

Thirukumar Nadesan v Ministry of Defence

RTIC Appeal/217/2018(*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: P.R. Rajapaksa, Additional Secretary (Parliamentary Affairs, Policy & Planning)/Designated Officer (DO), Ministry of Defence

Appearance/ Represented by:

Appellant – Mr. T. Nadesan

Ms. Dilumi de Alwis Attorney-at-Law

Ms. Dilini Jayasuriya Attorney-at-Law

Public Authority (PA) - R. P. R. Rajapaksa Additional Secretary
Brigadier Upali Weerasinghe
A Jayasekera Legal Officer

RTI Request filed on	12.10.2017
Information Officer (IO) responded on	17.10.2017 (acknowledgment) 04.12.2017 (decision)
First Appeal to DO filed on	13.12.2017
DO responded on	18.12.2017 (acknowledgement) 26.12.2017 (decision) 04.01.2018 (receipt by the Appellant)
Appeal to RTIC filed on	24/02/2018

Brief Factual Background:

The Appellant by Information Request dated 12.10.2017 requested ‘information of all payments made to the following two parties in respect of any and all work carried out in respect of the project on the construction of the Defence HQ Complex in Akuregoda in the period 2011 to 31st May 2015,’

- i) Muditha Jayakody Associates (Pvt.) Ltd;
- ii) Muditha Jayakody

The Appellant had requested the information in the following manner;

- A statement of accounts detailing all payments as described above, including amount, date of payment, method of payment (cash or cheque or bank to bank remittances) certified as a true copy/ true copies.
- Certified true copies of receipts issued by Muditha Jayakody Associates (Pvt.) Ltd and / or Muditha Jayakody.

The IO responding on 04.12.2017 denied the information on the basis that it is exempted under Section 5 (h) (i) of the Right to Information Act No. 12 of 2016 (the Act). Dissatisfied with the response the Appellant lodged an appeal with the DO on 13.12.2017. The DO responded on 26.12.2017 denying the information citing Section 5 (h) (i). The Appellant thereafter lodged an appeal with the Commission on 24.02.2018.

Matters Arising During the Course of the Hearing:

At the outset, Counsel for the Appellant submitted that the Information Officer (IO) and Designated Officer (DO) had failed to provide decisions on to the information request and the Appeal respectively, within the time period stipulated under the Act. The Appellant thereafter submitted the factual background that led to the Appeal.

Counsel for the Appellant submitted that as stated in the PA's written submissions dated 04.06.2018 the PA is maintaining its position to deny the information citing Section 5 (1) (h) (i) of the Act 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 in its written submissions to the Commission had further submitted that it has sought the advice of the Attorney-General in this regard. The PA by written submissions dated 04.06.2018, submitted the following in relation to the applicability of Section 5 (1) (h) (i)

Major General Weerasekera, Director of Project Management Unit of the Defence Headquarters Complex Project had reported to the Secretary to the PA the existence of an overpayment for service provided as consultancy fee.

The aforesaid observation is in respect of public property which warranted serious concern of the Ministry of Defence and hence this being a matter of criminal nature before the eyes of the law Secretary Defence referred the issue for advice of the Hon. Attorney General soliciting advice on course of action to be initiated in this regard.

Hon Attorney General has advised the Secretary Defence certain steps to be taken prior to initiating legal action on this matter.

Hence, Ministry of Defence is in the process of analyzing available data to finalise the facts on the advice of the Hon. Attorney General.

Counsel for the Appellant responding to the written submissions of the PA (dated 04.06.2018) by written submissions dated 12.07.2018, as well as during the course of the hearing drew the attention of the Commission to the inadvertent reference to the parties in RTIC Appeal/216/2018 (*T Nadesan v Cabinet of Ministers*) in the written submissions of the PA. At the hearing Counsel for the Appellant alleged that this was evidence that the PA in the present instance i.e. the Ministry of Defence and the PA in RTIC Appeal 216/2018 were acting in cahoots.

At the hearing the PA affirmed that the primary reason for refusal was the pending investigation, and that the subject matter in issue is worth approximately SLR 150 Million in relation to which fraudulent dealings are alleged.

Counsel for the Appellant responded to this by drawing the attention of the Commission to the fact that this particular incident took place in 2015, since which approximately three years have lapsed without steps being taken. She further alleged that the PA was analyzing facts and figures on its own accord instead of lodging a complaint with a law enforcement agency the police/ CIABOC/ CID/ FICD by which an actual investigation will commence and were using the delay as an excuse to deny the information. It was further submitted that the failure and /or delay on the part of the PA and/ or other state entities to take action is no reason to deny a citizen of his/her right to the information requested especially in the context where the PA itself has in its written submissions admitted that the transaction has been fraudulent and necessitated legal action. It was further submitted that the PA conducting an investigation into fraud was no reason to prevent the Appellant from accessing the information and in fact, that on previous occasions, the Commission had directed disclosure of the information during the pendency of court cases and as such the mere existence of an investigation is not a valid reason to refuse the information.

Counsel for the Appellant drew the attention of the Commission to orders on previous occasions where disclosure of the information has been directed even during the pendency of court cases and as such the mere existence of an investigation is not a valid reason. Reading out the relevant RTI provision 5 (1) (h) she stressed on the fact that it was to “prevent” commission of crime which was not the scenario in this case, as the offence had already been committed. It was further submitted that these details were provided to a sub-committee appointed by the Cabinet to investigate this matter which prepared a report that has been submitted to the Cabinet. Counsel for the Appellant also produced a document that contained a gist of this particular report which she submitted was already on the website of the Cabinet and in the public domain. Therefore it was submitted that the denial on the basis that the information falls within Section 5 (1) (h) (i) cannot be maintained. The Appellant in paragraph 13 of the written submissions dated 12.07.2018 emphasized that the ‘onus to establish that disclosure of the information will pose a clear impediment to investigation or prosecution of the crime’ is on the PA, which has not been discharged.

The Commission noted that if the PA is to maintain the applicability of Section 5 (1) (h) (i) a particular standard of proof must be met and as such the nexus between the prejudice caused to the ‘apprehension or prosecution of offenders’ and the disclosure of the information must be established (given that the crime had already taken place and had been detected as noted by the Appellant).

The Commission queried from the PA whether the Attorney-General’s Department had recommended the institution of criminal proceedings to which the PA responded that no such recommendation had been made to date.

The Appellant in paragraph 14 of the written submissions date 12.07.2018 alleges that the information requested which pertain to payments made to two private parties which the PA is statutorily obliged to disclose proactively every six months under and in terms of Section 8 (2) (v) of the Act. Section 8 (2) (v) of the Act requires that the Minister publish a report biannually including *inter alia* ‘the budget allocated, indicating the particulars of all plans, proposed expenditures and reports on disbursements made.’

Order:

The PA is directed to demonstrate at the next hearing the linkage between provision in the RTI Act i.e. Section 5 (1) (h) and its application to the information request especially in the context of a summarized version of the report prepared utilizing the requested information is already on the website of the Cabinet and in the public domain. The PA has to therefore establish the nexus between the exemption cited and its applicability to the information in question.

It is desirable based on the PA's reference to the fact that it is in '*the process of analyzing available data to finalize the facts on the advice of the Hon. Attorney General,*' that the PA be represented by the Attorney-General's Department.

The Appeal is adjourned.

Next Date of Hearing: 04.09.2018

Thirukumar Nadesan v Office of the Cabinet of Ministers/ Ministry of Defence

RTIC Appeal (In-Person)/ 216& 217/2018 - *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)* – heard as part of a formal meeting of the Commission on 11.12.2018

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

Director-General: Mr. Piyathissa Ranasinghe

Appellant: Mr. T. Nadesan

Notice Issued to:

RTIC Appeal 216/2018- Thirukumar Nadesan v Office of the Cabinet of Ministers- S. Abeyasinghe Secretary to the Cabinet, Office of the Cabinet of Ministers – Designated Officer (DO)

RTIC Appeal 217/2018- Thirukumar Nadesan v Ministry of Defence P. R. Rajapaksa, Additional Secretary (Parliamentary Affairs, Policy & Planning)/Designated Officer (DO), Ministry of Defence

Appearance/ Represented by:

Appellant - Ms. Dilumi de Alwis, Attorney-at-Law for the Appellant

Public Authority - Mr. Suren Gnanaraj State Counsel Attorney-General's Department for both Public Authorities

Matters Arising During the Course of the Hearing (RTICAppeal/217/2018):

Counsel for the Appellant read out the information requested from the Ministry of Defence which is namely;

‘information of all payments made to the following two parties in respect of any and all work carried out in respect of the project on the construction of the Defence HQ Complex in Akuregoda in the period 2011 to 31st May 2015,’

- iii) Muditha Jayakody Associates (Pvt.) Ltd;
- iv) Muditha Jayakody

The information was requested in the following manner;

- A statement of accounts detailing all payments as described above, including amount, date of payment, method of payment (cash or cheque or bank to bank remittances) certified as a true copy/ true copies.
- Certified true copies of receipts issued by Muditha Jayakody Associates (Pvt.) Ltd and / or Muditha Jayakody.

It was noted that although the information was refused citing Section 5 (1) (h) (i) of the Act which was not addressed in the submissions made for RTICAppeal/217/2018. The Commission also noted that there needs to be concrete evidence of prosecutions taking place which is directly impacted by the information requested. The Commission also pointed out that during other appeals the Commission has taken the position that the mere pendency of an investigation is insufficient to invoke the exemption and the prejudice caused to the investigation due to the release of the information must be demonstrated for a successful application of the exemption.

Counsel for the Appellant submitted that the basis for refusing the information is that Ministry of Defence claims that it is in the process of analyzing data in order to finalise facts which may or may not lead to an investigation and subsequent prosecution and this is an insufficient basis to deny the information sought by the Appellant which is only concerns payments in relation to a particular transaction. Further attention was drawn to the order of the Commission on the last occasion which required the PA to demonstrate how the facts and circumstances fall within the exemption cited.

Counsel for the PA submitted that in so far as the Ministry of Defence was concerned the matter was initially referred to the Attorney-General's Department requesting legal advice on how to proceed. The Attorney-General's Department advised the PA based on which the Ministry appointed a Committee to probe into actual losses suffered in relation to the payments made for the consultancy. The report of the Committee will be forwarded to the Secretary of the Ministry who will communicate this to the Cabinet who will then again refer this to the Ministry again with directions on steps to be taken. Thereafter the Ministry will seek the advice from the Attorney-General's Department in relation to civil and criminal

action to be taken. It was therefore submitted that it is on this basis that the PA refused to divulge the information requested. Especially in the context of the present case where the Appellant has requested payment vouchers and cheque numbers it is only thorough and subsequent to a full scale investigation will the authenticity of the documents be established.

Counsel for the PA further submitted that since the Commission has directed that the PA be represented by the Attorney-General's Department, the Department is under an obligation to make representations on behalf of itself as the information sought to be disclosed would also cause grave prejudice to an ongoing prosecution against the Appellant which has not been disclosed to this Commission. Counsel for the PA at this point tendered copies of the indictment served on the Appellant where in he is named as the second accused in a case pending before the High Court of Gampaha (26/2017; Next Date: 18.02.2019). The Attention of the Commission was drawn to page 7 of the indictment wherein the second witness is Muditha Jayakody in relation to whom the information is requested. Counsel for the PA submitted that this information is sought with the motive of prejudicing the prosecution of this particular case.

The Commission notes that the imputation of motive cannot be done although the PA is perfectly entitled to refuse the information citing an exemption.

Counsel for the Appellant submitted that the PA is exaggerating the extent of the investigation by the Committee going to the extent to state that the Ministry of Defence is unaware as to what payments have been made that pertain to the information request. The information request is very clear and requires only what is in the possession, custody and control of the PA. Since the Ministry has to forward details of these payments to the Auditor-General annually the fact that the Ministry claims that three years later it is as yet looking into the authenticity of the documents/ receipts demonstrates mala fides on the part of the PA.

In relation to the prejudice caused to the prosecution of the case against the Appellant, Counsel submitted that since this happened in 2015 and for three years the PA has taken no steps to prosecute again shows that the PA is merely attempting to evade the provision of the information without proper justification.

In relation to the assertion that the motive of the Appellant in lodging this information request is to hinder the prosecution against himself, Counsel for the Appellant submitted that under and in terms of the RTI Act it need not be disclosed as to why a citizen seeks information. The Commission also noted that it is not in line with the Act to attach any weight to the motives or rationale behind an information request.

At this point the Commission queried from the PA as to whether appeal against the Ministry of Defence directly relates to the case against the Appellant in the High Court of Gampaha to which the PA responded in the negative. Counsel for the PA was required to demonstrate the exact relevance of the case to the information requested. It was submitted that Muditha Jayakody in relation to who the documentation in the information request pertains is the main witness in the case against the Appellant.

Counsel for the Appellant submitted that the spirit in which the information request was submitted was to combat corruption since overpayments are alleged to this particular consultant Muditha Jayakody and a lot of impropriety suggested.

The Commission noted that since the case before the Appellant is not directly related to the information request and in view of the fact that the Commission has repeatedly directed the release of information in appeals before the Commission where a direct correlation could not be drawn between the information requested and a pending court case, it would have to assess whether there is sufficient nexus between the case pending before the High Court of Gampaha and the information requested. Furthermore the argument that the provision of the information will enable the Appellant to have an undue influence over the prosecution conducted by the Attorney-General's Department against himself will have to be assessed, to determine whether this will make Section 5 (1) (h) (i) applicable.

Counsel for the Appellant submitted that she would want to receive instructions from her client and to respond on this new argument raised and material placed before the Commission.

The Commission reverted to the previous submission made by Counsel for the PA where the information requested itself has become or may become part of an ongoing investigation by a Committee. Counsel submitted that the report is yet to submitted to the Cabinet, as the Committee was appointed in August 2018, subsequent to which the Cabinet will direct the Ministry of Defence on subsequent steps. Thereafter the Ministry would seek the advice of the Attorney-General's Department on how to proceed in in a civil recovery case/ criminal prosecution/ both. The Counsel for the PA was queried as to whether this is in relation to the loss through payments made in relation to the individual or to the consultancy to which the PA responded that it was in relation to the consultancy. Furthermore since the Attorney-General's Department will have to advice on the matter if information in relation to this is disclosed at this point prematurely it would be prejudicial to a potential prosecution/ action.

The Commission noted that whether the Government acted legally in making these payments to the said persons/ firms would have a bearing on whether the information is to be released.

Order in RTICAppeal/217/2018:

The Appellant is directed to state whether he is amenable to rephrase the information request so as to specify the exact information requested and to clarify whether what is sought is not sensitive information pertaining to an ongoing investigation or national security and falling within Sections 5 (1) (h) (i) or 5 (1) (b), which can then be reconsidered by the PA.

Next Date of Hearing: 12th February 2019
