

**M. F. A. Mansoor v Ministry of Urban Development, Water Supply and Housing
Facilities (Ministry of Megapolis and Western Development)**

RTIC Appeal (In – person) 1108/2019 (*Order adopted as part of a formal meeting of the Commission on 25.06.2019*)

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
Mr. S.G. Punchihewa
Dr. Selvy Thiruchandran
Justice Rohini Walgama

Notice issued to:

Appellant: M. F. A. Mansoor

Public Authority: Designated Officer, Ministry of Megapolis and Western Development

Appearance/ Represented by:

Appellant- M. F. A. Mansoor, N. A. R. Fernando, Fr. Nihal C. Fernando

PA - Anjalie Devaraja, Additional Secretary

RTI Request filed on:	15.11.2018
IO responded on:	Acknowledgment only
First Appeal to DO filed on:	05/12/2018
DO responded on:	21.12.2018
Appeal to RTIC filed on:	14/01/2019

Brief Factual Background:

The Appellant by request dated 15.11.2018 requested a copy of the following;

1. A Copy of the Tripartite Agreement together with all Appendixes and Annexures signed by Secretary, Ministry of Megapolis and Western Development, Urban Development Authority and the CHEC Port City Colombo (Pvt) Ltd for the development of a new Colombo International Financial City replacing the Agreement signed by the GoSL and/or its representatives on 16th September, 2014 for the construction of a Port City
2. Copies of all Environmental monitoring reports as specified in the Proposed Colombo Port City Development Project Supplementary Environmental Impact Assessments of December 2015

3. Copies of all Environmental monitoring reports as specified in the Supplementary Environmental Impact Assessment for the Off Shore Sand Extraction Project at Kerawalapitiya of December 2016

As the IO had not responded to the substantive request, the Appellant lodged an appeal with the DO 05/12/2018. The DO responded on 21.12.2018 stating that the Tripartite Agreement cannot be disclosed due to confidential clauses in the Agreement, as informed by the Director Legal Services of the Urban Development Authority (vide letter dated 14.12.2018 marked 05A). The Director Legal Services, UDA, has stated in his letter that by virtue of the aforesaid Tripartite Agreement (Clause 42) strict confidentiality clauses exist and therefore the information is denied in terms of Section 29 (2) (c) of the Right to Information Act No 12 of 2016. Furthermore, it has been stated that in terms of Section 5 of the Act the disclosure of the information would cause serious prejudice to the economy of Sri Lanka by disclosing premature decisions to change or continue government, economic or financial policies relating to; entering into overseas agreements.

The PA therein further directed the Appellant to contact the Project Director of the Port City Development Project to inspect the other requested documents. The Appellant was informed that after inspection he can inform the PA of the required pages/ documents so that photocopies of the same can be made available to the Appellant. In relation to item No. 5 (II) (3) (i.e. Item 3 above) the Appellant was directed to contact the IO of the Sri Lanka Land Reclamation and Development Corporation (SLLRDC) as the request relates to the SLLRDC.

Dissatisfied with this response the Appellant lodged an appeal with the Commission on 14/01/2019.

Matters Arising During the Hearing:

The Appellant and the PA were both present for the hearing.

The Appellant submitted that there is serious public interest in the disclosure of the information requested given that Sri Lanka had invested USD 4 Billion as capital in the port city project in comparison to the Chinese Government which invested only USD 500 million, and had obtained less saleable land in terms of the Agreement which prima facie appears to be detrimental to Sri Lanka. It was further submitted that there is no evidence of proper independent consultancy obtained on the impact of the project, no statutory supervision has taken place in relation to the project and the only information the public has access to in relation to the project is the 2015 Supplementary Environmental Impact Assessment Report, which provides insufficient insight into the actual situation. Thus the Appellant submitted that given the fact that several legal requisites have been overlooked and the project commenced without a proper, lawful agreement in place the information is requested in order to ascertain actual nature of the contract.

The Commission noted that there is sufficient public interest in the matter and questioned the PA on its stance in this context.

The PA reiterated the response of the DO, dated 21.11.2018 and submitted that the information was denied on the basis that there is strict commercial confidence required to be maintained in respect of the contract and claimed a fiduciary relationship existed which prevent the disclosure of the information. It was further submitted on behalf of the PA that this is contained in letter dated 24.06.2019 as well.

The PA was also queried as to whether it had requested the consent of the third party to the disclosure of the information under and in terms of Section 29 of the Act on the assumption that Section 5 (1) (i) was applicable.

The PA responding in the affirmative stated that, one of the parties to the agreement (the UDA) stated that the information should not be disclosed. The Commission observed that the wording of the response of the UDA is not in accordance with Section 29 of the Act, and that a third party is required to arrive at its own decision vis a vis the provision of consent to the release of information rather than agreeing or disagreeing with the views of a PA.

Order:

The attention of the PA is drawn to the fact that the confidentiality clause in the agreement does not in itself bring into operation Section 5 (1) (d) of the Right to Information Act No. 12 of 2016. In order for the said exemption to apply the PA has to also demonstrate how the release of the information would harm the competitive interests of the third party. In *Airline Pilots Guild of Sri Lanka v. SriLankan Airlines Ltd.* (RTIC Appeal (In-Person)/99/2017 Order delivered on 12.06.2018), it was stated that the mere existence of a confidentiality clause in agreement is insufficient to bring into operation Section 5 (1) (d) and to refuse the release of the information. Thus the confidential nature of the information has to be coupled with the demonstration of the harm caused to the competitive interest of the third party.

Section 5 (1) (d) of the Act states as follows;

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;

Section 5 (4) of the Act states as follows;

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.

In the instant appeal the public interest element is important given that it is found within Section 5 (1) (d) itself as well as in Section 5(4) of the Act. The attention of the PA is drawn to the fact that even though certain information may be redacted provided sufficient harm to a third party is demonstrated, even in an such instance the harm caused should outweigh the public interest in the release of the information.

In relation to the consent of the third party to the disclosure of the information under and in terms of Section 29 of the Act, the attention of the PA is drawn to the relevant sections of the Act which are reproduced below.

Section 5 (1) (i) states as follows;

subject to the provisions of section 29(2)(c), the information has been supplied in confidence to the public authority concerned by a third party and the third party does not consent to its disclosure;

Section 29 states that,

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

(2) An information officer shall be required in making his decision on any request made for the disclosure of information which relates to or has been supplied by a third party, to take into consideration the representations made by such third party under subsection (1), and shall, where the third party

(a) does not respond to the notice, disclose information requested for;

(b) responds to the notice and agrees to the disclosure of the information requested for, disclose such information;

(c) responds to the notice and refuses to the disclosure of the information requested for, deny access to the information requested for

Provided however, the Commission may on the application made in that behalf by the citizen making the request, direct the disclosure of the information in question notwithstanding any objections raised by such third party against its disclosure,

where the release of the information concerned demonstrably outweighs the private interest in non disclosure.

Accordingly, the PA is directed to file written submissions citing and demonstrating how the exemptions cited are applicable and that sufficient public interest does not lie warranting the disclosure of information on or before the 25th of July 2019. The Appellant may respond to the same on or before the 25th of August 2019.

The PA is also directed to provide the written proof of its compliance with Section 29 of the RTI Act.

Next Date of Hearing: 24.09.2019 at 1.30 p.m.
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RTIC Appeal (In – person) 1108/2019 (*Order adopted as part of a formal meeting of the Commission on 24.09.2019*)
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
Mr. S.G. Punchihewa
Dr. Selvy Thiruchandran
Justice Rohini Walgama

Notice issued to:

Appellant: M. F. A. Mansoor

Public Authority: Designated Officer, Ministry of Megapolis and Western Development

Appearance/ Represented by:

Appellant- M. F. A. Mansoor

Michael Media- TISL- RTI Manager

PA - Anjalie Devaraja, Additional Secretary
Anusha Vithanage

Matters arising during the course of the hearing:

The PA and the Appellant were both present at the hearing.

The PA stated that it is denying the requested information based on Section 29 of the Act wherein confidential information is provided by a third party. The PA went on to state that clause 42 of the Tripartite Agreement contains a confidentiality clause and therefore it cannot disclose the agreement requested by the Appellant. In its written submissions dated

24.07.2019, the PA stated that the nature of the information in question is bound by commercial confidence and fiduciary relationship as the Tripartite Agreement entered with CHEC port city Colombo contains a strict confidentiality clause by virtue of clause 42. The PA stated that the confidentiality clause in the Tripartite Agreement envisages an instance where there may be a potential breach of confidentiality as certain aspects of this Agreement are still ongoing even if the Agreement itself is signed and finalised.

The PA further went on to state that it is relying on Section 5(1)(b)(ii) which states as follows:

(b) disclosure of such information-

(ii) 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;

Clarifying the context in which this objection may be raised, the Commission noted that the mere fact that information is sought under an international agreement will not suffice to prevent disclosure of information under the RTI Act. Accordingly, in order for the PA to raise the exemption under Section 5(1)(b)(ii), it must be demonstrated that information obtained under an international agreement was “given by or obtained in confidence.”

As elucidated in his written submissions dated 23.08.2019, the Appellant stated that the Tripartite Agreement in question is not an ‘international’ agreement as it is an agreement between the Government of Sri Lanka (namely the Ministry of Megapolis and Western Development and the Urban Development Authority) and CHEC Port City Colombo (PVT) Ltd, a company incorporated in Sri Lanka, which is a subsidiary of China Communications Construction Corporation. According to the Appellant, the Tripartite Agreement is between a Sri Lankan corporation and two agencies of the Government of Sri Lanka and therefore the PA cannot treat the said agreement as an international agreement.

Moreover, the PA went on to state that it is relying on Section 5(1)(c)(v) which is as follows:

(c) 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

(v) the entering into of overseas trade agreements;

The Appellant stated that Section 5(1)(c)(v) refers to ongoing trade agreements and not concluded agreements. In response, the PA stated that certain decisions under the agreement have not been concluded and are yet to be finalized. As an example, the PA stated that decisions relating to land acquisition, decisions relating to which part of the country the port city would belong to are decisions which are not yet finalized.

In response, the Appellant reiterated that the imperative element in Section 5(1)(c)(v) relates to “entering into” of overseas trade agreements which envisages an instance where discussions are ongoing and does not apply to the instance where the agreement is signed and the commitment of all parties to the agreement is finalized. The Appellant stated that the public has a right to know what the Government of Sri Lanka has committed itself to in respect of the agreement which is already signed and finalized between all parties. Citing his written submissions dated 23.08.2019, the Appellant went on to state that the PA’s stance that disclosure of information would cause serious prejudice to the economy is based on presumptions which are not substantiated by facts.

The Appellant also raised the objection that Section 5(1)(c)(v) applies to “overseas trade agreements” and in the instant matter the CHEC Port City Colombo (PVT) Ltd is a domestically incorporated company. Therefore, it was the position of the Appellant that the agreement between the Government of Sri Lanka and a domestically incorporated company cannot be considered as an agreement pertaining to an overseas trade agreement.

In response to the PA’s written submission dated 24.07.2019 wherein it is stated that there are no direct adverse consequences to the fishing community, the Appellant in his written submissions of 23.08.2019 has provided evidence of impacts on food, nutrition, livelihood of those residing in Bassiyawatte in Negombo. In terms of overriding public interest, the Appellant has elaborated that the sand mining from the Port City project is likely to have an adverse environmental impact on erosion of the Western Coast of Negombo together with livelihood and health impacts on the Negombo fisher folk. The Appellant has also raised impacts on the urban population of Colombo due to the high-rise building constructions in the Port City.

Order

In view of Section 29(1) of the RTI Act, the confidentiality clause would strictly be applicable to an instance where information was provided by a third party and it was treated as confidential at the time the information was supplied to the PA. As such, Section 29 (1) is not automatically invoked when a confidentiality clause is in issue, as was explained in *Airline Pilots Guild v Sri Lankan Airlines* (RTIC Appeal (In-Person)/99/2017, Order delivered on 12.06.2018) where the Order of this Commission was that confidentiality clauses in concluded agreements in particular, could not be accepted, *per se*, as a basis to deny information.

The position of the PA that the confidentiality clause is applicable to a ‘potential breach of confidentiality’ in future cannot be accepted in the absence of firm documentation before us that aspects of this Tripartite Agreement are still ongoing. The PA is under a burden of proof to clearly demonstrate what those ‘ongoing aspects’ are, referenced by specific clauses of that Agreement. General or vague objections in this regard are unacceptable.

The Commission orders that similar to the position taken up by the Ministry in relying on Section 29, Section 5(1)(b)(ii) would not apply as the mere existence of a confidentiality clause in the agreement does not assure that “such information was given by or obtained in confidence.” The PA is put under an obligation to demonstrate the specific context in which such a clause can apply to ongoing negotiations.

In terms of Section 5(1)(c)(v), this relates to disclosing premature decisions which indicates a time prior to entering into an international trade agreement which bars disclosure. The Tripartite Agreement is concluded and signed between parties and therefore this is not a ‘premature decision.’ The Ministry is directed to provide specific proof that certain provisions of the agreement are ongoing and may be adversely affected due to premature disclosure. Accordingly, the PA is directed to identify the exact clauses of the Tripartite Agreement where decisions are pending and are yet to be finalized. The Commission directs the PA to clarify if the particular 3rd party concerned is a locally incorporated company and in such an instance how the definition of an ‘overseas trade agreement’ is applicable.

The Appellant is directed to file written submission specifically on the question whether Section 5(1)(c)(v) applies to a domestically incorporated company on or before 15.10.2019. The PA is directed to respond to the Appellant’s written submission as well as the issues raised before the Commission.

Furthermore, the PA is directed to submit all Environmental monitoring reports as specified in the Proposed Colombo Port City Development Project Supplementary Environmental Impact Assessments of December 2015 and copies of all Environmental monitoring reports as specified in the Supplementary Environmental Impact Assessment for the Off Shore Sand Extraction Project at Kerawelapitiya of December 2016 on or before 05.11.2019 for the perusal of this Commission under and in terms of its powers, as conferred by the RTI Act. Enabling public scrutiny of these EIA reports is a mandatory statutory duty vested with the PA.

The Appeal is adjourned. Next date- 26.11.2019

Order is 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).

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RTIC Appeal (In – person) 1108/2019 (*Order adopted as part of a formal meeting of the Commission on 26.11.2019*)
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: Mr. S.G. Punchihewa
Dr. Selvy Thiruchandran
Justice Rohini Walgama

Director General: Mr. D.G.M.V. Hapuarachchi

Notice issued to:

Appellant: M. F. A. Mansoor

Public Authority: Designated Officer, Ministry of Megapolis and Western Development

Matters Arising During the Course of the Hearing:

The appeal was re-fixed for consideration on 03.12.2019

Appeal adjourned.

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RTIC Appeal (In – person) 1108/2019 (*Order adopted as part of a formal meeting of the Commission on 03.12.2019*)
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
Mr. S.G. Punchihewa
Dr. Selvy Thiruchandran
Justice Rohini Walgama

Director General: Mr. D.G.M.V. Hapuarachchi

Notice issued to:

Appellant: M. F. A. Mansoor

Public Authority: Designated Officer, Ministry of Megapolis and Western Development

Appearance/ Represented by:

Appellant- M. F. A. Mansoor
Fr. Noel Christine Fernando
Sarath Iddamalgoda
N.A. Roshan Fernando

PA- Absent

Matters arising during the course of the hearing:

The Appellants written submission dated 15.10.2019 is received of record. The PA by letter dated 13.11.2019 has written to the Commission seeking time till 26.11.2019 to file its written submission. However, as at the date of the hearing the Commission has not received written submissions from the PA.

Reiterating his previous position, the Appellant stated that the information he is seeking should be disclosed as it is a matter of public interest. It was brought to the notice of the Commission that the Appellant together with other members of the fisherfolk union have gone before the Supreme Court on a similar issue of the Port City Project in SC (FR) 151/2015. The proceedings of this Fundamental Rights case were terminated on the ground that “*if the Petitioners need any documents by which approvals were granted the Petitioners are free to indicate a list of such documents to the Attorney General’s Department who will in turn refer it to the Ministry Megapolis Western Development to enable the Petitioners to get the said documents.*” The Appellant went on to submit that even though the Petitioners in the aforementioned case have written to the Attorney General’s Department requesting for such documents, including those that are requested in the instant appeal, they have not received a favourable response to date.

With regard to copies of all environmental monitoring reports as specified in the Port City SEIA of 2015 and the SEIA for the Off Shore Sand Extraction Project at Keralapitiya of December 2016, the Appellant informed that even though the PA by letter dated 21.12.2018 has informed the Appellant to visit the Ministry and inspect the requested documents, except the tripartite agreement, he has not taken any action in this regard. It was further brought to the notice of the Commission that CHECH Port City Colombo (PVT) Ltd has written to the PA on 20.12.2018 that there is no need to disclose the environmental monitoring reports as specified in the SEIA at the stage that CHECH has completed 95% of the reclamation work.

Order

Attention is drawn to Section 27 of the RTI which states *inter alia*:

27. (1) Where decision has been made to grant a request for information, such information shall be provided in the form in which it is requested for, unless the information officer is of the view that providing the information in the form requested for would not be detrimental to the safety or preservation of the relevant document or record in respect of which the request was made.....

.....(3) Subject to the provisions of subsection (1), a citizen, whose request for information has been granted, is entitled to:–

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(a) *inspect relevant work, documents, records;*

(b) *take notes, extracts or certified copies of documents or records;*

The DO's response on 21.12.2018 indicates that Appellant was informed to contact the Project Director of the Port City Development Project during office hours to inspect the requested documents, except the tripartite agreement. The DOs response further state that after inspecting the said documents the Appellant may inform which pages are required to be photocopied.

With respect of the Items No. (2) and (3) requested by the Appellant in his information request dated 15.11.2018, the Commission has examined the matter in detail are of the view that the PA has informed the Appellant "*inspect relevant work, documents, records and take notes, extracts or certified copies of documents or records*" in accordance with Section 27(3) of the RTI Act.

The Appellant is directed to oblige with the request of the PA to inspect documentation relevant to items No. (2) and (3) of his information request and act in accordance thereto.

The appeal in adjourned. Next date- 28.01.2020

Order is 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).

RTIC Appeal (In – person) 1108/2019 (*Order adopted as part of a formal meeting of the Commission on 05.02.2020*)

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-Jayawardene

Mr. S.G. Punchihewa

Dr. Selvy Thiruchandran

Justice Rohini Walgama

Director General: Mr. D.G.M.V. Hapuarachchi

Notice issued to:

Appellant: M. F. A. Mansoor

Public Authority: Designated Officer, Ministry of Megapolis and Western Development

Appearance/ Represented by:

Appellant- F Mansoor, Fr. Iddamalgoda, Fr. Noel Christine Fernando, N. A. Roshan Fernando

PA- Absent

Matters Arising During the Course of the Hearing:

The Appeal was initially fixed for consideration on 28.01.2020 however due to unavoidable circumstances. There was a delay in the commencement of the proceedings of the Commission at 9.45 a.m. and the representative of the PA had stated that she had an official meeting to attend at 10.15 a.m. and was therefore absent before the Commission at the time of hearing.

The Appellant submitted that the Project director of the Port City Project has been replaced. He further submitted that the PA did not nominate another person to coordinate re the appeal as the representative of the PA would be retiring shortly.

The representative on behalf of the Appellant in RTIC Appeal 1114/2019 submitted that there is a pending case in the Court of Appeal whereby the Environmental Impact Assessment carried out with respect to the Port City Project has been challenged. Judgment has been reserved in the said case. It was submitted that the case was filed on the basis that the original EIA was flawed in that although the Central Environmental Authority's position is that supplementary EIAs can be accepted, the Geological Survey and Mines Bureau does not make such allowances in its law.

The Appellant in RTIC 1108/2019 submitted that the state is intentionally delaying the provision of information and continues to delay the filing of written submissions. It was further submitted on behalf of the Appellant that there is a severe impact the coastal environment due to the port city project.

The Appellant further submitted that there was a fundamental right application in the Supreme Court (SCFR 151/15) of which the proceedings were terminated on 07.07.2016. In the said case the supplementary EIA proposes that a sum of 5 Million be allocated to the Ministry of Fisheries via the MMWD to meet the requirements of the fisheries community. The proceedings of the case were terminated on the basis that if the Petitioners need any documents by which approvals were granted they are to indicate a list of such documents to the Attorney-General's Department who will in turn refer it to the Ministry of Megapolis and Western Development to enable the Petitioners to obtain the required documents and that the Petitioner are free to revert to the Supreme Court after obtaining the documents.

Order:

In the instant appeal, the PA has submitted that there are parts of the agreement which are ongoing. The PA was therefore directed to file written submissions on the same as well as substantiate the other exemptions cited by the PA and in response to the written submissions of the Appellant, by order dated 24.09.2019. Further time was requested by the PA on 15.10.2019 subsequent to which a further 3 months has lapsed. The PA has as of now failed to file written submissions. The attention of the PA is drawn to Section 39 (1) (e) of the Act which state as follows;

At the Right to Information Commission of Sri Lanka

Every person who... fails or refuses to comply with or give effect to a decision of the Commission... commits an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding fifty thousand rupees or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Furthermore the attention of the PA is drawn to Section 39 (1) (f) of the Act which states that,

Every person who... resists or obstructs the Commission or any officer or other employee of the Commission, in the exercise of any power conferred on the Commission or such officer or employee, by this Act... commits an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding fifty thousand rupees or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

Accordingly the non-compliance of the PA with the directive of the Commission to file written submissions attracts the applicability of a Section 39 offence under and in terms of the Act and a prosecution may be instituted by the Commission against the officers of the PA, in terms of Section 39 (4) of the Act. Section 39 (4) states that ‘a prosecution under this Act shall be instituted by the Commission.’

The PA is directed to submit written submission clearly substantiating the applicability of the exemption/s, and the manner in which the harm caused by disclosure would override the public interest in disclosure. The PA is directed to file written submissions/ affidavits before the next date of hearing i.e. 25.02.2020 with a copy to the Appellant. Strict compliance with this order is directed failing which the Commission will be called upon to take necessary steps under the RTI Act.

The Appeal is adjourned.

Next Date of Hearing: 25.02.2020

RTIC Appeal (In – person) 1108/2019 (*Order adopted as part of a formal meeting of the Commission on 25.02.2020*)

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-Jayawardene
Mr. S.G. Punchihewa
Dr. Selvy Thiruchandran
Justice Rohini Walgama

Director General: Mr. D.G.M.V. Hapuarachchi

Notice issued to:

Appellant: M. F. A. Mansoor

Public Authority: Designated Officer, Ministry of Urban Development, Water Supply and Housing Facilities

Appearance/ Represented by:

Appellant- F Mansoor, Fr. Iddamalгода, Fr. Noel Christine Fernando, N. A. Roshan Fernando

PA- S K A P Devaraja Additional Secretary, Ministry of Urban Development, Water Supply and Housing Facilities

Matters Arising During the Course of the Hearing:

The PA was queried on its failure to comply with the previous directions of the Commission. In response, it was submitted on behalf of the PA, that advice had been sought from the Attorney-General's Department in this regard. However as the relevant Ministry under whose purview the instant matter falls has changed, the Attorney-General's Department had advised the officials in charge of this matter to revert to the relevant Ministry and to obtain fresh instructions which will thereafter inform any advice by the Attorney-General's Department.

The attention of the PA was drawn by the Commission to the fact that the direction of the Commission previously required a factual clarification of the status of specific clauses contained in the Tripartite Agreement in view of the specific submission on behalf of the PA regarding the same, for which clarification, the appeal cannot be interminably delayed by explanations of the PA that advice is being sought from the Department of the Attorney General.

Order:

The attention of the PA is drawn to the fact that Order dated 24.09.2019 states that;

The position of the PA that the confidentiality clause is applicable to a 'potential breach of confidentiality' in future cannot be accepted in the absence of firm documentation before us that aspects of this Tripartite Agreement are still ongoing. The PA is under a burden of proof to clearly demonstrate what those 'ongoing aspects' are, referenced by specific clauses of that Agreement. General or vague objections in this regard are unacceptable.

By Order dated 05.02.2020, the attention of the PA was once again drawn to Order dated 24.09.2019 and strict compliance was required. However 5 months has lapsed since the original direction to the PA to indicate the specific clauses of the Tripartite Agreement in which the specific clauses are contended as ongoing. As of this date, the PA initially cited in this appeal as well as the PA succeeding to the aforesaid obligations consequent to the gazetting of portfolios in Gazette No. 2153/12 issued on 10.12.2019 following the Presidential Elections of 16.11.2019, has failed to respond on the same.

It needs to be emphasized that this Commission has refrained from issuing an Order to date in this appeal purely for the reason that a factual clarification was required from the PA in regard to certain aspects of the said Agreement being ongoing. The attention of the PA is drawn to the fact that this is a vital and substantive factor that needs to be taken into account by the Commission in coming to its conclusions.

At the Right to Information Commission of Sri Lanka

Accordingly the PA is directed to comply with order dated 24.09.2019 which inter alia includes the indication of the specific clauses contained in the Tripartite Agreement which are still ongoing on or before 03.03.2020.

The PA is further directed to submit a copy of the said Tripartite Agreement to the Commission under confidential cover in order that the Commission, so that it can observe for itself, the clauses in re the submission that certain clauses concern ongoing aspects, on or before 03.03.2020. This direction is made in terms of Section 15 (c) of the Right to Information Act No 12 of 2016 which states that,

For the purpose of performing its duties and discharging of its functions under this Act, the Commission shall have the power... to inspect any information held by a public authority, including any information denied by a public authority under the provisions of this Act

Furthermore, it is also noted that, acting in pursuance of the said statutory powers vested in it, this Commission has in previous appeal hearings directed relevant Public Authorities to provide information under confidential cover for the perusal of the Commission (*vide RTIC Appeal / 216/2018 T. Nadesan v Office of the Cabinet of Ministers, Order dated 11.12.2018; RTIC Appeal 89/2017 H.C.S. de Zoysa Siriwardena v. Sri Lanka Army Order dated 30.01.2018*), pursuant to which Orders, the information has been so provided.

Next Date of Hearing: 03.03.2020

RTIC Appeal (In – person) 1108/2019 (*Order adopted as part of a formal meeting of the Commission on 03.03.2020*)
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-Jayawardene
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Justice Rohini Walgama

Director General: Mr. D.G.M.V. Hapuarachchi

Notice issued to:

Appellant: M. F. A. Mansoor

Public Authority: Designated Officer, Ministry of Urban Development, Water Supply and Housing Facilities

Appearance/ Represented by:

Appellant- F Mansoor, Fr. Iddamalgoda, Fr. Noel Christine Fernando, N. A. Roshan Fernando

PA- S K A P Devaraja Additional Secretary, Ministry of Urban Development, Water Supply and Housing Facilities

Matters Arising During the Course of the Hearing:

It was noted of record that the DO by letter dated 13.02.2020 had submitted that she was present at 9.45 a.m. on 05.02.2020 as noticed by the Commission but was compelled to leave prior to the hearing due to the delay in the start of proceedings of the Commission, as she had to attend another meeting.

The PA submitted a copy of the Tripartite agreement for the perusal of the Commission along with letter dated 03.03.2020 indicating the responses of the PA to Order dated 25.02.2020 of the Commission. The said letter inter alia stated as follows;

The proposed CPCDP has to be developed on a stage by stage basis. The first stage is Land formation and making as offshore island with construction of Offshore Breakwater, Seawalls, Revetments and Ground Improvements. The second stage is to develop infrastructure and utility services. This is the infrastructure and landscape works of the phase-1.

Chapter 6- Hand over the water area

Chapter 7- Construction work

Chapter 11- rectification of the design solution

Chapter 12- Applicable permits for the reclamation works

Chapter 14- Utilities

Chapter 16- Progress reviews, Ports Authority access and testing

Chapter 18- Completion of reclamation works

In the context of the above letter, the Appellant queried as to whether it is the position of the PA that it would not provide the Tripartite Agreement until work in relation to all aspects of the agreement are concluded. The PA responded in the negative and submitted that it was merely concerned that disclosure of information that should not be disclosed would occur through the provision of the Agreement which could be prejudicial to the ongoing aspects of the agreement.

The Appellant further submitted that the filling of land has already been completed to the detriment of the citizens living in and around the area and as such there is a grave urgency in the provision of a copy of the agreement to the public.

Order:

Apart from the chapters listed by the PA as relating to the aspects of the Tripartite agreement relevant to the ongoing work being done and in regard to which deliverables have yet to be settled, the PA is directed to also provide a similar categorization in respect of aspects of the agreement where work has not yet commenced.

Further the PA is directed to indicate which chapters of the said Tripartite Agreement have no impact whatsoever to ongoing work which is yet to commence.

On the submission of the PA to the effect that aspects of the ongoing work and work which has not yet been started in terms of the said Tripartite Agreement which have been contended by the PA to be encompassed within the confidential information which the PA is hesitant to divulge as it may impact an ongoing negotiation, the attention of the PA is drawn to clause 42.6 (c) and 42.6 (c) a reading of which indicates that the PA's own exemption of confidentiality does not apply across the entire agreement. Therefore the PA is called upon to clarify where and in relation to what clauses, clause 42.6 (c) and 42.6 (c) would apply.

Lastly the PA has contended that this agreement would extend to a period beyond 2020. The PA is called upon to indicate the exact clause of the Tripartite Agreement where the said time period is stipulated/ end date indicated.

At the Right to Information Commission of Sri Lanka

The PA is directed to submit a list of all the Environmental Impact Assessments (EIAs), Supplementary EIAs available re the Port City Project and copies of the said Assessments before the Commission.

The Appellant together with the Appellant in RTIC Appeal 1114/2019 are directed to inform the PA and the Commission as to what Environmental Impact Assessments (EIAs) and Supplementary EIAs are in his possession.

It is based on an assessment of risks to the environment as disclosed in the said EIAs and SEIAs, and which demonstrate the public interest, which this appeal will be examined.

The Appeal is adjourned.

Next Date of Hearing: 17.03.2020

Order is 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).
