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

RTICAppeal (In-Person)/26/2018 - *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 formal meetings of the Commission on 16.03.2018, 09.05.2018, 03.07.2018, 07.08.2018 and 04.09.2018

Date of Order - 27.11.2018

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

Director-General: Mr. Piyathissa Ranasinghe

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

Appearance/ Represented by:
Appellant -

Dr. Nishan de Mel, Executive Director, Verité Research (Pvt.) Ltd,
Mr. Gehan Gunatilleke,AAL, Verité Research (Pvt.) Ltd, .
Ms. Malsirini de Silva, AAL, Verité Reseach (Pvt.) Ltd,
Mr. Anushan Kapilan, Research Assistant, Verité Research (Pvt.) Ltd

PA-

Dr. P.N. Weerasinghe, Deputy Governor, Central Bank of Sri Lanka (CBSL)
Mr, H. A. Karunaratne, Deputy Governor, Central Bank of Sri Lanka (CBSL)
Ms. K.N.N.M. Bandara, Superintendent – EPF, CBSL
Ms. S.H. Gunawardena, Director – Communications, CBSL
Mr. K.G.P. Sirikumara, Additional Director, CBSL
Mr. W.G. Prabath, Deputy Superintendent, CBSL
Mr. D.S. Meemadunne, Senior Manager, CBSL
Mr. M. Ariyaratne, Assistant Director, CBSL
Ms. D. Wilathgamuwa, Senior Assistant Director, CBSL
Mr. C. J. P. Siriwardena Deputy Governor CBSL
Mr. A. A. I. N. Wickramasinghe Acting Deputy Director CBSL
Mr. P. V. L. Nandasiri Director Legal CBSL

Written Submissions of the PA: 06.04.2018; 19.06.2018 (further written submissions); 17.08.2018(written submissions in response to the clarifications sought by the Commission on 03.07.2018)

Written Submissions of the Appellant: 15.03.2018,13.04.2018; 06.08.2018 (written submissions in response to the clarifications sought by the Commission on 03.07.2018); 24.10.2018

Brief Factual Background:

The Appellant submitted an information request to the Public Authority on 15.05.2017 requesting the following information:

1. Decision-making process for investment of EPF funds, including all committees and bodies involved, approval processes and structures, and any guidelines and rules to be followed. (if any of the formal structures and processes do not exist, give details of all alternative structures and processes by which the EPF funds are managed.)
2. Any guidelines and rules that govern Investment Committee
3. Names and designations of members of the Investment Committee
4. Annual reports of the EPF Dept. from the years 2014,2015 and 2016
5. A list of the following assets held by EPF as at 30.04.2017
    - All govt. securities categorized by maturity period and yield to maturity
    - All listed and unlisted equities (mentioning the name of the company, purchase cost and current market value)
    - All Rupee loans
    - All corporate debentures
6. 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 IO responded on 30.06.2017 providing responses to all except item Nos. 4 and 6 and cited Section 5 (1) (a) regarding item 6. With regard to item 4 the PA maintained that the 2016 Annual Report of the EPF Department had not been finalised as yet.

The Appellant appealed to the DO on 24.07.2017. The DO responded that item 4 would be provided once the approval of Cabinet was received, and with regard to item 6 that there was an investigation of secondary market transactions on Government securities of EPF by the Presidential Commission of Inquiry (COI) to investigate, inquire and report on the issuance of Treasury Bonds (Bond Commission) during the period 1st January 2015 to 31st March 2016. The COI had requested similar information and the PA had provided the information to the Commission under the "Confidential and non-publishable" category. Therefore, the PA submitted that the Appellant's request would be considered once the investigation by the Commission was completed.

Dissatisfied with the response, the Appellant preferred an appeal to the RTI Commission on 06.11.2017.

Matters Arising During the Course of the Hearing:

By consensus between both parties, it was agreed that both appeals RTICAppeal/25/2018 and RTICAppeal/26/2018 would be heard together but that the relevant Orders would be issued separately.

At the outset, it was noted by the Commission (RTIC Minute of the Record, 16.03.2018) in taking into account the fact that the Appellant had not averred citizenship in its original information requests in compliance with the requirements of Section 43 that the Appellant Organisation had however averred citizenship in the appeals filed to the Commission under Section 32 (1) and that accordingly, in terms of the Commission's Order in TISL v. Prime Minister's Office/Presidential Secretariat (RTICAppeal/05/2017 & RTICAppeal/06/201, RTIC Minutes of 23.02.2018), the same was accepted.

The Commission recorded the submission of the Public Authority that it had processed the instant information requests disregarding non-conformity to the jurisdictional requirements laid down in the RTI Act as the objective of the Public Authority was to respond in good faith to information requests in the spirit of the RTI Act. On this basis, a later objection raised in the Written Submissions of the Public Authority (dated 6th April 2018) was not proceeded with in accordance of the Order of the Commission dated 16.03.2018 and was not disputed thereto by the Public Authority.

On 16.03.2018, the PA agreed to provide A and B of the information requested by item 6 (as highlighted below) namely, the date of purchase and the date of bill/ bond issue (if different from the date of purchase) in relation to primary market transactions held through auctions, primary market transactions held through direct placement, secondary market transactions of all government securities market transactions of the EPF from January 2015 to 30.04.2017. In relation to item 4 the PA was directed to provide whatever information that would ordinarily be contained in the Annual Report relative to the year in question severed if so required as provided for in Section 6 of the RTI Act.

Subsequently, in its Written Submissions dated 06.04.2018, 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 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 one of the combinations below as proposed;

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

The Appellant was however not amenable to the same but reiterated only that it was not pursuing the names of those who are transacting (counterparties) (Vide RTIC Minute of the Record, 03.07.2018). Several attempts were made by this Commission to arrive a compromise between the parties as to what information could be released in a manner that is equitable in terms of the competing interests involved in this matter; i.e. the need for transparency and accountability in dealing with the EPF fund given the undoubted public interest implicit in the same and the need to preserve the competitive interests of the EPF in the financial market. On 07.08.2018, the Appellant submitted that it is willing to compromise if the PA agrees to provide one of the following combinations.

1. A B C D F G and E OR
2. A B C D F G and H

Following further questions being posed by the Commission to the PA, the PA then agreed to provide items of information in the request (excepting item No I) up to the year 2016 on the basis that the external audit was in progress for the year 2017, rendering the information for the said year incomplete. (*vide* RTIC Minute of the Record, *07.08.2018*).

However by letter dated 17.08.2018 signed by Senior Deputy Governor Dr. P. N. Weerasinghe and at the hearing on 04.09.2018, the PA reverted to its original position that it was willing to disclose only items A, B, C, D, on the basis that disclosure of transaction wise information pertaining to information items E, H and G and I would 'expose EPF to a competitive disadvantage which will impact on operations in the primary and secondary market as well thereby causing irreparable harm to the EPF.'

By Order of 03.07.2018, the Commission detailed several questions to be answered by both parties with particular questions to be responded to by the Public Authority alone, including, inter alia, the following;

> 1. 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"?
>
> 2. 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)?

3. 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?

These questions were answered by the parties to the appeal through Written Submissions of the PA, (dated 17.08.2018) and of the Appellant (dated 06.08.2018). In particular and answering question 1 posed above in regard to existing statutory duties prescribed on the PA, the PA stated that Section 5 (1)(h) of the EPF Act only required a statement of investment annually with face value, market value and purchase price (which information is contained in the Annual Reports in satisfaction of that statutory guarantee), which do not mean individual transactions as such, as the Appellant requests.

It was also claimed by the PA (vide paragraph 28 of the said Written Submissions) that disclosing items A to D as well as F in item 6 of the information request is not market sensitive as the respective counter parties and prices/cost is not disclosed but that 'disclosing items E, G H and I thereto will affect investment strategies and further, if the counter party name is not to be disclosed, that should equally apply to the EPF too.'

Order:

In RTIC Appeal 26/2018 the information request pertaining to the EPF fund termed as 'the largest Social Security Scheme in Sri Lanka,' (<http://www.epf.lk/>), constituted by member accounts considered as consisting real savings of those members.

The Appellant has contended that the information is of significant public interest given that (Vide Written Submissions of 24th October 2018, para 1), the EPF is the 'largest single fund

in Sri Lanka with LKR 2 trillion worth of retirement funds and 17.3 million total member accounts, estimating to almost 80% of Sri Lanka's population. Under and in terms of the provisions of the EPF Act, No. 15 of 1958 (the EPF Act), the Public Authority is required to invest the funds of the EPF in such securities as the Monetary Board may consider fit (Section 5(1)(e) of the EPF Act.

At the time of delivery of this Order, the single issue in this Appeal centered on item 6 of the information request which concerned;

> *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)*

As aforesaid, the Appellant affirmed on record that it was not pursuing information item I (Vide RTIC Minute of the Record, 03.07.2018).

It has been submitted to this Commission that the information sought is already disclosed on the Bloomberg platform albeit without the names of the counterparties (vide written submissions of the Appellant dated 06.08.2018 in response to the clarifications sought by the Commissions). The PA's contention is that the disclosure of the information, even without those of the counterparties that the EPF trades with, will have an adverse impact on the competitive interests of the EPF which will be the only party disclosing its details (vide RTIC Minute of the Record 04.09.2018). From the point of view of EPF, counterparties are traders with EPF; i.e. buyers and sellers from and to EPF. Counterparties can be investors or brokers and the position of the PA was that therefore the disclosure of E, G, and H would be prejudicial to the interests of the EPF.
However, if the view of the PA that EPF, by its size, is the dominant player is accepted, it necessarily follows that it may be extremely difficult for smaller payers to influence the EPF, other than through insider information. Whether the EPF currently trades in the secondary market is not clear. The PA has submitted for the record that EPF transactions have been limited to primary market purchases subsequent to the introduction of

reporting on the Bloomberg Platform on 15th July 2016 (*vide paragraph 12, Written Submissions of the PA dated 17.08.2018*).

The Appellant Organisation has submitted that it is willing to limit the information to 2015 and 2016. Therefore what is required at this point would be a determination of the disclosure of items A-H in relation to; *Primary market transactions held through auctions, Primary market transactions held through direct placement and Secondary market transactions between January 2015 and July 2016 and the Primary market transactions held through auctions and Primary market transactions held through direct placement between July 2016 and December 2016.*

Applicability of Exemptions 5 (1) (a), 5 (1) (d) and 5 (1) (h) (i)

General Observations

Section 5 (1) (a) is inapplicable in this instance as privacy rights of individuals are not attracted in the circumstances of the case, thus rendering the basis of the rejection of the information request/first appeal by the PA to be flawed in terms of the RTI Act. However Section 5 (1) (h) (i) and 5 (1) (d) have been raised as applicable exemptions by the Public Authority (PA) to deny the information in the hearings before this Commission.

What is in issue is the disclosure of information during 2015 and 2016 given the aforesaid agreement of the PA as of record during the appeal hearing of this Commission (Vide RTIC Minute of the Record, 07.08.2018) that it was amenable to the same being disclosed which was acceded to by the Appellant, but which agreement was subsequently withdrawn from by the PA.

The PA has strenuously contended that real prejudice to the competitive interest of the EPF will be sustained if the said information is disclosed. However, it is an accepted principle that information requests pertaining to completed transactions/past data will be responded to differently as compared to ongoing transactions which carry with them particular sensitivities. This principle was acknowledged by this Commission in its decision in *Airline Pilots Guild v Sri Lankan Airlines* (Order delivered on 12.06.2018)

An analogy may be drawn (albeit in a different context) from a relevant Indian precedent, (*Institute of Chartered Accountants of India vs Shaunak H Sayta &Ors on 2 September, 2011*) where the subject matter related to the disclosure of examination papers and wherein Section 8 (1) (d) of the Indian RTI Act was pleaded as an exemption to refuse the information. The Court stated that;

> *'Information can be sought under the RTI Act at different stages or different points of time. What is exempted from disclosure at one point of time may cease to be exempted at a later point of time, depending upon the nature of exemption. ...if information relating to the intellectual property, that is the question papers, solutions/model answers and instructions, in regard to any particular examination conducted by the appellant cannot be disclosed before the examination is held, as it would harm the*

> *competitive position of innumerable third parties who are taking the said examination. Therefore it is obvious that the appellant examining body is not liable to give to any citizen any information relating to question papers, solutions/model answers and instructions relating to a particular examination before the date of such examination. But the position will be different once the examination is held. Disclosure of the question papers, model answers and instructions in regard to any particular examination, would not harm the competitive position of any third party once the examination is held.'*

In the present appeal, the transactions relating to the information that was initially agreed to be disclosed before us (ie; up to the year 2016) have taken place more than two years ago. The Public Authority has failed to demonstrate how it would be prejudicial to the competitive interests of the third party i.e. the EPF assuming that the EPF is in fact a third party falling within the scope of Section 5 (1) (d). Furthermore, based on the facts before this Commission, the added disclosure would seem to lead to better investments and more or equally importantly, prevent disadvantageous transactions. It would appear to hold the PA more accountable to the EPF members. Accordingly it is our view that this contention has been insufficiently substantiated in its merits.

It is also noted that under Section 5(1)(e) of the EPF Act, only the moneys of the Fund as are not immediately required may be invested in such securities as the Monetary Board may consider fit and may sell such securities. This means that the objectives of EPF seem to be long term investments, which are much less sensitive to market when compared to short term investments. The said Section empowers "investment" in "securities". This is capable of being interpreted as even covering situations where a number of investments, from the perspective of the EPF members, could be made in a single security. This distinction is relevant, as subsequently discussed in this Order.

Relevance of the Exemption in Section 5 (1) (d) of the RTI Act

Section 5 (1) (d) of the RTI Act 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.'*

It is relevant to note in this regard that the placing of the commas in that Section presents a cogent argument that what is deemed exempt under Section 5(1)(d) is information (including commercial confidence, trade secrets, or intellectual property) which are protected under the Intellectual Property Act. Hence those that are not protected under the Intellectual Property Act do not fall within the ambit of Section 5(1)(d). The comma inserted by the framers of the Act between the words "intellectual property" and the word "protected" leads to the two words being read as disjunctive, thus inferring with some force that the said Section applies only to information protected by the Intellectual Property Act.

However and in any event, considering the Public Authority's contention that the protection of 'commercial confidence' in a general sense would apply to deny the release of information in this appeal, we will consider the competing arguments of both parties in that regard.

The thrust of the Appellant's argument was that the EPF being the single largest fund in the country, holding probably over 90% of the local borrowings of the government and being mostly active only in the primary market – (i.e. buying directly from the government, and not third parties in the secondary market); any secondary market activity of the EPF is of significant 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).' (Vide Written Submissions of the Appellant dated 13th April 2018, at paragraph 14),*

Refuting the above, the PA argued that the provision of the information would result in investment strategies and patterns adopted by EPF becoming accessible by competitors through the disclosure of transactions that may affect the movements of price levels of holdings thus becoming price/market sensitive information. With respect to the submission by the Appellant that the information is already in the public domain via the Bloomberg platform, the PA submitted that market participants are not able to trace the parties who are transacting, although the fact of transaction of a particular bond maybe available.

Having considered the submissions of both parties it appears that although the PA has repeatedly claimed that the information is market sensitive and falls within the protection of Section 5 (1) (d) of the RTI Act, it has failed to demonstrated **exactly** how (emphasis ours) this information impacts on the competitiveness of the EPF in the market or rather how it falls within Section 5 (1) (d).

It must be noted that this Commission took special effort to ascertain the same including querying (order dated 03.07.2018) the exact criteria used by the CBSL to designate a particular information as "market sensitive" whilst ensuring transparency and disclosure as required also under the EPF Act. The PA was asked to identify what items of the information requested can be categorized as "market sensitive" or included within the ambit of Section 5 (1) (d) of the RTI Act and why the said information would be market sensitive. In response, the PA submitted (vide written submissions of the PA dated 17.08.2018) that;

> *day-to-day investment strategies and investment pattern of the EPF can be exploited by other parties due to disclosure of such information and that can adversely affect for the market competitiveness of EPF. Using this information anyone can identify the position of the EPF i.e. percentage holdings of a security. Similarly, investment and trading strategies such as profit margin adopted in trading can be used by competitors for their advantage and also for front running activities. Accordingly, market*

> *participants can judge the requirements of the EPF and future dealings strategy. Therefore, anticipating EPF transactions, others can try to buy which escalates the prices unnecessarily causing a higher price for EPF and its members and vice versa. Ultimately this situation would bring an adverse situation to the members of the fund.*

It was reiterated that if information in relation to the EPF is in the possession of a third party compromising the EPF's ability to compete or deal effectively and which prompts other competitors to act prior to the EPF investment actions, market prices can move adversely. Further, it was submitted that as the 'EPF is a counterparty in the market the release of details pertaining to counterparties allow competitors to act maximizing their profits. Investment strategies and patterns adopted by the EPF can be accessible by competitors through the disclosure of transactions that may affect the movements of price levels of holdings and therefore price/market sensitive,' (vide written submissions of the PA dated 17.08.2018).

Similarly the PA stated that the information can be used by competitors to their advantage and also for front running activities and that market participants can accordingly judge the requirements of the EPF and future dealings strategy.

Analysing the responses of the PA to these questions it is evident that although the PA pleads that information disclosure will enable anyone to identify the position of the EPF, it has failed to demonstrate as to **how (emphasis ours),** the identification of the position of the EPF in the market in terms of percentage holdings of a security would affect its competitiveness in the market, especially when EPF is, as stated by the PA, the dominant player.

It is our view that the PA has failed to demonstrate how that information, in this instance completed transactions/ past data can be used with certainty by competitors to their advantage and to the disadvantage of the EPF. The illustration provided, along with the response of the PA, is unhelpful in that regard as it is a generalized response and in our opinion, would be more applicable to future/ongoing transactions rather than those already completed.

Furthermore the response of the PA to the query by the Commission whether disclosure should not be mandated for the very purpose of preventing the obtaining of an unfair competitive advantage through, limited and/or non-disclosure, is circuitously phrased as follows;

> *The purpose of disclosure is the reduction of asymmetry thereby the prevention of unfair competitive advantage. However, the non-disclosure of the counterparty, ownership and transactions envisages the maintenance of privacy and confidentiality where such information does not affect the market competitiveness.* (vide written submissions of the PA dated 17.08.2018, paragraph 26)

The Appellant's response affirms that since the establishment of the Bloomberg Platform, all market participants have access to data (which includes items of the information

requested directly or indirectly except counterparties). It may therefore be concluded that it is illogical to argue that the older transactions (i.e. between January 2015 and 15th July 2016 when the Bloomberg platform was introduced) are more market sensitive. (emphasis ours). It is generally understood that in a competitive market deals cannot be confidential and counterparties can share deal information.

Furthermore we are inclined to agree with the argument of the Appellant in the appeal hearings that it is an established principle of efficient markets that equal public disclosure is the best way to promote the proper functioning of the market, as it is in the absence of public disclosure that data can be shared privately and exploited unequally.

The Commission also notes the salutary disclosure requirements as contained in Section 5(1)(h) of the EPF Act, where the law clearly mandates preparation 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**" (emphasis ours). This, we take to mean each investment in security.

In that context, it is relevant that, in response to the Commission's query as to 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, while the Appellant submitted that,

> *in any market, the key factor that drives healthy market outcomes is that the price is equally visible and known to all parties. Every time a bond or stock is traded, the date of trading is relevant because these are assets of which the value depends on the passing of time, and therefore the date of trading,*

the PA stated that 'individual transactions of counterparties with respective prices should be held confidentially,' (vide written submissions of the Appellant and PA dated 06.08.2018 and 17.08.2018 respectively).

Moreover, in response to the question by the Commission as to the mechanism 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, the Appellant submitted that,

> *there is no mechanism available to members to obtain real time information on EPF investment. The only information made available to the public, on the investments, is the data on securities held by the EPF, in the incomplete manner that it is published in the annual report (it reports the static stock at given point of time only). The EPF is slow in producing these annual reports – their publication is routinely delayed for over two years.*

The PA too submitted that there is no such mechanism whereby members are updated as and when an investment is made. However the PA submitted that 'key financial data is disclosed and published annually in the national newspapers and EPF website in addition

to the Annual Report.' (vide written submissions of the Appellant and PA dated 06.08.2018 and 17.08.2018 respectively). On further query with respect to the safeguards followed by the PA, it was submitted that,

> *the Monetary Board as the custodian of the Fund monitors the investments made by the EPF on a regular basis. The Internal Audit and Risk Management Department of CBSL oversee the investment of the EPF. The EPF prepares annual accounts including the statement of investment which is submitted to the Ministers of Labour and Finance. Auditor General conducts an annual audit of the EPF and reports to Parliament.* (vide Written Submissions of the dated 17.08.2018).

The above relates to generalised monitoring of EPF investments. But it must be stated that the purpose and objective of the RTI Act was to superimpose a greater element of information disclosure and hence, a greater element of transparency in the functioning of Public Authorities than what had prevailed before. If, as the PA contends, existing overall monitoring of the EPF's investments by relevant statutory agencies is taken as being sufficient for the purpose, then indeed, the purpose of an information law in this country becomes irrelevant. Rather, the question for this Commission is set at the measurably higher level as to whether the PA has satisfactorily established the precise manner in which this requested information, as relevant to 2015 and 2016, will attract the protection of Section 5(1)(d), defeating the public interest test inherently contained in that Section as well as the general public interest override in Section 5 (4).

In that regard, the Commission notes the salutary disclosure requirements as contained in Section 5(1)(h) of the EPF Act, where the law clearly mandates preparation 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**" (emphasis ours). This, we take to mean each investment in security.

The disclosure provisions of the EPF Act suggest disclosure of information of EPF activities is in the larger public interest.

We note that, Section 32 (4) of the Right to Information Act states that 'On appeal, the burden of proof shall be on the public authority to show that it acted in compliance with this Act in processing a request.' This duty is even more onerous where Section 5(1)(d) of the Act is claimed as an exemption to release information (as the Public Authority has done) as the public interest test is contained inherently in that exemption itself as well as in the general override in Section 5(4). (*vide order dated 16.03.2018).* We do not find this burden to have been satisfied.

In particular, it is a relevant factor that information as to items A to H up to 2016 was undertaken to be given by the PA at one point as aforesaid, which undertaking was thereafter revised with a reversion to earlier contentions advanced in regard to withholding of the information but with no clear rationale as to why that revision was deemed imperative,

Section 5 (1) (h) of the Employees Provident Fund Act No. 15 of 1958 (EPF Act)- Disclosure requirements- Distinction between an 'investment' and a' transaction'

Certain compliance issues arose with respect to this statement of investments which the PA is required to publish under and in terms of Section 5 (1) (h) of the Employees Provident Fund Act No. 15 of 1958 which requires that the PA;

> *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.*

and which in terms of Section 5 (1) (i) of the EPF Act shall be transmitted to the Minister 'within three months after the thirty-first day of December of that year.' Whilst the Appellant contends that any exemptions in the RTI Act would still have to be read in line with this statutory duty the PA was of the view that it was beyond the mandate of the Commission to require adherence to the obligations arising under and in terms of the EPF Act (vide RTIC Minute of the Record of 16.03.2018).

The issue arose as to whether the *statement of investments showing the face value, purchase price, and market value of each of the investments in* Section 5 (1) (h) of the EPF Act required that details of each transaction as envisaged by the information request be disclosed. Clarifying the requirement in Section 5(1) (h) of the EPF Act, the PA submitted that while the information requestor looks for information on each transaction, the law only requires that the PA disclose in relation to each investment. It was emphasized that in relation to one investment, there may be a series of transactions and that a distinction must be drawn between the reference to investments in the Act and 'transactions' as requested by the information request.

It may be useful to examine what the terms 'transaction' and 'investment' mean. Whilst a transaction is defined 'an instance of buying or selling something' (https://en.oxforddictionaries.com/definition/transaction;https://dictionary.cambridge.org/dictionary/english/transaction), an investment is defined as 'the act of putting money, effort, time, etc. into something to make a profit or get an advantage, or the money, effort, time, etc. used to do this (https://dictionary.cambridge.org/dictionary/english/investment).

In the context of international arbitration, it has been determined that,

> *There is no uniform definition of the term investment, but the meaning of this term varies… While in ordinary language investment is often understood as being capital or property used as a financial basis for a company or a business activity with the aim to produce revenue or income, wider definitions are frequently found in treaties on the protection of investments, whether bilateral (BITs) or multilateral (MITs). The term investment must therefore be interpreted in the context of each particular treaty in*

> *which the term is used. Article 31(1) of the Treaty on the Law of Treaties provides, as the main rule for treaty interpretation, that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It is obvious that, when there is a definition of a term in the treaty itself, that definition shall apply and the words used in the definition shall be interpreted in the light of the principle set out in Article 31(1) of the Treaty on the Law of Treaties* (Petrobart v. Kyrgyz Republic, Stockholm Chamber Case No. 126/2003, Final Award, 29 March 2005).

Further Indian jurisprudence too seems to indicate that whether or not something is an investment or a trade/ business (transaction) would depend on the facts and context of each case (*Khan Bahadur Ahmed Alladin & Sons. v. CIT (1968) 68 ITR 573(SC); Premji Bhimji v. CIT((1971)81ITR 179(Cal.); CIT v. Associated Industrial Development Co. (P) Limited (1971) 82 ITR 586/1972 CTR(SC) 239(SC))*.

In *Premji Bhimji v. CIT ((1971)81ITR 179(Cal.))*it was stated that,

> *In deciding whether a venture is in nature of trade no rigid formula can be applied. The total impression must be gathered from all the relevant facts and circumstances. In a transaction of purchase and re-sale, whether the purchase is made solely and exclusively with the intention to re-sell at a profit and the purchaser has no intention of holding the property for himself or otherwise using it, the presence of such an intention is a relevant fact and unless offset raises a strong presumption that the adventure is in the nature of trade.*

In *CIT v. Associated Industrial Development Co. (P) Limited (1971) 82 ITR 586/1972 CTR(SC) 239(SC),* the Supreme Court held that,

> *Whether a particular holding is by way of investment or forms part of the Stock in trade is a matter which is within the knowledge of the assesses, who hold the shares and it should, in normal circumstances, be in a position to produce evidence from its record as to whether it has maintained any distinction between those shares which are its stock in trade and those which are held by way of investment.*

In Bhogilal H. Patel v. CIT (1969) 74 ITR 692 (Bom.) the intention of a person entering into a transaction was considered relevant. It was stated that,

> *a person is undertaking a trade or business, or entering into an adventure in the nature of trade, it is essential that the particular transactions under scrutiny should have been entered into with the intention of earning a profit on the other hand if a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a case of capital accretion and not profit derived from an adventure in the nature of trade. So intention of the person at the time of entering into transaction will be important to decide whether it is a transaction in the nature of trade or an investment.*

Relevance of Section 5 (1) (h) of the RTI Act

The PA denied the information to the Appellant on the basis that regard there was an investigation of secondary market transactions on Government securities of EPF by the Presidential Commission of Inquiry (COI) to Investigate, Inquire and Report on the issuance of Treasury Bonds (hereinafter COI) during the period 1st January 2015 to 31st March 2016. The PA further stated that the COI requested similar information and the PA had provided the information to the COI under the "confidential and non-publishable" category and that the Appellant's request would be considered once the investigation by the COI was completed.

During the proceedings before the RTI Commission, the PA pleaded Section 5 (1) (a) once again along with Section 5 (1) (h) (i) of the RTI Act which exempts information where disclosure 'w*ould… cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders;' (vide RTIC Minute of the Record of 16.03.2018).* In both these respects, there is a statutory burden on the PA which needs to be discharged. This is not a requirement peculiar to the Sri Lankan law and in fact, is a common statutory provision in other comparable jurisdictions.

In *Smt. Ashwini Dixit v. Reserve Bank of India* (decided on 12 March, 2012) the Central Information Commission of India was of the view that the mere cursory argument that information sought is protected under Section 8 (1) (d) is insufficient and that the burden of proof cast on the PA in terms of Section 19 (5) must be discharged. The Commission stated that;

> *In order to claim the exemption under Section 8(1)(d) of the RTI Act, the PIO must establish that disclosure of the information sought (which may include commercial or trade secrets, intellectual property or similar information) would result in harming the competitive position of a third party. As per Section 19(5) of the RTI Act, the burden of establishing the applicability of the exemption lies on the PIO.*

In ascertaining the applicability of Section 5 (1) (h), it is of note that the corresponding Section of the Indian Act (Right to Information Act No. 22 of 2005) Section 8 (1) (h) which exempts 'information which would impede the process of investigation or apprehension or prosecution of offenders' is similar in content to Section 5 (1) (h) of Sri Lanka's RTI Act. In comparable instances in terms of the Indian law, a strict position has been taken by the relevant statutory agencies.

In *Rajeev Kumar Jain v. Delhi Jal Board, Gnctd* (decided on 19 January, 2011) the Central Information Commission (CIC) directed the release of information in an instance where the PA has claimed the benefit of Section 8 (1) (h). The CIC decided that 'the PIO has not shown any specific ground on which he can show that the process of investigation would be impeded by releasing the information.' This was based on the fact that 'Section 8 (1) (h) of the RTI Act uses the word… 'would' impede and not 'may' impede.' It was thus concluded that 'there has to be reasonable possibility of the investigation being impeded and a mere

conjecture that there is some possibility of further investigation being held and being impeded does not meet the requirements of Section 8(1)(h) of the RTI Act.'

In *B S Mathur v. Public Information Officer of Delhi HC* (decided on 3 June, 2011) the Delhi High Court held that,

> *As regards Section 8 (1) (h) of the RTI Act, which is the only provision invoked by the Respondent to deny the Petitioner the information sought by him, it will have to be shown by the public authority that the information sought "would impede the process of investigation." The mere reproducing of the wording of the statute would not be sufficient when recourse is had to Section 8 (1) (h) of the RTI Act. The burden is on the public authority to show in what manner the disclosure of such information would "impede" the investigation.*

Further, in *Shri. S Satyanarayana v. Reserve Bank of India* (decided on 24 August, 2011) it was observed by the CIC that;

> *Merely because the process of investigation or prosecution of offenders is continuing, the bar stipulated under Section 8(1)(h) of the RTI Act is not attracted; it must be clearly established by the PIO that disclosure of the information would impede the process of investigation or apprehension or prosecution of offenders.*

The thinking of the CIC in this regard is well reflected in the following warning issued in *Bhagat Singh v. CIC* (W.P. (C) No. 3114/2007, paragraphs 13 and 14as follows:

> *13. Access to information, under Section 3 of the Act, is the rule and exemptions under Section 8, the exception. Section 8 being a restriction on this fundamental right, must therefore… be strictly construed. It should not be interpreted in manner as to shadow the very right itself. Under Section 8, exemption from releasing information is granted if it would impede the process of investigation or the prosecution of the offenders… the mere existence of an investigation process cannot be a ground for refusal of the information; the authority withholding information must show satisfactory reasons as to why the release of such information would hamper the investigation process. Such reasons should be germane, and the opinion of the process being hampered should be reasonable and based on some material. Sans this consideration, Section 8(1)(h) and other such provisions would become the haven for dodging demands for information.*
>
> *14. A rights based enactment is akin to a welfare measure, like the Act, should receive a liberal interpretation. The contextual background and history of the Act is such that the exemptions, outlined in Section 8, relieving the authorities from the obligation to provide information, constitute restrictions on the exercise of the rights provided by it. Therefore, such exemption provisions have to be construed in their terms; there is some authority supporting this view (See Nathi Devi v. Radha Devi Gupta 2005 (2) SCC 201; B. R. Kapoor v. State of Tamil Nadu 2001 (7) SCC 231 and V. Tulasamma v. Sesha Reddy 1977 (3) SCC 99). Adopting a different approach would result in narrowing the*

> *rights and approving a judicially mandated class of restriction on the rights under the Act, which is unwarranted." (Emphasis added)*

In that instance, the Information Officer was called upon to *show satisfactory reasons as to why disclosure of such information would impede the process of investigation or apprehension or prosecution of offenders.* It was emphasized that these reasons must be relevant and the opinion of the PIO in that regard must be 'reasonably' formed, must be based on some material 'and cannot be a mere apprehension not supported by any evidence.'In the absence of the same and on what was determined to be a mere 'blanket statement' of the information officer in refusing the information, the denial of information was determined to be unwarranted.

Applying the aforesaid principles to the facts of this appeal, it is evident that the burden is on the PA to demonstrate the '*grave prejudice to… the apprehension or prosecution of offenders.'* However, apart from the inquiry posed to the Attorney-General's Department requesting the status of the investigation to which no response had been received at the close of submissions, the PA has been unable to demonstrate the prejudice that may conceivably be caused.

In its written submission dated 19.06.2018, the PA has stated that 'action' is being taken including action to recover undue gains obtained by counterparties and criminal investigations to ensure that the secondary market dealings of the EPF are devoid of malpractice. On this basis the PA denied the information. We find that this bare denial is not capable of being sustained as a basis to refuse to give the information under and in terms of Section 5(1)(h) of the Act.

The Public Authority is under a duty to specify as to how 'serious prejudice' may be caused in respect of the same as required in terms of that Section, if the information is released in relation to the specific items of information asked for rather than a generalised citation of the said exemption. (vide *RTIC Order dated 16.03.2018).*

Whereas the Bond Commission ended during the pendency of this Appeal culminating with the release of the report of the said Commission of Inquiry, the PA pleaded that investigations are ongoing by the CID consequent to which certain individuals have been arrested and remanded (*vide RTIC Minute of the Record of 03.07.2018*). Having been directed by this Commission 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 (*vide RTIC Minute of the Record of 03.07.2018)* the PA submitted that it had inquired from the Attorney-General's Department as to the status of the investigation by letter dated 12.06.2018 and that it had not received a response on the matter to date (*vide RTIC Minute of the Record of 04.09.2018*).

The Public Interest in the Disclosure of the Information

We are of the view that, in the circumstances of this appeal 'the public interest in disclosing the information outweighs the harm that would result from its disclosure' as mandated in Section 5(4) would apply.

The fact that there was an investigation of secondary market transactions on Government securities of the EPF by the Commission of Inquiry (PCOI) appointed to investigate, inquire and report on the issuance of Treasury Bonds during the period 1st January 2015 to 31st March 2016 adds to the public interest in the matter.

While it is evident that the PA will only be disclosing information in relation to the EPF in whose interests it is bound to act by protecting *inter alia* the competitive advantage the EPF like any other counterparty commands in a market, this has to be weighed with the requirement of the maintaining transparency and accountability which is also in the interests of the EPF and its members, as the PA is investing the monies of 17.3 million EPF members collectively i.e. public money, who are mandated by law to contribute to this retirement fund and who do not have the choice of investing their money in other places. Thus the context in which the EPF operates is itself sufficient to justify the public interest. The Commission is compelled to note that the PA is performing multiple roles; Manger and Investor of EPF Funds; Market developer and banking regulator; and agent of Government in raising financing for governmental expenditure through the Bond market. If the PA choses or is required to perform these multiple roles, it must acknowledge and implement common as well as standalone multiple reporting and accountability requirements specific to each of these roles.

Furthermore, the fact that the EPF, during 2015 and 2016, transacted in the secondary market buttresses the public interest in disclosure of the information requested. When an explanation was sought from the Appellant in relation to its submission that 'investments in EPF funds are held long term with few transactions,' (*vide RTIC Minute of the Record of 03.07.2018*) the Appellant responded as follows;

> *…The EPF Fund is a retirement fund that obtains monthly contribution from the members, and pays back the members on retirement, which is typically more than 20-30 years later. The theory on investing retirement funds is that contributions to the Fund should be invested targeting long-term returns and not short-term returns. Typically, long-term investments are mostly held to maturity and are not traded frequently – in finance jargon, investments targeting short-term returns are held in a 'trading portfolio' and those targeting long term returns are held in an 'investment portfolio'. It is only the trading portfolio that is subject to frequent transactions.*

Comparative precedents are of persuasive value in examining as to the manner in which the applicability of RTI exemptions and the public interest may be balanced. In *Dr. Mohan K Patil v. Reserve Bank of India, RBI* (decided on 29 November, 2011) the Central Information Commission stated that despite Section 8 (1) (d) being applicable where the information requested concerned 'findings of the enquiry made by RBI, actions proposed and taken

against' a third party 'Bank and its officials including official notings, decisions and final orders passed and issued.'

> *citizens have a right to know about the functioning of the Bank including any regulatory lapses. If there are irregularities in the functioning of the Bank… citizens certainly have a right to know about the same. A larger public interest would be served by disclosing this information- under Section 8(2) of the RTI Act… The Nation's interest would be better served through transparency and exposure of illegal acts.*

Furthermore where in the same case, the PA had claimed another exemption 8 (1) (a), the Indian Commission recognized the importance of transparency in a context where the PA is a regulatory authority and acknowledged that it is in the public interest to disclose the information. The Commission stated that,

> *The RBI is a regulatory authority which is responsible for inter alia monitoring subordinate banks and institutions. Needless to state significant amounts of public funds are kept with such banks and institutions. Therefore, it is only logical that the public has a right to know about the functioning and working of such entities including any lapses in regulatory compliances which may be inferred from the correspondence exchanged between RBI and the banks. Merely because disclosure of such information may adversely affect public confidence in defaulting institutions, cannot be a reason for denial of information under the RTI Act. If there are certain irregularities in the working and functioning of such banks and institutions, the citizens certainly have a right to know about the same. The best check on arbitrariness, mistakes and corruption is transparency, which allows thousands of citizens to act as monitors of public interest.*
>
> *A Nation's economic interests lie in the robustness of its Institutions and weeding out of the bad ones. There must be transparency as regards such organisations so that citizens can make an informed choice about them. In view of the same, this Bench is of the considered opinion that even if the information sought in query 2 was exempt under Section 8(1)(a) of the RTI Act,-as claimed by the Respondent,- Section 8(2) of the RTI Act would mandate disclosure of the information sought.*

In the Sri Lankan context, it is relevant that the Right to Information is a fundamental right guaranteed by Article 14A of the Constitution. Any restriction placed upon it through the Constitution or through any other statutory provision such as Section 5 of the RTI Act must be applied and interpreted in consonance with principles such as proportionality, as necessary in a democratic society and in furtherance of a legitimate aim to which the restriction bears a *rational nexus*.

Even previously to the constitutional enshrining of the right to information, the Supreme Court had recognized this right as a necessary corollary of the freedom of expression *(Environmental Foundation Ltd. v. Urban Development Authority* SC (FR) Application No. 47/04: SCM 28.11.2005).

In language closely reflecting the constitutional right to information in Sri Lanka, it was observed by the Supreme Court in *Sunila Abeysekera v. Ariya Rubasinghe, Competent Authority And Others* [2000] 1 Sri LR 314, that restrictions to rights 'must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it,' (at page 375). These restrictions must be necessary in a democratic society. Further, the Court observed that,

> *It is only by informed discussion that proposals adduced can be modified so that the political, social and economic measures desired by voters can be brought about …*
>
> *...Moreover, in a representative democracy there must be a continuing public interest in the workings of government which should be open to scrutiny and well-founded constructive criticism.*

These are admirable sentiments that must weigh with this Commission in deciding the disclosure of information in line with the avowed aims of Sri Lanka's RTI Act being, the fostering of a 'culture of transparency and accountability in public authorities' as articulated in the preamble to the Act.

In the aforesaid circumstances, it is our view that release of the information requested in A B C D E F and G of item 6 in this appeal, in so far as the said information pertains to the years 2015 and 2016 will suffice the requirements of transparency and accountability as envisaged in the RTI Act's preamble, that the same is not impeded from release by the operation of Sections 5 (1) (a), 5 (1) (d) and 5 (1) (h) (i) of the Act and that, in any event, the public interest override in Section 5 (4) will prevail. Accordingly we direct that the said information be released and reverse the decision of the Designated Officer in that regard.

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

The Appeal is concluded.

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