

# The Right to Information Commission

M.F.A. Mansoor,  
Puwakwatta Estate,  
Kotadeniyawa.

**-Appellant-**

**RTIC App/No :- 1108/2019**

Vs.

Presidential Secretariat,  
Galle Face.  
Colombo- 01

Ministry of Urban Development  
and Housing Facilities,  
35 Lakdiya Medura,  
New Parliament Road,  
Pelwatta, Battaramulla.

**-Public Authority-**

**-And now between-**

M.F.A. Mansoor,  
Puwakwatta Estate,  
Kotadeniyawa.

-  
**Appellant-**

Vs.

Ministry of Investment Promotion  
15<sup>th</sup> Floor,  
Suhurupaya  
Battaramulla

**-Public Authority-**

Center for Environmental Justice  
Kuruppu Road  
Colombo.

**-Appellant-**

**RTIC App/No :- 1114/2019**

Vs.

Presidential Secretariat,  
Galle Face.  
Colombo- 01

Ministry of Urban Development  
and Housing Facilities,  
35 Lakdiya Medura,  
New Parliament Road,  
Pelwatta, Battaramulla.

**-Public Authority-**

**-And now between-**

Center for Environmental Justice  
Kuruppu Road  
Colombo.

**-Appellant-**

Vs.

Ministry of Investment Promotion  
15<sup>th</sup> Floor,  
Suhurupaya  
Battaramulla

**-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  
5. Mr. A.M Nahiya - Commissioner

**Appearance** : The Appellants are present.

The Public Authority represented by Mrs. O.G.D.S Jayaweera,  
Legal Officer

**Written Submissions:** Appellant - 25.06.2019, 23.08.2019, 15.10.2019,  
29.09.2021

Public Authority - 24.07.2019, 20.07.2021, 02.08.2022,  
12.07.2021, 18.08.2019, 02.08.2021,  
28.09.2021

**Dates of Hearing** : 25.06.2019, 24.09.2019, 26.11.2019, 26.11.2019,  
03.12.2019, 05.02.2020, 25.02.2020, 03.03.2020,  
19.01.2021, 09.03.2021, 20.07.2021, 03.08.2022,  
07.09.2021, 24.09.2021, 29.09.2021, 04.05.2022,  
03.08.2022, 27.10.2022, 14.12.2022, 12.01.2023

**Decided on** : 06.04.2023

## **Decision of the Commission**

### **Factual Background**

#### **Appeal No 1108/2019**

By Information Request dated 15.11.2018 the Appellant requested the below information;

- 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*

3. *Copies of all Environmental monitoring reports as specified in the Supplementary Environmental Impact Assessment for the Off Shore Sand Extraction Project at Kerawalapitiya in December 2016*

As the Information Officer (IO) had not responded to the substantive request, the Appellant lodged an appeal with the Designated Officer (DO) on 05/12/2018. The DO responded on 21.12.2018 stating that the Tripartite Agreement cannot be disclosed due to confidentiality clauses in the Agreement, as informed by the Director Legal Services of the Urban Development Authority (vide letter dated 14.12.2018 marked 05A).

Director Legal Services, UDA, had stated in his letter that by virtue of the aforesaid Tripartite Agreement (Clause 42) confidentiality clauses exist and therefore the information is denied in terms of Section 29 (2) (c) of the Right to Information Act No 12 of 2016. Furthermore, it was stated that in terms of Section 5 of the Act, 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.

Dissatisfied with this response, the Appellant lodged the present appeal with the Commission on 14/01/2019.

**Appeal No 1114/2019**

By Information Request dated 08.10.2018, the Appellant requested the below information;

*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, 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 had 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 Appellant 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 the present appeal to the Commission on 21.01.2019.

By written submissions dated 24.07.2019, the PA took up the position that the nature of the information in question is bound by commercial confidence and fiduciary relationship as the Tripartite Agreement entered with CHEC Port City Colombo contains a strict confidentiality clause by virtue of clause 42. The PA stated that the confidentiality clause in the Tripartite Agreement envisages an instance where there may be a potential breach of confidentiality as

certain aspects of this Agreement are still ‘ongoing’ even if the Agreement itself is signed and finalised. PA further went on to state that it is relying on Section 5(1)(b)(ii), Section 5(1)(c)(v), Section 5 (1) (i) and Section 5 (1) (d).

By written submission dated 23.08.2019, the in RTIC/Appeal/1108/2019 Mr. M.F.A. Mansoor refuted that the Tripartite Agreement in question is not an ‘international’ agreement but rather, 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.

The Appellant stated that Section 5(1)(c)(v) refers to ongoing trade agreements and not concluded agreements. In response, the PA reiterated that ‘certain decisions’ under the agreement have not been concluded and are yet to be finalized.

During the course of the hearings the Commission directed the PA on several occasions to respond, *inter alia* to the below points of contention:

1. *Identify the Intellectual Property interests in respect of the contents of the Tripartite Agreement, and substantiate the manner in which Section 5 (1) (d) would be violated by the release of information.*
2. *Its reliance on Section 5 (1) (i) read with Section 29 in the context of the Section/s applying strictly to instances where information has been given by a third party under confidential cover stated as such at the time of handing over that information to a PA.*
3. *Is the entire Tripartite Agreement affected by the ongoing aspects of the Port City Project or are only the Clauses relating to ongoing aspects precluded from disclosure, due to their non-completion?*
4. *The PA at previous hearings of this Appeal cited Sections 5 (1) (b) (ii) and 5 (1) (c) (v) of the Act, as relevant exemptions. Does the PA wish to continue to plead these Sections as exemptions to release the information? If so, the applicability of these Sections to the immediate information request must be substantiated. The Tripartite Agreement which forms the subject matter of the present information request has not been entered between two governments, but rather between a government Ministry, an Authority under the Ministry’s purview, and a locally incorporated company. As such, the applicability of both Sections 5 (1) (b) (ii) and 5 (1) (c) (v) need to be substantiated in view of the fact that these exemptions relate to inter-state relations...*

Further, the PA was called upon by the Commission to respond on the following.

*What is the relevance of the Colombo Port City Economic Commission Act No 11 of 2021 to the Tripartite Agreement, when each of the two documents make no reference to the other?*

A synopsis of the respective positions taken by the parties to this Appeal is as follows, as per the documents furnished to the Commission at different stages of this Appeal in accordance with Rule 20 (3) of the RTI Regulations of 2017 (Gazette 2004/66, dated 03.02.2017)

*Position taken up by the PA (synopsis)*

a. Written Submissions of the PA dated 24.07.2019

- (i) The nature of the information in question is bound by commercial confidence and fiduciary relationships since the Tripartite Agreement entered with CHEC port City Colombo itself had subsumed confidential clauses by virtue of Clause 42, and the information emanates from an international project of magnitude which encompasses policies associated with the economic conditions of the country and its well – being. Hence, divulging such information without the written consent of the CHEC Port City Colombo will be highly prejudicial to the interest of the parties and in such circumstances, right of access to information is denied under Section 29 (2) (C) of the Right to Information Act.
- (ii) The CHEC Port City Colombo (Pvt) Ltd has denied the request due to the confidential and price sensitive nature of the information contained in the Tripartite Agreement. Thus it would amount to a breach of trust and confidence in the event the GOSL acts contrary to the commercial privacy sustained by the CHEC. In these circumstances, the claimant has the burden to prove beyond reasonable doubt that the disclosure of this information is of paramount importance to the public at large and that the interest of the public would be severely jeopardized due to the unavailability of such information in the public domain.
- (iii) The Designated Officer has all the right to turn down the request in terms of Sections 5 (1) (b) (ii) & c (v) of the RTI Act where the disclosure of such information would cause serious prejudice to the economy of Sri Lanka by disclosing prematurely decisions to change economic or financial policies to; entering into overseas trade agreements. Accordingly, the access to information shall be refused in terms of Section 5 where 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 the entering into of overseas trade agreements.
- (iv) Thus in circumstances where the request is denied by the UDA, the burden of proof lies with the Appellants to prove their allegation that the information contained in the Tripartite Agreements is of substantial importance to the public. Hence, the Ministry has no duty to prove otherwise unless or until the burden of proof is shifted to it.

b. Written Submissions of the PA dated 12.07.2021 (synopsis)

- (i) The Ministry had provided reasons for its denial to disclose the Tripartite Agreement in terms of Section 5 of the RTI Act read together with Section 29 (2) (c) owing to its utmost confidential nature.

- (ii) Mr. Feisal Mansoor and Centre for Environmental Justice have impugned the exception relied upon the Ministry, on the ground, that it involves the right to livelihood of fisherfolk and the right to clean air of the citizens of Colombo. However, they had failed to collaborate this reasoning with strong evidence and thus his allegation is not admissible in a court of law under any circumstance. It is ambiguous as to how the clean air is polluted or obstructed and/or how this poses a direct threat to the livelihood of fish, so as to render disclosure of such information pertaining to the Tripartite Agreement is crucial to the public.
- (iii) Hence, divulging such information requested by Mr. Feisal Mansoor and the Centre for Environmental Justice, without the written consent of the CHEC Port City Colombo, would be prejudicial to the interest of the parties and such circumstances right of access to information is denied under Section 29(2) (c) of the Right to Information Act.
- (iv) It is observed that when taking the Port City Project as a whole, it is clear that there are no direct adverse consequences by and large on the fishing community. In fact, the stages of the Port City Project were revised in an effort to come to terms with the objectives of the fishing community. Accordingly, this project comprises sub-projects, that predominantly aims at improving the living standards and livelihood of fishermen and their families. Thus, it is envisaged that this project would be beneficial to their community in the long run.
- (v) The Commission had expressed the view that the submissions provided by the UDA stating that the aspects of the Tripartite Agreement are still ongoing could not be accepted at face value in the absence of documentary evidence so as to link to the ‘potential breach of confidentiality.’ This requires isolation of the impending work from the ongoing works.
- (vi) Thus the Ministry had submitted a recent progress report presented by China Harbour Engineering Company Ltd had reflected the progress achieved during the period of 1st January 2020 to 31st January 2020, although it is not quite satisfactory since a number of abnormalities have been identified from the time that requires rectification. The physical progress (based on Labour units) achieved, according to the Master Construction Program V1.3 at the end of this period (31 January 2020) is 23.9% against 25.6% of the plan (Please refer to Appendix P). Although certain works such as installation of a power distribution system, substations equipment installation and Cabling works of Phase-1 has been commenced, the completion date cannot be prematurely determined at this stage. Temporary office, camp, storage yard, road, and workshop constructions are in progress.
- (vii) The Colombo Port City Development Project (CPCDP) is a brand new city development built as an extension of the Central Business District of Sri Lanka’s vibrant commercial capital, Colombo. According to the original agreement of the CPCDP, the entire project is envisaged to be completed by two Sections as Phase-1 and Phase-2. The proposed CPCDP has to be developed on stage by stage basis. The first stage is Land Formation and

making an offshore island with the construction of Offshore Breakwater, Seawalls, Revetments, and Ground Improvements. The second stage is to develop infrastructure and utility services. The Construction effort shall consist of Vehicular Bridges, Foot Bridges, Underpasses, Roads, Utility Corridors, Sewer-Storm-Potable-Fire and Irrigation Water Systems together with Pumping Stations and Potable and Irrigation Reservoirs of Phase-1. Further, for the ease of construction, the project was sub-divided into seven packages as Package IA, IB, III, IIA, IIB, IV, and V. Package IA, IB, III, IV, and V Work were commenced on 19 July 2018. Further, the commencement of Package IIA and IIB were assumed on 15th January 2019, however, receipt of GFC drawings is considered from 19 July 2018. Construction duration for Package IIA and IIB shall be decided henceforth.

*Position of the Appellant in 1108/2019, Mr. M. F. A. Mansoor*

a) Written Submissions dated 23.08.2019

(i) The Public Authority has not given reasonable grounds in invoking Sections 5(1)(b)(ii) & (c)(v) of the RTI Act. According to these Sections disclosure can only be barred if the information requested would demonstrably cause serious prejudice to Sri Lanka in relation to international agreements or Sri Lankan economy. However, the Public Authority has failed to show that disclosure of the agreement could cause serious prejudice to Sri Lanka; their argument is based on series of presumptions rather than on facts.

(ii) The wording of Section 5(1)(c)(v) is that "...disclosing prematurely decisions ... relating to the entering into of overseas trade agreements". Thus the Section clearly refers to time before entering an international trade agreement thereby barred the disclosure. However, in the present case the said Tripartite Agreement has already been signed and contracted by the parties. Therefore, the Public Authority (PA) has erred in applying Section 5(1)(c)(v) and the information cannot be denied under this Section.

(iii) The said Tripartite Agreement is between a private Sri Lankan corporation and two agencies of the GoSL. Black's Law Dictionary defines a treaty as "an agreement formally signed, ratified, or adhered to between two countries or sovereigns; an international agreement concluded between two or more states in written form and governed by international law." Thus, the Public Authority cannot seek protection under any of the above Sections as this agreement is not an international agreement. Therefore, both these Sections have no application regarding to the current information request.

(iv) To invoke Section 5(1)(d) of the RTI Act, two grounds need to be established. First, information which includes commercial confidence, trade secrets or intellectual property should be protected under the Intellectual Property Act, No. 36 of 2003 and secondly, disclosure of information should harm the competitive position of a third party. However, the respondent has failed to establish both grounds.... The case for commercial confidence... is redundant in the face of the Dec 2015 SEIA which specified not only the expected costs in construction but also the expected revenue stream. Blanket



application of the provisions of the Act is peremptory, unsupported by evidence... that could possibly outweigh the public interest in accountability and transparency in action of public servants.

(v) A commercial interest relates to an ability to participate competitively in a commercial activity. In the case of the CPC the financial feasibility and Cost Benefit Analysis already reveal the projected pricing of the land; it is unclear therefore what could be sensitive about pricing information. It is however abundantly clear that there are matters of substantial import to the public at large that far outweigh any purported need for commercial or fiduciary secrecy to a third party.

#### Written Submissions of the Appellant dated 15.10.2019

(i) For Section 5 (1) (c) (v) to apply, the PA must establish why the release of the information would be premature, how it relates to decisions to change or continue government economic or financial policy, how such release would cause serious prejudice to the economy of Sri Lanka and its relationship to entering in to of overseas trade agreements. The Appellant humbly submits that the PA has not made any tangible submissions to establish these facts and have neglected the provisions of Section 5(4) of the RTI Act wherein it states: “Notwithstanding the provisions of sub Section (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.”

(ii) The language of the Act is clear, refusal of information relates to a period prior to the signing or entering in to of an overseas trade agreement, that is during the negotiations; any other interpretation would render the words “entering in to of” meaningless in Section 5(1)(c)(v). Section 5(3) makes clear the intent of the enactment to provide for confidentiality during negotiations leading to the formulation of an overseas trade agreement and not after it has been entered in to.

(iii) This request for information pertains to an agreement already entered in to by two agencies of government and a private corporation and is admitted by the PA to be in the process of implementation. As such it cannot and does not pertain to future outcomes but to the original decision to enter in to the said Tripartite Agreement. Accordingly, the provisions of Section 5(1)(c)(v) cannot be upheld as affecting future government economic or financial policy.

#### *Position of the Appellant in 1114/2019, Centre for Environmental Justice*

#### Written Submissions dated 18.08.2019

(i) This project has a clear public interest and the Appellant is bringing that interest before the Commission in the form of this RTI request. There are a number of environmental and social issues which are of the public interest.

- (ii) The project was implemented without a full-scale EIA. Although there were subsequent Addendums, they were lacking alternatives related to the locations, technologies including alternative development model for Sri Lanka etc. Therefore, the EIA has not identified less environmentally, socially and economically destructive alternatives to the country.
- (iii) 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 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 Appellant would request for access to the Tripartite Agreement even if the sensitive details are withheld. However, the Appellant expects the Commission to decide what such sensitive information is, in line with the Right to Information Act No. 12 of 2016.

*Position of the Added PA, Presidential Secretariat*

On 20.07.2021, at the request of both the Public Authority as well as the Office of the Presidential Secretariat, the Secretariat was added as an added respondent to this appeal.

Written Submissions, submitted together with cover letter dated 02.08.2021

- (i) It is submitted that the nature of the information in question is bound by the commercial confidence and the fiduciary relationship since the Tripartite Agreement entered with CHEC Port City had subsumed strict confidential clauses by virtue of Clause 42 of the said agreement.
- (ii) The Designation Officer has all rights to turn down the request in terms of Section 5 (1) (b) (ii) & (c) (v) of the Right to Information Act since the disclosure of such information would be a reason to cause prejudice to the economy of the country in the present as well as future.
- (iii) It is the (sic) duty of Appellant to show that the information contained in the said Tripartite Agreement is of important to the public. However, the Appellant has failed to do so.
- (iv) The Colombo Port City Act No. 11 of 2021 has been passed by the Parliament by a two third majority and the Hon. Speaker has certified the said Act on 27<sup>th</sup> May 2021 and now it has become the law of the country. Now no longer it can be challenged. The said Tripartite Agreement was the basis of the formation of said law. Since it has become a law which can no longer be challenged there is no basis for exploring the foundation for the formation of the said law and it would not serve any purpose. In the circumstances, it is respectfully submitted that in view of the content of this appeal which has been preferred before it becomes the law of the country cannot be proceeded any longer.

(v) The Presidential Secretariat was added as a Respondent by the Hon. Commission only on 20.07.2021. After ordering it be added as a party, the Hon. Commission has directed the said added party to file written submission at short notice.

(vi) As a respect to the said order of the Commission, these submissions are tendered. However, the Added Respondent is of the view that an opinion of the Hon. Attorney General should be sought on this matter. In the circumstances it is respectfully moved that some further time be granted to seek the opinion of the Hon. Attorney General on this matter.

(vii) In conclusion, it is respectfully moved that the said appeal be dismissed as it cannot be proceeded due to the reasons stated above.

The 2016 Tripartite Agreement was handed over to the Commission by the original PA in this 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. Consequently, 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.

Responding to the directive of the Commission in its Interim Order dated 24.09.2021 calling upon the Appellants to specify the clauses in the Tripartite Agreement of 2016 which would be of public interest, the Appellants in both RTIC Appeal 1108/2019 and RTIC Appeal 1114/2019, made submissions as follows.

In his Written Submissions dated 28.09.2021, as well as during the hearing of this Appeal on 24.09.2021, Executive Director of the Centre for Environmental Justice (Appellant in RTIC Appeal 1114/2019) highlighted the clauses in 2016 Tripartite Agreement that are of public interest to the Appellants.

*“We agree that we are amenable to the redaction of clauses which may have to be withheld due to the sensitivity of information pertaining to ‘commercial confidence’ in accordance with 5 Section (1) (d) RTI Act.*

*As agreed on the 24/09/2021 hearing, we herewith submit the further matters we are interested in this agreement.*

*1. Any conditions related to development rights, alienation of Public property including beach front, sea bed, sand & rock material etc.*

*2. Any conditions that affect the services, responsibilities that the Government of Sri Lanka committed to the public at present and future generations and the nature of the conditions under which they are bound.*

*3. Section 28 (d) imposes a duty of each and every member of the public to protect the public property and such duties are accepted as enforceable duties as in the SC judgment of Chunnakam and Court of appeal judgment on Wilpattu. Therefore no one can prevent exercising our duty and we want to know if any conditions affect such duties.*

4. Provisions available for the government of Sri Lanka or any agency under the same to interfere with the development work by the project company for the purpose of ensuring the health, safety of the public and the environment.
5. Preliminary clearances obtained for the port city development including rights to use filling material such as sea sand, rock material and the conditions relating to the payment of royalty and other costs.
6. Agency in the government of Sri Lanka has been given the task of compliance monitoring, environmental monitoring and the conditions and the plans.
7. Terms on claiming any resources, archaeological treasures discovered during the dredging operations in the sea.
8. Procedure the reclaimed land will be allotted between the government of Sri Lanka and the project developing company? Percentage wise figures including common areas and rights of the public to enter those areas and enjoy in the constitutional rights and engage in constitutional duties and responsibilities.
9. Information related to the ownership of the beach front. Marina etc.
- 10 The clauses related to the services to provide and other connected projects/ activities that the government of Sri Lanka need to build at the cost of public funds including solid waste management, fecal waste management, pollution management flood control, road access, electricity supply, water supply, security services, maintenance of the ground water level etc.”

Mr. Feisal Mansoor, Appellant in RTIC Appeal 1108/2019, submitted as follows in his Written Submissions to the Commission dated 29.09.2021,

*“In response to the Hon. Commission’s direction to the Appellant to “... apprise the Commission of the aspects of the Tripartite Agreement that, to their knowledge, impact upon/or are exceptionally important in terms of Section 5 (4) of the RTI Act in order for the Commission to assess the same in the context of the Agreement which is presently before the Commission...” the Appellant states that it is not possible to directly and accurately respond to this direction without knowledge of the provisions of the said Tripartite Agreement or even its Table of Contents, except as he has already done in response to the objections raised by the Public Authority in its presentments to the Hon. Commission and insofar as those presents are concerned the Appellant is of the view that the Public Authority has not presented any legal impediment to the disclosure of this Tripartite Agreement in full....”*

Accordingly the Commission issued an interim order dated 29.09.2021 as follows.

*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.*

Thereafter, by an email dated 08.10.2021, the Appellant for the RTIC 1108/2019 confirmed that he had received the Environmental Monitoring Reports that he had asked for in items 2 and 3 of his information request dated 15.11. 2018.

At the hearing of this Appeal on 27.10.2022 S.K Henadheera, Senior Asst. Secretary / Information Officer of the Presidential Secretariat informed the Commission that the relevant information which regards to the said information request is now within the possession, custody and control of the Ministry of Investment Promotions, therefore, they are not in position to respond to the said information request Notices were therefore issued on the new Public Authority and the Information Officer of the Ministry of Investment Promotions.

The new Public Authority, the Ministry of Investment Promotions handed over a letter dated 2022.11.28 to the Commission, that had been received by the Public Authority from the Attorney Generals' Department regarding the queries made by the PA on releasing the subjected Tripartite Agreement, to the following effect;

*Section 05 of the Right to Information Act No. 12 of 2016 identifies situations in which a request for information submitted by a person should be rejected. Accordingly, it is pointed out that the provisions of the above section should be taken into consideration when considering the request submitted regarding the provision of a copy of the subjected tripartite agreement and I draw your special attention to Section 5(d) of the said Act.*

*Even so, it appears that the Right to Information Commission is conducting an inquiry into the matter pursuant to the statutory powers conferred on the Commission under Section 15 of the Right to Information Act. Accordingly, in relation to the orders issued by the concerned commission, in addition to the provisions mentioned above, it is advisable to comply with the other provisions of the Act.*

The PA submitted another letter dated 09.11.2022 sent by the Colombo Port City Economic Commission, communicating Tripartite Agreement should not be released due to the 'confidential and price sensitive nature' of the information contained in the Tripartite Agreement. On 01.12.2022, 14.12.2022 and 12.01.2023, the Commission provided the Public Authority, Ministry of Investments and Promotions with repeated opportunities to submit their position on why the requested information should not be released. However, these opportunities were not availed of by the Public Authority.

On 12.01.2023 which was intimated to be the final hearing date by which the Public Authority agreed to present to the Commission the exact clauses that were price-sensitive in its assessment, the Public Authority was absent and unrepresented before the Commission. On the afternoon of the very day of hearing (viz; at 12.01.2023), the Public Authority sent a request for postponement on 'unavoidable circumstances' (by electronic mail at 12.42 p.m. on 12.01.2023).

Consequently and in the context of several postponement dates being granted for appeal hearings at the request of the Public Authority, the Commission declined the request for a further postponement, observing that ‘both parties have filed their comprehensive written submissions, enabling the inquiry to proceed’ and for the decision of the Commission to be entered in to thereto.

## **Consideration**

The two Appeals in issue which are taken up together given the commonality of the information requests in question, relates to the release of the Tripartite Agreement signed between the Government of Sri Lanka and CHEC Port City Colombo (Pvt) Ltd on 12<sup>th</sup> August 2016 for the development of a new international financial city.

The said Tripartite Agreement had been requested by the Appellants on the basis that, its terms regarding (higher) investment and consequent potential benefits to be enjoyed by the people of Sri Lanka were manifestly disadvantageous as compared to the (lower) investment and (higher) gains by CHEC Port City Colombo (Pvt) Ltd. It was also pleaded that an adequate and independent assessment of the impact of the project had not taken place by the Government of Sri Lanka, resulting in continuing negative impact on the livelihoods of communities living in the vicinity of what is commonly called the Port City.

During the appeal hearings before this Commission, items 2) and 3) of the said information request were released to the Appellant in RTIC 1108/2019 as of record, excluding item 1) of the information asked for, namely, the aforesaid Tripartite Agreement. This constitutes the remaining issue in Appeal No 1108/2019 and 1114/2019 in regard to which the Commission is called upon to decide whether the refusal of the Public Authority to release the same under Section 5(1)(b)(ii), Section 5(1)(i)(v), Section 5 (1) (d) and Section 5 (1) (i) read with Section 29 of the RTI Act, is justified.

At the outset, we note that Section 32(4) of the Right to Information Act (RTI Act) specifies that on appeal to the Commission, the burden of proof shall be on the Public Authority to show that it acted in compliance with the Act in processing a request. Accordingly, the Public Authority, (vide the decision of the Designated Officer dated 21.12.2018 which is impugned in this appeal), must satisfactorily discharge the burden as aforesaid.

However, the relevant Public Authorities (at all stages of this appeal hearing) limited itself to the mere citation of a confidentiality clause in the Tripartite Agreement (namely Section 42 titled ‘Confidential Information’) to justify the aforesaid refusal. We have carefully perused this Section of the Agreement which was handed over by the Public Authority to the Commission to enable examination of its contents on 03.03.2020, consequent to the direction of the Commission dated 25.02.2020.

The said Section clearly does not pertain to the entire Agreement in issue as evidenced at the outset, viz; Section 42.1

‘The GOSL, the UDA and the Project Company shall, from time to time, require or acquire Confidential Information, necessary for the development, operation and management of the Reclamation Works.’

Further, Section 42.6 states that, ‘the obligations of each Party does not apply, *inter alia*, where ‘information (is) required to be disclosed or retained by each other, by the laws of any applicable jurisdiction...’

Scrutiny of relevant clauses in the predecessor Tripartite Agreement of 2014, which is now in the public domain consequent to being released by way of court order (CA/Writ/112/2015) as acknowledged by the Respondent, indicates the very same wording therein, viz; Section 42.1

‘Each Party shall, from time to time, require or acquire Confidential Information necessary for the development, operation and management of the Reclamation Works.’

Similarly Section 42.6 stipulates that the ‘obligations of each Party’ does not apply, *inter alia*, where ‘information (is) required to be disclosed or retained by each other, by the laws of any applicable jurisdiction...’

We note that these clauses have not precluded the public release of the 2014 Tripartite Agreement through a court process as accepted by the Public Authority as aforesaid during the deliberations of this Commission. Accordingly, that Agreement is now in the public domain, strengthening the case of the Appellants that, the said clauses do not operate to prevent the release of the 2016 Tripartite Agreement.

In fact, as recorded in the interim decision of the Commission on 29.09.2021, the Public Authority agreed to release the content of specified Sections of the 2016 Tripartite Agreement in issue (vide; proceedings of the record, 29.09.2021), based on the fact that the 2014 Tripartite Agreement had already been made public by that time. Those Sections related to the Recital Clause (J), 2. Development Rights, 13. Preliminary Clearance for the Development Master Plan, 15. Archaeological/Geological items, 24. Reclaimed Land, Schedule 9; GOSL Works and Services (Fisherman’s Compensation).

At that point, the Commission reserved consideration of the release of the remainder of the Tripartite Agreement of 2016. This was on the basis that the prevailing covid 19 pandemic state of emergency at the time precluded consideration of further submissions that the Public Authority as well as the legal division of the Presidential Secretariat (added to the appeal hearing as a party on 20.07.2021 following its request) had indicated to the Commission that they wished to make.

Previously, this Commission had noted that, the instant two Appeals had been postponed for the entirety of the year 2020 as well as for several months in the year 2021 due to requests by the Public Authority (vide record of proceedings dated 07.09.2021). However, the primary question required by the Public Authority to answer remained in abeyance; viz; to list the specific portions in the Tripartite Agreement that were avowedly price-sensitive or those

parts of the project that were still ‘ongoing’ as claimed within the ambit of Section 42 of the Tripartite Agreement.

That remained the case even despite several Written Submissions being filed by the Public Authority and despite frequent changes in the relevant Public Authority as a result of changes in ministerial portfolios. On 27.10.2022, the Presidential Secretariat was discharged from the proceedings on its request on the basis that the relevant information was now with the Ministry of Investment and Promotions.

The only response (in part) was a so-called ‘progress report’ presented by China Harbour Engineering Company Ltd which had noted ‘progress achieved’ during 1st January 2020 to 31st January 2020. In that regard, the Public Authority has also informed that certain ‘construction’ work is pending; however no explanation has been forthcoming as to in what manner, that work is included within the ambit of Section 42 of the Tripartite Agreement, relied upon by the Public Authority to justify refusal to release the information. Since then, a full two years have passed with no intimation from the relevant Public Authority regarding the ‘ongoing’ work or the ‘price sensitive’ clauses adverted to by the Acting Director General/Commissioner, Colombo Port City Economic Commission in his letter dated 09.11.2022 to the Public Authority, the Ministry of Investment Promotion.

We are also cognisant of the fact that, the Attorney General had, by letter dated 28.11.2022, informed the Public Authority to abide by its statutory duty to conform to the RTI Act.

Following these Appeals being taken up for hearing in 2022 and 2023, that failure of the Public Authority to properly discharge its burden to established that it processed the information requests in issue, in compliance with Section 32 (4) of the RTI Act, persisted. On the last named date of the appeal hearing, (viz; final date of the appeal hearings, 12.01.2023), the Public Authority was absent and unrepresented despite a specific undertaking that it would respond to the Commission as directed in regard to the specific clauses in the Tripartite Agreement that were price sensitive or related to ‘ongoing’ work.

Accordingly we find that during the pendency of this entire appeal hearing for more than three years, the relevant Public Authority has abstained from clarifying key matters for determination, apart from citing a confidentiality clause in the Tripartite Agreement and/or placing a so-called progress report dated January 2021 as aforesaid. This, we note, is manifestly insufficient to discharge its burden in terms of Section 32(4) of the Act.

Moreover, this Commission has categorically taken the position that, the existence of a confidentiality clause *per se* in an agreement entered into between parties is insufficient to bring into operation Section 5(1)(d) to justify the refusal of information on that ground (vide; *Airline Pilots Guild of Sri Lanka v. Sri Lankan Airlines Ltd*, decision dated 12th June, 2018). The stance reiterated in that decision of the Commission is that, the impact of these clauses lapse in any event, with the effluxion of time. Therefore, the burden upon the Public Authority to specifically indicate what aspects of the 2016 Tripartite Agreement are ‘ongoing’ is important.



This is in terms of the burden to establish that it acted in conformity with the RTI Act under Section 32(4) and, further, under Section 5(4), to establish that it had addressed its mind to the fact 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.’

That had been indicated to the relevant Public Authority as far back as on 25.06.2019 (vide; record of proceedings of that date) as well as on several appeal hearing dates thereafter (vide record of proceedings of 29.09.2021). Despite time given since the proceedings of the Commission on 29.09.2022, that burden has not been discharged so far. This Commission reiterates its reminder to Public Authorities in *Airline Pilots Guild of Sri Lanka v. Sri Lankan Airlines Ltd*, decision dated 12th June, 2018) as follows;

*...the main objective of Sri Lanka’s RTI Act, as detailed in its substantive provisions and underpinned by the overarching force of the preamble which embodies the fundamental values and the philosophy of the Act, is 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....*

*...The central focus given to transparency and accountability in Public Authorities is clear. In that regard, it may be said that the preamble of Sri Lanka’s RTI Act, even more unambiguously underpins the principle of maximum disclosure, subject to narrowly defined exceptions that must also yield to the public interest override...*

*... It is instructive to note that this is contrasted with, for example, the preamble of India’s RTI Act (2005) which refers to the ‘harmonizing of conflicting interests’ (absent in its Sri Lankan counterpart); “...and whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Government’s optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information; and whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal.’*

In the foregoing, we are not inclined to accept the submission of the Public Authority that Section 5(1)(d) and Section 5(1)(i) read with Section 29 operates as a bar to refuse the release of the remaining content of the Port City Tripartite Agreement of 2016 or that, the Colombo Port City Act, No 11 of 2021 precludes release of the same in regard to which the Public Authority has failed to discharge its burden under Section 32 (4). This Commission is satisfied that the public interest as established by the Appellants, brings the information requested in these Appeals brings the information requested within the ambit of the proviso to Section 29(2) of the RTI Act.

We also determine that the information requested by the Appellants in item 1) of the information request dated 15.11.2018 (RTIC 1108/2019) and in RTIC 1114/2019 does not fall within the exempted categories in Section 5(1)(b)(ii) as the relevant Agreement is not

encompassed within its ambit. We further hold that Section 5(1) (c) (v) is inapplicable as no 'premature' disclosure of an overseas trade agreement is evidenced on the facts.

Consequently, we decide that the Public Authority should release the said information requested by the Appellants in RTIC 1108 and RTIC 1114/2019, namely the 2016 Port City Tripartite Agreement, before 04.05.2023.

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.***