

T. Nadesan v Office of the Cabinet of Ministers

RTIC Appeal/216/2018(*Order adopted as part of a formal meeting of the Commission on 17.07.2018*)

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. T. Nadesan

Notice issued to: S Abeysinghe Secretary to the Cabinet, Office of the Cabinet of Ministers – Designated Officer (DO)

Appearance/ Represented by:

Appellant – Mr. T. Nadesan

Ms. Dilumi de Alwis, Attorney-at-Law

Ms. Dilini Jayasuriya, Attorney-at-Law

Public Authority (PA)- Mayuri Perera Senior Assistant Secretary Office of the Cabinet of Ministers

Brief Factual Background:

The Appellant by information request dated 12.10.2017 requested true copies of

1. The **full report** of the Committee appointed in terms of Cabinet Decision dated 05.08.2015 (No. 15/1131/603/045) to investigate and make recommendations on the matters related to the ‘consultancy firms and related payments’ of the project on the construction of the Defence Headquarters Complex (DHQC) in Akuregoda, together with **all annexes, appendixes and attachments** thereto.
2. The **Cabinet Decision dated 05.08.2015 (No. 15/1131/603/045)** to investigate and make recommendations on the matters related to the ‘consultancy firms and related payments’ of the project on the construction of the Defence Headquarters complex (DHQC) in Akuregoda.

The PA by response dated 12.10.2017 denied the information citing Section 5 (1) (b) of the Right to Information Act No. 12 of 2016. Thereafter the Appellant lodged an appeal with the DO on 23.10.2017 to which the DO responded on 18.11.2017 stating that since the information

requested falls within Section 29 of the Act it was forwarded to the Secretary Ministry of Defence for the Ministry's consent on 30.10.2017. The Ministry of Defence responded on 22.11.2017 refusing to consent to the disclosure of the information citing Sections 5 (1) (h) and 5 (1) (i). The PA accordingly denied the information in terms of 5 (1) (i) as the PA is unable to provide the information without the consent of the third party (Ministry of Defence).

Dissatisfied with the response, the Appellant preferred an Appeal to the Commission on 17.01.2018. The Appellant submitted that the information requested pertains to a Cabinet decision the sole author of it being the Cabinet itself therefore the PA is wrong in claiming that it falls within Sections 29 and /or 5(1)(i). The Appellant further submitted that the report had been prepared by a committee appointed by the Cabinet itself and therefore it is false to claim that the report has been supplied in confidence by the Ministry of Defence (third party).

Written Submissions filed on behalf of the Parties

The PA:

The PA had filed written submissions on 30.05.2018, stating that the Appellant is appealing the decision of the *Cabinet of Ministers* which does not fall within the definition of a Public Authority in Section 43 of the RTI Act, resulting in the appeal being rendered procedurally flawed. The PA submitted that in terms of Article 50 (2) to the Constitution, the Secretary to the Cabinet of Ministers has charge of the Office of the Cabinet of Ministers and as such, the relevant PA is the *Office of the Cabinet of Ministers*.

Addressing the refusal by the IO by letter dated 18.10.2017 (in response to the Appellant's information request) citing Section 5 (1) (b) (i), the PA in its written submissions submitted that,

The Information Officer, having observed that the requested documents were interconnected, interdependent and contained vital classified information pertinent to the establishment and structure of the Defence Headquarters at Akuregoda and being cognizant that under Regulation 19, the Appellant can copy, publish, translate, adapt, distribute or otherwise reuse in any mode or format the said classified information, refrained from granting access to the same, thereby preventing a potential threat to the defence of the State and national security, that may have arisen through the said information being released to the public domain and eventually being accessed by undesirable elements that pose a threat to the National Security.

Regulation 19 which concerns the 'Use and Reuse of Information' states that;

- 1. Any information disclosed by a Public Authority under this Act is subject to a royalty-free, perpetual, nonexclusive license to reuse the information.*
- 2. For purposes of clause 01, reuse includes copying, publishing, translating, adapting, distributing or otherwise using in any medium, mode or format for any lawful purpose.*

The DO had submitted that subsequent to the appeal to him, himself 'being cognizant of the provisions of section 29(1), as well as the provisions of section 5(1) (h) (i)', he 'inquired from the Information Officer as to whether he has, in his capacity as the Information Officer, written

to the Secretary to the Ministry of Defence in compliance with the provisions of section 29(1).’ The DO submitted that the IO had informed him that the IO ‘had thought that restrictions imposed in section 5 (1) (b) (i) would be preclude him from providing the requested information.’ However the DO submitted that he ‘thought that it would be best to obtain the views of the Secretary to the Ministry of Defence, since the Note to the Cabinet and the Official’s Committee Report are in his custody and control, as to the feasibility of the disclosure of its contents as sought by the Appellant.’

The DO ‘being fully aware of the fact that in terms of Section 29 it is the Information Officer who is mandated to act under Section 29, invited the Third party who supplied the information, which is of a very confidential nature, to make representation for or against such disclosure,’ by letter dated 30.10.2017. The Ministry of Defence by letter dated 23.11.2017 refused to consent to the disclosure citing Section 5 (1) (h) (i) of the Act ‘ as the material relating to this issue has been forwarded to the Hon. Attorney General for advice and under investigation for apportioning accountability in the conduct of those responsible...’

In paragraph 16 of his written submissions the DO submitted that the Appellant is laboring ‘under the misapprehension that since the Cabinet of Ministers is the author of a Cabinet decision, the Cabinet would also be the author of any document that is submitted by a Third Party under its direction.’ The DO thereafter went on to set out to distinguish between ‘a Cabinet Memorandum/Note to the Cabinet, a Report by a Cabinet Appointed Subcommittee and a Cabinet decision which...are authored by three different persons.’

The DO submitted that a Cabinet Memorandum, should be prepared by the Secretary to the Ministry on the instructions of the Minister. The PA submitted that ‘even though the relevant Minister is responsible for the proposals in the Memorandum, the Secretary to the Ministry should be responsible for the accuracy of the facts contained therein. As such, where the covering letter sent to the Cabinet Office with the Cabinet Memorandum is not signed by the Secretary to the Ministry, it should be counter-signed by a Senior Officer of the Ministry.’ Thus, the PA submitted, ‘the source of origin of the Note to the Cabinet, on which the decision of the Cabinet of Ministers dated 05" August 2015, referred by the Appellant was, the Ministry of Defence.’

With regard to the ‘source of origin of a Committee Report’ of a Subcommittee appointed by the Cabinet, the PA submitted that the source would be ‘the members of that particular Subcommittee, and not the Cabinet of Ministers.’ The PA submitted that with regard to the matter at hand, the Subcommittee was chaired by the Secretary to the Ministry of Defence, and this Subcommittee authored the Report. The PA thus, contends that the report, ‘having been officially received at this office as a confidential document, is in its “possession” and “custody.”’ However by virtue of originating from and being authored by a “third party” the PA claimed that the document was not under the “control” of its office. The PA submitted that it ‘cannot release such a document submitted by a “Third Party” in response to a RTI request, without first ascertaining the consent of the said “Third Party” who has authored the said document and who are the “rights holders” of the said document.’ The PA therefore contends that as the report originated and was authored by the Ministry of Defence as opposed to the PA, the report is not under the “control” of the PA. The PA further submitted that the Ministry of Defence is the “rights holder” of the said document.

With regard to the decision of the Cabinet of Ministers the DO submitted that the Cabinet of Ministers arrives at a decision ‘based on the contents of such a Report.’

The PA relied on Sections 5 (1) (b) (i), 5 (1) (h) (i) and 5 (1) (i) to deny the information and stressed that the information in question ‘in its entirety relates to the defence of the State and being confidential documents’ cannot be disclosed ‘in part or full, in the interests of preventing a potential threat to National Security.’ The DO has further submitted that the Appellant’s right to this Appeal ‘flows from his right under Article 14A(1) of the Constitution and that right of access to information is necessarily subject to the restrictions in Article 14 A(2) of the Constitution.’

The DO submitted that ‘the grounds put forward by the Appellant are not substantive enough to outweigh the threat to the defence of the State and National Security’ and in fact ‘non-disclosure would be in the public interest.’

The Appellant:

The Appellant had filed written submissions on 10.07.2017 and in paragraph 5, addressing the issue of procedural irregularity alleged by the PA, submitted that the Office of the Cabinet of Ministers is merely the administrative arm which is responsible for supporting the Cabinet of Ministers. The Appellant accordingly submitted that the PA is ‘under a misconception that it is the Office of the Cabinet of Ministers and not the Cabinet of Ministers that is established under the Constitution which is ex-facie erroneous in law and fact.’

In the Appellant’s written submissions, it is submitted that the since a Note to the Cabinet is not requested, the PA’s extensive submissions on the note to the cabinet/ cabinet memoranda is unnecessary given that the information request does not concern any note to cabinet but a cabinet decision itself. The Appellant had further submitted that a Cabinet Decision cannot fall within the ambit of Section 5 (1) (i) as the sole author of a cabinet decision is the Cabinet itself and as such, is not information supplied in confidence by a third party.

The Appellant further pointed out that the PA in paragraph 16 ii of its written submissions. argues that the source of the requested report is are the members of the Subcommittee appointed for a said purpose, which in this instance was chaired by the Secretary to the Ministry of Defence, in contradiction to its claim that the report was supplied by the Ministry of Defence itself. The Appellant contended that the mere fact of the Secretary to the Ministry chairing a subcommittee appointed by the Cabinet of Ministers does not amount to the report originating from the Ministry of Defence. Further it is immaterial as to who the author of the document is. In any event, with respect to a Cabinet memorandum, it is a document tabled by the Minister at a meeting of the Cabinet of Ministers which then becomes a part of the record of the Cabinet of Ministers and does not constitute an item of information supplied in confidence by a third party. Accordingly if a citizen is to request a cabinet memorandum, the request would be lodged with the Cabinet of Ministers and not with the line Ministry which prepared the memorandum.

The Appellant submitted that in any event, the PA is very clear of the fact that the information requested is in its custody which ‘means “to be in charge”, or “have guardianship or care” of a thing.’

The Cabinet appointed mandated and directed the committee, similar to what would be expected from an officer employee 'in the same manner an officer or employee or external consultant or advisor or auditor or an entity may carry out an investigation or inquiry and submit a report to the said entity.

Addressing the public interest in disclosure, the Appellant in paragraph 29 submitted that

'Without prejudice to the aforesaid, I further submit that in terms of the provisions of Section 5(4) of the Act, the overriding larger public interest element attached to the requested information warrants that it be disclosed without any further delay. It is pertinent to note that the public has the absolute right to know how and in what manner the tax payer's money has been expended or rather misappropriated in a large scale corruption and fraud carried out by means of excessive payments to politically affiliated "consultants" in the construction of the Akuregoda Defence Headquarters. The core intent of the RTI Act was just this, as clearly reflected in its preamble. In this context, the PA's resistance to disclose such information of great importance to the public, is of concern.

Matters Arising During the Course of the Hearing:

By letter dated 13.07.2018, the PA had moved for a further date and further time to respond to the Appellant's written submissions. At the hearing, the PA further submitted that it wished to seek the advice of the Attorney-General's Department and revert on the matter and if so needed, be represented by the Attorney-General on the next date of hearing.

Counsel for the Appellant first addressed the issue of procedural irregularity as alleged by the PA which states that the Appeal is instituted against a body not in existence i.e. the "Cabinet of Ministers" as opposed to the Office of the Cabinet of Ministers. She submitted that this was a frivolous objection as in terms of the Constitution the Cabinet of Minister is a body coming within the definition of Section 43 of the Act which states that 'any body or office created or established by or under the Constitution, any written law, other than the Companies Act No. 7 of 2007, except to the extent specified in paragraph (e), or a statute of a Provincial Council' and it is clear the Appellant intended this information request to be directed to the Office of the Cabinet of Ministers.

Counsel further submitted that the IO first relied on the exemption under 5 (1) (b) (i), this was subsequently changed and DO claimed exemption under 5 (1) (h) (i) claimed was relied on and then finally the exemption in relation to the third party is also claimed. It was pointed out that the Appellant only required the report which was generated by the Subcommittee appointed by the PA for the purpose of investigating into the matter in issue and not the raw material on which it was based. The position taken by the PA that the information was supplied by the Ministry of Defence which is a third party was therefore *mala fide* and the PA in this instance and the Ministry of Defence are acting in collusion. Further, in the written submissions of the Ministry of Defence in relation to RTIC Appeal/ 217/ 2018 the caption being titled *T Nadesan v Cabinet of Ministers* further substantiates this inference.

It was contended that Section 29 was not applicable to the report as the report was not supplied in confidence by a third party (i.e. the Ministry of Defence) but was rather commissioned by the PA itself. It was also submitted that the Ministry of Defence and the Cabinet of Ministers were colluding with each other to deny the Constitutional right of the Appellant. The Commission noted that it was the Appellant's statutory right that was being pursued in this particular forum since remedies for the infringement of constitutional rights must be sought from the Supreme Court.

The attention of the PA was drawn by the Commission to the fact that if it is advancing the exemption under Section 5 (1) (i) then it is required to ask the relevant third party to make representations for or against disclosure. The PA submitted that it complied with the said procedure. The PA was questioned as to whether it had annexed the letter by the Ministry of Defence refusing disclosure. Although the PA submitted that it had, it appeared upon the perusal of the documentation before the Commission as well as the Appellant, such a letter had not been included.

Counsel for the Appellant further submitted that in the written submissions dated 30.05.2018, the PA had stated that it wrote to the Ministry of Defence simply because the Secretary to the Ministry was the Chair of the Subcommittee. However the attention of the Commission was drawn to the fact that one Mr. Withanage, who was not the Secretary to the Ministry of Defence had, at a point in time, chaired the Subcommittee, contrary to the PA's submission that the Secretary to the Ministry of Defence chaired the Subcommittee.

The attention of the PA was drawn to the fact that written refusal of consent to the disclosure was required in terms of Section 29 if Section 5 (1) (i) is claimed by the PA. The PA submitted that the Secretary wished to respond in detail and that the instructions for this particular hearing were limited to obtaining more time.

Counsel for the Appellant submitted that there is no third party consideration in this instance as the report and the decisions were not supplied by a third party and this was unlike a situation where plans or project proposals are submitted in confidence by third parties. It was claimed that the PA was attempting to take cover under Section 29. Further this Subcommittee had been commissioned by the PA itself and therefore it cannot be pleaded that it is confidentially supplied by a third party.

The PA submitted that the document was in fact marked confidential and submitted confidentially. The Commission queried whether, since the Subcommittee was in fact commissioned by the PA itself, the document does not become a document of the PA? The PA responded submitting that it is not a document of the PA *per se*. The Appellant submitted that the Cabinet had appointed the Subcommittee to look into the various aspects in relation to this construction and to prepare a report, subsequent to which the Cabinet appointed Subcommittee would go into disuse as it is an *ad hoc* committee appointed for a specific function.

It was submitted on behalf of the Appellant, that in anticipation of the third party exemption being claimed, he submitted a separate request to the Ministry of Defence for the receipts and accounts maintained in relation to this project and did not seek the report or the cabinet decisions from Ministry of Defence. However it is only fair that the Cabinet provide the Appellant with the

report since it was commission by the Cabinet itself and the third party exemption claimed cannot be maintained in this context.

The PA submitted that if the Commission peruses the report it will understand that certain information cannot be disclosed as the contents of the report are not limited to the finances and the awarding of tenders and the fraud that the Appellant is seeking to expose. The PA submitted that the report was based on information submitted in confidence by the Ministry of Defence and if required the Secretary was willing to submit the report to the Commission for its perusal which would reveal the confidential or sensitive nature of the subject matter contained in the report.

Counsel for the Appellant submitted that the PA's contention of the applicability of Section 5 (1) (b) (i), i.e. the that the disclosure 'would undermine the defence of the State or its territorial integrity or national security' is untenable as these were payments or financial irregularities concerning the construction of a building which irregularities were first raised by the Minister for Finance himself and which were reported in the media. It was claimed that the contract had been awarded to an unregistered architect who was unable to perform the contract resulting in the project being transferred to the Central Engineering Consultancy Bureau (CECB) and that a clear case of corruption can be made out in these circumstances.

It was further submitted that payments were made to individuals for construction of a building in Atulkotte and that the PA's contention of possible national security breach was not tenable, bearing in mind these were payments / financial irregularities for the construction of a building, these irregularities having been first raised by the Finance Minister.

Order:

Article 42(1) of the Constitution states that '*there shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic,*' which in terms of Article 42 (2) '*shall be collectively responsible and answerable to Parliament.*' Section 43 (1) of the Right to Information Act No 12 of 2016 (the Act) states that '*any body or office created or established by or under the Constitution, any written law, other than the Companies Act No. 7 of 2007, except to the extent specified in paragraph (e), or a statute of a Provincial Council,*' is deemed to be a PA. Therefore there can be no doubt that the Cabinet of Ministers does fall within the ambit of the Act.

Articles 50 (1) and 50 (2) of the Constitution state that

(1) There shall be a Secretary to the Cabinet of Ministers who shall be appointed by the President.

(2) The Secretary shall, subject to the direction of the President, have charge of the office of the Cabinet of Ministers, and shall discharge and perform such other functions and duties as may be assigned to him by the President or the Cabinet of Ministers.

In this instance, Section 5(1) (i) interlinked to Section 29 of the Act has been cited by the named Public Authority as one of the exemptions relied on for refusing the information. The attention of the Public Authority is drawn to the fact that the RTI Act stipulates a time period within which a third party must respond. Section 29 (1) is as follows,

*Where a request made to an information officer by any citizen to disclose information which relates to, or has been supplied by a third party and such information has been treated as confidential at the time the information was supplied, the information officer shall, within one week of the receipt of such request, invite such third party by notice issued in writing, to make representation for or against such disclosure, **within seven days of the receipt of the notice,***

states that the PA is required to direct the third party to respond '**within seven days of the receipt of the notice.**'

Although the PA has referred to the letter by the Ministry of Defence in this context as amounting to a refusal by a 3rd party, this letter is not before us. Accordingly the PA is directed to produce the letter by the PA to the Ministry of Defence noticing the Ministry to make representation for or against disclosure as well as the response by the Ministry of Defence (the third party) refusing to consent to the said disclosure.

The PA contends that since the report has been authored by the Subcommittee chaired by the Secretary to the Ministry of Defence although it is in the possession and custody of the PA it is not in its control. It is noted that Section 3 (1) which states that '*Subject to the provisions of section 5 of this Act, every citizen shall have a right of access to information which is in the possession, custody or control of a public authority,*' does not envisage that all aspects i.e. possession, custody *and* control be fulfilled for a citizen to have right to access to information and for the corresponding obligation on the part of the PA, to provide the information, to arise. It is merely sufficient that the information be in the possession, custody **or (emphasis ours)** in the control of the PA for the right to access to arise under Section 3 of the Act.

Public interest

Section 5 (4) states that

Notwithstanding the provisions of subsection (1), a request for information shall not be refused where the public interest in disclosing the information outweighs the harm that would result from its disclosure.

The proviso to Section 29 (2) (c) states that

Provided however, the Commission may on the application made in that behalf by the citizen making the request, direct the disclosure of the information in question notwithstanding any objections raised by such third party against its disclosure, where the release of the information concerned demonstrably outweighs the private interest in non disclosure.

Even in the event that the exemptions are found to apply, in terms of Section 5(4) which states that 'where the public interest in disclosing the information outweighs the harm that would result from its disclosure,' and the proviso to Section 29 (2) (c) which states that 'where the release of the information concerned demonstrably outweighs the private interest in non-disclosure,' the information must be disclosed in any instance upon an assessment of the public interest in disclosure and based on whether the private interest in disclosure is outweighed by interest in disclosure.

The PA is directed to clarify the specific exemptions being relied upon to refuse information in this instance with the relevant supporting material. The Appeal is adjourned.

Next date of hearing: 04.09.2018.
