

Transparency International Sri Lanka v. Prime Minister's Office/Presidential Secretariat

RTICAppeal/05/2017 & RTICAppeal/06/2017(Appeal heard and Order adopted as part of a formal meeting of the Commission on 26.06.2018)

Order under Section 32 (1) of the Right to Information Act, No 12 of 2016 and Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure)

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

Director-General: Piyathissa Ranasinghe

Appearance/ Represented by:

Appellant Organisation – Mr. Gehan Gunathilleke Attorney-at-Law on behalf of Transparency International Sri Lanka

Mr. Daniel Fernandosz
Mr. Lakwijaya Bandara

Public Authority (PA) - Suren Gnanaraj State Counsel Attorney General's Department

Information Request filed on;
Presidential Secretariat- 03.02.2017
Prime Minister's Office- 03.02.2017

Response by Information Officers on;
Presidential Secretariat- 06.03.2017
Prime Minister's Office- 01.03.2017

Appeal filed to Designated Officers on;
Presidential Secretariat- 10.03.2017
Prime Minister's Office- 10.03.2017

Response by Designated Officers on:
Presidential Secretariat- 20.03.2017
Prime Minister's Office- 14.03.2017

Appeal filed to RTI Commission on;
Presidential Secretariat- 19.05.2017

Prime Minister's Office- 12.05.2017

Written Submissions/Further Written Submissions filed on;

By the Appellant: 25.06.2018

By the Respondent: Presidential Secretariat: -

Prime Minister's Office: -

Brief Description of the Facts

On 3rd February 2017, the Appellant (Transparency International, Sri Lanka) filed two information requests to two Public Authorities (viz; the Presidential Secretariat and the Prime Minister's Office under Section 24 (1) of the Act.

The request to the Presidential Secretariat was to obtain access to a certified copy of the Declaration of Assets and Liabilities of President Maithripala Sirisena for the years 2015 and 2016 as well as for a certified copy of the Declaration of Assets and Liabilities of Prime Minister Ranil Wickremesinghe for the years 2015 and 2016.

On the same day (ie; 3rd February 2017), the Appellant filed an information request under Section 24 (1) of the Act to the Prime Minister's Office requesting a certified copy of the Declaration of Assets and Liabilities of Prime Minister Ranil Wickremesinghe for the years 2015 and 2016.

At the time, the Appellant had submitted the two information requests to the Secretary to the President and one information request to the Secretary to the Prime Minister on the basis that it was 'unable to obtain the name of the Information Officer' at the respective offices.

The said information requests to the Presidential Secretariat were rejected on 6th March 2017 by the Information Officer which refusal was upheld by the Designated Officer of the said Public Authority (the Secretary to the President) on 20th March 2017.

Where the Appellant's information request to the Prime Minister's Office was concerned, it was rejected by the Secretary to the Prime Minister on 1st March 2017 (to whom the information request was addressed by the Appellant under Section 23 (1)(b) as aforesaid) and again reiterated on 14th March 2017.

Under and in terms of Section 32 (1) of the Act, on 22nd May 2017, this Commission received an appeal from the Appellant dated 19th May 2017 against the decision of the Designated Officer of the Presidential Secretariat. On 15th May, a similar Appeal was received dated 12th May against the decision of the Designated Officer of the Prime Minister's Office. Both Appeals impugned the rejection of the information requests on substantive grounds.

In the wake of the Appellant failing to aver the fact of citizenship in the information requests consisting of letters written to the two Public Authorities on 3rd February 2017, which failure

was manifest also in the consequent two Appeals filed to this Commission as aforesaid, by Order dated 23rd February 2018, this Commission permitted the said defect/s to be cured, being of the view that if the Commission allows the Appellant to aver citizenship at appeal stage, that will tantamount to the Commission taking the necessary steps in terms of its inherent powers under Section 32 (1) of the Act to determine if the Appellant has a right of appeal in satisfaction of the jurisdictional facts (albeit contingent) that must be ascertained under the Act. Accordingly, the Appellant cured the said defect/s through papers submitted on 24.04.2018.

Matters Arising During the Course of the Hearing:

Submissions on behalf of the Appellant Organisation

The Appellant commenced submissions by summarising the factual background to the Appeal. One appeal concerns an information request to the Prime Minister's Office requesting the Assets Declaration of the Prime Minister (RTIC Appeal 05/2017) and the other concerns the information request to the Presidential Secretariat requesting the Assets Declaration of the President and the Assets Declaration of the Prime Minister (RTIC Appeal/ 06/2018).

Counsel for the Appellant submitted that it is based on a statutory function performed by the Presidential Secretariat that the assumption was made that the Prime Minister's Assets Declaration would also be with the Presidential Secretariat which led to the information request.

The Appellant Organisation submitted that in both the initial responses of the PAs, it was informed that the Speaker had made a ruling that Members of Parliament (MPs) are exempt from providing their asset declarations. On the first appeal as provided for under the Act, the DO of the Prime Minister's Office had referred to the same ground while the DO of the Presidential Secretariat had refused the information citing Sections 5(1)(a) and 5(1)(g).

Counsel for the Appellant submitted that, in relation to the Prime Minister's Assets Declaration, no specific grounds have been urged in regard to citing the said exemptions. It was urged that an exemption, as cited, must be strictly contained in Section 5(1), must be buttressed by reasoning in support thereof. It was also submitted that new exemptions cannot be relied upon by Public Authorities at the stage of second appeal before the Commission.

The Commission noted that with respect to the pleading of new exemptions, Public Authorities have been allowed to vary the exemptions cited or to plead new exemptions and that it is for the Commission to assess whether or not to permit such. However, it was observed that the fact that an incorrect exemption or no exemption was raised at all by the Designated Officer or Information Officer in refusing the information was a matter that will be of specific note. .

Counsel for the Appellant queried from the Commission and the PA as to whether it should be assumed that the PA is claiming the benefit of Section 5 (1) (a) with respect to both appeals.

The Commission directed the Appellant to make the submissions in relation to the relevant appeal in which such objection has been raised and in regard to which the PA will be given an opportunity to respond and to which in turn the Appellant Organisation may counter-respond.

Section 5 (1) (a) - Privacy

Counsel for the Appellant Organisation began his submission by stating that Section 5 (1) (a) is a unique Section, its first limb exempting personal information ‘which has no relationship to any public activity or interest’ its second limb exempting personal information which ‘would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure’ (which does not arise according the Submissions of Counsel in this instance)

The Section was thus deconstructed as follows by counsel for the Appellant;

The information relates to personal information the disclosure of

- (1) which has no relationship to any public activity or interest, or*
- (2) which would cause unwarranted invasion of the privacy of the individual*
 - a. unless the larger public interest justifies the disclosure of such information or*
 - b. the person concerned has consented in writing to such disclosure;*

Counsel for the Appellant submitted that therefore the question that must be determined in the first instance would be whether the personal information sought has no relationship to public activity or interest, or information that would be unwarranted invasion into privacy.

Interpretation the phrase ‘possession, custody or control of a public authority’ in Section 3(1) with ‘personal information’ in Section 5 (1) (a) [Fact of possession vs. Legal Obligation to possess]

The Commission at this point noted that there is an intertwining of Section 5 and Section 3 of the Act. The question arises as to what extent the Assets Declarations of any person comes with the purview of ‘the possession, custody and control’ of the Public Authority. As such the interpretation to be given to personal information of Section 5 (1) (a) and the interpretation to be given to the phrase ‘possession, custody and control’ in Section 3 become important.

It was noted that the Supreme Court of India had defined what constitutes personal information in a recent decision defining the ambit of the privacy right (*Puttaswamy and Another v. Union of India and Others*, 24th August 2017). Accordingly it was observed that the Commission would benefit from submissions as to how the requested information does or does not fall within the ambit of personal information in the context of Section 3 read with Section 5(1) (a) of the Act.

Counsel for the Appellant while admitting that this was a challenge, submitted that the information is being sought on the assumption that these particular persons who hold public officer are statutorily bound to submit to a particular authority and/or on the assumption that the information is in fact in the PA’s possession, custody and control.

The Commission noted that what may need to be looked at is whether the information sought is that which is statutorily required to be forwarded to the PA with which the request has been lodged or whether it is sent personally by a particular = individual to his/ her superior to whom the information ought to be submitted as statutorily mandated. Counsel representing the Appellant Organisation was thus queried as to how it defines those two questions in the context of the present appeal and in terms of the applicable law. In response, it was submitted that the Appellant Organisation was seeking the information on the assumption that this particular document would be with this particular PA. Further clarifying it was submitted that the Prime Minister's Office does not have a statutory right or authority to have in its possession custody or control the Prime Minister's Assets Declaration.

The Commission at this point intervened stating that this is a core issue which must be addressed in this instance i.e. the interpretation of the terms 'possession, custody and control' of the PA.

Counsel on behalf of the Appellant Organisation responded by submitting that if the PA did not in fact have the information requested, this matter would have ended with the Information Officer himself, but the fact that both PAs are invoking grounds of exemption leads to a strong presumption that the information is in fact in their possession, custody and control. It was further submitted that Section 3 (1) ought not to be interpreted to mean that the PA should have statutory authority or a statutory obligation cast upon it in order to have possession, custody or control of the information but rather that this should be treated as a matter that ought to be factually ascertained. If the statutory authority or the PA in question happened to have had this information, then the information can be requested. If it did not have the information, then the PA should have responded stating that it did not have the information and directed the Appellant Organisation to the correct PA or state that it was unaware as to which PA might have had this information. Counsel submitted that either way the Appellant Organisation is confining itself to the question of possession merely as a factual claim rather than a statutory boundary.

Purpose of an Assets Declaration

Counsel for the Appellant Organisation further submitted that if he were to debate this question in the context where the information requested is an Assets Declaration it is important to ascertain the objective of certain persons being required to have an Assets Declaration which some individuals might want to access. It was observed that the forms utilised for the disclosure of Assets enables an official to declare his/her assets at the point of entering public office and at a point during his/her tenure. Thus it can be ascertained whether or not public funds, resources were misappropriated/ mishandled during that period in the event an investigation is commenced by the authorities.

Counsel referred to a judgment of the Supreme Court of India *Lok Prahari Through Its General Secretary S.N. Shukla V Union Of India And Others* (16 February, 2018 at paragraph 58) (Paragraph 32 of written submissions on behalf of the Appellant Organisation filed on

25.06.2018) where the importance of an Assets Declaration was well articulated which was a situation where the Petitioners sought a scheme where the growth of Assets can be ascertained over a period of time. The Supreme Court stated that

The citizen, the ultimate repository of sovereignty in a democracy must have access to all information that enables critical audit of the performance of the State, its instrumentalities and their incumbent or aspiring public officials. It is only through access to such information that the citizen is enabled/ empowered to make rational choices as regards those holding or aspiring to hold public offices, of the State.

Counsel submitted that this statement was made in reference to an Assets Declaration which the Court considered was not merely private or personal information. Counsel, relying on the persuasive authority of this judgment, put forward the argument that the very nature of asset declarations enables citizens to access information that would help them make rational choices and which is absolutely fundamental to a functioning democracy. It was further submitted that the highest offices in Government i.e. those of the President and the Prime Minister cannot possibly invoke the first limb of Section 5 (1) (a) and state that the information has no relationship to a public activity/ interest. Thus it was submitted that information is not 'personal information... which has no relationship to any public activity or interest' as envisaged by the first limb of Section 5 (1) (a).

Unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information

Counsel for the Appellant Organisation moving on to the second limb of the exemption applied i.e. whether it was an unwarranted invasion of privacy of the individual and the larger public interest is not served.

In this respect, Counsel for the Appellant requested that the Commission engage in an act of balancing in order to weigh the claim of unwarranted invasion of the privacy of the individual against the public interest served by disclosure. Counsel reiterated the *Lok Prahari* decision where it was held that even the information of spouses and dependents as far as Assets Declarations are concerned or the assets held by these individuals ought to be disclosed to the citizen requested because it is only through comprehensive disclosure that the purpose of having an Assets Declaration is served. Counsel then Assets Declaration referred to an European Court case, of persuasive value, *Wytych v. Poland* (25 October, 2005, application no. 2428/05) where again the facts of the case concerned the impact of the disclosure of an Assets Declaration on the privacy of the local councillors where Article 8 of the ECHR which guarantees the right to privacy was relied upon. What was he said was this would be an unwarranted invasion of his privacy if he discloses this information. The European Court of Human Rights declared that this does not amount to an over burdensome incursion into privacy and even though the information comes within the domain of privacy, such privacy is not an absolute right, and the limitation experienced by the individual was warranted given the public interest at large. Counsel quoted the following passage from the judgment;

'it is precisely this comprehensive character which makes it realistic to assume that the impugned provisions will meet their objective of giving the public a reasonably exhaustive picture of councilors' financial positions ... that the additional obligation to submit information on property, including marital property, can be said to be reasonable in that it is designed to discourage attempts to conceal assets simply by acquiring them using the name of a councilor's spouse.'

Thus it was submitted that this comprehensive scheme has been recognized in India and in the European jurisdiction as extremely important to enable a citizen to make rational choices about the democratic system within which an individual is placed. Counsel reiterated that therefore it is the Commission's task is to balance the privacy of the individual or the claim that disclosure is a violation of privacy with the important overarching function that an Assets Declaration serves which is to provide the citizen with an opportunity to assess whether an individual has misappropriated funds over a period of time. It was further submitted that the President and Prime Minister ought to set an example by making the information requested publicly available.

Embedding of the public interest element within the exemption

At this point, the Commission noted that another question that arises is the fact that certain exemptions under the Act contain the public interest embedded within the exemption itself in addition to the general public interest override in Section 5 (4). Attention was drawn to Sections 5 (1) (a) and 5 (1) (d). The Commission queried as to what significance may be attributed to this In the view of the Appellant in the circumstances of the case.

Counsel for the Appellant submitted in response that that this is exactly why the Commission must consider the balancing process at the outset which was why Section 5(4) was not invoked. It was submitted that Section 5 (4) would become relevant only at a later stage. Counsel argued that this provision (Section 5 (4)) cannot be invoked without first establishing that the public interest outweighs the claim of unwarranted invasion into the privacy of an individual.

The Commission stated that submissions in respect to the significance of the fact that, as legislatively intended, the public interest had been brought in as a specific element in the assessment of certain exemptions, for example in Sections 5 (1) (a) and 5 (1) (d) in addition to the general public interest override in Section 5 (4) which applies to all the exemptions, would be welcome from both parties.

Counsel for the Appellant submitted that, where the term public interest has been embedded in the substantive exemption itself as differentiated from the general public interest override in Section 5(4), the legislature had intended those it to be narrowly applied in refusing information .

The Commission queried whether the Indian RTI Act contains an assessment of the public interest embedded in the exemptions themselves. Counsel on behalf of the Appellant responded in the negative.

Distinction between Elected officials and other officers of the state

Secondly the Commission noted that in the assessment of the threshold issue with respect to Section 5 (1) (a), the issue arises whether a distinction can be drawn between a public servant and of those running for political office; specifically whether the very fact of having to contest for public office requires such persons to adhere to a higher level of transparency and accountability than that required by a public servant.

Counsel for the Appellant submitted that this would most certainly be something that the Commission ought to take cognizance of when balancing privacy and the public interest. As opposed to a school administrator, the public interest element attached to disclosing the assets declarations of elected representative of the people such as the President and the Prime Minister would also have to be taken into account.

The Commission noted that it would like the Attorney-General also to respond as to whether such a distinction may be perceived between political office and office of any other kind in the circumstances of the appeals and particularly within the context of right to information legislation.

Counsel for the Appellant further submitted that the policy decisions of the present government have been geared towards the full disclosure of assets declarations. Attention of the Commission was drawn to the Open Government Partnership approved by the Cabinet whereby the Government commits to an amendment to the law requiring the full disclosure of assets declarations and the resulting incongruity of claiming that assets declarations are within the privacy domain of individuals while making a public commitment to make assets declarations accessible.

Fiduciary Relationship Section 5 (1) (g)

Counsel for the Appellant commenced submissions in respect to the above exemption by quoting the following passage from the judgment of the Indian Supreme Court decision *Reserve Bank of India vs Jayantilal N. Mistry* (16 December, 2015) which lays down four possible scenarios where a fiduciary relationship is established.

- (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first,*
- (2) when one person assumes control and responsibility over another,*
- (3) when one person has a duty to act or give advice to another on matters falling within the (e.g. lawyer client relationship) scope of the relationship, or*

(4) when there is specific relationship that has traditionally be recognized as involving fiduciary duties (doctor-patient relationship), as with a lawyer and a client, or a stockbroker and a customer.”

These particular situations were cited in order to aid in the assessment of whether the President has a fiduciary relationship toward the Prime Minister as that is the only context in which this particular ground has been invoked.

Counsel for the Appellant submitted that although there is no direct authority in the Indian context that may be cited as relevant on all fours to the instant appeals, a useful illustration may be given in regard to the controversies that arose in regard to the assets declarations of Supreme Court judges in India. . In that instance the question which arose was whether the relationship of the Chief Justice and the other judges of the Supreme Court of India fell within the ambit of a fiduciary relationship.

The attention of the Commission was thus drawn to the following passage in *Secretary General, Supreme Court ... vs Subhash Chandra Agarwal* (12 January, 2010 Delhi High Court at paragraph 102), as being relevant by analogy in this instance,

The CJI cannot be a fiduciary vis-à-vis Judges of the Supreme Court. The Judges of the Supreme Court hold independent office, and there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. The declarations are not furnished to the CJI in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest.

Counsel further submitted that this rationale is relevant in the present context in relation to the relationship between the President and the Prime Minister and even more so in the context of the 19th Amendment to the Constitution and the structure of the present Coalition Government where Counsel for the Appellant argued no such hierarchy may be observed warranting the existence of a fiduciary relationship. Furthermore it was submitted that an argument to the effect that the Prime Minister submitted his Assets Declaration in a private capacity cannot be sustained.

Severability- Section 6

Counsel for the Appellant also submitted that the next point he raises may only be applicable in the event that the exemption under Section 5(1) (a) is sustained which is that anything that may fall within the privacy domain may be redacted as provided for by Section 6 of the Act. Counsel noted that this option exists given the scheme of an assets declaration, for example if the information in an assets declaration contains details of a spouse or child which should not be in the public domain this need not unnecessarily be released to the adverse effect of the particular individual and that it would not be responsible behaviour on the part of the Appellant Organisation.

Submissions on behalf of the PA

Counsel on behalf of the PA responding to submissions made on behalf of the Appellant Organisation submitted that three matters are before the Commission for consideration. Namely;

1. The application to the Secretary to the Prime Minister requesting the disclosure of the Prime Minister's Assets Declaration.
2. The Application to the Secretary to the President requesting the disclosure of the Prime Minister's Assets Declaration.
3. The application to the Secretary to the President Secretary requesting the disclosure of His Excellency the President's Assets Declaration. .

The Right to Information Act in the context of the Assets and Liabilities Law (Section 4 – Priority clause)/ Speaker's Ruling / Parliamentary Privilege

With regard to the first matter, while thanking the Commission for permitting the citation of exemptions at the point of Appeal to the Commission and during the pendency of the Appeal, especially in light of the fact that this was one of the first requests lodged and the Authorities concerned were new to the processes, Counsel for the PA submitted that the IO's position was based on a ruling made by the Speaker (hereinafter referred to as the Speaker's ruling) which states that so far as assets declarations are concerned the applicable law is the Declaration of Assets and Liabilities Law No. 1 of 1975 and not the Right to Information Act No 12 of 2016. Therefore the basis on which the rejection has taken place is that any person who seeks an assets declaration within the framework of the law must do so within the Assets Declaration law. Counsel for the PA then submitted that while the Appellant has taken the view that the information requested does not fall within the exemptions contained in Section 5, the Commission is required to first assess whether the information sought falls within Section 3 of the Act i.e. whether the information is in possession, custody or control of the PA. It was submitted that it is for this reason that the PA relied heavily on the Declaration of Assets and Liabilities Law.

Counsel submitted that this is a special law governing a special purpose with a specific procedure laying down how and the points at which the assets should be disclosed with the corresponding duty of the person receiving that information to maintain secrecy. Further this law also contains provisions with penal consequences to those acting in breach deterring persons from acting contrary to the provisions therein. Counsel further submitted that although the public interest in disclosure was dealt with in the submissions made on behalf of the Appellant Organisation the fact that the Declaration of Assets and Liabilities Law contains secrecy provisions which if breached result in penal consequences was not dealt with.

The Commission then queried from the Counsel representing the PA as to the applicability of the priority clause Section 4 in this context.

Counsel for the PA submitted that it is interesting to note that the Declaration of Assets and Liabilities Law also contained a priority clause. However the Commission drew the attention to the fact that the Right to Information Act supersedes the Declaration of Assets and Liabilities Law. Counsel then submitted that this is what the Speaker's Ruling states. The Commission noted that if the PA is advancing a reason which is based on documentation that is not available before the Commission and if this decision is to be taken seriously, substantive grounds on which that decision was made to be made available to the Commission. Counsel on behalf of the Appellant submitted that the ruling should be made available to the Appellant and drew attention to the fact such ruling should be reported in the Hansard.

Counsel on behalf of the PA submitted that this ruling can be disclosed before the Commission for its perusal only as it has not been made in the well of Parliament and that he has no instruction to make the said ruling available to any other person/ party. The Commission noted that it is willing to examine the ruling in the first instance and to then issue an order with respect to the Speaker's ruling after considering the objection of the parties to making the ruling public or otherwise.

The Commission noted that the issue at hand was in relation to the applicability of Section 4 to the facts of this particular denial as the PA is relying on a priority clause of a law passed in the 1970's as opposed to the Right to Information Act which came into operation in 2017. Counsel for the PA submitted that the Commission would have to address this issue in relation to the priority clauses.

Counsel for the PA submitted that in his original written submissions the merits of the case were also addressed and the argument that the Declarations of Assets and Liabilities Law is a special law was raised.

The Appellant submitted that the special position given to the Declaration of Assets and Liabilities Law, the Speaker's Ruling and the basis for the non- disclosure of the said ruling will have to be considered.

Counsel for the Appellant queried the reason as to why the said ruling was not made publicly available since this was the first time he became aware of the fact that it was not made in the well of Parliament and this was not realised previously. Counsel for the PA submitted that the IO has made available the crux of the ruling. The Commission noted that the matter in issue is serious enough to warrant a perusal of the entire ruling by the Commission to which counsel for PA submitted that he had no objection.

Counsel for the PA drew the attention of the Commission to the letter written by the then Secretary to the President to the Commission, dated 9th June 2017 specifically mentioning the ruling. Counsel read out the letter.

The Commission noted that there are two issues in this instance with respect to which the PA is required to make representations:

1. The application of Section 4 of the RTI Act *vis a vis* the Declaration of Assets and Liabilities Law
2. The assumption inherent in that letter regarding the application of privileges to the Office of the President

The Commission noted that this will have to be addressed specifically as when considering the relevant Constitutional Article and the Parliamentary Privileges Act both appear to apply to President when going to and from Parliament. Therefore with respect to the President the question arises whether the privilege arises in instances where the President acts outside Parliament. Further, with respect to Section 3 the interpretation given to custody control and possession of the PA must be examined.

Counsel for the PA was queried as to whether he has further submissions to make with respect to the interpretation attaching to Section 3. Counsel responded that he wished to rely on Section 3 (1) and 3(2) which will be linked to Parliamentary Privilege.

Severability in the event the exemptions prevail

In counter response, Counsel for the Appellant drew the attention of the Commission to the distinction between the assets declaration and the information found within the assets declaration. Counsel submitted that while the Assets Declaration Law concerns a specific document which cannot be disclosed under that law and what is sought is the information in that document as can be obtained under the RTI law. Counsel maintained that this distinction is important especially in the context of Section 6.

Section 6 allows this goes to heart of the question as to whether the Declaration of Assets and Liabilities Law prevails over the RTI Act. It was further submitted that the Appellant cannot be held to its original position because the PA had already been allowed to deviate. It was the submitted that the information can be disclosed in a way that does not curtail the privacy or privileges or any other ground that has been or may be invoked in this case. The key issue would be whether the RTI Act supersedes the Declaration of Assets and Liabilities Law.

Counsel for the PA responding to this submitted that the Appellant is taking up a very different position to that taken by the appeal lodged. Counsel submitted that the Commission is bound to determine the appeal and that the Appellant Organisation cannot change the basis of its appeal. Attention was drawn to the specific and categorical reference in the appeal to the fact that the President must make a declaration to Commissioner of Elections (read from the appeal) a piece of information sought by, set out and as required by a specific law . The Commission was invited to decide whether the refusal of this document, under this law, is correct. Counsel submitted that at this point in time a submission cannot be made on behalf of the Appellant Organisation to the effect that it wants in the alternative any document containing in substance the assets and liabilities of the President.

The Commission while noting this submission drew the attention of the Counsel for the PA to Section 6 which provides for the severability of part of the information based on the applicability of an exemption if the Commission is so inclined.

Counsel for the Appellant submitted that Regulation 12 lays down how this may be carried out and thus submitted that it was possible to extract the information and present it in another form. Counsel for the PA submitted that at this point it appears that the Appellant was requesting *an* (emphasis) assets declaration if the information requested in the first instance i.e. the assets declaration of the President and the Prime Minister cannot be disclosed.

The Commission noted that the other issue of concern is whether the law as at present required the President to declare assets and liabilities, to which counsel for the PA responded in the negative. Thus at the inception determine the applicability of the law to the President would have to be determined. Counsel for the Appellant Organisation interjected at this point submitting that if this position is to be maintained i.e. that there is no document in the custody of the Presidential Secretariat.

The Commission pointed out that the issue in this instance will be the legal duty for the Presidential Secretariat to have in its possession, custody or control such a document, there again the interpretation given to possession custody and control being crucial to the determination of the matter at hand. Thereafter the PA may be queried as to whether it in fact does have it.

Counsel on behalf of the Appellant contended that it disputes this approach and pointed out that, for example in relation to information on admissions to school, the law may not require the school to have detailed information kept in a file, however it may be presumed or in is in fact known that such information is maintained. Counsel submitted that if information can be denied due to inability to cite a statutory provision that mandates that particular authority to have possession or custody of that information, then a large number of information requests will go unanswered/ be denied.

The Commission pointed out that this is not an issue of the presence of a statutory provision but rather the interpretation that must be given to the phrase 'possession, custody and control,' the analogy of information in relation to school admissions being inapposite to this instance.

The Commission noted that the second issue that arises if by law the PA is required to keep a particular document then the obligation to either give or refuse (citing a statutory exemption) arises immediately under Section 3. The Commission further noted that it cannot hypothesize about what is required by law to be kept or otherwise; therefore an interpretation of the applicability of Section 3 becomes necessary with respect to the President's Assets Declaration.

Counsel for the Appellant sought to draw an analogy with respect to draft laws where there is no statutory or Constitutional provision requiring the Ministry spearheading that particular draft law to maintain such drafts. The Commission noted that once again this analogy was hard to maintain since the existence of a draft law is a matter of practical reality and is not stipulated in a statute as in this instance.

Further the primary issue will be whether the individual in question i.e. the President of Sri Lanka *qua* President of Sri Lanka is required in law to submit a Declaration of Assets and Liabilities. The Commission would thus be required to rule on the question of whether the President is required in law to prepare an Assets Declaration which Counsel on behalf of both parties were required to respond to. The Appellant requested that this would have to be considered separately from the appeal relating to the Prime Minister's Declaration of Assets and Liabilities.

Order

Counsel representing the two PAs in these appeals is directed to cite the exemptions that are being relied on for the record in refusing the information requested at the stage of second appeal before the Commission.

The ruling of the Speaker on which information had been refused by the Information Officers in the first instance is directed to be made available to this Commission for its perusal.

Both parties are directed to file Written Submissions on matters arising during the hearing of the appeals.

Respondent's Written Submission Due: July 17, 2018

Appellant's Response Due: August 6, 2018

Next hearing: September 4, 2018 at 3.30pm