

Verite Research (Pvt.) Ltd. v. Central Bank of Sri Lanka

RTICAppeal(In person)/25/2018 and RTICAppeal(In person)/26/2018 (*Order adopted as part of a formal meeting of the Commission on 09.05.2018*)

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: Mr. Mahinda Gammampila
Commission Members: Ms. Kishali Pinto-Jayawardena
Dr. Selvy Thiruchandran
Justice Rohini Walgama

Present: Director-General Mr. Piyathissa Ranasinghe

Appellant: Verite Research (Pvt.) Ltd.
Notice issued to: Dr. Indrajith Coomaraswamy, Governor, Central Bank of Sri Lanka

Appearance/ Represented by:

Appellant Organisation -

Nishan de Mel, Executive Director, Verite Research (Pvt.) Ltd.
Gehan Gunatilleke, AAL, Verite Research (Pvt.) Ltd.
Malsirini de Silva, AAL, Verite Research (Pvt.) Ltd.
Anushan Kapilan, Research Assistant, Verite Research (Pvt.) Ltd.

PA-

C. J. P. Siriwardena Deputy Governor CBSL
A. A. I. N. Wickramasinghe Acting Deputy Director CBSL
D. Wilathgamuwa, Senior Assistant Director, CBSL
W.G. Prabath, Deputy Superintendent, CBSL
P. V. L. Nandasiri Director Legal CBSL
D.S. Meemadunne, Senior Manager, CBSL
K.N.N.M. Bandara, Superintendent – EPF, CBSL
S.H. Gunawardena, Director – Communications, CBSL
K.G.P. Sirikumara, Additional Director, CBSL
M. Ariyaratne, Assistant Director, CBSL

Matters arising during the Course of the Hearing

At the outset, both parties to the Appeal were informed that the hearing on the instant date would be a public hearing in accordance with Rule 33 of the Rules of the RTI Commission as gazetted in Gazette No. 2004/66 dated 03.02.2017 which states,

‘The Commission shall conduct an Appeal hearing under the Act in open or closed (in camera) proceedings at its discretion, having regard to the need to protect information

which is exempt by virtue of Section 5 of the Act and any other relevant confidentiality interests.'

The PA recorded in its objections to the hearing being a public hearing. It submitted that some of the information being discussed related to confidential information which could not be disclosed to the public. The Commission recorded the objections of the PA and informed the PA that the hearings of the Commission were assumed to be public and that this objection by the PA would amount to this particular hearing being an exception to the Rule. The hearing then continued as a closed door hearing.

Written submissions were submitted to the Commission by both parties. The Public Authority (PA) in its written submissions dated 06.04.2018 submitted a preliminary objection that in terms of the RTI Act, No. 12 of 2016, the right to information was available only to citizens and that under Sections 31 and 32 an appeal to the Designated Officer (DO) and the RTI Commission could only be submitted by a citizen and therefore the Appellant should have averred citizenship in the information request form and/ or appeal which the PA submitted that the Appellant had failed to do. The PA submitted that it being an organisation had failed to include the specific averment that it came within the definition of the term 'citizen' as defined in the Act.

With regard to the information requested in RTIC Appeal/25/2018; namely,

'A list of all secondary market transactions of the 30 year treasury bond issued on 27th February 2015 from the date of issue till 31st May 2017. Details of the transactions should include the following information:

- A. Date of transaction
- B. ISIN Number of the bond
- C. Coupon rate of the bond
- D. The yield to maturity (net of taxes) of the bond during each transaction
- E. Face value of the bond
- F. Cost of the bond
- G. The price at which the bond was sold
- H. Names of the parties involved in the transaction'

- the PA made the following submissions:
1. That it can provide the information in items A & E (extracted from the LankaSecure System) if the Appellant agreed to the other positions taken by the PA;
 2. Information in items B & C had already been published in the PA's website (www.cbsl.gov.lk);
 3. That it did not have the information in items D, F, & G in the LankaSecure (Scriptless Securities Settlement System/Central Depository System) as the transacting parties do not have the facility to submit such information;
 4. With regard to item H, the PA submitted that it relates to information excluded under Section 5 (1) (a) of the RTI Act in that it relates to personal information which disclosure has no relationship to any public activity or interest.

5. The PA also submitted that the Treasury Bond issuance on 27th February 2015 had been subjected to much scrutiny in the proceedings of the Presidential Commission of Inquiry appointed to investigate into and report on the issuance of treasury bonds during the period 01st February 2015 to 31st March 2016 (Bond Commission). As a result of the Bond Commission's recommendations, the PA submitted that actions were being taken against the alleged offenders and therefore disclosure of certain information, particularly information of counterparties would affect the effective prosecution of offenders and would impede the enforcement of criminal justice and therefore the information requested in item H would also be precluded under Section 5 (1) (h) in that its disclosure would cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders.
6. Further, the PA submitted that the parties involved in the transactions (under item H) would include a large number of corporate bodies and individuals who had invested in Treasury Bonds and that the disclosure of such investment had no relationship to any public activity or interest. It submitted that disclosure of such information would amount to an unwarranted disclosure of private information and would be against the public interest in that confidence in the government securities market is threatened by such disclosures.

With regard to RTICAppeal/26/2018, where the information requested related to, A list of all govt. securities market transactions of the EPF from January 2015 to 30.04.2017. The list should include the following market activities.

- Primary market transactions held through auctions
- Primary market transactions held through direct placement
- Secondary market transactions

Details of the transactions specified above should include the following information:

- A. Date of purchase
- B. Date of bill/ bond issue (if different from the date of purchase)
- C. ISIN number of the bill/bond
- D. Coupon rate of the bill/bond
- E. The yield to maturity (net of taxes) of the bill/bond
- F. Face value of the bill/bond
- G. Purchase cost of the bill/bond
- H. The price of each bill/bond
- I. Counter party (party with whom the transaction was held)

-the PA submitted that it was required to invest the funds of the EPF 'in such securities as the Monetary Board may consider fit' in terms of the EPF Act, No.15 of 1958. When acting in this capacity it had to aim at obtaining a reasonable return for the investments while ensuring the safety of the funds as it has to handle investments for the benefit of nearly 17.3 million members of the EPF. The PA submitted that in order to achieve the safety and profitability of the funds, a large majority of the funds have been invested in government securities. In this capacity, it submitted that it plays the role of a market participant. As a market participant it acts as a competitor in the financial market interacting with other participants with the aim to maximize

its return on investments. In order to ensure profitability and competitiveness in a market with a limited number of participants, it submitted that it was essential for participants to preserve strict secrecy with regard to market sensitive information.

The PA submitted that any disclosure of sensitive information of a market participant would invariably result in gains to competitors at the expense of the disclosing party. Therefore, the PA submitted that the information requested by the Appellant, in its totality was sensitive information of the EPF which should not be revealed to a competitor and that if revealed it would result in the EPF suffering losses. It further submitted that this would harm the competitive position of the EPF and its member since the losses would ultimately affect the return due to members of the EPF. The PA submitted that this information would be exempted under Section 5 (1) (d) of the RTI Act, which exempts,

‘.information, including commercial confidence, trade secrets or intellectual property, protected under the Intellectual Property Act, No. 36 of 2003, the disclosure of which would harm the competitive position of a third party, unless the public authority is satisfied that larger public interest warrants the disclosure of such information.’

The PA further submitted that the Treasury Bond issuance on 27th February 2015 had been subjected to much scrutiny in the proceedings of the Bond Commission and that as a result of the Bond Commission’s recommendations, actions were being taken against the alleged offenders and therefore disclosure of certain information, particularly information of counterparties would affect the effective prosecution of offenders and would impede the enforcement of criminal justice and therefore the information requested in item H would also be precluded under Section 5 (1) (h) in that its disclosure would cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders.

The PA emphasized that while it may not be possible to issue the entirety of the information requested, it would be able to release certain information within the framework of the law and that it had identified several combinations of information which could be disclosed without affecting the rights of the EPF, and that the Appellant could choose from only one of the combinations below relating to information that the PA was willing to provide;

- I. A B C D
- II. A B E
- III. A F
- IV. A G
- V. A H

The Appellant, by written submissions dated 13.04.2018, responded that in so far as the preliminary objection taken by the PA was concerned, that the matter was raised before the RTI Commission at the last hearing on 16.03.2018 and that the Appellant had informed the Commission that it had averred citizenship at the point of submitting its appeal to the Commission and had requested the Commission to accept in its discretion the averment in lieu of the requirement to aver citizenship at the point of the original information request. The Commission had accordingly granted such request. Further, as the PA had not objected to the

Commission's said order and had instead made submissions on the merits of the application the Appellant submitted that the PA was bound by the Commission's order accepting the Appellant's averment of citizenship and was estopped from raising a preliminary objection thereafter.

Further, with regard to RTIC Appeal/25/2018, the Appellant submitted that the PA's claim that the data relating to items D, F, & G was not available in the LankaSecure Scriptless Securities Settlement System/ Central Depository System was not a valid reason for the denial of information. The Appellant submitted that unavailability of information on a particular system was not a valid exemption under the RTI Act since the PA had not submitted that it was not in possession of the requested information. The Appellant stated that it believed the information was already in the possession of the PA as aggregate data on similar transactions are published in the PA's weekly economic indicator on its website (<https://www.cbsl.gov.lk/en/statistics/economic-indicators/weeklyindicators>).

Further, regarding item H, the Appellant submitted that;

(a) Information on this particular 30-year bond has a very high level of public interest as the prima facie information is already in the public domain that the transactions in both the initial purchasing and subsequent transactions of this bond has caused losses to the public, through the manipulation of the price, passing through various intermediaries; and

(b) Even if private individuals purchasing government bonds might prefer to keep their identities discrete, this concern would be over-ridden by the public interest dimension of this particular bond transaction. The concern for privacy, however, also has no relevance for corporate entities that are expected to act with full disclosure. Most of the counterparties to bond transactions in Sri Lanka are Primary Dealers (PDs), Banks and Non-Bank Financial Institutions (NBFIs) that are listed in the stock exchange and are bound by obligations of public and shareholder disclosure in any case.; and

(c) The entities transacting bonds include not only listed companies, with obligations to disclose their market actions, but also government entities – including banks, non-bank institutions such as insurance companies, as well as the EPF, which has the strongest obligation to be open with its data and transactions, as the steward of the retirement savings of Sri Lankan workers.; and

(d) The Bloomberg platform set up by the respondent in August 2016, was evidence which showed that every bond transaction was recorded, in terms of its date, identity (ISIN), price and value of the transaction and each market participant had access to all transaction. If the PA believed that provision of this information was detrimental to the market, then the Bloomberg platform was contradictory to its claims; and

(e) The information withheld by the PA is carefully designed to prevent the discovery of the sale price commanded in secondary transactions of the Bond (and to conceal the names of the counterparties, including that of the EPF even when it has been engaged in transactions that are inconsistent with ascertainable market price); and

(f) If the idea being propounded by the PA in defending this position is that market prices and counterparties should be concealed for the benefit of the market function – then it runs counter to the foundational concept of how and why a market mechanism is expected to function in the public interest.

The Appellant submitted that the market system works most fairly and efficiently when the prices of transactions are transparent and that laws exist to ensure that prices are marked, published or made known, precisely for that reason. It submitted that, on tenders and auctions, when prices are only determined at the conclusion of the process, all information relating to the final decision such as the name of the party which won the bid, value of their bid, and other details that are relevant to establishing the integrity of the transaction are normally made public to ensure that participants who were not successful are satisfied that they have been dealt with fairly.

It further submitted that, contrary to what was stated by the PA, the provision of such information would increase confidence in the market – as a closed policy on price and purchaser information would tend only to benefit illegal/unethical practitioners. Participants that are not engaged in unethical manipulation of prices do not benefit from the concealment of such information.

The Appellant strongly contested the refusal by the PA to provide the names of the parties involved in the transaction, claiming it to be exempted under section 5 (1) (h) of the RTI Act, which relates to grave prejudice to the prevention or detection of any crime or apprehension or prosecution of offenders. It claimed that it was unclear as to how the provision of such information could cause prejudice to the above-mentioned activities. The PA could, it submitted, claim an exemption, if at all, only where the requested information causes grave prejudice to a particular investigation. The PA was required under the RTI Act to disclose any information that was not directly related to an ongoing investigation and that it was required to disclose information that relates to an ongoing investigation if the public interest in disclosing such information outweighs any prejudice caused to the investigation through such disclosure.

With regard to RTICAppeal/26/2018, the Appellant submitted, that the PA had failed to explain how the historical data on the transactions of the EPF would lead to unfair losses to the fund for its future transactions. It submitted that the information could be regarded as sensitive information only if it pertained to future investment strategies. For example, the land registry has all information pertaining to the owners of the land and the prices at which the land was bought/sold. The information in this registry could be given to anyone for reference and this improves the transparency and enhances the functioning of the system. The information requested from the PA, the Appellant submitted, was also of similar nature, where the asset is the treasury bill/bond.

The Appellant further submitted that the information withheld by the PA was already published in its annual report in an aggregate form. The information request by the Appellant was regarding the disaggregated form of this data, which it submitted had no consequence on the EPF's future position in the market.

Further, the Appellant submitted that the EPF is the single largest fund in the country holding probably over 90% of the local borrowings of the government and that it is mostly active only in the primary market – i.e. buying directly from the government, and not third parties in the secondary market. Therefore, the Appellant submitted that any secondary market activity of the EPF was of huge public interest, as it could be a means to move public money to private hands (whereas primary dealings are a cost or benefit to the government only -the government, in turn, taxes the public to pay their debts).

The Appellant also reiterated that the choice of data that the PA was willing to provide was designed in a way that would prevent any person from inquiring into the performance of the EPF, compared to the rest of the market. This choice, it submitted reflected an attempt to conceal certain information to prevent scrutiny of possible malpractices relating to the EPF.

The Appellant submitted that the PA claimed under section 5 (1) (h) of the RTI Act that disclosing information on counterparty (item I) would affect the prosecution of offenders but that it was unclear as to how the disclosure of the particular information would affect any prosecution. The Appellant further submitted that the counterparties who are alleged to be offenders are in any event aware of the transaction involving the EPF. The PA could, it submitted, claim an exemption, if at all, only where the requested information causes grave prejudice to a particular investigation. The Appellant submitted that the PA was required under the RTI Act to disclose any information that was not directly related to an ongoing investigation and that it was required to disclose information that relates to an ongoing investigation if the public interest in disclosing such information outweighs any prejudice caused to the investigation through such disclosure.

The Appellant submitted that, with regard to RTICAppeal/26/2018, none of the combinations suggested by the PA include the information on the counterparties and that if such information related to individuals the Appellant suggested that it could be redacted but no redaction should be allowed if it related to other Public Authorities since Section 5 (1) (a) of the Act would not apply to Public Authorities. The Appellant also submitted that the combinations as provided would not provide the exact information the Appellant required which was the transactional history. The Appellant submitted that merely knowing that something was transacted would not be the same as knowing exactly what was transacted.

The PA submitted that this was market sensitive information. The Appellant counter-responded that items A- H should be released as providing the combinations suggested that the PA was willing to release all the information. The PA submitted that if all the information was released, any calculation could be done to calculate the yield on the bond because yield and amount are very sensitive and this would hurt the EPF's market activity.

The Commission queried from the PA which of items F, G, and H, if would be willing to release along with items A, B, C, D. The PA submitted that the combination of F, G, and H together was price sensitive and that even if one of these was revealed any party can make a calculation to its advantage.

At the Right to Information Commission of Sri Lanka

The Appellant stated that it would not affect any market player since others would not buy and sell according to the activities of the PA and that the value of the bond is very precise and given. The Appellant further stated the PA's act of concealing that information would amount to concealing malpractice. The Appellant further submitted that it was not clear as to what special sanctity lay with regard to item E: the yield to maturity (net of taxes) of the Bill/Bond.

Next date of hearing: 03/07/2018

RTICAppeal(In-person)/25/2018 and RTICAppeal(In person)/26/2018 (Order adopted as part of a formal meeting of the Commission on 03.07.2018)

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

Present: Director-General Mr. Piyathissa Ranasinghe

Appellant Organisation: Verite Research (Pvt.) Ltd.

Notice issued to: Dr. Indrajith Coomaraswamy, Governor, Central Bank of Sri Lanka

Appearance/ Represented by:

Appellant Organisation -

Nishan de Mel, Executive Director, Verite Research (Pvt.) Ltd.

Gehan Gunatilleke, AAL, Verite Research (Pvt.) Ltd.

Malsirini de Silva, AAL, Verite Reseach (Pvt.) Ltd.

Anushan Kapilan, Research Assistant, Verite Research (Pvt.) Ltd.

Public Authority

C. J. P. Siriwardena Deputy Governor CBSL

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D. Wilathgamuwa, Senior Assistant Director (Legal) CBSL

W.G. Prabath, Deputy Superintendent of Public Debt, CBSL

P. V. L. Nandasiri Director Legal (representing the Governor of CBSL)

D.S. Meemaduma, Deputy Superintendent, CBSL

K.N.N.M. Bandara, Superintendent – EPF, CBSL

S.H. Gunawardena, Director – Communications, CBSL

Matters arising during the Course of the Hearing:

Clarification of Exemptions

At the outset, a clarification was sought as to what exemptions were being cited by the PA given the fact that, in relation to RTIC Appeal/25/2018 the IO had denied the information request citing Sections 5 (1) (a), 5 (1) (d), and 5 (1) (j) of the Act and the DO had denied the information request citing Section 5(1) (a). Further the PA had submitted that it did not have items D, F and G of the said information request in its possession, custody and control which would in effect be a refusal of information under and in terms of Section 3 of the Act. The PA in response, clarified that it is relying on Section 3 (1) and in terms of the exemptions under Section 5 cited subsections (a) and (h).

The Commission at this point noted that Section 5 (1) (h) relates to refusal based on the fact there is an ongoing criminal investigation and queried from the PA whether these exemptions are being relied on in respect of both RTIC Appeal/25/2018 and RTIC Appeal/-26/2018 to which the PA responded in the positive and stated further that the specific sub-section it was relying on was Section 5 (1) (h) (i).

The Appellant Organisation pointed out that Section 5(1) (h) had not been cited by the PA in the initial responses to RTIC Appeal/25/2018. The Commission noted that a PA is entitled to raise new exemptions at the appeal stage before the Commission, provided the Public Authority is clear on the exemptions being invoked. The Commission emphasized that, as stated in the RTIC Minute of 16.03.2018, in order to rely on Section 5 (1) (h) (i), which exempts from disclosure information which would ‘cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders,’ the PA is under a duty to demonstrate grave prejudice. It was observed that in relation to RTIC Appeal/25/2018, one case in particular was cited (No. 8266/2018) as reflected in the written submissions of the PA but that details had to be furnished of that case along with the grave prejudice that is contended to be caused if information requested in the appeal is released.

Justification for the citation of Section 5 (1) (h) (i)

The PA submitted that subsequent to the release of the report of the Commission of Inquiry (the subject matter of which concerns the bond issue) action had been taken in the criminal and civil fields and the CID together with the Attorney-General’s Department. The PA submitted that investigations are ongoing and consequent to these investigations certain individuals have been arrested and remanded. The PA submitted that it too is not aware of the specifics and that a special team of officials belonging to the Financial Investigations Unit (FIU) of the PA were assisting the CID in this matter. The PA submitted that the FIU and the PA do not exchange information on this and that it was not in a position to immediately clarify the said details but that the information could be obtained upon Order of the Commission.

The Appellant Organisation interjected at this point and requested a time frame to be detailed by the Commission for the provision of the said information in the context of delays being caused otherwise.

It was noted by the PA that when this Appeal was first lodged in March 2018 there were no cases pending. The Appellant Organisation submitted that the information request in relation to this was in May 2017 and that it is hard to comprehend that every bond transaction is under investigation. The PA responded submitting that it is unaware as to how many transactions are under investigation but that there is enormous national interest in the matter and that the fact that Directors and CEOS have been arrested and remanded for 5 months is an indication of the severity of the matter.

Withdrawal of the request for counterparties and the public interest in disclosing the other information

At this point the Appellant Organisation submitted for the record that it is not pursuing the names of those who are transacting (counterparties). The Appellant Organisation submitted that it is only seeking information on the transactions. The Appellant Organisation sought permission to demonstrate using the research it had carried out, based on what is publicly available, precisely why the disclosure of this information is in the public interest. The Appellant Organisation submitted that the analysis was done using one bond transaction that was publicly available. The Appellant Organisation submitted that it does not intend to prejudice the market, or to disrupt the investigation, but rather seeks to understand how the EPF fund which is a public fund functions, how it has been dealt with and how poor investments have been made to the detriment of the public.

Section 5 (1) (h) of the Employees Provident Fund Act No. 15 of 1958 (EPF Act)- Disclosure requirements

Section 5 (1) (h) of the EPF Act;

*'shall cause to be prepared in respect of the Fund for each year a statement of receipts and payments, a statement of income and expenditure, a statement of assets and liabilities, and a **statement of investments** showing the face value, purchase price, and market value of **each of the investments.**'*

The Commission intervened to observe that a lack of clarity arose in terms of the position taken by the PA in this Appeal and mandatory statutory disclosure requirements in terms of the EPF Act. In relation to RTIC Appeal/26/2018 which concerns the EPF, Section 5(1) (h) of the EPF Act is relevant. This Section imposes a legal obligation on the EPF to maintain '*a statement of receipts and payments, a statement of income and expenditure, a statement of assets and liabilities, and a **statement of investments** showing the face value, purchase price, and market value of **each of the investments.***' (emphasis ours). The attention of the PA was drawn to the exemption cited in relation to RTIC Appeal/26/2018, where it is stated that exact details cannot be given but only the aggregate amount can be given. The PA was queried in regard to the conflict between this statement and the legal obligation imposed under Section 5 (1) (h) of the EPF Act.

The PA responded stating that in its annual reports the EPF discloses much more than what is required in terms of Section 5 (1) (h). The Appellant Organisation at this point interjected to

show the Annual report put forward in compliance with this Section which showed that maturity date, the face value of the bond etc. reported. The PA was queried on what it meant by ‘much more’. The PA submitted that its accounts are prepared in terms of the law and it is required to prepare a ‘Statement of Investments’ which will provide the details in aggregate form. The Commission queried as to why the PA uses the term aggregate since the Act refers to investment. The PA submitted that in relation to one security there may be a large number of transactions (thousands) and that each transaction is not reported. The Commission pointed out that the large volume of data does not exempt the PA from having to maintain such.

The PA submitted that its published information is in compliance with accounting standards.

The Commission queried from the PA how it adheres to Section 5 (1) (h) i.e. what it discloses with regard to each investment. The Appellant Organisation was directed to handover to the PA the document which claimed to have details in relation to each transaction. However the PA stated that this does not contain the breakdown but is rather a summary provided for each security and not a detailed version of each transaction affecting the security. The PA submitted that since there are thousands of transactions it cannot be reflected in an annual report and as such, is not done by any organisation at present.

The Commission pointed out the legal issue to be determined related to the PA’s compliance with Section 5 (1) (h) of the EPF Act on the basis of which, a further question arises as what information must legitimately be released under and in terms of the RTI Act which is the RTI Commission’s statutory duty. The question that arises is whether the PA maintains a Statement of Investments and if so does that require that details of each transaction affecting a security be recorded. The PA reiterated that it can provide details only in relation to the status of its investment and not how the investment moves i.e. data depicting how it is bought and sold in the market, in effect data in relation to each transaction.

The Appellant Organisation explained why it needs the details of the transactions as opposed to what the PA states is reported. The Appellant Organisation demonstrated this using information from the COPE report. The Appellant Organisation submitted that the fact that the information was released through the COPE report also contradicts the PA’s position that the release of information affects the liquidity of the funds and that the Appellant Organisation is requesting information that was not disclosed.

The Commission reiterated that the first issue would be whether the PA is in adherence with the legal obligations imposed by Section 5 (1) (h). The PA released a snapshot at a particular point and between that point and the current point the fact that a particular bond is bought and sold several times which in effect are multiple investments is not indicated. According to the Appellant Organisation, the PA could thus buy and sell securities which are unrecorded and/or undisclosed. The Appellant Organisation contended that the PA has to report at each point an investment it is bought and/ or sold which is in effect ‘reporting each transaction’ in terms of the EPF Act.

The PA was questioned as to whether it agrees with this submission of the Appellant Organisation to which the PA responded in the negative stating that this is additional information

which the PA is not required to disclose under and in terms of the EPF Act. The PA submitted that what the Appellant Organisation required was a record of the movement of each investment which obligation was practically not possible to adhere to.

The PA reiterated that it is meeting the legal requirement and that it is disclosing more than what is required by law. The PA submitted that it is in compliance with the required reporting standards as otherwise the Auditor General would have pointed it and it would have been queried in Parliament as well.

In relation to the period which the Appellant Organisation has requested the information, the Appellant Organisation submitted that it has requested data only in relation to a period of 2.5 years to establish that the data can be shared. However it is of the opinion that any research needs data pertaining to a longer period of time.

The Commission pointed out that the question remains as to the difference between items , G and H in RTIC Appeal/26/2018 and the disclosure that is required under Section 5 (1) (h) of the EPF Act. The PA was queried as to whether items F, G and H encompass what is required to be disclosed under 5 (1) (h) and if not what remains to be included.

The PA submitted the main difference between the information requested and what is required by the statute is that the information request revolves around the date of purchase. Thus the PA is being asked to provide date wise information. The Appellant Organisation requires a breakdown of each security/investment. What has been provided/ what can be provided is however information regarding the position of each bond at a point in time which is what the PA presents as 'aggregate.' The Appellant Organisation submitted that the PA used the word aggregate in the wrong sense which is causing a lot of confusion.

The PA submitted that the investment is in a bond and that in relation to one bond there can be for instance two auctions within one day.

Why the Appellant Organisation requires the deconstructed information i.e. information pertaining to each transaction

The Appellant Organisation then submitted that it seeks this deconstructed information with the intention of discovering the transactions that a bond goes through which is a question of public interest. The Appellant Organisation submitted exhibit 1.1 which is a paper the Appellant Organisation published in 2012. It was based on the EPF purchases in the stock market in the years 2009 and 2010. The Appellant Organisation submitted that the EPF Investments in stock received a return of 3.73% in 2009 where the stock market as whole made a return of 125% in the immediate aftermath of the war. In 2010, the EPF return on investment was 4.2% while the stock market had a 96% return. The Appellant contended that this revelation resulted in considerable public debates and discussions. The Appellant claimed that the EPF's dealings in the market involved individuals buying investment at a cheap rate and selling to EPF at a high price. Public money suddenly became private in what seemed to be a legitimate manner.

The Appellant Organisation submitted that questions arose as to whether what was happening in the stock market could also be happening in the bond market and that the COPE investigation into Perpetual Treasuries disclosed relevant facts of interest. The Appellant Organisation submitted that the COPE investigations had disclosed that Perpetual Treasuries had bought bonds at a lower price on a particular a day, and sold it to the EPF a few months later for a much higher price making an extraordinary profit in the process. The Appellant submitted that it cannot trace/find the other transactions because Perpetual Treasuries also sold to other parties who sold to EPF. The Appellant Organisation submitted that it cannot find the details of these transactions because the aforesaid COPE report released the direct sales. The Appellant Organisation submitted that it does not wish to focus on one actor or one bond, but rather on the systemic problem as evidenced through these transactions.

The Appellant Organisation submitted that to determine whether the EPF purchased at a reasonable price, it is necessary to know the purchase date as, only then, can that purchase price be compared with the secondary market price that the PA publishes for that week thereby enabling the public to ascertain if the purchase price of the EPF was reasonable. In the example put forward by the Appellant Organisation where all the data was available it was demonstrated that the EPF incurred heavy losses as a result. The Appellant Organisation submitted that it is people's future savings that are taken and put into private hands through secondary market transactions. The Appellant Organisation submitted that if these transactions took place in the primary market, it would be a different issue but here, secondary market transactions call into question the efficiency or good management of the fund which directly impacts on the public interest.

The Appellant Organisation further submitted that the public interest in better systemic management of public funds can be assessed only by ascertaining as to whether a fair price has been paid and for that, the purchase date through which the purchase price published by the PA corresponding to that period can be compared in order to arrive at an assessment as to whether a fair price has been paid. The price which is publicized by the PA for a particular day/week is determined based on market interest rates. The value at which the bond can be sold depends on what is happening to daily market interest rates. The Appellant Organisation further reiterated that the provision of this information would be in the public interest and that, for example, if 6 transactions resulted in a Rs. 222 million loss, the loss incurred in the event of a similar scenario arising in relation to the other 1000s of transactions the PA states occur, is incalculable. Thus, it is only fair by the public that bad investment strategies are exposed and subjected to criticism in the public domain.

The PA's response

The PA submitted that it does not wish to justify its investment strategies and the fact that the stock market made high profits while the CBSL investments made small profits can be justified in different ways. The PA submitted that its investment strategies in relation to securities are more conservative, long term and risk averse. In demonstrating this, the PA made submissions outlining the history and context in which it is allowed to invest the EPF funds. The PA submitted that it is more concerned about the safety of the funds which is why invests in securities rather than in the share market since the share market could collapse at any moment.

The PA further noted that based on the submission by the Appellant Organisation it appears that the Annual report contains the information requested. The Appellant Organisation submitted that all except the date of purchase is provided.

Distinction between an ‘investment’ and a ‘transaction’ - The PA’s submissions

The PA clarifying the requirement in Section 5(1) (h) of the EPF Act submitted that while the information request looks for information on each transaction, the law only requires that the PA disclose in relation to each investment. The PA submitted that in relation to one investment, there may be a series of transactions. The PA submitted that it is not in a position to provide this information in relation to each and every transaction as this would be prejudicial to the interests of the EPF and could lead to irreparable losses to the EPF which consists of the funds of 17 million EPF members. The PA submitted that the provision of the information will be detrimental to the public interest.

The Appellant Organisation disagreeing with this response was prepared to respond to the PA’s submission that economic damage/ market losses would occur if the information is disclosed.

The Commission sought to further clarify from the Appellant Organisation whether in the information request pertaining to RTIC Appeal/26/2018 it required details in relation to each transaction. As items F G H (as numbered in the further written submissions PA) of the request speak of Face value of the bill/bond, purchase cost of the bill/bond, price of each bill/bond the Commission wished to clarify whether the Appellant Organisation is requesting details of each transaction.

The Appellant Organisation responded stating that the Bill/bond can be bought on different dates. The analysis conducted by the Appellant Organisation based on the data available in the COPE report is only possible because the date of purchase is known. The Appellant Organisation submitted that without this item it cannot ascertain whether the EPF overpaid.

The Commission queried from the PA whether it does not maintain records of each transaction to which the PA responded that it is required to maintain such records and in fact, does so.

The PA also reiterated the submission made on the previous occasion that the EPF’s sale of these bonds at low price which were then purchased at a high price resulting in the loss was first revealed by the PA itself in the public domain. The PA further wished to have on record the fact that the PA of its own accord requested the President to appoint a Commission of Inquiry to inquire into these malpractices. The PA submitted that it is noteworthy that persons responsible for these dealings resulting in losses to EPF have been interdicted and investigations are being conducted against them. The PA submitted that the disclosure of this information would prejudice these investigations and cause irreparable losses to the EPF.

‘Volume of transactions’

Emanating from the Commission noting the issue of multiplicity of details in terms of each transaction, but that the PA in fact maintains the records requested, the Appellant Organisation submitted that on its interpretation of the EPF Act, an investment cannot be the net of a series of transactions. For example if the EPF buys a bond in the primary market, then sells it and buys it again this would be reflected only once according to the interpretation of / what is disclosed at present whereas, in actual fact, two separate investments have taken place.

The PA reiterated that the Statement of Investment does not envisage the reporting of each transaction. The PA was queried on whether in terms of the submission by the Appellant Organisation whether that would not be an investment in terms of what was submitted by the Appellant Organisation. The PA responded stating that what is meant by investment is that made in a security/bond. It was then questioned as to whether it has ever had occasion to examine what is meant in terms of the law, by 'investment' in the context of the duties cast by Section 5 (1) (h) of the EPF Act. The PA submitted that there has been no incident occasioning an interpretation of the term 'investment' or what obligations arise out of Section 5 (1) (h). The PA further submitted that disclosure of these transactions which could potentially amount to thousands of transactions cannot be required and is not required by law.

The Appellant Organisation's response to the 'volume of transactions'

The Commission then required the Appellant Organisation to respond to the submission of multiplicity of transactions since the objection raised by the PA appeared to have logical grounds. The Appellant Organisation submitted that the EPF is not an organisation that is trying to make money by playing the bond market unlike a private player. Even private traders/investors have distinguished stocks for transactions and stocks for investment. Stocks for investment are held long term or to maturity. The EPF should be one that is focused on the long term and cannot be engaged in very many transactions anyway. The Appellant Organisation submits that most of the bonds will have only one transaction. Generally bonds when bought are held for 10, 20 or 30 years. The bonds bought in the most recent year will have a maximum of 10 transactions.

The Commission pointed out that if the PA is claiming a multiplicity of transactions resulting in feasibility issues in the provision of the information then it must demonstrate this multiplicity or clarify whether it is held long term with few transactions as the Appellant Organisation submits. The PA submitted that it has a type of year round transaction and that it is in the process of improving its controls. The PA submitted that prior to the bond scam, it transacted in the secondary market; however since 2017, most of the transactions are at maturity.

The Appellant Organisation submitted that an examination of the bonds held by the EPF will show that a large part is never transacted. The Commission queried from the PA whether it is only relying on the multiplicity of transaction in relation to the purchase date or whether the exemption under Section 5 (1) (h) is being claimed to which the PA responded that it is relying on the exemption as well.

Section 5 (1) (d) Commercial Confidence

The PA then submitted that in relation to F G and H the exemption relied on is not 5 (1) (h) but 5 (1) (d). The PA submitted that it had claimed these exemptions in both its written submissions as well as its further written submissions.

The PA was queried as to how the commercial confidence exemption applies in this case in relation to items F G and H as I (counterparties) will not be disclosed. The PA submitted that it is the position of the EPF that if the data is obtained together, through reverse calculations other details can be ascertained. The combinations which could be released have been carefully identified. The Appellant Organisation wants details in relation to transactions. The PA's position was that if this is released in total, the EPF would in effect be releasing sensitive information to other parties.

The PA submitted that the EPF is not alone in the market; it is a competitive market with a large number of competitors such as banks and private investors. The PA submitted that if no other party except the EPF is subject to this kind of disclosure requirement all other competitors will most certainly be at an advantage which is why it is pleading Section 5 (1) (d). The PA submitted that the EPF will most certainly suffer a loss if it were to disclose this information.

The PA reiterated that if it discloses its position by stating the date and price of purchase, other traders in the market will automatically be able to ascertain the movements pertaining to the PA. The PA submitted that traders will in effect know the security and price at which it was bought by the PA on a particular date. The Appellant Organisation submitted that since 50% of government securities are with the PA, others will know its position and will use it to the disadvantage of the PA in the market even if the counterparty is not disclosed.

The Commission, while noting the argument by the PA that it will be unfairly prejudiced sought to ascertain what information was actually available on a trading platform to private players, observing that if the exemption in Section 5 (1) (d) was pleaded, that it was imperative to discern the information that was anyway, publicly available to traders in the market.

Information commonly available on a trading platform- attempt to tally it with the information request

The Commission then reverted to the question as to what information is commonly available out of items A to I on a trading platform. The PA was specifically directed to answer this question since the argument that disclosure was unfairly prejudicial to it then it must follow logically that none of the items are disclosed on a trading platform/ the items the PA is refusing to disclose is not normally found on a trading platform to which all traders have access. The Commission noted that this would also be an important factor in determining what information can be disclosed. A-I are as follows;

- A. Date of purchase
- B. Date of bill/ bond issue (if different from the date of purchase)
- C. ISIN number of the bill/bond
- D. Coupon rate of the bill/bond
- E. The yield to maturity (net of taxes) of the bill/bond
- F. Face value of the bill/bond

- G. Purchase cost of the bill/bond
- H. The price of each bill/bond
- I. Counter party (party with whom the transaction was held)

The PA submitted that to its knowledge F, H and E were available. The Appellant Organisation submitted that last volume transacted is also available.

The Appellant Organisation requested permission to make submission in relation to the exemption (5 (1) (d)) cited by the PA. The Appellant Organisation submitted that the PA cannot make generalized statements, but must specifically demonstrate how the market will be jeopardized. The Appellant Organisation submitted that in the PA's written submission it was evident that statements and assertions were made which were unsubstantiated. The Commission took cognisance of this submission.

The Appellant Organisation submitted that two main points were being made. First that future EPF cash flow can be forecast and secondly future prices of the Treasury bond market can be predicted. The response of the Appellant Organisation was as follows;

'The treasury bond market depends on the Government's need to borrow. That depends on maturity of Government debt. The Government publishes a comprehensive list of its debt holdings, thus the Government makes known its debtors. Amongst these the EPF is only one lender. Therefore it does not matter who has lent. It is only the Government's need to borrow which will affect the treasury market. Therefore that objection is not valid in light of the fact that the Government borrowings are known.'

'In relation to the cash flow question, it is unfortunate that the PA is making this argument because if you look at this list and see what the EPF records, one would already know the dates of maturity of all EPF bonds. All I need to know is maturity, face values and total holdings. I don't need to know details of the transactions for cash flow. Anyone can predict cash flow using information which is already in the public domain. The suppression of the purchase date does not have any impact on a person's ability to predict the cash flow.'

The Appellant Organisation accordingly submitted that both arguments put forward by the PA are irrelevant since both cash flow and future prices in the Treasury bond market are affected by information which is already in the public domain.

The PA submitted that since representations are being made by legal counsel and the instructions received are that the disclosure would be prejudicial, the PA sought permission to clarify the technical points. The PA submitted that it would look into explaining exactly how the disclosure is prejudicial to an EPF member.

The Appellant Organisation further submitted that it was merely responding to the claim by the PA that disclosure of certain items of information would be prejudicial to the market which was merely an economic analysis and not an attempt to formulate a legal issue. The PA was further required to substantiate how the exemption in 5 (1) (d) would be linked to cash flow. The

Commission noted that this would have to be substantiated in detail since the Appellant Organisation's position is that much of the information asked for is already available in the public domain. The importance of ascertaining what information was readily available on the trading platform to the public was re-emphasized.

Order:

For the purposes of deliberating on the matters in issue in this appeal and given the PA's heavy reliance on the same in arriving at its decision to refuse items of information requested by the Appellant, we have examined the publicly available version of the Presidential Commission of Inquiry (COI) to investigate, inquire and report on the issuance of Treasury Bonds (Bond Commission) Report, 2017 and further directed our attention to relevant provisions of the Registered Stock and Securities Ordinance No 2 of 2004 (as amended), the Monetary Law Act, No 58 of 1949 (as amended) and the Employees Provident Fund (EPF) Act, No 15 of 1958 (as amended).

However, in order to more fully assess the contested refusal of information by the Public Authority in this Appeal, the PA is directed to produce an official copy of the of the Presidential Commission of Inquiry (COI) to investigate, inquire and report on the issuance of Treasury Bonds (Bond Commission) Report within two weeks of the receipt of this Order. .

The PA is also directed to obtain from relevant law enforcement/prosecutorial agencies, concrete/specific examples of case/s where 'grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders' in terms of Section 5(1) (h) (i) of the RTI Act would occur following the release of the information in relation to the two Appeals before us. Further in respect of RTIC 25/2018, where the Annual Report of the PA in respect of the year 2016 is concerned, the PA is required to place before us, facts relevant to the current status of the Report, when it would be finalized and available for disclosure to which timeline, the PA will be held as accountable. As previously directed, the PA may also consider the feasibility of providing whatever information that would ordinarily be contained in the Annual Report relative to the year in question, severing such information on justifiable exemptions detailed in Section 5(1) of the RTI Act and provided to the Appellant as stipulated in Section 6 of the RTI Act

Where the substantive contents of the information sought to be released in regard to both appeals are concerned, this Commission is cognisant of the fact that the information that will be ordered for disclosure needs to be assessed against what is already required to be released under the EPF law and other statutes, independent of the RTI Act. In order to consider whether to release the information under the RTI Act, it must be first ascertained what the PA is required to disclose under the law in force, prior to the enactment of the RTI Act in 2016. Consequently, the PA is directed to specify the same in respect of both Appeals in necessary detail.

The following questions required to be answered by both parties arise specifically in relation to the matters in issue in **RTIC Appeal/26/2018**.

The Commission directs that the PA respond to the following questions in relation to RTIC Appeal/26/2018 prior to the next date of hearing;

1. Under Section 5 (1) (h) of the EPF Act “statement of investments showing the face value, purchase price and market value of each of the investments” has to be given. In the Further written submissions, (Paragraph 13) it is claimed that ‘exact details’ of each transaction is not given but only aggregate amounts. But the EPF Act requirements specifically state details to be given re ‘each of the investments.’ How can the CBSL comply with this provision, especially in giving information of “each investment” without disclosing the information, including the price of the bill/bond (Item H)?
2. As the EPF Act has no exceptions on alleged “market sensitive information”, how does the CBSL prevent disclosure of information termed “market sensitive” whilst complying with the legal requirements of the Act, especially §5(1) (h) in respect of “each investment”?
3. What guidelines/regulations has the CBSL prescribed to balance non-disclosure of information considered by the CBSL as “market sensitive” with transparency requirements associated with public debt (through issuance of Bonds)?
4. What criteria does the CBSL use to designate a particular information as “market sensitive” whilst ensuring transparency and disclosure as required also under the EPF Act?
5. Using that set of criteria what of the information, as requested by the Appellant Organisation can be categorized as “market sensitive” or included within the ambit of Section 5 (1) (d) of the RTI Act and why ?
6. How is the exemption of “commercial confidence” in Section 5(1)(d) of the Act, as claimed by the PA, linked to cash flow?
7. If a multiplicity of transactions in regard to EPF funds results in feasibility issues in the provision of the information is claimed by the PA, then it must demonstrate this multiplicity with concrete facts supplied to this Commission following which a decision may be made in regard to whether the same constitutes information that may be legitimately released under the RTI Act. In particular, it must show within the period set out in the said information request in issue, as illustrative of a general pattern, as to whether or not EPF purchased bonds in the secondary market, from whom and at what price, and what price these bonds were traded in the primary market?

The Appellant Organization is directed to respond to the following questions;

1. At oral submissions in this appeal, the Appellant Organization has stated that ‘investments in EPF funds are held long term with few transactions.’ It is necessary to support this argument with concrete material, given that this is a factual issue in dispute between the parties to this Appeal.

2. The Appellant further stated that; : “The Bloomberg platform set up by the Respondent in August 2016, was evidence which showed that every bond transaction was recorded, in terms of its date, identity (ISIN), price and value of the transaction and each market participant had access to all transaction. If the PA believed that provision of this information was detrimental to the market, then the Bloomberg platform was contradictory to its claims”. The CBSL’s response (Further WS of the PA dated 19.06.2018) is that all bond transactions are not recorded through Bloomberg and that market participants are not able to view individual transaction details of other participants (at Para 8). Is that position agreed to by the Appellant Organization?
3. Does the above statement of the Appellant Organization apply to EPF’s present secondary market transactions?

Both Parties are directed to respond to the following;

1. How do the parties interpret the following terms;
 - a) Purchase price (as contemplated in the EPF Act) and ‘Price of each bill/bond’ (Item H);
 - b) “Counterparty”? Is it the Broker and/or the ultimate beneficiary/investor?;
 - c) Definition of 'each investment' in Section 5 (1) (h) of the EPF Act;
2. Out of Items A - I, what are the types of information, out of the information requested, that are generally available on a trading platform? What is the trading platform for bond markets of Sri Lanka? What information is available on that trading platform?
3. What types of trading information of government Bonds should be held as confidential in comparisons with information made available in relation to similar stock market transactions?
4. Is there higher disclosure requirement and transparency for Government Bonds, when compared with shares and private bonds as they deal with public debt spread over long periods?
5. The Bond Commission report, at page 238 refers to “pumping and dumping” in relation to EPF? Please explain what this phenomenon is and whether this happens due to lack of publicly available information similar to the stock market?
6. Does the EPF record its transaction on the Bloomberg terminal at all?
7. What is the difference between CDS and SSSS?
8. What mechanism is available for each of the members of the EPF to know, on a real time basis, the investments made by the EPF on their behalf using their funds?
9. What are the safeguards followed in that regard?

10. Section 6 of the EPF Act and §43 of the Monetary Law Act grants almost unlimited power of audit to the Auditor General (AG). Has the Auditor General disclosed specific details of individual investments made by the EPF that he considers as raising audit issues?
11. With regard to information;
 - a. If Primary Market transactions are held through Auction, what information (out of items A-I) is recorded by CBSL?
 - b. If Primary Market transactions are held through Direct Placement, what information (out of items A-I) is recorded by CBSL?
 - c. What information is recorded by the CBSL for Secondary Market transactions?
12. §21A - §21F of the RSSO does not contain a secrecy clause. Is there a legal provision that prohibits the CBSL from disclosing the information as requested keeping in mind that EPF investments are governed by the EPF Act and the Government Bonds are under the RSSO and not the MLA?
13. If another entity, other than CBSL, was operating the EPF would the secrecy provisions of the MLA apply to that entity?
14. What information is made available by CBSL to the Government to ascertain if the CBSL, as the manager of Public Debt, has raised funds at the lowest possible cost and risk?
15. Does the CBSL use EPF funds as a part of its strategy to raise funds for the Government at the lowest possible cost?
16. If the answer is yes to the above, what information does the EPF provide to its members, of the costs, if any, to the EPF?
17. Do the members of other superannuation funds and/or investors in Government Security Markets (not EPF members) have the right to ask for information items A – I with regard to their investments?
18. How will the disclosure of the ownership of Government Bonds consequent to Secondary Market transactions by the EPF or institutional investors or Public Listed Companies amount to “unwarranted disclosure of Privacy” if such information is available to members of other superannuation funds and/or investors in Government Security Markets?
- 19.. Should not disclosure be mandated in fact for the very purpose of preventing the obtaining of an unfair competitive advantage through, limited and/or non-disclosure?
20. Out of the A - I information requests, which amount to sensitive information affecting competition and why?
21. The CBSL in its written Submission dated 06/04/2018 has agreed to provide Item H information, provided it is done so in combination with Item A. How does this combination of A and H take away the Market sensitivity of item H as alleged by CBSL? Should not anyway the

Face value and the Purchase Cost (Items F and G) be provided in line with S. 5(1) (h) of the EPF Act?

22. Other than through the Bond Commission proceedings, what other information is disclosed enabling the regulators to monitor the investment decisions of the market activities of the EPF in the Government Bond Market?

23. What is the information that the Primary Dealers are mandated to report to the Scriptless Securities Settlement System and/or the Central Depository System, particularly in terms of the RSSO, Local Treasury Bills Ordinance and the regulations made thereunder?

24. Of the information collected by the CBSL for Secondary Market transactions, what information is recorded in the Bloomberg platform, set up in August 2016?

25. Can details of Secondary Market trades on the 30 year Bond be given without the names of individuals?

26. What information of items of information in RTIC Appeals 25/2018 and 26/2018 are presently available in the public domain?

27. The publicly available version of the Presidential Commission of Inquiry (COI) to investigate, inquire and report on the issuance of Treasury Bonds (at page 238) refers to “pumping and dumping” in relation to EPF? Please explain what this phenomenon is and whether this happens due to lack of publicly available information similar to the stock market?

The Appeal is adjourned. Order is directed to be conveyed to both parties in terms of Rule 27 (3) of the RTI Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017).

Next Date of Hearing: Aug 7, 2018 at 11.00 a.m.
