

Capital Alliance Securities (Private) Ltd v Department of Census and Statistics

RTIC Appeal (In – person) 543/2018 (*Order adopted as part of a formal meeting of the Commission on 11.12.2018*)

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

Director-General: Mr. Piyathissa Ranasinghe

Appellant: Capital Alliance Securities (Private) Ltd

Notice issued to: Dr. A. J. Satharasinghe, Director General/ Designated Officer (DO), Department of Census and Statistics

Appearance/ Represented by:

Appellant - Mr. Amila Perera Analyst -Research, Capital Alliance Securities (Private) Ltd., Mr. Udeeshan Jonas Head of Research Capital Alliance Securities (Private) Ltd

PA - Mr. P. M. P. Anura Kumara; A. M. U. K. Alahakoon

RTI Request filed on:	13.06.2018
IO responded on:	18.06.2018 (Acknowledgment) 29.06.2018 (Response)
First Appeal to DO filed on:	12.07.2018
DO responded on:	26.07.2018 (Acknowledgement) 13.08.2018 (Response)
Appeal to RTIC filed on:	17.09.2018

Brief Factual Background:

The Appellant by request dated 13.06.2018 requested the following information relating to the Colombo Consumer Price Index (Base: 2013=100)

- a) *A list of sub-groups classified under each of the following major groups in calculating the Colombo Consumer Price Index (Base: 2013=100)*
- I. *Food and Non-Alcoholic Beverages*
 - II. *Alcoholic Beverages, Tobacco and Narcotics*

- III. *Clothing and Footwear*
 - IV. *Housing, Water, Electricity and Fuel*
 - V. *Furnishing, Household Equipment and Routine Household Maintenance*
 - VI. *Health*
 - VII. *Transport*
 - VIII. *Communication*
 - IX. *Recreation and Culture*
 - X. *Education*
 - XI. *Restaurant and Hotels*
 - XII. *Miscellaneous goods and services*
- b) *A list of items classified under each sub-group identified in (a) hereinabove*
 - c) *Base year prices of each item identified in (b) hereinabove*
 - d) *Weights and the quantities allocated to each item identified in (b) hereinabove in the Calculation of Colombo Consumer Price Index (Base 2013=100)*
 - e) *Monthly mean prices, used in the calculation of the Colombo Consumer Price Index (Base:2013=100), of each item identified in (b) hereinabove for the following months,*
 - I. *March 2017*
 - II. *April 2017*
 - III. *May 2017*
 - IV. *March 2018*
 - V. *April 2018*
 - VI. *May 2018*

The Information Officer (IO) on 29.06.2018 informed the Appellant that the Public Authority (PA) had decided to provide the information requested by items a and b and that the information requested by items c, d and e is exempted under and in terms of Section (5) (1) (c) and (d) of the Right to Information Act No. 12 of 2016 (RTI Act). The Appellant dissatisfied with the response of the PA lodged an appeal with the DO on 12.07.2018. The DO responding on 13.08.2018 had denied the information on the basis that it is exempted under and in terms of Section 5 (1) (d) of the RTI Act. The Appellant thereafter preferred an appeal to the Commission on 17.09.2018.

The Appellant had by written submission dated 30.11.2018 submitted that the information requested does not fall within the exemptions cited by the IO or the DO (i.e. Sections 5 (1) (c) or 5 (1) (d)) in that the 'information requested does not relate to a premature disclosure of information that could cause a serious prejudice to the economy of Sri Lanka' nor does it 'harm the competitive position of a third party.'

On the applicability of Section 5 (1) (d) of the RTI Act

The Appellant had submitted that the information requested does not fall within Section 5 (1) (d) of the RTI Act on the basis that Section 5 (1) (d) concerns information protected under the Intellectual Property Act, No. 36 of 2003 which harms the competitive position of a third

party. The Appellant's contention is that on a reading of the Sinhala RTI Act the intention of the legislature to confine the exemption to information protected under the Intellectual Property Act, No. 36 of 2003 is confirmed.

The Appellant Company further submitted that the information requested does not harm the competitive position of a third party as the requested information namely 'Base year prices, monthly average prices, or quantities of each item constituting the inflation basket' cannot be used to identify a third party and therefore cannot reasonably affect a third party.

It was also its contention that 'the Statistics Ordinance has provisions preventing only the identification of any particulars published as being particulars relating to any individual or business. Therefore, the intention of the legislature in establishing the Department of Census and Statistics could not have been collecting data to be kept in secret and publishing only selective parts of information.' (vide paragraph 19 of the written submissions of the Appellant). Section 16 of the Statistics Ordinance was reproduced.

"In any report, summary statistics, or other publication prepared under this Ordinance with reference to any trade secret or industry, the particulars comprised in the information supplied by any one person shall not be disclosed or so arranged as to facilitate the identification of any particulars so published as being particulars relating to any individual person or business."

On the Public Interest given that the PA is exercising public power in the performance of a public function for the benefit of the public

The Appellant further submitted that the context in which the PA functions further buttresses the assertion that there is public interest in the disclosure of the information. The Appellant states in paragraph 3 of the written submissions that 'The Public Authority is an institution exercising public power in performing a public function in public interest which inter alia includes the collection and preparation of statistics relating to economic conditions of Sri Lanka. It is the authorized agency to compile Colombo Consumer Price Index (CCPI) which indicates average changes in the prices of goods and services purchased by households in urban areas of Colombo District. It is one of the widely used measures of inflation in the Country.'

Furthermore the Appellant Company had contended that 'the Public Authority is performing a statutory duty when collecting data and compiling the Colombo Consumer Price Index. The Department of Census and Statistics being a public authority exercising public power to collect and prepare statistics on certain matters relating to economic conditions of Sri Lanka is performing a public function when preparing the Colombo Consumer Price Index.' (vide paragraph 13 of the written submissions of the Appellant dated 30.11.2018). The Appellant Company further submitted that 'the public purpose for which statutory powers were granted

to the Public Authority is the collection and preparation of statistics on matters relating to economic conditions of Sri Lanka' which includes the powers laid down in Section 5 of the Statistics Ordinance (vide paragraph 15 of the written submissions of the Appellant dated 30.11.2018). The Appellant quoted Section 5 (1) of the Ordinance whereby 'The Director may at any time by notice in writing require any person to supply, substantially in the prescribed form and before a specified date, any information relating to any matter to which' the Statistics Ordinance applies as an example.

The Appellant Company further stated that 'The Public Authority being an institute funded by the public having extraordinary statutory powers over the public to collect of data, cannot, in any manner, claim intellectual property rights against the citizens of Sri Lanka whether as economic rights, moral rights or in any other way.'

Thus in this context it was the Appellant Company's contention that 'there is a considerable public benefit in disclosing the requested information.'

Matters Arising During the Hearing:

The PA submitted that items a and b of the information request had been provided. Therefore items c, d and e were in issue. The PA was queried as to the exemption it was relying on given that the IO had pleaded Sections 5 (1) (c) and 5 (1) (d) and the DO Section 5 (1) (d). The PA submitted that it was relying on Section 5 (1) (d). Explaining how Section 5 (1) (d) was applicable in this instance the PA submitted that the formula used for the Consumer Price Index is unique to Sri Lanka and the PA is the sole agent in charge of preparing this index. The PA submitted that this is done using internationally accepted scientific methods with assistance from the UN. The PA submitted that if certain items of the information request are disclosed it will raise issues amongst the people which cannot be explained and which may also result in harming a third party. The PA submits that the index is issued after obtaining parliamentary approval. The PA submitted that it cannot provide the base year prices of each item and the weights and the quantities allocated to each item. The PA submitted that it considers 14 markets where for each three prices are taken and the average is calculated.

When queried as to why the base year prices of each item cannot be provided (i.e. item c of the information request) it became evident that while the PA had published all the prices in relation to each category/ Group it had not published the average prices in relation to each of the items under the respective sub group. The PA was again queried as to why it cannot provide the average price to which the PA responded stating that it does not know with what purpose the Appellant Company is seeking the information. The Commission pointed out that under and in terms of the Act a citizen cannot be questioned on the reasons as to why information is being requested. The PA further agreed to provide the prices as it was an average price and did not reveal the identity of a vendor.

Counsel for the Appellant reiterating the written submissions submitted that given the statutory duties and powers conferred on the PA enabling it to collect the requisite data in order to compile and formulate the Consumer Price Index is performing a public function. The Appellant further highlighted the fact that ‘The technical note on base year revision’ published by the PA outlines the importance of a Consumer Price index as follows:

“A Consumer Price Index serves a number of purposes. It is an indicator to measure the changes in the general level of consumer prices and used as one of the key indicators of inflation. Consumer Price Index is also used for socio-economic analysis and policy purposes, mainly in the determination of monetary and income policies. It is used in the analysis of the trends in wages and other monetary income, for indexation of salaries and wages etc. Consumer price index is also used to deflate the current values in National Accounts to obtain real values and therefore, a major determinant of the GDP deflator.”

The Appellant’s submission was thus that this information is of much value to any citizen and enables participation in public life as the citizen will have a better idea of what the index is comprised of.

The question arose as to what the experiences of other countries are in the disclosure of information in relation to the respective price index. The PA submitted that it works in accordance with UN and IMF guidelines and publishes the necessary information on the website at the end of the month. The PA confirmed that it does not release item wise information but rather for each sub group.

In relation to item d of the information request the PA submitted that as the PA is empowered to perform the function of collecting data under and in terms of the Statistics Ordinance No. 44 of 1935 as amended and that individuals from whom the data is collected provide the information in trust to the PA. The PA submitted that it will be problematic to provide the information as it could among others pose problems when collecting data in future.

The Commission queried as to how data such as weights and quantities could pose problems to third parties. The PA explained stating that purchases are made from three vendors each week in 14 markets and these prices are held on confidence as any disclosure would have a severe impact on the market.

The Appellant submitted that what was requested is not the disclosure each price but the average price. The Appellant further clarified that the basket weight is something decided by the PA. The PA submitted that once in three years it carries out a Household Income and Expenditure Survey which is representative of the entire country’s income and expenses and based on which the values are decided. The PA submitted that the urban sector values or data is used in the calculation or formulation of the Colombo Consumer Price Index. The PA

submitted that it is through an Act of Parliament that it is conferred with the duty to calculate the Price Inflation Rate. The PA further submitted that there would be repercussions if the rates assigned are revealed to the public.

The PA submitted that there are selected shops from which prices are obtained and it is the price movement that is measured. Furthermore the specifications of the items in the basket are fixed. The PA submitted that all this is carried out by experienced officers and that once the rate and price are given out an index is created automatically. The PA submitted that if an outside party calibrates and creates an index based on the data it has collected then there may arise a situation in which the official calculation of the PA conflicts with that calculated by the external party which will ultimately give rise to issues.

The Appellant submitted that there is no dispute about the fact that this is an important index which is exactly why the PA is duty bound to uphold principles of transparency and accountability. Further more in relation to the PA's claim that Section 5 (1) (d) is applicable, Counsel for the Appellant wished to point out that the PA has never claimed any copyright of its publication. Counsel also submitted that as data is collected for the public, the public has a right to have access to this information.

The PA is also under a burden to demonstrate how the competitive position of a third party is affected under and in terms of Section 5 (1) (d).

The PA submitted that when obtaining the prices from the relevant vendor it assures them that the information will only be used for this particular purpose. The Appellant pointed out that it was the average price that was requested and not the individual prices as such their identities will not be compromised which is the basis on which the PA agreed to provide the information previously.

Furthermore the applicability of Section 5 (1) (i) of the RTI Act was discussed given that data is collected from individuals which feeds into the generation of certain items/ parts of the information requested. However it was noted that with respect to the weights i.e. information requested by item d, if the information was not submitted by a third party then the third party exemption in Section 5 (1) (i) will not be relevant.

Order:

As the PA has submitted that it is relying on Section 5 (1) (d) of the Right to Information Act No 12 of 2016 which states as follows;

“Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where information, including commercial confidence, trade secrets or intellectual property, protected under the Intellectual Property Act, No. 36 of 2003, the

disclosure of which would harm the competitive position of a third party, unless the public authority is satisfied that larger public interest warrants the disclosure of such information”

The Appellant Company has in its written submissions contested that the said exemption does not apply on the basis that the scope of Section 5 (1) (d) is limited to information falling within the four corners of the Intellectual Property Act No. 36 of 2003 and which harms the competitive position of a third party. The Appellant Company buttresses its position that Section 5 (1) (d) is limited to information coming with the Intellectual Property Act based on the wording in the Sinhala version of the RTI Act.

The Commission is of the view that it took in *Verite Research v Central Bank of Sri Lanka (RTIC Appeal 26/2018 Order dated 27.11.2018)* wherein this Commission observed as follows;

‘... the placing of the commas... 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.’

The Commission’s attention having been drawn to the Sinhala version of the Act in the present appeal, this would weigh in in the interpretation of the Section. The Section in the Sinhala Act reads as follows;

එම තොරතුරු හෙළිදරව් කිරීම විශාල වශයෙන් මහජන සුභසිද්ධිය සඳහා හේතුවන බවට පොදු අධිකාරිය විසින් සැනීමට පත්වේ නම් මිස, 2003 අංක 36 දරන බුද්ධිමය දේපළ පනත යටතේ ආරක්ෂා කර ඇති වාණිජ රහස්, වෙළඳ රහස් හෝ බුද්ධිමය දේපළ ඇතුළු තොරතුරු හෙළිදරව් කිරීම යම් තුන්වන පාශ්චායක තරඟකාරී තත්ත්වයට අහිතකර ලෙස බලපානු ලබන්නේ නම්;

Furthermore considering the public interest embedded within Section 5 (1) (d) and Section 5 (4) itself an analogy maybe drawn to this Commission’s interpretation to Section 5 (1) (a) in *Transparency International Sri Lanka v Presidential Secretariat* wherein it was stated that;

In instances where Section 5(1)(a) is urged to deny information, it is an important factor that this Section contains the public interest embedded within the exemption itself. We find that, on a consideration of Section 5(1)(a) itself, that the public interest in this matter outweighs the claim of unwarranted invasion into the privacy of an individual. In any event, we find that Section 5(4) containing the general public interest override will apply to support the release of the information requested.

Section 5 (4) of the RTI Act 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.’

Therefore the burden lies on the PA to demonstrate how the information falls within the exemption cited and to demonstrate how the larger public interest does not warrant the disclosure of the information given the submissions made on behalf of the Appellant Company.

The PA is directed to provide item c of the information request, namely, the base year prices of each item identified in item b of the information request.

The PA is directed to file written submissions demonstrating the necessary nexus between the information denied and the exemptions cited within one month. Specifically the PA is required to demonstrate how the information requested falls under Section 5 (1) (d) of the RTI Act. The fact that the public interest element is embedded in Section 5 (1) (d) places a greater burden on the PA in this regard. Furthermore how the release of the information has an impact on the competitive interests of a third party must be established.

Next Date of Hearing: 05.03.2019

RTIC Appeal (In – person) 543/2018 (*Order adopted as part of a formal meeting of the Commission on 05.03.2019*)

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
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Dr. Selvy Thiruchandran
Justice Rohini Walgama

Appellant: Capital Alliance Securities (Private) Ltd

Notice issued to: Dr. A. J. Satharasinghe, Director General/ Designated Officer (DO), Department of Census and Statistics

Appearance/ Represented by:

Appellant - Mr. Amila Perera Attorney-at-Law/Analyst -Research, Capital Alliance Securities (Private) Ltd., Mr. Udeeshan Jonas Head of Research Capital Alliance Securities (Private) Ltd

PA - P. M. P. Anura Kumara Additional Director;
V. P. Lalith Senior Statistician
D R M C M Rathnayake Statistician
Chinthaka Karunarathna Statistician
W. P. K. Wickramasinghe Development Officer

Matters Arising During the Course of the Hearing:

At hearing dated 05.03.2019 it transpired that the PA had provided items a and b of the information request and agreed to provide item c. Thus the items in issue were d and e.

On being queried as to the specific position of the PA *viz a viz* the exemptions the PA had tendered written submissions dated 11.01.2019. The PA had submitted therein as well as during the course of the hearing that the information is exempt as it falls within Section 5 (1) (d) of the Act. The PA submitted that while it ‘publishes average market prices of significant items regularly on monthly basis and that the 2013 base year expenditure values which were used to construct CCPI were originated from the survey conducted in the year 2012/13 the PA does not alienate to third party their lower level Weights, Codes, Syntax (computer programme), procedure files developed by the PA.’ (vide paragraph 30 b) and 30 c))

The Commission observed that in terms of Section 5 (1) (d) the burden was on the PA to demonstrate how the release of the information requested would harm the competitive position of a third party, in addition to it being intellectual property covered under the Intellectual Property Act No 36 of 2003. The PA was accordingly queried on how the this would harm a third party’s interest.

The PA describing its functions submitted that it collects and analyses data which are stored as micro data files. Upon a request being made for this information/ data it is then sold on behalf of the government and through which profit is generated for the state. The PA submitted that there is a separate process through which a request for this data can be made and the party requesting the said data/ information can use the same on for the specific purpose which will be indicated to the PA. Furthermore the said information/ data cannot be utilized in any other forum/ for any other purpose besides the one specifically informed to the PA as is required under this process. The PA submitted that there is a significant value addition to the data which is collected through the analysis carried out by the PA thereafter and this information is shared for profit. The PA also pointed out that the collection and analysis of this data is done at a great cost to the state, and the provision of this information at paper cost under the Right to Information Act No 12 of 2016 would result in a situation where the PA will no longer be able to profit from the data it collects and analyses. The PA submitted that the revenue targets of the government will not be met as once the information is released not only the party requesting it but the public at large will have free access to it.

The Commission observed that although this may be the position of the PA in this instance given the exemption pleaded by the PA, the PA is required to demonstrate how a third party is prejudiced by the release of the information and any prejudice caused to the PA itself is insufficient in order to maintain the applicability of Section 5 (1) (d).

The PA submitted that there are several other listed companies who will lose their competitive advantage as only the Appellant company will have access to the information (vide paragraph 8 (b) of the written submissions of the PA dated 11.01.2019). However at this point it became obvious that the release of the information to the Appellant would be tantamount to the release of the information into the public domain and therefore such prejudice is not caused.

The PA was then queried as to whether the initial refusal is under 5 (1) (c) is still relevant and being pursued by the PA. Section 5 (1) (c) states that

the disclosure of such information would cause serious prejudice to the economy of Sri Lanka by disclosing prematurely decisions to change or continue government economic or financial policies relating to... the stability, control and adjustment of prices of goods and services, rents and other costs and rates of wages, salaries and other income; or

The PA further submitted that the intermediate products created subsequent to the collection of data will have to be released the moment they are prepared if information requests such as the instant one are permitted.

In relation to item d the PA was queried as to impact of the release of the 2013 weights and also about the said item being in its possession, custody and control as in the PA's written submissions dated 11.01.2019 at paragraph 7 (d) wherein the PA states that,

According to the request dated 13.06.2018 the Appellant company has requested base year prices, weights and quantities. However the Appellant company stated that on this appeal the company asks only the base year prices and quantities of the CCPI. Nevertheless, weights of CCPI are derived from the expenditure values obtained from the [Household Income and Expenditure Survey] and quantities are not used in compilation of the CCPI. Thus there is no list of quantities available as such. Hence, the purview of the appeal is out of the scope of the data request under RTI Act.

The PA was also requested to provide a practical example of how the release of the weights and the quantities for the base year 2013 will impact on any future transactions and/or would be a premature disclosure.

The PA responding to the query as to whether or not the information was in its possession, custody or control submitted that it would have to provide the intermediate product which is a data file.

The PA submitted that the data file obtained from the *Household Income and Expenditure Survey* is used to calculate weights. Furthermore the two divisions, data and price are combined to formulate the weights and as available on the software of the PA these cannot be obtained separately.

The PA was then specifically queried as to whether it cannot identify the information requested and whether with a reasonable effort the PA is unable to compile the information requested.

Attention of the PA was drawn to the fact that the PA is not under an obligation to make an effort to compile and analyse information but that it is only required to provide what is already in its possession, custody or control.

The Appellant responding to the submissions of the PA stated that it was an absurd response on the part of the PA to state that it does not have a list of the weights as that is an essential component utilized to calculate the CCPI. Furthermore responding to the query posed at the hearing of 11.12.2019 the Appellant submitted that India publishes this information which is compiled in a separate data warehouse.

It was further submitted on behalf of the Appellant that what was required was not information on how the PA compiles the index but rather the constituents of the index. Furthermore it was submitted that a fundamental purpose the Right to Information seeks to achieve is transparency in instances where information is withheld without proper cause. Furthermore the fact that the PA was statutorily required in terms of the Statistics Ordinance to compile data as a duty owed to the public using taxpayer money was further emphasizes as at the previous hearing on 11.12.2018 as well as in the written submissions of the Appellant Company.

Counsel for the Appellant further submitted that the allegation that the Appellant was attempting to acquire information for personal gain was unfounded and that the Appellant would deem it a positive step if the PA provided access to the information requested to all citizens. The Appellant further submitted that all other stock brokers have a similar right of access to this information and therefore their interests will not be prejudiced. Furthermore the law assists the vigilant and not the indolent and the request for information is perfectly reasonable. Counsel further submitted that the withholding of the information is not only a violation of Article 14A but also of 14 (1) (g) of the Constitution. It was further submitted that the Governors of the Central Bank of Sri Lanka too in statements made have indicated that the figures provided by the PA are unreliable and that the GDP growth that is demonstrated is an inaccurate depiction of the actual situation and this is an even stronger reason for the public to be given access to the information.

With respect to the PA's submission that it will have to extract and/or compile information in order to respond to item d of the information request, the attention of the PA was drawn to Regulation 4 (07.) of the Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017) which states that,

A Public Authority shall not be required to collect information to respond to a request but it shall not refuse a request on the ground that it does not hold the information where, with a reasonable effort the information may be produced from records held by the Public Authority, using the resources which is normally available to the Public Authority, or again with a reasonable effort, the information may be compiled from different records held by the Public Authority.

The PA and the Appellant were both directed to provide comprehensive written submissions on the practices of other jurisdictions in the provision of information pertaining to the calculation of Consumer Price Indices of the respective jurisdictions. Furthermore the PA was directed to justify how the information falls within Sections 5 (1) (c) (iv) and Section 5 (1) (d) of the RTI Act.

The PA's agreement to provide the information requested under items c and e was recorded.

In relation to the submissions made on behalf of the PA that the provision of the information would be prejudicial to the revenue earned at present by sharing the data and/or analyses of such data with persons in conformance with procedures outside the RTI Act, the Attention of the PA was drawn to Regulation 19 of the Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017), on use and reuse, which states that,

Any information disclosed by a Public Authority under this Act is subject to a royalty-free, perpetual, non-exclusive licence to reuse the information.

Next Date of Hearing: 02.07.2019
