

Dileep Amuthan v. Presidential Secretariat

RTIC Appeal (In person)/114/2017 (*Order adopted as part of a formal meeting of the Commission on 03.04.2018*)

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

Mr. S.G. Punchihewa

Dr. Selvy Thiruchandran

Justice Rohini Walgama

Present: Director-General Mr. Piyathissa Ranasinghe

Appellant: Mr. Dileep Amuthan

Notice issued to: B.K.S. Ravindra, Additional Secretary to the President

Appearance/ Represented by:

Appellant - Mr. Dileep Amuthan

PA - Mrs. Luckshmi Jayawickrema, Additional Secretary (Legal)

RTI Request filed on:	09.05.2017
IO responded on:	25.05.2017
First Appeal to DO filed on:	23.06.2017
DO responded on:	No response
Appeal to RTIC filed on:	28.09.2017

Brief Factual Background:

Through an information request dated 09.05.2017 the Appellant requested the following information from the PA.

1] 1. How many times has President Rajapakse travelled to the Northern Province when he was President between 2010 and January 7th, 2015? 2. The dates of each such travel.

2] 1. How many times has President Sirisena travelled to Northern Province from 9th January 2015 to 10th March 2017? 2. The dates of each such travel.

3] 1. How many times has President Sirisena travelled abroad between January 9th 2015 to March 10th 2017? 2. Dates of each travel.

4] 1. How many times has President Rajapakse travelled abroad since 1st December 2005 till January 8th, 2017? 2. Dates of such travel.

By response date 25.05.2017 the Information Officer (IO) denied the information citing Section 5 (1) (b) (i) of the RTI Act No.12 of 2016 which states,

5. (1) Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where—
- (b) disclosure of such information—
- (i) would undermine the defence of the State or its territorial integrity or national security;

The Appellant then appealed to the Designated Officer (DO) on 23.06.2017 but received no response. Thereafter he appealed to the RTI Commission on 28.09.2017.

Matters Arising During the Course of the Hearing:

The matter had first been taken up on November 20th, 2017 but the PA submitted that it had not received the Appeal details and requested from the Commission another date. The request was granted. At the next date, January 22nd, 2018, the PA was absent. The Appellant reiterated the details of his information request, he was excused by the Commission from appearing for the next hearing on February 27th, 2018. On February 27th, 2018, the Additional Secretary (Legal) of the PA submitted that she was not in a position to make submissions until she received authorisation from the Secretary to the President. The Appeal was adjourned to the 3rd of April 2018.

On 3rd April 2018, both parties to the Appeal were present. The PA submitted that the information requested about the President was subject to privilege under the exemption in Section 5 (1) (k) of the RTI Act, No. 12 of 2016.

Section 5 (1) (k) of the Act states,

“the disclosure of such information would infringe the privileges of Parliament or of a Provincial Council as provided by Law;”

The PA submitted that items 1 & 4 of the information request related to the former President of Sri Lanka and items 2 & 3 related to the current President. The Additional Secretary (Legal) representing the PA, noted that unfortunately the PA did not have in its possession the travel details of the former President as, during that period, even the PA was unaware of most of the travel details. She further submitted that the PA was unaware of who handled the travel details during that period (2005 - 2015).

Order:

Article 32 (3) of the Constitution (as amended by the 18th Amendment to the Constitution) states,

‘The President shall, by virtue of his office attend Parliament once in every three months. In the discharge of this function the President shall be entitled to all the privileges, immunities and powers of a Member of Parliament, other than the entitlement to vote, and shall not be liable for any breach of the privileges of Parliament or of its members.’

It is evident that the privileges applying to a Member of Parliament is applicable to the President only ‘in the discharge of this function’ (viz; attending Parliament) as above stated. In any event Parliamentary Privileges are not applicable to travel details of Parliamentarians. Public funds are being used for such travel and hence Parliamentarians should be accountable to the Public regarding the use of such funds.

The PA is directed to file Written Submissions on the precise manner in which providing past travel details of the President or a former President would harm national security as well as the manner in which privilege is deemed to apply to the said travel details under and in terms of the RTI Act and the relevant constitutional provisions.

Written submissions are to be sent to the Commission (with copy to the Appellant) by April 24th, 2018. The Appellant is directed to send his written submissions, if he wishes, (with copy to the PA) by May 8th 2018.

The Appeal is adjourned.

Next date of hearing: 15/05/2018

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PA - Mrs. Luckshmi Jayawickrema, Additional Secretary (Legal)

Matters Arising During the Course of the Hearing:

Written submissions dated 04.05.2018 had been submitted by the PA to the Commission (with copy to the Appellant). The PA stated that full details of the information requests submitted by the Appellant had been ascertained only at this point and that it appeared that the Appellant had filed four information requests which had been received by it at different times and responded accordingly.

Reiterating the contents of the Written Submissions filed by it, the Public Authority submitted as follows;

1. That the Appeal was not in accordance with the Act due to the following reasons;

The PA had received his information request with regard to item 3 on 25.05.2017. This was responded to by the IO on 12.06.2017 denying the information citing the exemption in Section 5 (1) (b) (i).

The PA also received his information request with regard to item 4 on 25.05.2017 but it had not responded to this request till 18.01.2018 denying the information citing Section 5 (i) (b) (i), Section 5 (1) h (ii) and Section 5 (1) (k). Therefore, the PA argued that the Appellant could not have appealed to the Commission on this information request as that appeal had been filed on a date prior to the sending of the said response dated 18.01.2018 by the PA).

That the Appellant's next information request with regard to item 2 had been received by the PA on 14.07.2017. This was responded to by the IO on 18.01.2018 and hence the PA argued that the Appellant could not have appealed to the Commission on this information request at a date prior to the sending of the said response by the PA). In that response, the information was denied, citing the exemption in Section 5 (1) (b) (i).

The PA also received the Appellant's information request with regard to item 1 on 14.07.2017 to which the IO had responded on 18.01.2018 stating that the information could not be provided due to non-availability of the details at the PA. It was similarly contended that an appeal filed to the Commission on 28.09.2017 was not legally sustainable as the response of the Public Authority had been on 18.01.2018.

The PA argued in its written submission that in his Appeal to the Designated Officer (DO) on 23.06.2017 the Appellant had only referred to the response made to his information request regarding item 3. The Appeal had been acknowledged on 13.07.2017 but no response had been provided by the DO. The PA in its written submissions submitted therefore that the Appellant could not have appealed on the other requests for information since they were only replied to on 18.01.2018 and that, as seen by the different numbers given to each of the appeals by the Appellants, these had been in response to different appeals filed on each of the four items of the Appellant's rather than one appeal containing four information requests as sought to be claimed by the Appellant.

2. That the activities of the President as Head of State and Commander in Chief of the Armed Forces (*vide* Article 30 (1)) of the Constitution of Sri Lanka, 1978 are interconnected and comes within the definition of National Security in the plain meaning of the term as defined in the Oxford Dictionary. Safety of a nation against threats such as terrorism, war or espionage i.e. the systematic use of spies to get military or political secrets." Therefore, the PA submitted that disclosing the movements of the President relating to official activities would invariably undermine the defence of the State as well as national security and pleaded exemption under Section 5 (1)(b) (i).
3. The PA further submitted that due to the security reasons, it did not maintain a file or register or any kind of official records regarding the travels of the President and could not be expected to maintain records of such high security information. Therefore, the PA submitted that such information is not in its possession, custody or control as required by Section 3 of the RTI Act.
4. The PA also submitted that travel details should be considered information exempted under Section (5) (l) (a), since such personal information if disclosed

would amount to an unwarranted invasion of the privacy of the individual i.e. the President.

5. The PA submitted that according to Art 32 (3) of the Constitution of Sri Lanka, 1978 the President is entitled to all the privileges, immunities and powers of a Member of Parliament and that Article 67 stated that the privileges, immunities and powers of Parliament and of its members may be determined and regulated by Parliament by law and until so determined and regulated, the provisions of the Parliament (Powers and Privileges) Act, would, *mutatis mutandis*, apply.

The PA further submitted that the Parliament (Power and Privileges) Act No.21 of 1953 interprets that a Member of Parliament includes the President, Speaker or any Member presiding in Parliament or Committee. As such, all the immunities mentioned in Part I of the above Act applied to the Members of Parliament as well as to the President.

It was further noted that *vide* section 7 of the Act No. 21 of 1953, the members shall hold. enjoy and exercise, in addition to the privileges, immunities and powers conferred by that Act, such and the like immunities as were for the time being held, enjoyed and exercised by the Commons House of the Parliament of the United Kingdom and by the members thereof'. It noted that the rights and immunities of the individual members of the House of Commons included freedom from obstruction, interference, intimidation etc. Therefore, the PA submitted that to interfere with the functions constitutionally assigned to the President amounts to violation of Parliamentary privileges.

At the instant hearing the PA reiterated the facts recorded in its written submissions. The PA also submitted that while ordinarily PAs would be expected to have personal files relating to each individual, such a file was not maintained in relation to the President due to security factors.

Responding, the Appellant submitted that he had filed all four information requests together by information requests dated 09.05.2017 and had appealed against all four requests in his appeal to the DO dated 23.06.2017 after assuming that the response sent by the IO related to all four appeals. He further submitted that he had sent all four information requests dated the same date (09.05.2017) by one cover and by registered post to the PA on 10.05.2017 and could later provide the registered postal article receipt which was not in his possession currently.

In regard to the assertion by the Public Authority that the requested information was not within its 'possession, custody and control' as required by Section 3 of the Act, the Appellant queried as to whether the Presidential Secretariat channels the allocations made through the Treasury to the Presidents travels, and that if so, the financial allocations would indicate details of the travels undertaken by the President.

The Additional Secretary (Legal) of the PA submitted that she was not aware of how the funds were released and would need to consult with Chief Accountant of the Presidential Secretariat, i.e. the Secretary to the President, to obtain the said information.

Order:

The Appellant is directed to produce the registered postal article receipt of the said information requests to determine the confusion in regard to the submission of the four information requests to the Public Authority. It is relevant to note that the absence of a response by the IO and/or the DO under and in terms of Sections 25(1) and 31(3) and the failure to adhere to the time limits specified therein amounts to an infringement of the said sections against which an appeal may be lodged to the Commission under and in terms of the Act.

In regard to the applicability of Article 32 (3) of the Constitution read with Section 5(1)(k) of the RTI Act, it was opined by this Commission during the previous hearing of this appeal that the privileges applying to a Member of Parliament is applicable to the President only 'in the discharge of this function' (viz; attending Parliament) as above stated.

In regard to the objection taken by the Public Authority that the requested information is not within its 'possession, custody or control' as required by Section 3 (1) of the Act, it is an inferential question as to who then provides the funds allocations for such travel. It cannot be contended that this is a separate question as the objection taken by the Public Authority is not sustainable in the absence of an explanation in regard to the same.

The Public Authority is therefore required to respond on the same in order for the Commission to assess the legitimacy of the applicability of Section 3 in this instance.

The applicability of the exemptions to the information requested (i.e. Sections 5(10(a) and 5(b) (i) and the relevance of the public interest override stipulated in Section 5 (5) will be assessed at the next hearing of this appeal, consequent to the above information being provided by both the Appellant and the Public Authority.

The appeal is adjourned.

Next date of Hearing: 03/07/2018

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Matters Arising During the Hearing

The Additional Secretary (Legal) of the PA submitted that it envisages no difficulty in making available the information requested by the Appellant but in the absence of a register being maintained for this purpose, resulted in the requested information not being within its 'possession, custody and control' under and in terms of Section 3 of the RTI Act No.12 of 2016.

Nonetheless, the Appellant questioned whether such information could be obtained from the related Ministries as one Parliamentarian, Mr. Udaya Gammanpila requested the details of the President's visit to UN and as such the information was supplied in Parliament by the Ministry of Foreign Affairs. The PA responded stating that then the Appellant should make an information request in this regard to the Ministry of Foreign Affairs as such visit could be due to an official invitation and information in relation to such invitations are within the purview of Ministry of Foreign Affairs.

With regard to the stance taken by the Public Authority, that the requested information is not within its 'possession, custody or control' as required by Section 3 (1) of the Act, an inferential question arises as to who then provides the fund allocations for such travel or whether there is a budget allocation for the same as that was the question the PA was directed to respond to by Order dated 15.05.2018.

The Additional Secretary (Legal) of the PA responded stating that there is no separate allocation for the above but that a general allocation from the Treasury for the functions of the president, for security and to maintain Presidential fund etc. is made.

Further, the Commission queried as to who approves the disbursement of funds for travel from the general allocation. The PA responded stating that if there is a request for funds it had to be first approved by the Chief Financial Officer (CFO) of the PA.

Order

The PA has stated that it has no information in relation to the travel details of the former President as well as the incumbent President in its possession, custody and control.

However, as far as the incumbent President, i.e. President Maithripala Sirisena is concerned, it has clarified that the Chief Financial Officer (CFO) of the PA is responsible for allocations made for various purposes as and when required, including for travel. In the circumstances and in order to substantiate the contention of the PA that it does not have required information in its 'possession, custody and control' (vide Section 3 of the RTI Act) in law, this Commission has a statutory duty to ascertain if the CFO has in fact, approved/set aside allocations for travel details during the period asked for;

No 2 of the Information Request - Dates of travel by President Maithripala Sirisena to the Northern Province from 9th January 2015 to 10th March 2017;

No 3 of the Information Request - Dates of overseas travel by President Maithripala Sirisena between January 9th 2015 to March 10th 2017;

Following the certification that no such allocation has been made, it can logically be inferred that the information requested is in effect, not in the possession, custody and control of the Public Authority.

The PA is directed to obtain a certification from the CFO of the PA as to whether allocations were made for the above purposes during the period stated above or not, as the case may be. If the CFO did not approve any disbursements for the same, the position of the PA that that it does not have in its custody, information of the travel dates of the President may be ruled upon by us.

It is of record that the PA agreed to provide the said certification/affirmation within two weeks of the receipt of the Order with a covering letter to the Commission regarding the same.

The matter is to be mentioned on 07.08.2018 to ascertain the status of provision of information as directed.

The Appeal is adjourned.
