

Centre for Environmental Justice v Ministry of Urban Development, Water Supply and Housing Facilities (Ministry of Megapolis and Western Development)

RTIC Appeal (In – person) 1114/2019 (*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

Appellant: Centre for Environmental Justice

Notice issued to: Designated Officer Ministry of Megapolis and Western Development

Appearance/ Represented by:

Appellant- Indika Rajapaksha, Environmental Officer, Centre for Environmental Justice
Nilmal Wickramasinghe, Director, Centre for Environmental Justice
Waruni Bamunusinghe Legal Officer, Centre for Environmental Justice

PA - Anjalie Devaraja, Additional Secretary

RTI Request filed on:	08.10.2018
IO responded on:	16.10.2018
First Appeal to DO filed on:	14.11.2018
DO responded on:	21.11.2018
Appeal to RTIC filed on:	21.01.2019

Brief Factual Background:

The Appellant, by request dated 08.10.2018, requested, *a copy of the Tripartite Agreement signed between the Ministry of Megapolis & Western Development, the UDA, and the CHEC Port City Colombo (Pvt) Ltd on the Colombo Port City Development Project in August 2016*, for study purposes.

The Information Officer responded on 16.10.2018, denying the information, on the basis that the information is that which was provided or obtained by the Government or through an International Agreement. The IO also stated that the information has been supplied by a third party in confidence who has not provided consent to the provision of the information.

Dissatisfied with the response of the IO, the PA lodged an appeal with the DO on 14.11.2018. The DO denied the information on the basis that the Director (Legal Services) of the UDA has informed her that the Agreement cannot be disclosed due to the confidentiality clauses in the Agreement. A copy of the letter sent by the Director UDA was annexed to this response. Dissatisfied with this response the Appellant preferred an appeal to the Commission on 21.01.2019. The Appellant states that there is significant public interest in the disclosure of the information.

Matters Arising During the Course of the Hearing:

At the outset it was noted that the information requested was identical to item 1 of the information request in RTIC Appeal/1108/2019. The Appellant submitted that the information was requested for study purposes and in order to finalise pleadings in a fundamental rights application filed by the Appellant challenging the Agreement, which is the subject matter of the information request.

Order:

The Appellant is an organization and as such is required to aver citizenship indicating that it is a body in which three-fourths of its members are citizens of Sri Lanka (*vide TISL v. Prime Minister's Office RTIC Appeal/05/2017 and TISL v Presidential Secretariat RTIC Appeal/06/2017 order delivered on 23.02.2018*). The Appellant is directed to file an amended appeal indicating the same prior to the next date of hearing.

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 25 July 2019. The Appellant may respond to the same on or before the 25 August 2019. The Attention of the PA is drawn to the order in RTIC Appeal/1108/2019 (order dated 25.06.2019, *M. F. A. Mansoor v Ministry of Megapolis and Western Development*) in relation to this appeal given that the information requests and the position of the PA are similar.

Next Date of Hearing: 24.09.2019 at 2.00 p.m.

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) 1114/2019 (*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

Appellant: Centre for Environmental Justice

Notice issued to: Designated Officer, Ministry of Megapolis and Western Development

Appearance/ Represented by:

Appellant- Absent

PA - Anjalie Devaraja, Additional Secretary
Anusha Vithanage

Matters arising during the course of the hearing

The PA is present and the Appellant is absent.

The PA reiterated that it is denying the requested information based on Section 29 of the Right to Information Act No.12 of 2016 (RTI 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.

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 submit that it is relying on Section 5(1)(b)(ii) of the RTI Act 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;

In response, the Commission stated 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."

Moreover, the PA went on to state that it is relying on Section 5(1)(c)(v) which states 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; [REDACTED]

The PA reiterated 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 which part of the country the port city would belong to are decisions which are not yet finalized.

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 PA is directed to file written submissions on or before 05.11.2019.

The Appeal is adjourned for Final Order on the next hearing date. The Appellant is directed to be present on that date.

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: Center for Environmental Justice

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.

RTIC Appeal (In – person) 1108/2019 (*Order adopted as part of a formal meeting of the Commission on 03.12.2019*)

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- Indika Rajapaksha

Kalpanee Dissanayake

PA - Absent

Matters Arising During the Course of the Hearing:

The Appellant is present. The PA is absent.

Further to the order of the Commission on 25.06.2019, the Appellant by letter dated 23.10.2019 has averred citizenship of the Center for Environmental Justice (Guarantee) Limited.

As the PA was absent the written submission of the PA in RTIC 1108/2019 was shared with the Appellant to inform the Appellant of the objections raised by the PA in not disclosing the Tripartite Agreement signed between the Ministry of Megapolis & Western Development, the UDA, and the CHEC Port City Colombo (Pvt) Ltd on the Colombo Port City Development Project.

Accordingly, the Appellant is permitted to tender written submissions in response to the PA's submission, if needed.

The appeal is adjourned. Next date- 28.01.2020

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. Iddamalgodha, 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 in RTIC 1108/2019 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 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 in RTIC 1108/2019 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 and 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;

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.

Furthermore the Appellant in RTIC Appeal 1114/2019 is directed to send the copy of the Appeal papers and the journal entries vis a vis the case pending judgment before the Court of Appeal within one week.

The Appeal is adjourned.

Next Date of Hearing: 25.02.2020

RTIC Appeal (In – person) 1114/2019 (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: Centre for Equality and Justice

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

Appearance/ Represented by:

Appellant- K N Sanjeevani Legal Officer, J H A Thusini Jayasekera Legal Intern

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 Appellant had by letter dated 17.02.2020 submitted a copy of the Petition of CA (W) 112/2015 to the Commission.

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.

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) 1114/2019 (*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
Mr. S.G. Punchihewa
Justice Rohini Walgama

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

Notice issued to:

Appellant: Indika Rajapaksha

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

Appearance/ Represented by:

Appellant- Indika Rajapaksha, K N Sanjeevani Legal Officer, J H A Thusini Jayasekera Legal Intern
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 thorough 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 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.

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 1108/2019 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).
