

The Right to Information Commission

A A M Rifthi Ali
No.140/B, Cassim Road,
Kalmunai-10

-Appellant-

RTIC Appeal No :- 647/2021

Vs.

Sri Lanka Ports Authority,
No.19, Chaithya Road,
Colombo-01.

-Public Authority-

Before : 1. Justice Upaly Abeyrathne (Rtd.) - Chairman
2. Justice Rohini Walgama (Rtd.) - Commissioner
3. Ms.Kishali Pinto-Jayawardena (Attorney-at-Law) - Commissioner
4. Mr.Jagath Liyana Arachchi (Attorney-at-Law) - Commissioner

Appearance : The Appellant is Present

The Public Authority is represented by Mr. B.L.M Inas, Deputy Chief Law Officer (Information Officer) and Ms. M.M.P.M. Gunaratne, Deputy Chief Finance Manager.

Written Submission : Appellant – Not Submitted

Public Authority - 28.07.2022

Date of Hearing : 08.06.2022, 03.08.2022

Decided on : 03.08.2022

Order of the Commission

Factual Background

By Information Request dated 01.12.2021, the Appellant requested the below information;

- “1. When did you start the Oluvil Harbor project?*
- 2. What was the reason to construct the Harbor in Oluvil?*
- 3. What are the benefits to the public and government through this project?*

4. *Did Ministry or Ports Authority conduct the Environmental Impact Assessment (EIA) before constructing the Harbor?*
 - a. *If yes, please share the reports and details?*
 - b. *If not, why did not conduct the EIA*
5. *Who is the contractor to construct this? Name list, please?*
6. *How much amount of money did Sri Lanka Government spend on this project?*
7. *How much loan did you get? Please give full details?*
8. *What is the status of the loan settlement now?*
9. *How much of acres land of public loan encroach to construct this project?*
10. *How much of amount compensation is given to public to encroach lands?*
11. *What is the current status of the Harbor now? If this Harbor still not operates, what is the reason?*
12. *How much amount of money spends monthly to maintain this Harbor?*
13. *What the environmental impact in the area after Harbor construct?*
14. *How many ships arrived at the Harbor up to now?"*

The Information Officer on 10.01.2022 responded as follows;

1. *Launched on 1st July 2018.*
2. *The main objectives of the project are to provide proper harbor and appropriate coastal facilities for ships engaged in transport activities. He also identified the development of coastal passenger transport, the supply of fisheries and coastal service requirements for the future.*
3. *Fish production, especially tuna production and employment opportunities, and foreign exchange supply. It also aims to alleviate the hardships faced by long-distance and deep-sea fishing vessels, to attract investors to set up factories for products such as cement fertilizer, and to provide fuel for coastal and offshore vessels.*
4. *The Central Engineering Consultancy Bureau has submitted an EIA report. The conclusions and recommendations pointed out in the report will be enclosed with this and if a complete study of the report is required, it can be facilitated by the Library of the Authority.*
5. *M/S MT Hojgaard*
6. *We do not have the details of the expenditure incurred by the Government on this project and details can be obtained from the Treasury Department.*
7. *Nordia Bank of Denmark has donated 46 46,095,369.45 to the Government of Sri Lanka from Danish A / S.*
8. *Debt settlement is done by the Treasury Department and we have the relevant details.*

9. Acquisition of land 52 acres, Rude 01, 13 perches
10. Rs. 77,155,662.00 has been paid as compensation so far.
11. Oluvil Port Current Status: The main entrance to the port is completely covered with sand, making it difficult for vessels to enter or exit. As a result, operations ceased on September 23, 2018. The trader also handed over nine buildings in the area to the Navy for quarantine. Cabinet approval has been granted to transfer several parts of the Fisheries Harbor area to the Ministry of Fisheries.
12. The daily operation and maintenance of the Oluvil Port costs around Rs. 56 lakhs per month.
13. Lands north of the port have been identified as being eroded by the sea and sand accumulating near the lower port entrances.
14. There are no ships coming to Oluvil and only fishing boats arrived from 05.09.2013 to 0721.06.2021 and that number is given below.

Year	IMUL - A multi-day vessel 30-60	Fishery Boat		Hairu Boat
		OFRP - A small craft 19.5	One day Craft 28-30	
2013.09.05	445	193	176	-
2014	1401	587	387	03
2015	1741	268	487	02
2016	2020	500	694	2
2017	03	191	04	01
2018	NIL	NIL		01
2019	NIL	NIL		02
2020	NIL	NIL		-
2021	NIL	NIL		01

Dissatisfied with the charging of fees for the above information on the basis that it was excessive, the Appellant lodged an appeal to the Designated Officer on 27.01.2022.

The Designated Officer on 07.03. 2022 responded as follows;

“That the Ports Authority of Sri Lanka has levied charges as per Section 37 of the Ports Authority of Sri Lanka Act as mentioned in the tariff list.

It was decided that the position taken by the Information Officer regarding the charging of fees was in accordance with the above Act.”

Dissatisfied with the above response, the Appellant preferred the above Appeal to the Commission on 18.03.2022. By way of interim Order on 08.06.2022, the Commission ordered the Public Authority to respond as follows;

“.... Section 37 (1) empowers the Ports Authority to reschedule their tariffs for services provided by them with the approval of the Minister in charge of the subject. The booklet provided by the Public Authority to establish their position does not exhibit that the same has the approval of the Minister in charge of the subject.

Therefore, the Public Authority is directed to prove that the said booklet titled ‘Sri Lanka Ports Authority Tariff 2022’ has been published with the approval of the Minister in charge....it appears that the tariff schedule which has been brought into operation in 2022 has no retrospective effect in regard to applications made prior to 2022. It appears that the Public Authority is not in a position to produce a tariff schedule maintained during the year 2021.

In the circumstances, the Public Authority is directed to explain why they should not be directed otherwise with regard to the charging of fees from the Appellant for the release of information under the Right to Information Act No.12 of 2016.

The Public Authority makes an application to file a written submission. Written submission to be filed on or before 30.06.2022 with copies to the Appellant and the Appellant is also entitled to file his written submission within 3 weeks from the receipt of written submission filed by the Public Authority”

In response to the order issued by the Commission, the Public Authority (PA) submitted a written submission dated 28.07.2022 to the Commission, *stating inter alia*, that,

“.....

04. The issues raised by the Commission was discussed at the Tariff Committee Meeting of the Public Authority held on 28.06.2022 and the Tariff Committee considering the all issues has recommended following with regard to the fee applicable to the RTI application.

(i) In the event a port user or the applicant under RTI request for certified copies of SLPA document to apply the tariff Item 60.06. – USD 2

(ii) In the event port user or the applicant under RTI request for photo copies of SLPA document to apply the tariff Item 60.14. – USD 0.15

05. Without prejudice to the above submissions, it is submitted that for the purpose of Rule 5 all what the Public Authority required to be established is that there existed

a fee schedule prescribed/issued by the Public Authority prior to the RTI Act came into operation and the said requirement has been fulfilled by Public Authority by producing the Tariff Booklets published prior to 2016. Further

06. In the circumstances Public Authority submits that in fixing and/or revising the charges from time to time, the Public Authority has followed the procedure stipulated in Section 37 of the SLPA Act. However, the Public Authority is not in a position to trace all the approvals obtained from the line Ministry during the last 43 years. Further Public Authority submits that it has not applied the Tariff item in a retrospective manner in respect of the RTI application submitted by the Appellant. The Public Authority further submits that it intends to collect fee as proposed in Item 4 above.”

Consideration

In terms of powers vested in the Commission under Section 42 (c) of the Right to Information Act, No 12 of 2016, the Fee Schedule according to which fees may be charged by a Public Authority for the provision of information in response to a RTI request (Gazette No 2004/66 – February 3rd 2017), is prescribed in the RTI Rules of 2017 (‘Fees and Appeal Procedure) as follows, extracted in relevant parts;

Rule No 4: Unless otherwise prescribed, the following Fees may be charged by a Public Authority for provision of information in response to a RTI request:

Rule No 5: Where there exists, a previous Fee Schedule prescribed or issued by Public Authorities by way of circulars or regulations, that Fee Schedule shall continue to operate notwithstanding the Fees prescribed in Rule 4.

Provided that any dispute in regard to claims relating to existing Fee Schedules may be the subject of an Appeal to be determined by the Commission in accordance with these Rules on Fees and Appeals.

Rule No 10: Appeals regarding Fees: (1) If the citizen making the request is of the opinion that the Fee charged by the Information Officer is in excess to the amount properly required, he/she may appeal to the Designated Officer within fourteen days of being informed by the Information Officer of the fee payable as per Section 31 of the Act using the format prescribed in the RTI regulations.

In the instant Appeal, the Appellant preferred an appeal to the Commission in terms of Section 32 read with Rule 10 of the RTI Rules of 2017 (‘Fees and Appeal Procedure) as aforesaid, stating that the fees that he was required to pay for the information supplied to him was in foreign currency (USD) and that he was appealing against the upholding of the decision of the Information Officer by the Designated Officer of the Public Authority, communicated to him through letter dated 07.03.2022.

We have carefully examined the said impugned decision of the Designated Officer which proceeds on the basis that, ‘*That the Ports Authority of Sri Lanka has levied charges as per*

Section 37 of the Ports Authority of Sri Lanka Act as mentioned in the tariff list.’ (vide letter dated 07.03.2022)

The applicable criteria to determine if the tariff schedule imposed by the Public Authority according to which the Information Officer acted to charge fees which the Appellant has claimed as excessive, is set out in Rules No 4 and 5 of the RTI Rules of 2017 (‘Fees and Appeal Procedure).

On a plain reading of both these Rules, a specific pre-condition applies in this regard; viz; does the impugned tariff schedule come within the ambit of the pre-condition, ‘Unless otherwise prescribed...’ (Rule No 4) read with ‘Where there exists a previous Fee Schedule prescribed or issued by Public Authorities by way of circulars or regulations, that Fee Schedule shall continue to operate notwithstanding the Fees prescribed in Rule 4’ (Rule 4).

We note that whereas Rule 4 refers to ‘prescribed,’ Rule 5 sets out this pre-condition in greater detail by specifically stating that, the tariff schedule must be either ‘prescribed or issued... by way of circulars or regulations.’

Accordingly, the question before us is whether the tariff schedule applied by the Public Authority to levy fees on the Appellant, was either ‘prescribed or issued’ by way of ‘circulars or regulations.’ The relevant part of the tariff schedule in 2022 according to which, the Public Authority has acted, is tariff item 60.6 titled ‘certified copies of SLPA documents’ under General Services and Facilities (payable by applicant).

The Public Authority’s Written Submissions of 28.07.2022 admits that, its power to issue tariff schedules in terms of Section 37 (1) of the Sri Lanka Ports Authority Act, for ‘services provided by the Authority’ shall be ‘fixed and may be revised from time to time, by the Authority with the approval of the Minister who shall, before giving his approval, consult the Minister in charge of the subject of Finance.’

Thus, ministerial approval of revision of the said tariff schedules issued by the Public Authority is mandatorily stipulated in terms of Section 37 (1) as aforesaid. Absent such approval, tariff schedules are not ‘prescribed or issued’ by way of ‘circulars or regulations’ as set out in Rules 4 and 5 of the RTI Rules of 2017 (‘Fees and Appeal Procedure).

Section 32(4) states that, ‘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.’ By way of interim Order of this Commission dated 08.06.2022, the Public Authority was directed to prove that the said booklet titled ‘Sri Lanka Ports Authority Tariff 2022’ has been published with the approval of the Minister in charge... In consequent Written Submissions dated 28.07.2022, the Public Authority admitted that it ‘...does not possess...all the approvals obtained from the line Ministry for revision of charges or introduction of new charges’ (vide, paragraph 03 (ii) of the aforesaid Written Submission).

The Public Authority’s contention is that, the 2022 tariff schedule contains collection charges uniformly detailed in previous years and that there is no practice of obtaining yearly approvals. Consequently, it is maintained that, the ‘retrospective application’ of tariff item

60.6 in the 2022 tariff schedule by the Information Officer to an information request filed in 2021 does not arise (vide paragraph 03 (iv)).

Perusal of the various tariff schedules of the Public Authority in respect of levying fees for 'certified copies of SLPA documents' indicates irregularities in conforming to Section 37 (1) of the SLPA Act. The Public Authority failed to produce the applicable tariff schedule for 2021 as observed in the interim Order of this Commission dated 08.06.2022. However, the tariff schedule for 2021 is contained in the Public Authority's web link; https://www.slpa.lk/uploads/article_attachment/attachment_2021_03_09_16152764601615277064.pdf

The aforesaid link refers to a document titled 'SRI LANKA PORTS AUTHORITY TARIFF – 2021' with the sub-title 'This booklet contains the Tariff Charges applicable for the year 2019, to all Ports, serviced by Sri Lanka Ports Authority approved, under section 37(1) of the Sri Lanka Ports Authority Act No. 51 of 1979.' It is clear that, the said tariff schedule itself is *ex facie* defective thereof.

The Public Authority has failed to establish mandatory ministerial approval for even the relevant earliest tariff schedule, on its own argument, that these tariff schedules had been issued from 1979 and it does not obtain 'yearly approvals.' The 1998 tariff schedule that it has annexed relevant to the payment of fees for 'certified documents' is also not accompanied by ministerial approval.

The *ad hoc* approvals annexed to the Written Submissions relating to tariff revisions in various years (vide; paragraph 03 (iii)) pertain, *inter alia*, to handling cargo, tariffs relevant to ship-to-ship operations etc. These documents, in fact, indicate ministerial approvals in conformity to Section 37(1) of the SLPA Act in other respects where the operations of the Public Authority are concerned. This highlights the absence of the same in respect of the impugned sections relating to levying of fees in respect of 'certified documents.'

That defect visits the 2021 tariff schedule of the Public Authority (which should be the relevant applicable schedule to this information request) as well as the 2022 tariff schedule (which, in fact, was applied by the Information Officer to charge fees from the Appellant).

In fact, the Public Authority's contention that the tariffs for obtaining 'certified copies' applied unchanged for decades and that this is what the Information Officer applied to the Appellant in this case is not borne out by the facts. On the contrary, the Information Officer has followed Rule No; 6 of the RTI Rules of 2017 ('Fees and Appeal Procedure) by providing 4 pages free of charge to the Appellant and charged as per the 2022 Fee Schedule only in regard to the rest. In other words, it has followed the Commission's Fee Schedule in part and its own tariff schedule (2022) in part, in a manner that is patently irregular.

In consequence thereof, we are of the view that, the decision of the Information Officer to apply the 2022 SLPA tariff schedule to an information request filed in 2021 is not in conformity with Section 32 (4) of the Right to Information Act, No 12 of 2016. The absence of mandatory ministerial approvals of both the 2021 and 2022 tariff schedules to be indicated

ex facie on both schedules in accordance with Section 37(1) of the SLPA Act, also indicates non-compliance with the duties imposed on Public Authorities by that Section.

The Public Authority has failed to discharge its burden under and in terms of Section 32 (4) to establish that it ‘acted in compliance with this Act’ in processing an information request.’

Both tariff schedules in issue (2021 and 2022) have not conformed to the mandatory pre-condition of being properly ‘prescribed or issued’ in terms of Rule No 5 of the RTI Rules of 2017 (‘Fees and Appeal Procedure). Further, we decide that the said tariff schedules do not amount to ‘circulars or regulations’ in terms of the aforesaid Rule No 5. As such, in the absence of adherence to Rule 5 as aforesaid, the relevant fees charged by the Information Officer should have been the fees detailed in Rule 4 thereof.

In the foregoing and acting in terms of powers vested in this Commission under Section 32 (1), we reverse the decision dated 10.01.2022 of the Information Officer to charge fees from the Appellant in terms of tariff item 60.6 of the Public Authority’s tariff schedule 2022 relating to ‘certified copies.’

In view of the said ruling, we do not find it necessary to enter into the question whether the Public Authority, by providing information in terms of the Right to Information Act, No 12 of 2016, is permitted to apply the fee chargeable for ‘certified copies’ under and in terms of the ‘General Services and Facilities’.

We further draw the attention of the Information Officer to Section 38 (1) (iii) of the Right to Information Act, No 12 of 2016 which stipulates ‘excessive fees in breach of the Fee Schedule referred to in Section 14 (e)’ to be a ground on which the Commission may act in informing the ‘appropriate disciplinary authority.’

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

Appeal Concluded.