever be effectively proscribed as if they were a virulent disease. Facilis est descensus Averno…"

[Facilis est descensus Averno is from Virgil's Aeneid vi 126 and it means "the road to evil is smooth[6]"]

The Indian case cited for the Attorney General from the High Court of Kerala does not apply as that case had special regulations regarding fiduciary relationships which are not part of the Sri Lankan jurisprudence or the cursus curie. In any event the fiduciary relationship of the Chief Law Officer of the State and hence the Sovereign is with the People.

Therefore the Appellant has a right to obtain the information he seeks and the Attorney General [Public Authority] is directed to release that information to the Appellant within 30 days from the date hereof.

The Commission further decides that, if the Public Authority fails to comply with the said decision of the Commission before the said date, the Information Officer and the Public Authority shall be prosecuted before the relevant Magistrate's Court under Section 39 of the Right to Information Act No.12 of 2016.

For the completeness of this decision, we place on record that, in terms of Rule No. 11 of Right to Information Commission Rules of 2017, the Public Authority is not entitled to charge any fee from a citizen for the release of the information upon a decision made by this Commission.

The Director General is directed to convey the decision to the Appellant, the Information Officer and the Public Authority.

Appeal concluded.

[6] FACILIS DESCENSUS AVERNO Definition & Meaning - Merriam-Webster