

The Right to Information Commission

P. Nirosk Kumar,
Tamil Mirror Newspaper,
08 Hunupitiya Cross Road,
Colombo-02

-Appellant-

RTIC App/No: 1111/2022

Vs.

Sri Lanka Army,
Army Headquarters,
Sri Jayawardanapura,
Colombo

-Public Authority-

Before : 1. Justice Upaly Abeyrathne (Rtd) - Chairman
2. Justice Rohini Walgama (Rtd.) - Commissioner
3. Ms. Kishali Pinto-Jayawardena (Attorney-at-Law)- Commissioner
4. Mr. Jagath Liyana Arachchi (Attorney-at-Law) – Commissioner
5. Mr. A. M. Nahiya - Commissioner

Appearances : **For the Appellant** - Mr. K.S Rathnavel, Attorney-at-Law, Ms. Swasthika Arulingam, Attorney-at-Law, Mr. Pasan Jayasinghe, Attorney-at-Law, G.L Ranitha, Attorney-at-Law and Mr. Tharindu Jayawardana, Journalist

For the Public Authority - Brigadier N.K.N.K Nagahawatta, Designated Officer, Brigadier R.D.O Pathiranage, Judge Advocate General, President's Counsel/Designated Officer, Lieutenant Commander -01, and D.C.K.W Ranasinghe, Attorney-at-Law and Major B.D.S Jayaweera, Attorney-at-Law

Written Submissions : Appellant : 01.12.2022, 23.01.2023 & 25.04.2023
Public Authority: 16.01.2023 & 19.05.2023

Date of Hearing : 03.11.2022, 04.01.2023, 25.01.2023, 28.03.2023

Decided on : **08. 11. 2023**

Decision:

Factual Background:

The Appellant by request dated 04.04.2019, requested the following information;

“Information regarding members of the Liberation Tigers of Tamil Eelam who surrendered to the Sri Lankan Army during the final war period.

1. *How many members of the above organization surrendered to the Army? (How many Male, Female, Children)*
2. *The places where the members of the above organization surrendered to the Army? Information related to this should be provided.*
3. *Details of the higher military officers, Army Regiments who took charge of surrendered members of the above organization, should be given.*
4. *What was the action taken against the above members who surrendered? If cases have been filed against them, the relevant information should be provided.*
5. *How many Generals (leaders) or high-ranking people from the above organization surrendered to the army during the final war? The information of Army Commanders and the Army unit to whom and to which they surrendered should be provided.*
6. *What was the action taken against the main members of the above said organization who surrendered? If cases have been filed against the surrenders or if they are being imprisoned, that information should be given.”*

The receipt of the information was acknowledged by Colonel Legal (on behalf of the Information Officer) by the letter dated 18.04.2019, and another letter dated 06.05.2019, by the same Officer, was sent to the Appellant stating that the request had been directed to the Department of Official Language for a Sinhala translation and that future processes would occur after the translation copy is received.

Thereafter, the Information Officer (IO) responded via letter dated 25.06.2019 stating as follows;

“The members of LTTE have not surrendered to the Army during the final stages of the war, but to the Sri Lanka Government. The Bureau of the Commissioner General of Rehabilitation is the authorized institution to act with regard to the surrendered LTTE members. The expected information can be obtained from the said institution. Address of the institution is mentioned below;

288/12L, Royal Gardens, Sri Jayawardanapura Mawatha, Rajagiriya.”

Dissatisfied with the response of the IO, the Appellant lodged an Appeal with the Designated Officer (DO) dated 08.07.2019 **(NB; the Information request to the IO and the Appeal to the DO has the name of the Appellant in typed form but the signature is not affixed thereby as evidenced by documents on record).**

The DO responded via letter dated 17.07.2019 and informed the Appellant to obtain the said information from the Bureau of the Commissioner General of Rehabilitation, as mentioned in the letter dated 25.06.2019.

Dissatisfied with the response of the DO, the Appellant preferred an Appeal to the Commission which was received on 03.10.2019. However, the listing of the appeal for hearing thereto was delayed due to multiple factors including the prevalence of the covid-19 pandemic during 2020 and 2021 which had resulted in several island-wide lockdowns, the closure of the Commission office for extended periods of time and the departure of staff officers from the Commission office.

The Appellant followed the said appeals up by electronic email reminders two years later, (ie; on 21st and 22nd October 2021) querying as to the status of the hearing. By that time, the term of three Commissioners of the RTI Commission in its 1st term had lapsed (ie; by 1st October 2021) and the remaining two Commissioners had resigned with the result that the appeal, along with many others were left in limbo. With the reconstitution of the Commission in its 2nd term in December 2021, the appeal along with a considerable number of other pending appeals at that time were listed for hearing.

Accordingly, the appeal was first heard before the Commission on 03.11.2022 on which date, the Public Authority was directed to substantially respond to the Appellant’s written submissions (by 17.11.2022) in regard to the matters detailed in his information request. The Appellant’s submissions were directed to be filed by 17. 11. 2022 and in counter, the Public Authority’s submissions were fixed for 08.12. 2022. However, following a request by the Appellant for further time to prepare his papers which was granted, the Appellant filed his written submissions received by the Commission on 01.12.2022 (dated 30.10 2022).

In summary, the Appellant’s position was as follows;

- Under Section 25(1) of the Right to Information Act, an IO must communicate the decision to provide information within 14 working days and provide it within further 14 working days. The period for providing access to information may only be extended for the two reasons stipulated under the Section 25(5). Such extension must be

communicated to the requester. The Act does not provide a Public Authority with the ability to extend the decision to provide access to information for a reason as obtaining translation assistance. Accordingly, the IO had not properly carried out the constitutional duty conferred on him to discharge the right to information.

- After a long period, exceeding 14 days, the IO has responded stating that during the last stages of the war, LTTE members did not surrender to the Sri Lanka Army but instead to the Sri Lanka government, and has further stated that the information should be obtained from Bureau of the Commissioner General of Rehabilitation as it is the authority empowered to deal with LTTE.
- As per Regulation 4, Clause 6 of the RTI Regulations (Gazette No. 2004/66 dated 03.02.2017), the IO has not correspondingly transferred the RTI request and notified him.
- The DO has upheld the decision of the IO.
- When the Appellant submitted an identical information request to the Bureau of the Commissioner General of Rehabilitation, the response was that 10,790 LTTE members had surrendered to the Sri Lanka Army.
- Number of statements have been made by official representatives of the Sri Lanka Army in media, a report published in *The Indian Express*, statement made by the then Sri Lanka Army Spokesperson Brigadier Udaya Nanayakkara, articles published in the *BBC*, *Sunday Times*, and *Sri Lankan Mirror* to the effect that LTTE members surrendered to it during the last stage of the war, and these surrenders were recorded, further proving that information on surrenders is in the possession, custody or control of the Sri Lanka Army.
- According to the answers given by Dinesh Gunawardana for the Parliamentary Question numbered 3401/13, the Army had indeed assembled the displaced persons and informed those who had links with the LTTE to identify themselves, such LTTE members were directed to rehabilitation camps managed by the Bureau of the Commissioner General of Rehabilitation and that the names of those who had surrendered cannot be revealed in order to protect their identities. This means that there indeed exists a register of LTTE members who had surrendered to the Sri Lanka Army.
- At a press conference in October 2019, the Secretary to the Ministry of Defence at the time of the last stages of the war and then Presidential candidate stated that 13,784 people had surrendered to the Sri Lanka Army when the war ended. This is an acknowledgement from the highest levels of government command over the Sri Lanka Army that LTTE members had surrendered to the Sri Lanka Army, and the specific number of surrendeers cited also indicates that the surrenders were recorded by the Army.
- Furthermore, according to the Lessons Learnt and Reconciliation Commission (LLRC) Report, paragraph 4.217, p.103 it is stated that then Major General Shavendra Silva at his representation to the LLRC has stated “Whoever surrendered, surrendered to the Military” and “no sooner a combatant surrendered... he or she was sent as quickly as possible to the rear areas where competent people from the other sections within the Army handled them.”

It is clear that Sri Lanka Army had clearly taken into its custody LTTE members who had surrendered to it; that it had registered their details; and that it had maintained a database with these details.

Due to the delay in filing written submissions, the hearing of the appeal earlier fixed for 04.01.2023 could not be taken up on that date at which the Public Authority also requested for further time due to the need to gather various facts and figures from the relevant institutions. Further time was accordingly granted. By way of submissions dated 16.01. 2023, the Public Authority submitted as follows (in summary);

- For the purpose of providing necessary information to requested item No. 1, the Sri Lanka Army requested the information and assistance from the Bureau of the Commissioner General of Rehabilitation by letter dated 09.12.2022 (a copy of the letter is attached as 'X₁₄'), the response and the information provided by the Bureau are annexed as 'X₁₅' & 'X₁₆' respectively including statistics on the list of rehabilitated ex-LTTE combatants.
- During the final stages of the war which was crucial and sensitive, thousands of people who were internally displaced, came forward and sought the assistance of Sri Lanka Army for their survival. The Army helped internally displaced people (IDPs) by providing them food and shelter during which process, several IDPs volunteered and informed that there are members of the LTTE amongst them. The Public Authority handed over all self-identified LTTE members who came forward voluntarily to the Bureau for the purpose of rehabilitating them.
- Regarding item no 02: Since the humanitarian operation was not limited to a designated or identified area. The Public Authority is not in a position to give details about exact locations from where these IDPs were received.
- Regarding item no 03: Since all officers had to act according to the ground situation and as the Army was mainly focusing on the wellbeing of the IDPs, the urgent requirement was not to compile data and statistics but to provide food, shelter and security. Therefore, the Public Authority does not have any statistical information in this regard.
- Regarding item no 04:
 - i) The task of rehabilitating ex-combatants was assigned to the Bureau of the Commissioner General of Rehabilitation in terms of Gazette No.1979/05 dated 29.08.2011. 24 secure homes and rehabilitation centers were established in the North and East
 - ii) 1598 surrenders were rehabilitated upon court orders.
 - iii) Filing of cases is not under the purview of the Public Authority and the Appellant may get that information from the relevant Authorities.
- Regarding information requests item no 5 & 6:
 - ✓ Filing of cases is not under the purview of the Public Authority and the Appellant may get that information from the relevant Authorities.

- ✓ All LTTE terrorist militants are called as LTTE cadres/combatants. Furthermore, the Public Authority does not recognize the members of the organization as officers and based on that position, the answers given from question no. 1 to 4 are reiterated.

In response to the counter submission filed by the Public Authority, the Appellant filed further submissions dated 23.01.2023, stating that;

- The Appellant's primary contention is that the Public Authority has not responded to any of his information requests but has only provided incidental information which does not satisfactorily answer the same.

Item 1

- In regard to item no. 01: this information must be in the possession, custody or control of the Public Authority since the statements by the Sri Lanka Army and government officials acknowledging surrenders of LTTE members to Sri Lanka Army, and LTTE surrenders to Sri Lanka Army detailed by the Lessons Learnt and Reconciliation Commission.
- The Public Authority's initial position to the RTI request was that during the last stages of the war, LTTE members did not surrender to the Sri Lanka Army, but instead to the Sri Lankan government, and therefore the information should be sought from the Bureau of the Commissioner General of Rehabilitation. Then the Public Authority changed its position, at the hearing before the Commission and on Counter Submissions filed on 16.01.2023, stating that the Sri Lanka Army accepted all self-identified LTTE members who came forward voluntarily and then handed them over to the Bureau of the Commissioner General of Rehabilitation.
- There is an acknowledgement by the Public Authority that LTTE members had surrendered to the Sri Lanka Army first, before being handed over to the Bureau of the Commissioner General of Rehabilitation, and it is the information sought by the Appellant in his initial information request which has not been provided yet.
- Further the information provided by the Bureau of the Commissioner General of Rehabilitation states that 10,790 persons surrendered to the Sri Lanka Army which statement contradicts the Public Authority's position that no LTTE members surrendered to it and that it does not have the information in its possession, custody or control. Further the contention that basic information concerning the actions of Public Authority (accepting LTTE members who had surrendered) being held by another Authority is implausible.
- While in this response the Bureau has stated that 10,790 persons surrendered to the Army during the last stage of the war. However, the earlier response of the Bureau was that 10,790 persons handed themselves over to the Sri Lanka Army at once on May 19, 2009. This reveals two contradictory interpretations taken by the Bureau as to the meaning of "the last stage of war" either to mean a single day or a longer period and therefore the figure is problematic.

Item 2

- The response provided by the Public Authority is irrelevant as the actual information request does not concern details of ‘humanitarian operation’ or the areas affected by LTTE activities.
- The information request relates to LTTE members surrendered during the last stage of the war and not the war’s entirety and therefore does not cover “almost entire Northern and Eastern provinces affected by LTTE activities”.
- The sequence of information in Parliamentary Question 3401/’13 relates to the Sri Lanka Army assembling displaced persons at Vattuvalai and informing those who had links with LTTE to surrender. Further, the Lessons Learnt and Reconciliation Commission Report reveals that the Army field Headquarters in the frontline has maintained detailed registers of both LTTE surrendeers and IDPs up to about January 19, 2009 and transported them to Omanthai where proper registration was done.
- The Public Authority has interpreted the request to mean that since an exhaustive list of all places LTTE members surrendered to the Army has not been kept, no information of any place can be provided whereas the request at the very least should be interpreted as placing a duty on the public authority to provide some or most places LTTE members surrendered during the last stages of war.
- The Public Authority’s response that it was not in a position to provide the information, which is not the same as stating that it does not have the information in its possession, custody or control. It is clear that the Public Authority does in fact have the information requested in its possession, custody or control, and as such it is under a duty to provide the same.

Item 3

- The information request was not in relation to the compilation of statistical data by the Public Authority but instead about the basic administration details inclusive of the deployment of senior officials at any point in time by geographical location and it is difficult to believe that the Public Authority is not in the possession, custody or control of such deployments when they regularly publish the presence and efforts of its battalions, units and troops on various media including its own website. Further a commitment to the wellbeing of the IDPs would mean that the Public Authority should have a record of senior officers deployed to provide food, shelter and security to IDPs.
- The Public Authority has not responded directly to the counter submissions made by the Appellant showcasing that Senior Army Officers by their own admission received surrendering LTTE members as mentioned in the Report of the Lessons Learnt and Reconciliation Commission. Therefore, it is difficult to believe that the Army does not have any records of such officers.

Item 4

- The response of the Public Authority “1598 surrenders have been rehabilitated and socialized upon court orders” only relates to a specific subset of the surrendered

personnel and does not make it clear what actions were taken against the remaining surrendered personnel who were not rehabilitated and socialized upon court orders.

- Further according to the figure given by the Bureau of the Commissioner General of Rehabilitation, which is 10,790, this leaves a shortfall of 9,192 persons who are unaccounted for in terms of what actions were taken against them and whether court cases were filed against them.
- As per the Counter Submissions filed by the Appellant, again the Appellant states that this is information that the Public Authority should have in its possession, custody or control.

Meanwhile, the Attorney at Law for the Appellant submitted three copies of Orders made by the High Court of Vavuniya in Habeas Corpus applications No. HCV/Writ/507/2013, 508/2013, 509/2013, 510/2013 and 511/2013 with covering letter dated 21.03.2023.

Further oral hearings in this appeal took place before the Commission on 25.01.2023 and on 28.03.2023 following which, the matter was reserved for delivery of the decision of the Commission. We also record the receipt of further submissions by the Appellant and the Public Authority respectively dated 25.04.2023 and 19.05.2023.

Consideration:

The legal question before this Commission for determination in this appeal is the factual existence of categorised data in the ‘possession, custody or control’ (vide Section 3(1) of the RTI Act) of the Public Authority in respect of each of the 10 items of information requested by the Appellant in information request dated 04.04. 2019, specifically in relation to combatants of the Liberation Tigers of Tamil Eelam (LTTE) who surrendered to the Sri Lanka Army ‘during the final war period.’

This question must be differentiated from the fact of surrender of LTTE combatants to the Public Authority regarding which there is no doubt, as would be discussed later in this decision.

In other words the matter to be decided is whether the Public Authority not only compiled in detailed records/lists/database etc of categorised information separately pertaining to LTTE combatants who had surrendered (or ‘self- surrendered’ as the case may be) at the time of surrender (ie’ final stages of the war) but also maintained that documentation in its ‘possession, custody or control’ (Section 3 (1), from which the abovesaid information could now be directed by this Commission to be extracted.

That again must be differentiated from general information taken down in regard to surrendeers during the period (including civilians, IDPs, LTTE cadre) as reflected in evidence given to the Lessons Learnt and Reconciliation Commission (LLRC, 2011) by senior officers of the Public Authority.

The Appellant concedes this point and strenuously argues that such ‘registers,’ as separately categorised, of LTTE combatants do exist in the ‘possession, custody and control’ of the Public Authority which the Public Authority, as strenuously, denies.

We also emphasize at the outset that the Right to Information Act (‘the RTI Act’ or ‘the Act’) read with the Right to Information Regulations and the Rules of the Commission on Fees and Appeals (Gazette 2004/66, 03.02.2017) do not require a Public Authority to freshly compile information in answer to a request, which is different to a ‘reasonable effort’ that may be required in relevant instances to put the information together (Vide Regulation No 4 (7) of the RTI Regulations).

In preliminary consideration of this appeal, it must be noted that the procedure and processes relating to the filing of information requests to the IO of a Public Authority and appeals thereto made to the DO in that same Public Authority are set out in full detail in the RTI Act, the RTI Regulations and the Commission’s Rules as aforesaid.

We are constrained to remind both parties of the above due to irregularities that have occurred in the appeal process which is adverted to below despite the Commission deciding to hear and determine this appeal notwithstanding those irregularities.

On 03.11.2022, the Commission declined to accept the stance of the Public Authority that, *per se*, the relevant information lies with another Public Authority (ie; the Bureau of the Commissioner General of Rehabilitation) and that the Appellant should obtain the information from there. The Public Authority was directed to respond in detail to the information request, item by item. This was to satisfy the standards imposed by the RTI Act which requires this Commission to fully apprise itself of the circumstances in which a Public Authority declines to provide information.

Accordingly, the Public Authority was called upon to substantiate the grounds on which it refuted the Appellant’s position and claimed that it did not have the information in issue in its ‘possession, custody or control’ as envisaged by Section 3 (1). That directive was made in pursuance of observing established natural justice standards of *audi alteram partem* and the principle of equity to both parties.

This was also in view of our observation that the IO’s response to the Appellant’s information request on 25.06. 2019 directing the Appellant to obtain the requested information from the Bureau as the ‘authorized institution’ thereof is flawed in law as it does not conform to Regulation 04/ sub-section 06 of the RTI Regulations (Gazette 2004/66, 03.02. 2017). This requires a Public Authority to take the responsibility to forward an information request to the relevant Public Authority if it is aware that the information is being held in that Public Authority, not to direct the information requestor to do so. The decision of the DO affirming the response of the IO on 17.07. 2019, is visited by that same flaw.

Consequent to that direction, the Public Authority provided information obtained from the Bureau, including information on LTTE surrendees, and presented the same to the Commission, with copies to the Appellant, by way of written submission dated 16.01.2023.

Where the Appellant is concerned, we observe that, the information request filed to the IO in terms of Section 24 and the appeal lodged to the DO in terms of Section 31 of the RTI Act are absent an affixed signature, therefore not constituting a proper request or an appeal in law from which an appeal lies to this Commission. However, given the considerable delay that had occurred in the hearing of the appeal due to circumstances beyond our control as aforesaid, the Commission determined to proceed with the hearing of the appeal filed to us under Section 32, notwithstanding the same.

Further, efforts were made by attorneys-at-law appearing for the Appellant at the last hearing of this appeal (namely 28.03. 2023) to expand the period of the information asked for, (from 'during the final war period') to earlier months of the conflict. This request was not acceded to. As observed in several other previous decisions, the Commission is strictly circumscribed in law when deciding an appeal submitted under Section 32 (1) of the RTI Act.

Following an information request to the IO under Section 24 and upon a decision/non-decision of the IO, an appeal in terms of Section 31 of the RTI Act may be filed by the information requestor to the DO from which decision/non-decision, an appeal lies to the Commission under Section 32 (1). It is not open to a requestor/appellant to vary the content of the information asked during that process and it is beyond the jurisdictional authority of the Commission to permit such a variation. It is for this reason that the provisions of the Act, the RTI Regulations and the Rules of the Commission must be adhered to, during the information seeking and appeal process.

In regard to the substantive grounds in issue in this appeal, much time has been taken by competing positions adopted by the Public Authority and the Appellant regarding the surrender of LTTE members. This is due to the IO initially asserting that the surrender was to the 'Sri Lanka Government' not to the Public Authority. However, and indisputably so, there is no 'Public Authority' in terms of Section 43 of the Act defined as 'the Sri Lanka Government'; therefore, this dispute is largely irrelevant to the matter before us.

On the substantive matters in dispute before us, the Appellant's written submissions contain several statements/pronouncements/claims by spokespersons/government officials/politicians as well as excerpts from the LLRC Report establishing that LTTE combatants surrendered to the Public Authority. Particularly, paragraphs 4 to 8 of the Appellant's written submissions dated 23.01.2023 detail contradictions in the stance taken by the Public Authority, namely that it first stated that, 'surrenders were not to the Public Authority but to the Government' then changed later in its written submissions to the Commission dated 16.01. 2023, stating that the Public Authority had accepted 'voluntary surrenders' of self-identified LTTE cadre.

It is important to emphasize that, the ‘surrender’ or the ‘accepting of those who voluntarily surrendered’ by the Public Authority in the circumstances of this case will not suffice for Section 3(1) to be satisfied on the Appellant’s case. A further step is required which is core to this information request and appeal arising thereto. As aforesaid, it must be established, as a matter of fact, that detailed records/lists/database etc of categorised information separately pertaining to LTTE members who had surrendered (or voluntarily surrendered as the case may be) were not only compiled by the Public Authority at the time (ie’ final stages of the war) but also maintained in its ‘possession, custody or control’ (Section 3 (1)).

The Appellant strongly contends that ‘detailed registers’ of surrendees and ‘detailed records’ were compiled by the Public Authority at the time. However, that ‘fact’ must be ascertained by this Commission on the documentation placed before us. The Appellant has pleaded that a burden does not lie upon him to prove the same (vide, paragraph 23 of his final submissions of 25.04.2023) and pleaded Sections 24 (5)(d) and 31 (4) of the RTI Act in support.

Section 24 (5)(d) states that information requestors do not have to give reasons for asking information. Section 32 (4) is confined to imposing a burden on a Public Authority to show that it acted in compliance with the Act in processing a request (emphasis ours). Both these Sections are not pertinent to the dispute before us which is a substantive question as to whether the information that the Appellant contends that the Public Authority ‘must have,’ does indeed exist.

Where information requests are concerned, Section 3 (1) of the Act which gives the right to citizens to access information in the ‘possession, custody and control’ of a Public Authority, comes into operation in multiple ways. Public Authorities are legally and institutionally obliged to collect/retain information in several factual contexts. A simple denial of ‘no information’ or that ‘information is in another branch of the Public Authority’ does not suffice in those circumstances.

This has been emphasized by us in several previous decisions (vide *Chamara Sampath v Parliament of Sri Lanka*, RTIC Appeal 719/2018, decision of 02.02.2021 directing the release of information concerning the list of members of parliament who have submitted their declarations of assets and liabilities to the Speaker in 2018/2010-2018, as affirmed by the Court of Appeal in CA,/RTI/Writ 004/2021, judgment dated 28.02.2023).

Neither does it suffice to say that the information in issue has been destroyed, in which case, Public Authorities have been directed to strictly prove if the same has been done according to law.

Conversely however, if a Public Authority is not under a legal duty to collect that information or factually does not, indeed, collect that information, this Commission has taken the view that Section 3(1) does not come into operation (Vide *Rubatheesan v Parliament of Sri Lanka*, RTIC Appeal 369/2021, decision of 20.07.2021, concerning an information request, to Parliament to *inter alia* disclose the names of the members of parliament who have criminal charges against them to which, the response of the Public Authority that the law does not enforce a

legal duty on Parliament to collect that information. That position was accepted by this Commission).

In this regard, we also note that Section 3(1) does not confine itself to information originating from the Public Authority to which a request is made. The threshold test – and the legislative intention as set out in the plain meaning of Section 3(1) - is only to satisfy the question whether the information requested is within its ‘possession, custody or control.’

In other words, the question is simply as we must reiterate, if the Public Authority maintained detailed records/lists/database of LTTE surrendees (as differentiated from general information of all surrendees) at the final stages of the war. This is what amounts to information on the facts of this appeal in terms of Section 3(1) of the Act (‘possession, custody or control’) from which, answers to the 10 items of information asked by the Appellant may be extracted.

If so established, this gives the Appellant the right to access that information subject to the defined and limited exceptions detailed in Section 5 (1). If that fact is not established within the four corners of the Act, Section 3(1) cannot be held as coming into operation in the first instance and this appeal fails on that ground. This distinction is important and cannot be over-emphasized for it goes to the root of the Appellant’s case. It must also be emphasized that the information request relates to registers purported to exist at the ‘final stages of the war.’ As such, these must be distinguished from records or details obtained during the post-war process of interrogation, identification and detention of LTTE members. As aforesaid, we are strictly restricted to the ambit of the information request as filed on 04.04.2019.

In oral hearings before us and in response to a specific question to that effect posed by the Commission, the Public Authority refuted the claim that it had such information in its ‘possession, custody or control’ under Section 3 (1) on the basis that, thousands of persons in the conflict affected areas had surrendered during the last stages of the war and that it was not possible to distinguish as to who was LTTE and who were civilians; thus, no ‘registers’ were maintained in that respect. It was affirmed that persons voluntarily identifying themselves as LTTE were handed over to the Bureau of the Commissioner General of Rehabilitation (vide paragraph 01 of the counter submissions of the Public Authority dated 16.01.2023) which then embarked on the process of identifying and listing the LTTE members who surrendered.

In his submission of 23.01.2023, referencing also the submission of 01. 12. 2022, the Appellant states that, ‘this information must be in the possession, custody or control of the Public Authority... there are extensive amount of public evidence that the Public Authority accepted surrendering LTTE members and maintained detailed registers of surrenders’ (vide paragraph 4).

The Appellant’s claim that this information ‘must be’ in the possession, custody or control of the Public Authority cannot rest on its own; it must be buttressed by solid evidence to that effect. Accordingly, we are duty bound to examine the veracity of this claim regarding the existence of ‘detailed registers of surrenders’ of LTTE members as against the documentation

presented to us. This Commission cannot be urged to ‘guess’ the existence of such registers being maintained by the Public Authority based on inferential reasoning. That would be highly inappropriate if not improper and beyond the legal mandate of the Commission in deliberating appeals filed to us under Section 32 of the RTI Act.

The Appellant’s claim regarding the ‘detailed registers’ of surrenders of LTTE combatants rest on documentation which emanates from three primary sources;

- i) Evidence given before the Lessons Learnt and Reconciliation Commission (LLRC)
- ii) Statements made by government politicians, officers of the Public Authority, state officials
- iii) Case records in habeas corpus inquiries

These extracts will be separately considered hereinafter for better elucidation of the facts in issue.

Evidence given before the Lessons Learnt and Reconciliation Commission (LLRC)

The Appellant has relied on paragraphs 4. 215 to 4.227 of the LLRC Report (2011) to support his position. Perusal of these paragraphs reveal testimony given by senior defence officials to the Commission regarding the ‘method in which the security forces facilitated the surrender.’ Paragraph 4.218 reads as follows;

‘It was stated that in the initial stages, field headquarters in the frontline had maintained detailed registers (referencing footnote 273) but in the final stages, as there was a massive inflow of IDPs and surrendeers from the NFZ into the Government held areas and for security reasons, they were only received by the forward troops and were treated for medical needs and given food and other immediate needs and without much delay were transported to Omanthai where proper registration was done...’

The relevant footnote 273 reads as ‘according to the Army, detailed registers were maintained at field headquarters in the frontline up to about 19 January 2009 – source, Ministry of Defence.’ This speaks to the fact that, after January 19 2009, such ‘detailed registers’ were not maintained at field headquarters due to the intensity of the conflict and the ‘massive inflow of IDPs and surrendeers’ but at Omanthai.

Paragraph 4. 222 states that, at Omanthai, announcements had been made requesting those who were involved with the LTTE to declare themselves, they had been sent to detention centres while IDPs had been sent to camps. That paragraph also goes on to state that, ‘due to the large numbers of civilians that had crossed over on 17th and 18th of May 2009, everyone had been sent to IDP camps at Vavuniya and registration had been done at this point.’

This testimony reflects the fact that during this period, civilians as well as LTTE members had surrendered, details had been taken at certain check points or receiving points including head counts, separation of females and males, identity and other personal information, including taking photographs of IDPs and surrendeers which were put into a 'data base (at paragraph 4.224). The Appellant has argued (vide paragraphs 9 to 13 of his written submissions dated 25.04. 2023), that, the registrations of all persons surrendering, as referred to in the LLRC Report, carried out at Omanthai and at Vavuniya, speaks to the fact of the Public Authority maintaining separate records/registers of surrendering LTTE members.

These references however seem to indicate a process of collective or general collection of information as such. If the 'data base' this referred to, had been stated in that testimony to be a 'data base of identified LTTE members', it would have gone a long way towards establishing the Appellant's case, but this is not so. He has also contended that, all persons who surrendered during the last stages of the war were sent either to IDP camps or to detention centres and that therefore, it would have 'ascertained' as to which was which, prior to sending them as aforesaid. However, that by itself, is, by no means, conclusive of the fact of documentation being compiled or maintained as required by Section 3(1).

That 'ascertainment'(even if done in the heat of the conflict) is distinct from establishing that the Public Authority had maintained/compiled a separate register of surrendered LTTE members at the immediate point of surrender. This is particularly so given the fact that, though the aforesaid paragraphs of the LLRC Report unequivocally establishes the fact of surrender of IDPs and LTTE members to the military, they speak as unequivocally to the 'difficulties experienced due to the mingling of the LTTE with the civilians' (vide at paragraph 4..225) with LTTE members disguising themselves in civil dress as well as Tamil civilians being forcibly conscripted by the LTTE to fight, as detailed in testimony elsewhere in the LLRC Report. We note further that the terms 'surrendeers' and 'detainees are used in various contexts without much clarity regarding the same.

As the LLRC Report details, the confusion at that point had been so great that some LTTE members had been sent to welfare camps even after intimation of their involvement with the LTTE and only thereafter, been extracted to be sent to detention centres (Vide paragraph 4.223, at sub section iii). The Report reflects the fact that LTTE members were sent to detention centres for proper identification, profiling and separation of 'hardcore' and 'softcore' members. This speaks to such 'records' coming into existence at a much later time than what is contended by the Appellant, effectively at a time when the Bureau of the Commissioner-General of Rehabilitation was in charge.

In its final submissions of 19.05.2023, the Public Authority has also relied on specific paragraphs of the LLRC Report to prove its own point (vide paragraphs 4.94-103, 5.45 – 5.49, 4.49-4.53, 4.89-4.90, 4.64-4.66, 4.71-4.74, 4.114-4.117, 4.354-4.358 of the Report).

Examining both submissions carefully, it is our considered view that the extracts of the LLRC Report relied upon by the Appellant do not establish that the Public Authority maintained 'detailed registers' of LTTE members surrendering to the Public Authority at the last stages of the war.

Statements made by government politicians, officers of the Public Authority, state officials.

The Appellant has stated that the abovesaid statement etc go to establish that the Public Authority maintained 'records' of the surrendeers. We have perused the same which are listed as follows;

- a) Statement made by Leader of the House Dinesh Gunewardene in Parliament in response to Parliamentary Question No 3401/13.

The said statement affirms that the names of three individuals were not among those who had surrendered to the Public Authority during the final stages of the war. This has been inferred by the Appellant to conclude that the said affirmation had been extracted from a list or records maintained by the Public Authority. However, this is equivocal as that response could well have been taken from the records maintained by the Bureau of the Commissioner General of Rehabilitation, particularly given the date on which the said response has been given and also, that the said statement itself refers to the fact that, the response by the Leader of the House thereto refers to all surrendeers being directed to the Bureau for rehabilitation;

- b) Media statements made by the then Secretary to the Ministry of Defence/officials/spokespersons of the Public Authority

These go to establish the fact of surrender to the Public Authority, which fact is undisputed as affirmed previously. Even so, this is a different question altogether from the fact as to whether 'detailed registers' of such surrendered LTTE members were maintained. Further, we note that these news reports, in fact, indicate that identification of LTTE members were still ongoing in camps housing IDPs which was at a point after the fact of surrender (Vide; 'Top Tiger leaders in security net', Sunday Times, May 31st 2009)

Case records in habeas corpus inquiries

The Order of the High Court in *habeas corpus* petition (Writ/507/2013) contains a reference to a witness (a senior army officer) making a statement during the proceedings to the effect that, records of LTTE members who surrendered to the Army in May 2009 as prepared by officers of the Army, were available at the Division Headquarters; however, the records that were in fact brought to court by this witness were the records prepared by the Commissioner General of Rehabilitation. The Order notes that the witness had stated that the records available at the Division were the Bureau records.

Where the other *habeas corpus* Orders are concerned, in Writ No 509/13, 510/13 and 511/2013, the same witness stated that he had examined the records of the Commissioner General of Rehabilitation and found that the '*corpora*' was not among those who had surrendered to the Army. However, the records had not been marked and produced to the court. Considering the same and taking into account, eyewitness testimony to the effect that the '*corpora*' in each case had been taken into the custody of the Army, writs of *habeas corpus* were issued.

In Writ No 508/2013, the Court had declined to issue writ upon finding that the petitioner had not sufficiently established that the '*corpora*' had surrendered to the Army.

We find that this evidence does not conclusively establish the existence of records of surrendered LTTE members maintained by the Public Authority. In any event, the objective and purpose of *habeas corpus* inquiries (ie; challenging the legality of detention and whether a particular '*corpus*' had surrendered to the custody of the state or not) is a very different legal proceeding to matters that are inquired into under the RTI Act in respect of securing the right to access to information to citizens.

In sum, having carefully considered the collectivity of the submissions before us, it is difficult for this Commission to conclude that the imperative requirements of Section 3(1) have been met in the circumstances of this appeal in respect of item 1. Where the Public Authority's responses to items 2, 3 and 5 are concerned, the Appellant has taken issue with the non-provision of all the places where surrendeers were received by the Public Authority and the names and details of senior officers who so received them.

The Public Authority's response has been that the operations covered the entirety of the North and East and given the chaos/confusion that prevailed at the time, details about the 'exact locations' of the surrendeers and the military officers who took them into custody, are not available.

We have given our anxious consideration to this matter. The LLRC Report, which has been cited by both the Appellant and the Public Authority in support of their competing positions, records the testimony of former LTTE cadre that they had 'crossed over' to the Government held areas with civilians and as 'civilians' (vide paragraph 4.223 of the LLRC Report), mainly from Puthumatthalan, Mullaivaikkal and Wattuwal (vide also paragraphs 4.232 - 4.259 of the LLRC Report). This testimony which is of public record reflects the confusion prevalent at the time. Some had been taken thereafter to IDP camps/welfare camps where interrogations of those declaring themselves to be LTTE had taken place with transferral to detention centres later, others had been taken directly to detention centres.

That is made very clear at paragraph 4.315 of the LLRC Report;

'4.315; In the final few days in May 2009, with the huge influx, a situation had arisen where it had been virtually impossible to carry out registrations in situ at the point of cross over and

civilians and combatants had been sent to IDP centres at Vavuniya. Announcements had been made at these Centres requesting any person who had even had one day's association with the LTTE to declare themselves. According to several detainees conditions had not been conducive to making a detailed statement at the time of surrender regarding the nature and extent of their involvement with the LTTE, whether they were conscripts or those who had joined voluntarily.'

These conclusions by the LLRC speaks to the formal registrations of surrendees as LTTE cadre at a much later point than at the numerous places of 'cross over' as referred to, namely at the camps run by the Commissioner General of Rehabilitation.

In the circumstances of this appeal and in the absence of sufficiently establishing the existence of compiled information in regard to the same (ie; places where surrendees were received and officers receiving the same) in the hands of the Public Authority, the Commission is left with no option but to conclude the absence of documentation in this regard.

It must be pointed out that, as aforesaid, the right of access that the Appellant has, under Section 3(1) of the RTI Act, is to information in existence; that Section does not impose a duty on a Public Authority to freshly compile information or records in that regard.

In regard to items 4 and 6 thereto relating to cases filed against surrendees, we are cognizant of the fact that it is not within the legal purview of the Public Authority to be filing cases and as such, we rule that information in regard to these two items are not within the 'possession, custody or control' of the Public Authority. The Appellant has contended in his written submissions dated 25.04.2023 that, information provided by the Bureau of the Commissioner General of Rehabilitation is inaccurate/contradictory.

If so, the Appellant must appeal in regard to the same to this Commission under and in terms of the RTI Act *vis a vis* that request to IO/appeal to DO from that Public Authority which would then be considered and decided at that point. We do not have this request before us nor an appeal listed for determination; as such, the Commission cannot examine the same in the exercise of our appeal powers under Section 32 (1).

In final written submissions dated 25.04. 2023, the Appellant has urged the Commission to exercise its 'inspection powers' under Section 15(c) of the RTI Act read with the Commission's Rules to 'inspect the registers of surrendees at the last stages of the war held by the PA.' The authority to inspect documents and records of a Public Authority is an important part of the Commission's powers, which authority has, in fact, been exercised by us in several instances when pertinent to a relevant appeal. However, what is being urged here is a different and disingenuous exercise, amounting in all respects to the Commission being asked to examine purported information of quite a different nature. This will require us to embark on a 'voyage of discovery,' which request cannot be responded to, particularly in view of the findings in this decision. To do so would be to exceed the legal authority conferred upon this Commission under Section 32 (1) of the RTI Act.

In the foregoing and after carefully perusing the several Written Submissions and taking into account, the submissions made by both parties at oral hearings of this appeal, we determine that the existence of categorised data in respect of the 10 items of information requested by the Appellant in his information request dated 4.4.2019 in the form, as he has later phrased, of 'detailed registers' of LTTE members who surrendered to the Public Authority compiled during 'the final war period' and maintained thereafter, has not been established in fact or in law to be in the 'possession, custody and control' of the Public Authority in a manner that brings Section 3(1) of the RTI Act into operation.

As aforesaid, the response of the IO in responding to the Appellant's information request on 25.06. 2019 as affirmed by the DO on 17.07. 2019 directing the Appellant to obtain this information from the Bureau of the Commissioner General of Rehabilitation is flawed in law as it does not conform to Regulation 04/ sub-section 06 of the RTI Regulations (Gazette 2004/66, 03.02. 2017). This requires a Public Authority to forward an information request to the relevant Public Authority if it is aware that the information is being held in that Public Authority.

To that extent, the decision of the IO in this appeal is varied in terms of the powers vested with the Commission under Section 32 (1). However, pursuant to the directive of this Commission dated 03.11.2022, as the Public Authority has taken the effort to collect whatever information available and present that to the Appellant (vide the submissions dated 16.01.2023); consequently, we determine that this variation does not require the Public Authority to take any further steps in this regard with the Bureau as aforesaid.

The Appeal is concluded.