

G. Dileep Amuthan v. Ministry of Defence

RTICAppeal(In-Person)/70/2018 - 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 23.03.2018

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. G. Dileep Amuthan
Notice Issued to: Designated Officer, Ministry of Defence

Appearance/ Represented by:

Appellant - Mr. G. Dileep Amuthan
Public Authority - Upali Weerasinghe, Legal Advisor, Ministry of Defence
Major Gunawardena, Legal Advisor, Ministry of Defence
A.M.S.B. Atapattu, Information Officer, Sri Lanka Army (SLA)

RTI Request filed on	28.09.2017
IO responded on	16.10.2017 (requesting copy of NIC)
First Appeal to DO filed on	22.10.2017
DO responded on	23.11.2017
Appeal to RTIC filed on	04.12.2017

Brief Background Facts

The Appellant had requested the following three items of information, by an information request dated 28.09.2017.

- I.
 1. A comprehensive list of the shops, canteens, outlets and/or restaurants catering *inter alia* to members of the public maintained by and/ or under which are responsible to the Sri Lanka Army and/or Sri Lanka Navy and / or Sri Lanka Air Force;
 2. A comprehensive list of all business enterprises other than those in point 1 above catering *inter alia* to members of the public maintained by and/ or under or which are responsible to the Sri Lanka Army and/or Sri Lanka Navy and/ or Sri Lanka Air Force;

- II.
 1. Relevant rules, procedures, guidelines and /or policies pertaining to the Army Directorate of Welfare;
 2. Annual Statements of accounts reflecting total income, total expenditure and other details for the Army Welfare Society Fund of the Sri Lanka Army for the last ten years, i.e. 2006 to 2016;
 3. Audit procedures pertaining to the Army Welfare Society Fund and all relevant audit documents for the last ten years, i.e. 2006 to 2016;
 4. A comprehensive list of the shops, canteens, outlets and / or restaurants catering *inter alia* to members of the public maintained by and / or under or which are responsible to the Directorate of Welfare;
 5. A comprehensive list of all business enterprises other than those in point 4 above catering *inter alia* to members of the public maintained by and/or under or which are responsible to the Army;
 6. Total number of army personnel working at and/ or assigned to and/ or posted to the establishments listed in question 4 and 5 above;
 7. Annual audited statement of accounts for each hotel under the Laya chain of hotels i.e. Laya Beach, Laya Leisure, Laya Safari, and Laya Waves from 2009 to 2016;
 8. Annual statements of accounts of ThalSevana hotel for the years 2010 to date;
 9. A comprehensive list of beneficiaries benefiting from the Legal Aid Fund maintained under the Directorate of Welfare and a comprehensive list of payments made thereunder;

- III. Concerning the allegations of Sri Lankan peacekeepers deployed to Haiti being perpetrators of sexual abuse of Haitian citizens in 2007.
 - Names of peacekeeping officers, including names of senior and high ranking officers who were repatriated from Haiti following the allegations of involvement in a sex ring while engaging in UN peacekeeping activities in Haiti in 2007;
 - Findings of the Court of Inquiry in the form of reports or investigative notations on activities concerning Sri Lankan peacekeepers deployed to Haiti and the events concerning the sex ring which unfolded in Haiti while the Sri Lankan peacekeepers were engaged in peacekeeping operations;

- A list of allegations made by citizens of Haiti against the peacekeepers deployed from Sri Lanka including the nature of their crimes, names of victims of such crimes and/ or any other relevant information regarding the allegations made against the peacekeepers deployed from Sri Lanka;
- Details of disciplinary action taken against the 11 soldiers, one Lieutenant Colonel and two Majors including the following:
 - Whether or not these persons were brought before a General Court Martial or submitted to any form of Court Martial process;
 - Findings of the General Court Martial and/ or any other Court Martial process;
 - Names and ranks of the officers who presided at the General Court Martial and/ or other Court Martial process;
 - List of the allegations and/ or crimes tried by the General Court Martial and / or other Court Martial process;
 - Disciplinary measures (including inter alia reprimanding, suspension, dismissal) taken against persons accused of committing/ being involved in the alleged crimes in Haiti;
 - Disciplinary and/ or penal action taken against the commander of the contingent;
 - Information on institution of prosecution off persons found to be guilty of committing the alleged crimes in Haiti including case numbers of such criminal action filed before the Courts in Sri Lanka;

He received a response on 16.10. 2017 requesting a copy of his National Identity Card (NIC) attested by the Grama Sevaka and Divisional Secretary. He was informed that this request was made on behalf of Sri Lanka Army. The Appellant stated that he had already mentioned his NIC number in his information request and that requesting a copy of said NIC seemed to be a delaying tactic or form of intimidation and appealed to the Designated Officer (DO) on 22. 10.2017. The DO responded stating that a copy of the NIC was needed to assess citizenship of the Appellant. The response was sent by the Additional Secretary (Parliamentary Affairs and Policies) on the letterhead of the Ministry of Defence. Dissatisfied with this response, the Appellant appealed to the Commission on 04.12.2017.

Matters Arising During the Hearing

Mr Weerasinghe, Legal Officer of the Ministry of Defence confirmed that the Public Authority (PA) had requested a copy of the Appellant's NIC upon receipt of the instant information request. The PA was informed that when an Appellant fills in the RTI Form 01 (information request form), he/she is only requested to state whether he/she is a citizen. The PA may question further only if there are objective grounds to doubt the citizenship of the Appellant. The

Commission queried as to what doubt the PA had regarding the Appellant's citizenship especially when the Appellant had already noted down his NIC number in his original information request. This question was answered by the Public Authority to the effect that the said query had been posed by the earlier Information Officer and assured that the practice of routinely asking Appellants to produce identity cards will not be repeated in the future.

With regard to the merits of the information request in Item I and II, the PA was notified by the Commission that as the details should be available in the annual reports of the concerned parties in response to which, the PA submitted that it had informed the Sri Lankan Army (SLA) regarding the same and that it was in a position to provide whatever documents were in its custody.. With regard to the information requested in Item III, the Information Officer (IO) of the SLA stated that this relates to internal disciplinary procedures of the SLA in regard to charges leveled against peacekeepers deployed from Sri Lanka and submitted that there were many allegations made against the SLA in international fora by interested parties and therefore it was hesitant to provide the information.

When queried by the Commission as to what specific exemption in Section 5(1) of the RTI Act was being cited by the SLA to decline the requested information with regard to item III, the IO reiterated that the incidents relating to the allegations had taken place in 2007, and that it was 2018 now, and therefore republishing details about this issue would tarnish the name of the SLA in the international fora and could be used for propaganda purposes by interested parties. He further submitted that roughly about 100 peacekeepers amounting to the whole contingent had been sent back but only 3 had been involved and that one officer was called back due to the rules of command responsibility being breached and therefore, the number of those who were recalled did not necessarily correspond to those who had allegations against them. He further submitted that the actions taken by the SLA with regard to these allegations were already in the public domain..

The IO also submitted that the Court of Inquiry had all details of the incidents but that revealing details about the court of inquiry would involve privacy concerns infringing Section 5(1)(a) of the Act and also that it would impact on the image of the country. Upon further questioning by the Commission about the propriety of the claim that the findings of a court of inquiry should not be made publicly available, he submitted that the SLA could accede to the direction of the Commission and provide a summary of the same.

Order

It must be reiterated that the Appellant is only required to note whether he/she is a citizen or not in the form RTI 01 as provided in the Regulations published in Gazette No.2004/66 dated 03.02.2017. The PA cannot keep questioning further without a substantial reason for belief that the Appellant is not a citizen. Further, requesting for proof of citizenship can only be on

objective grounds, for example when a request is made from abroad then there might be a reason to doubt the citizenship of the requestor.

As observed by this Commission in *TISL v. Prime Minister's Office/Presidential Secretariat* (RTICAppeal/05/2017 & RTICAppeal/06/201, RTIC Minutes of 23.02.), requesters should be asked for proof of citizenship only in the 'rarest of cases' (*Shri K. Balakrishna Pillai v. National Human Rights Commission* (No; CIC/OK/C/2008/00016, Minutes of the Central Information Commission of India, 26th May 2008), and only where there is a *bona fide* doubt on the part of the PA as to whether the information requester is a citizen.

In the instant matter, the Appellant has already mentioned his NIC number in his information request; therefore it is not appropriate for the PA to further request copies of his NIC and /or Passport. The RTI Act No.12 of 2016 is very clear, that an information request can only be declined by citing one of the exemptions in Section 5(1)(a) of the Act; it cannot be blocked through circuitous means. The Commission will therefore note as of record that this was a previous procedural policy at the PA which is now obsolete.

With regard to the substantive information request, it is difficult to uphold the argument by the Public Authority (SLA) that where there have been allegations against the Sri Lankan peacekeepers and there had been an inquiry on the said issue which has been concluded, that the SLA cannot provide the details of the inquiry to the public. To do so, is for the Public Authority (SLA) to claim a privilege especially for itself. Such privileges are not provided for in the RTI Act.

Further, in assessing the public interest in such matters, it is a relevant consideration that if there has been a process of inquiry, it is in the Public Authority (SLA)'s benefit to establish what concrete action it has taken regarding allegations made thereto. The Public Authority (SLA) is directed to prepare a thorough summary of the findings of the court of inquiry for submission to this Commission. Upon perusal thereof and if assessed as being required for the purpose, this Commission may call upon the Public Authority (SLA) to furnish the report of the court of inquiry for the Commission's examination in order to ascertain if the summary correctly reflects the contents of the substantive report.

Further, the PA is directed to call for the information requested in Item I of the information request from the Sri Lankan Airforce and Sri Lankan Navy.

The Appeal is adjourned.

Next date of hearing: 15/05/2018

.....
RTICAppeal(In-Person)/70/2018 - 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 15.05.2018

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. G. Dileep Amuthan
Notice Issued to: Designated Officer, Ministry of Defence

Appearance/ Represented by:

Appellant - Mr. G. Dileep Amuthan
Public Authority - Upali Weerasinghe, Legal Advisor, Ministry of Defence
A.M.S.B. Atapattu, Information Officer, Sri Lanka Army (SLA)
Captain W.H.S. Soysa, Subject Officer, Sri Lanka Army (SLA)

Matters Arising During the Hearing

Upon the items of information requested being considered in detail, in terms of Item II (1), the Public Authority (SLA) was informed by the Commission that policy guidelines were documents that should be proactively posted online in terms of the RTI Act. The SLA clarified that certain policy statements were up on their website; <http://www.army.lk/welfare>.

With regard to Item II (2), the SLA was informed by the Commission that these were public documents that should be freely available to the public. Stating of record that the apprehension was that providing the details in the information request could be used for negative purposes by certain interested parties overseas, the SLA agreed to submit the documents for the Commission's perusal after which the Commission could decide on whether the said documents should be provided to the Appellant.

With regard to Item II (8), the SLA submitted that ThalSevana had not been maintained as a business venture till 2011 so the expenses had not been audited before, but from 2011, SLA had been running it as a hotel. The SLA submitted that they would provide the audit reports relating to the period from 2011 onwards to the Commission. It agreed to do the same with regard to Item II (7). With regard to Item II (4) the SLA submitted that it had restaurants/canteens by the roadside in almost each camp which members of the public are also permitted to use and that this would therefore involve a substantial amount of information. The SLA agreed to provide the said details to the Commission, bifurcated if necessary by those canteens being maintained internally by the Army which the public is also permitted to use and those canteens explicitly run as a

public undertaking. It agreed to do the same with regard to Item II (5) and (6). The SLA further agreed to provide the details requested in Item II (9) for the Commission's perusal and subsequent decision.

In respect of Item I, where information had been requested about the enterprises run by the Sri Lankan Navy and the Sri Lankan Airforce, the PA explained that it had requested the said details from the Navy and the Air Force and that both had agreed to provide the information but had requested for more time to collect the information.

With regard to Item III, the SLA submitted the advice it had received from the AG's Department which stated that the exemption provided for in Section 5 (1) (b) (ii) would apply to the requested information.

The SLA further submitted that it had already prepared a summary of the findings of the Court of Inquiry as directed by the Commission at the last hearing but due to the advice received from the AG's Department, it is compelled to refrain from submitting the same at the present hearing.

Order

As agreed before us, the Public Authority (SLA) is directed to provide to the Commission the information in Items I and II which are public documents and not subject to any exemptions. Where it is so relevant, the requested information in regard to the relevant hospitality ventures under the management of the Army may be provided from the date that the same were converted as public/business ventures.

In respect of the information requested in Item II (4) the Public Authority (SLA) may provide the information bifurcated if necessary by those canteens being maintained internally by the Army which the public is also permitted to use and those canteens explicitly run as a public undertaking. In respect of the information requested in item II (9), this is directed to be submitted for our perusal consequent to which a decision will be made regarding public release of the same.

With regard to Item III and the exemption in Section 5 (1) (b) (ii) pleaded by the Public Authority (SLA) (as per the advice of the Department of the Attorney General), the attention of the Public Authority is drawn to the said Section which states that information can be declined where it;

*“would be or is likely to be seriously prejudicial to Sri Lanka's relations with any State, or in relation to international agreements or obligations under international law, where such information was **given by or obtained in confidence;**” (emphasis ours)*

It is important to note that the reliance on an international agreement to deny information pertains strictly to instances where the requested information was given or obtained in confidence and further, where provision of the same is assessed as being '*seriously prejudicial to*

Sri Lanka's relations with any State, or in relation to international agreements or obligations under international law. As such it is manifest that this exemption cannot be applied in a vague or generalized manner as to include all information relating to any international agreement.

The Public Authority is directed to clarify as to first, what international agreement or obligation under international law is at issue here; secondly, the precise terms of the serious prejudice that can be caused thereby; and thirdly, what information was given or obtained in confidence. This is in order for the Commission to assess the legitimacy of the applicability of the exemption that is cited in the first instance, as well as the relevance of the public interest override contained in Section 5(4) of the Act which states that;

(4) 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.

It is of further note that such an assessment is called for in accordance with the powers accorded to this Commission in the exercise of its statutory duties and functions in terms of Section 15 of the RTI Act, and that failure to abide by the same may constitute a breach of the statutory duties and functions given the scope and content of the preamble to the Act which emphasizes *'a need to foster a culture of transparency and accountability in Public Authorities by giving effect to the right of access to information.'*

If it so desires, the SLA may submit written submissions addressing the above specific issues (with copy to the Appellant) on or before June 26th, 2018:

The PA (Ministry of Defence) is directed to provide the information agreed upon as aforesaid in respect of Items I and II at the next date of hearing.

The Appeal is adjourned.

Next date of hearing: 03/07/2018.

.....
RTIC Appeal (In – person)/70/2018 (*Order adopted as part of a formal meeting of the Commission on 03.07.2018*)

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. G. Dileep Amuthan

Notice issued to: Designated Officer, Ministry of Defence

Appearance/ Represented by:

Appellant - Mr. G. Dileep Amuthan
PA - A.Jayasekara, Legal Officer, Ministry of Defence
Brigadier, E.S. Jayasinghe, D.Legal, Sri Lanka Army (SLA)
Col, W.A.C.N. Warakagoda , Col. Media (SLA)
A.M.S.B. Atapattu, Information Officer, Sri Lanka Army (SLA)

Matters Arising During the Hearing

Upon being queried as to the status of provision of information in regard to what was agreed to be given by the Public Authority (Sri Lanka Army, SLA) at the last hearing of this appeal (Order dated 15.05.2018) in items (I) and (II), including the list of hotels, shops, canteens, outlets and or restaurants maintained by the Public Authority (SLA) in the Northern Province and the annual audited statement of accounts for each hotel under the Laya chain of hotels i.e. Laya Beach, Laya Leisure, Laya Safari, and Laya Waves from 2009 to 2016, to the Appellant, the Public Authority (SLA) responded stating it was hesitant to provide the information due to concerns that it could be used to create friction among communities in Sri Lanka and be used to negative advantage by diaspora groups.

The Public Authority (SLA) further submitted that the hospitality ventures, including hotels, shops, canteens, outlets and or restaurants regarding which information has been requested, are funded by the welfare funds of the SLA and not by Government/public funds. It was stated that the hotels/hospitality ventures maintained by the welfare fund of the SLA are subject to a general audit conducted by the SLA.

The Commission noted that the said hospitality ventures are run by members of the Public Authority (SLA) who are maintained by government funds and that the claim made otherwise cannot be made in the abstract.

The Public Authority (SLA) submitted that it was in possession of a Military Intelligence Report concerning the Appellant and was hesitant to release the information as a result.

Responding, the Appellant stated that the PA (SLA) has engaged in a background check on him merely because he filed information requests under and in terms of the RTI Act, thus defeating the purpose of the RTI Act. The Public Authority (SLA) counter responded that the Military

Intelligence report that it had in its possession was prior to the Appellant commencing to use the RTI Act.

The Commission drew the attention of the SLA to the fact that the background of an Appellant or the purpose of an information request is not a ground of refusal under the Act. The SLA submitted that it relied on Section 5 (b) (i), namely, “*disclosure of such information would undermine the defence of the State, or its territorial integrity or national security*” as the concern was that the Appellant being a journalist, will use this information to perpetuate a negative image of the SLA by showing that it is conducting such business ventures. The SLA submitted that this could eventually lead to an unnecessary conflict between the SLA and the Business Communities of the Northern and Eastern Provinces which may in fact affect the ‘*defence of the State*’, and/or ‘*national security*.’ as contemplated by the RTI Act.

In reference to the above submission by the SLA, the Commission then questioned the PA (Ministry of Defence) as to their position with regard to the same. The PA (Ministry of Defence) submitted that in respect of item I, namely the comprehensive list of hospitality enterprises/ventures run by the Sri Lanka Army Navy and Air force, both the Sri Lanka Navy and Sri Lanka Air Force had released the said information by letters dated 05.06.2018 and 14.06.2018 respectively.

In the wake of the Sri Lanka Army Navy and Air Force releasing the list of hospitality enterprises/ventures run by them, the Sri Lanka Army (SLA) also agreed to release the same.

In respect of Item III, the SLA produced written submissions dated 03.07.2018 to substantiate the exemption of Section 5 (1) (b) (ii) (as per the advice of the Department of the Attorney General dated 02.04.2018) pleaded at the last hearing on 15.05.2018 and the Investigation Report on Alleged Sexual Exploitation and Abuse of Minor Girls at the United Nations Stabilization Mission in Haiti’.

Reiterating the contents of the written submissions dated 03.07.2018 the SLA submitted as follows,

1. The Appellant has requested information with regard to allegations of sexual abuse of Haitian citizens perpetrated by Sri Lanka Army persons while being deployed in U peacekeeping missions in 2007. Information requested include Court of inquiry proceedings, allegations made against the Army persons by civilian’s, names of victims, details of Courts Martial held against them, allegations, punishments awarded and other military disciplinary procedures.
2. All the allegations made against the personnel of the Army were duly investigated as provided for by the Army Disciplinary Regulation and awarded punishments through military procedure under the provisions of the Army Act.
3. The information with regard to sexual abuse case perpetrated by Sri Lanka Army personnel under the title of ‘Investigation Report on Alleged Sexual Exploitation and Abuse of Minor Girls at the United Nations Stabilization Mission in Haiti’ have been

submitted to the Sri Lanka Army by the UN under the security clarification of ‘**Strictly Confidential**’ and the Sri Lanka Army is under the obligation to refrain from disclosing such information to a third party.

4. As provided by Section 5 (1) (b) (ii) of the RTI Act, such information that would be or is likely to be seriously prejudicial to Sri Lanka’s relations with any State, or in relation to international agreements or obligations under International Law, where such information was given by or obtained in confidence shall be refused by the relevant public authorities.
5. If this information is disclosed to a third party, there would be a possibility of giving wider publicity over print and electronic media which would tarnish the image of the Army and finally cause to seriously affect the relations of Sri Lanka with friendly States.
6. Taking into account of the circumstances, the Hon. Attorney General is of the opinion that the information requested is coming under the description of Section 5 (1) (b) (ii) of the RTI Act and may be refused. Therefore, releasing such information to a third party is refused by the Army.

Order

In principle, it must be strongly emphasized that if any Public Authority commences to obtain Military Intelligence reports in regard to citizens purely on the basis that they are filing Right to Information requests which is a legitimate and legal procedure under the Right to Information (RTI) Act passed by the Sri Lanka Parliament, then the fundamental objectives of the Act would be negated.

While the Commission is not in a position to assess at this stage as to whether this has actually happened in this case or not on the facts before us, it must also be stated that in principle, this would be a matter of grave concern befitting the specific intervention of the Commission if RTI applicants are sought to be intimidated in any way whatsoever.

We note particularly that the background of an Appellant or the purpose of an information request is not a relevant consideration under and in terms of the RTI Act to deny information. Section 24 (5) (d) of the Act states that;

‘A citizen making a request for information shall... not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him or her.’

The function of the Commission is to ascertain whether the information requested can be legitimately and in law, be made available to the Appellant, provided that the said information does not fall within the purview of the several exemptions detailed in Section 5 of the RTI Act and further, the public override in Section 5 (4) is not found to apply. With regard to Item I of the information request before us, the Public Authority (SLA) is directed to handover to the Appellant the information requested akin to what has been provided by the Sri Lanka Navy and

the Sri Lanka Air Force at this appeal hearing, with a copy to the Commission on or before 07.08.2018.

In relation to item II (7) of the information request by which ‘the annual audited statement of accounts for each hotel under the Laya chain of hotels i.e. Laya Beach, Laya Leisure, Laya Safari, and Laya Waves from 2009 to 2016’ are requested, the consideration arises as to whether the hospitality ventures run by SLA are funded by public or private funds (Welfare society funds of SLA). It is a relevant factor that the said hospitality ventures are controlled, operated and maintained by members of the Public Authority who are being paid out of Government funds. Upholding the claim of the Public Authority without substantiating the same would in effect amount to allowing the Public Authority, a privilege that is not provided for under and in terms of the RTI Act which would be acting contrary to the RTI Act where the statutory function of this Commission is concerned.

The SLA is directed to more fully substantiate its position with respect to this item of information (item II (7) comprehensively on the next date of hearing. The Public Authority is further directed to more fully substantiate its position regarding in relation to each of the other items of information requested under item II in terms of the provisions of the RTI Act by the next date of hearing.

With regard to Item III, namely ‘the Investigation Report on Alleged Sexual Exploitation and Abuse of Minor Girls at the United Nations Stabilization Mission in Haiti’ a direction will be made by us subsequent to the examination of the report which was produced before us for our perusal at this hearing.

The Appeal is hereby adjourned.

The next date of hearing: 07.08.2018
