

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA

In the matter of an Application under and in terms of Section 34 of the Right to Information Act No. 12 of 2016 read together with Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Appeal/Application
No: CA/RTI/05/2022

1. Sri Lanka Telecom PLC,
Lotus Road,
Colombo 01.

Public Authority -
Petitioner

-Vs-

I.P. Ediribandu
No.66, Kapruk Sewana,
Delduwa, Wadduwa.

Appellant-Respondent

Before: Hon. D.N. Samarakoon, J.



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Counsel: Mr. Rajeev Amarasooriya with Ms. Dulanya Nanayakkara and Ms. Yohani Yogarajah for the Public Authority-Petitioner.

Appellant-Respondent absent and unrepresented.

Argued on: 19.01.2024

Written submission tendered on: 19.01.2024 by the Public Authority-Petitioner.

Decided on: 31.01.2024

D. N. Samarakoon J.

The judgment in this case must delve on the distinction, if any, between “information” and “gathering of information.”

As the Public Authority Petitioner, Sri Lanka Telecom PLC narrates in its written submissions, the following is the brief sequence of events.

“8. On 21/07/2017, the Telecommunications Engineers Union, which is a Union of the Petitioner, provided certain information including complaints to the Committee on Public Enterprises (COPE).

9. Thereafter on 11/10/2017, the Petitioner appointed a Special fact-finding Committee headed by a retired Court of Appeal Judge (His Lordship Justice Sunil Rajapakse) to look into the aforementioned information provided and carry out a fact-finding investigation.

10. On 15/10/2018, the Petitioner received the Subject Matter Report by the Special fact-finding Committee, Thereafter, the Petitioner states that though the Petitioner is not bound to disclose the contents of the said fact finding report (*inter alia due to the nature of the sensitive contents it contained, the need to protect privacy of individuals, the need to protect the*

fiduciary duties owed to stakeholders, the grave Prejudice it may cause to such persons and subsequent actions steps that needs to be taken, and particularly this being Purely a fact finding mission), the Board of the Petitioner in a bona fide spirit and with a view of upholding transparency and accountability in a manner that balances Competing interests of privacy and disclosure without prejudice, decided to make available relevant extracts of the said report ONLY to the Union Representatives or employees who have made the complaints by making available the relevant parts of the document in relation to their respective complaint/s (albeit with the requisite degree of severance and restraint as set out in the Written Submission of the Respondent before the RTI Commission), to the said stakeholders through the Officer specified in the said document. This is evidenced by the internal memo of the Petitioner dated 23/01/2019, found in the document marked P-3 (page 45 of the brief).

11. A Right to Information request dated 18/05/2020 was addressed to the Information Officer of the Petitioner by the Appellant-Respondent (hereinafter referred to as the 'Respondent') (found at page 4 of the brief) requesting to be provided with a Certified Copy of the aforementioned report received by the Petitioner on 15/10/2018, to which a response letter dated 10/06/2020 was tendered to the Respondent by the said Information Officer setting out the stance that the Respondent does not have an entitlement to the information requested under Sections 5 (1) of the Right to Information Act. The aforesaid response dated 10/06/2020 can be found at page 3 of the brief.

12. Thereafter, the Respondent preferred an appeal dated 19/06/2020 to the Designated Officer of the Petitioner, to which the said Designated Officer responded reaffirming the stance of the information Officer. This correspondence can be found respectively at pages 02 and 01 of the brief.

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13. The Respondent thereafter preferred an appeal to the RTI Commission dated 04/08/2020.

14. The Petitioner states that given the COVID 19 pandemic situation of the Country, the RTI Commission had resolved to determine this Appeal by its Documentary Hearings procedure as in the Right to Information Rules / Regulations.

15. As such, the Petitioner states that following the said procedure, the Petitioner submitted the first set of Written Submissions on 31/03/2021 which can be found at pages 44 to 38 of the brief.

16. The Respondent did not file any written submissions but only filed photographs, which can be found at pages 53 to 51 of the Brief.

17. The petitioner states that on 05/04/2021, the aforementioned Written Submissions of the Petitioner was submitted once again.

18. On the 08/04/2022, the RTI Commission inquired into this matter. The Petitioner was represented by their Legal Counsel in person and the Respondent participated virtually and after the conclusion of proceedings, the Impugned Order (P-1) was made”.

The petitioner appeals to this Court from the order P.01 dated 08.04.2022.

The excerpts from this order, which the petitioner has quoted in its written submissions in Sinhala will read as follows in their brief English rendering.

(01) The Public Authority has contended that sections 5(1) (g) *“the information is required to be kept confidential by reason of the existence of a fiduciary relationship;..”*, 5(1) (h) *“the disclosure of such information would (i) cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders; or (ii) expose the identity of a confidential source of information in relation to law enforcement or national security, to be ascertained;...”* and 5(1) *“(i) 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;...” apply

- (02) What is in question is only a fact finding report
- (03) It includes sensitive information and covered by the above provisions
- (04) But the Public Authority has on 23.01.2019 stated that it could be obtained by the representatives of trade unions and the employees who have made complaints
- (05) Hence the Public Authority has taken different positions before the Commission
- (06) This cannot be done
- (07) When two such stances are taken the general practice is to allow the affirmative
- (08) Hence the Commission decides that it is more appropriate to implement the stance taken on 23.01.2019
- (09) The Commission rejects the contention that the information comes under section 5(1)(g) (h) and (i)
- (10) The Public Authority through its Information Officer should release the information on or before 30.04.2022
- (11) If the Public Authority fails to do so action to be instituted in the Magistrates Court under section 39 of the Right to Information Act

The position taken up by the petitioner in paragraphs 25 and 26 of its written submissions is that

- (i) The petitioner in a bona fide spirit with a view to uphold transparency and accountability (*among other things which are referred to there*) decided to make available the said report ONLY to the union representatives or employees who have made complaints
- (ii) The respondent will be entitled to the report if he is a union representative or an employee who had made a complaint

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In paragraph 27 the petitioner alleges, that, the respondent is neither.

The petitioner has, then, in paragraphs 32 to 38 of its written submissions, specifically in paragraph 37, proceeded to analyse the entire section 05 with its manifold sub sections.

The petitioner, as it appears from the order P.01 of the Right to Information Commission has raised before it only objections under section 05(1) (g) (h) and (i). They are,

“(h) the disclosure of such information would

(i) cause grave prejudice to the prevention or detection of any crime or the apprehension or prosecution of offenders; or

(ii) expose the identity of a confidential source of information in relation to law enforcement or national security, to be ascertained;

(i)¹ 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;...”

However, this Court does not think, that, the petitioner is precluded now in appeal (*which can also be considered as an application for revision, because, until specific rules are made, the applicable procedure for an appeal is the procedure for an application for revision*) from raising matters that have not been raised before the Commission.

But, as it was indicated at the opening sentence of this judgment, this Court is of the view, that, the report in question does not come under the definition of “information” in the Right to Information Act.

It is as follows

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¹ This is simple “I”, the paragraph in the Act not Roman I.

According to the Act, "information" encompasses any material recorded in any form, including:

Records

Documents

Memos

Emails

Opinions

Advices

Press releases

Circulars

Orders

Log books

Contracts

Reports

Papers

Samples

Models

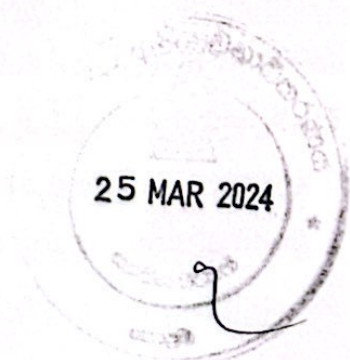
Correspondence

Memorandum

Draft legislation

Books

Plans



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Maps

Drawings

Diagrams

Pictorial or graphic works

Photographs

Films

Microfilm

Sound recordings

Video tapes

Machine-readable records

Computer records

Other documentary material, regardless of its physical form or character

Any copy of the above items.

A report of a fact finding inquiry is still a report. But it is not yet materialized as information. It is at the stage of gathering of information.

The definition at section 43 says, "information" includes any material which is recorded in, in any form including..."

It is seen that the above enumeration includes the term "reports." Hence it might appear to many that a report is information. So, it will be argued that even a fact finding report is a report and hence it constitutes "information".

Is this correct?

Let us once again examine the definition of the term "information" under the Right to Information Act.

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It says, as follows,

“Information” **includes** any material which is recorded in, in any form **including** records, documents, memos, emails, opinions, advices ...reports,...

The generic word “include” is used twice. Firstly,; “includes” and then “including”.

The first limb is “Information” includes any material which is recorded in”.

Does it say, “information” **is** any material which is recorded in?

It does not say so. After the words “recorded in” there is a comma.

Professor Nathenson² says,

“Pay close attention to punctuation. For example, a comma’s presence or absence may completely change the meaning of a statute or rule.”

So, one form of “information” is, a material recorded in. The next words, “in any form” signifies that the “information” need not to have been recorded only in the written form. But to reiterate, the word “includes” used after the term “information” shows that not only there could be, but there is other information (*note, the inverted commas are not used by me for the word information here*) which does not fall under the category of the term “information” in this definition.

The above list which enumerates several items such as records, documents, memos or reports gives the “**repositories**” in which “information” could be contained. That is for what, the words “any material which is recorded in” stands to regulate. **The list that enumerates various items are, therefore, not examples of “information” but examples of repositories in which the kind of “information” referred to in the Act could contain.**

In as much as, “Information” includes any material which is recorded in,” is not exhaustive, as the word “includes” denotes; so “information” includes what is not

² How to read a Rule or Statute – Professor Nathenson

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recorded too, it includes (as the word “including” occurring for the second time denotes) what is not recorded in records, documents, memos, etc.

Diagrammatic depiction of the concept of “information” and the description in section 43:

Hence if set E (universal set) is information, then recorded material (in any form) is a sub set (A) within E. The material recorded in the enumerated list of items are a second sub set within sets A and hence within set E.

Set E

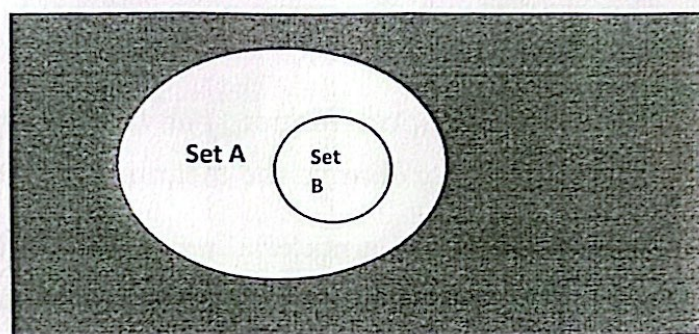


Figure 1 Set E shows sets A and B within it

The significance of what was discussed and analysed above is, that, all information is not described in the definition of “information” in the Right to Information Act. This is not to say, that, the Act does not cover everything what is “information.” Set E has all that which is information. Set A within set E refer to information “recorded” in any form. There is still a further sub set within set A that has “information” recorded in any form in repositories named under the enumerated list. This could be named set B.

Hence the following propositions could be deduced,

(01) the purported definition “information” in the Right to Information Act is not a definition of what comes under the English word information but a definition of repositories of information

³ This is a Venn Diagram as initially used by Mathematician John Venn, presently used in Boolean Algebra

(02) there is information that come within the purview of the English word information which do not fall within the scope of the description of the word "information" in the Right to Information Act, but comes under the purview of the Act, because the description says "information **includes...**"

So all information does not come under the description in section 43 of the Right to Information Act, but they must come under the purview of the Act due to the first word "includes" in the description.

Then, it must also be appreciated, that, every "fact" is not information.

What the petitioner had was a fact finding committee. It has produced a fact finding report. This occurs during an initial mission or preliminary research phase in which facts are collected for a subsequent processing.

According to the Golden Rules of the Queen's University Industrial Relations Centre (IRC) in Canada, the Rules are (I) go to the source (II) remain objective (iii) persistence - keep seeking information even if faced with obstacles (iv) avoid paralysis - distinguish necessary from unnecessary facts (v) avoid assumptions and (vi) device and follow a plan.

The Queen's University Industrial Relations Centre is a leading provider of premium professional development programs in labor relations, Human Resources and organization development.

As it was said, a fact finding report refers to a process of gathering information to ascertain facts. It is a part of an initial operation to collect data for subsequent processing of the same. It aims to discover and establish factual details about a situation, question or event.

Data exists prior to a fact. A fact when given a context transforms into information.

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Information is a result of processing facts to have a context. Only when facts are processed does it transform into information. Raw facts in its unprocessed state lacks context and meaning.

Two things were said, in the above discussion,

- (i) The “definition” of Right to Information Act is not exhaustive [It commences saying, that, “information **includes...**”]
- (ii) The purported “definition” is not a “definition” of the word “information” but a description of **certain** “repositories” of information

The term “any material” in section 43 does not widen the concept of “information” to any material:

The section says, “information includes **any material** which is recorded in, ...”

So, is “any material” information? It cannot be, as it is against, simple and straightforward logic. Hydrogen is a material. [It is an element⁴]. Hydrogen, with its single proton and one electron, is the simplest element in the universe. This simplicity contributes to its abundance. In fact, hydrogen is the most common element in the universe, constituting roughly 75% of all normal matter⁵. Hence “any material” is not “information.” The section only means, that, **certain** material is “information,” but not all material. Hence the term “any material” above is not a definition of information. In the sentence, “information includes any material which is recorded in...,” the subject is “information,” the predicate is “which is recorded in” and “any material” is a “predicate adjective⁶.” Hence the third proposition that could be deduced is, that, since the Right to Information Act has no definition for the word “information,” since it has described only

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⁴ each of more than one hundred substances that cannot be chemically interconverted or broken down into simpler substances and are primary constituents of matter. Each element is distinguished by its atomic number, i.e. the number of protons in the nuclei of its atoms.

⁵ <https://www.livescience.com/58498-why-is-hydrogen-the-most-common-element.html>

⁶ <https://www.grammar-monster.com/glossary/predicate.htm>

certain forms of repositories of information and since the purported definition is not exhaustive, "information" must mean what it means in the English language.

In this regard, it is appropriate to consider the etymology of the word "information."

Information is a late 14th century word that comes from Old French *informacion*, meaning "advice, instruction"⁷. It is derived from the Latin word *informatio*, which means "outline, concept, idea"⁸. The verb *inform* means "to train or instruct in some specific subject"⁹. It comes from Old French *informer*, meaning "instruct, teach"¹⁰. The word is directly from Latin *informare*, which means "to shape, give form to, delineate"¹¹. To shape is easy to understand, so is "give form to" and one of the meanings of "delineate" is "to describe." So this makes obvious, that, only when "facts" are given "shape" or "form" or "described" they become "information". This is exactly why it was said above, that, facts when processed become information. The "etymology" or "the origin of the meaning" of the word "information" shows without doubt, that, facts need to be processed to become information¹².

The quote, "facts are not science as the dictionary is not literature", [*which was said by Martin Henry Fischer, German-born American physician and author*¹³] has a close similarity in analogy to the statement, that, "facts are not information". While "facts" are results of "exploration" the "science" is the exploration of

⁷ <https://www.etymonline.com/word/information>

⁸ <https://www.etymonline.com/word/information>

⁹ <https://www.etymonline.com/word/inform>

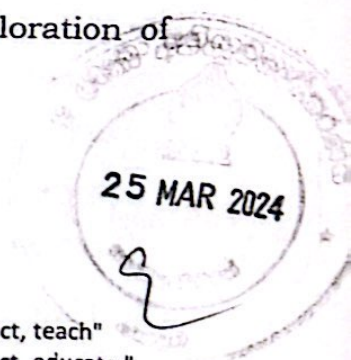
¹⁰ <https://www.etymonline.com/word/inform>

¹¹ <https://www.etymonline.com/word/inform>

¹² *inform* (v.)

early 14c., "to train or instruct in some specific subject," from Old French *informer*, *enformer* "instruct, teach" (13c.) and directly from Latin *informare* "to shape, give form to, delineate," figuratively "train, instruct, educate," from *in-* "into" (from PIE root **en* "in") + *formare* "to form, shape," from *forma* "form" (see *form* (n.)). In early use also *enform* until c. 1600. Sense of "report facts or news, communicate information to" first recorded late 14c. Related: *Informed*; *informing*. also from early 14c. <https://www.etymonline.com/word/inform>

¹³ He was born on November 10, 1879. Fischer is most famous for his teachings on the art and practice of medicine, including the famed quotation often recited on the first day of medical school, "A doctor must work eighteen hours a day and seven days a week". He was also a renowned author and artist.



connections, patterns, and theories, which ultimately is the process of interpretation¹⁴. The “fact finding” report, as its name denotes contains facts. They must be processed to become information.

Hence the problem with a fact finding report is that, it includes, (i) facts that has been fully processed and hence information, (ii) facts that has been partly processed and hence not yet bear the fully fledged characteristic of information and (iii) facts that has not been processed and hence that has not become information.

The petitioner on 23.01.2019 revealing certain “excerpts” only, is an implied (*and mostly unintentional*) “understanding” of the reality described in the passages above especially after the two deductions under (i) and (ii) on there being no proper definition of information in the Right to Information Act.

Therefore, the criticism by the Right to Information Commission, as that amounts to two standards taken by the petitioner is unwarranted.

Section 10(1) of the Indian Act of 2005 says,

“Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.”

The Sri Lankan Act in section 06 says,

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“Where a request for information is refused on any of the grounds referred to in section 5, **access shall nevertheless be given to that part of any record or document which contains any information that is not**

¹⁴ Martin H. Fischer: 'Facts are not science - as the dictionary is not literature.' — The Socratic Method (socratic-method.com) It is also said, that, “Science requires interpretation, exploration, and the constant pursuit of deeper understanding”.

exempted from being disclosed under that section, and which can reasonably be severed from any part that contains information exempted from being disclosed”.

Section 06 deals with severance of “information”. What is in a fact finding report, cannot be severed. Hence section 06 will not apply. What the petitioner said, in its written submissions at paragraph 10, that,

“...the Board of the Petitioner in a bona fide spirit and with a view of upholding transparency and accountability in a manner that balances Competing interests of privacy and disclosure without prejudice....”

does not give a right to the applicant for the information since it was done as a matter of grace.

So, the information requested for by the applicant, the facts contained in the fact finding report of His Lordship Justice Sunil Rajapakse becomes information only when it is processed used and analysed in context. Therefore the facts in the fact finding report are not information.

Hence, the applicant fails.

The appeal of the petitioner is allowed.


Judge of the Court of Appeal.



I do hereby certify that the foregoing is a true copy of the Court of Appeal *Judgment*..... dated *21/01/2024*.. filed of record in
...*P.T.I. C.S./2022*.....

Prepared by:- ; *[Signature]*
Compared with :- *25/03/2024*

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[Signature]
For Registrar Court of Appeal.
Sectional Registrar
Court of Appeal,
Colombo 12.

