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/RTI/REV/08/2022
RTIC Appeal No: 704/2021

1. Litro Gas Lanka Limited,
   No.267, Union Place,
   Colombo 02.

2. Litro Gas Terminal Lanka (Private) Limited,
   No.267, Union Place,
   Colombo 02.

Respondent – Petitioners

-Vs-

1. W.K.S. Karunarathne
   No.153/9, Thilaka Mawatha,
   Thanthirimulla,
   Panadura.

Appellant – Respondent

2. Right to Information Commission
   Room No. 203-204,
   BMICH, Bauddhaloka Mawatha,
   Colombo 07.

3. Justice Upali Abeyratne (Retired)
   Chairman,
   Right to Information Commission

4. Kishali Pinto-Jayawardena
   Commissioner,
   Right to Information Commission

5. Jagath Bandara Liyanaarachchi
   Commissioner,
   Right to Information Commission

   (all of Right to Information Commission, Room No. 203-204, BMICH, Bauddhaloka Mawath, Colombo 07.)

Respondents

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

Counsel: Mr. Ruwantha Cooray instructed by Wijesinghe Associates for the Respondent-Petitioners.
Mr. Sharmal Herath for the Appellant - Respondent.
Ms. Himalee Kularathna for the 2nd to 5th Respondents.

Argued on: 08.01.2024

Written submission tendered on: 31.01.2024 by the Respondent-Petitioners.
23.01.2024 by the Appellant–Respondent.

Decided on: 12.02.2024

(A) Preliminary Matters: The Preamble and the Constitution:

The Preamble to the Right to Information Act No. 16 of 2016 says,

> "AN ACT TO PROVIDE FOR THE RIGHT OF ACCESS TO INFORMATION; TO SPECIFY GROUNDS ON WHICH ACCESS MAY BE DENIED; TO ESTABLISH THE RIGHT TO INFORMATION COMMISSION; TO APPOINT INFORMATION OFFICERS; TO SET OUT THE PROCEDURE AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.
>
> WHEREAS the Constitution guarantees the right of access to information in Article 14A thereof and **there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of access to information and thereby promote a society in which the people of Sri Lanka would be able to more fully participate in public life** through combating corruption and promoting accountability and good governance".

Article 14A of the Constitution says,

> "3
>
> 14A. (1) Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right held by:-
>
> (a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;

(b) any Ministry of a Minister of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;

(c) any local authority; and

(d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a), (b) or (c) of this paragraph.

(2) **No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary.**

(3) In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.

The appellant respondent (the citizen) whose name is **W. K. Sudarshan Karunarathne**, who says, that, he is a Chartered Engineer and who was the Operations Director of **Litro Gas Lanka Ltd.**, sys, that, his services were unfairly terminated and that there is an application in the Labour Tribunal pending.

He requested to know the following information from the Litro Gas under the provisions of the Right to Information Act.

(A) Monthly salary and monthly allowances of top Management including,

(01) Chairman

(02) Managing Director

(03) Finance Director

(04) Sales and Marketing Director

(05) Operations Director – Litro Gas Terminal

(06) Human Resources Director

(07) Procurement Director

(08) Health Safety and Environment Director

(09) Head of Special Projects

(B) Amount of loans to each, amount of loans to be paid back and the interest rate for the amount to be paid back

The response of Litro Gas is reproduced in the order of the Right to Information Commission. It is as follows,

> "Litro Gas Lanka Limited and Litro Gas Terminal Lanka (Private) Limited are companies incorporated under the Companies Act No. 07 of 2007. In terms of section 3(1) of the Right to Information Act No. 12 of 2016, the citizens will get the right to access information which is in the possession custody or control of a "Public Authority".
>
> The term "Public Authority" has been interpreted in section 43 of the said Act and accordingly (sic) anybody or office created or established under the Companies Act No. 07 of 2007 except to the extent specified in paragraph (e) is exempted from such definition of Public Authority.
>
> Please note that the said Act does not cover companies other than the public authorities expressly defined in terms of the Law referred to above."

When Mr. Karunarathne made an appeal to Litro Gas he was informed, that,

> "Legal position of the said two companies have been already informed to you by our Head of Legal – letter dated 04th March 2021".

The position that Litro Gas Lanka Ltd., is not a "public authority" in terms of the provisions of the Right to Information Act was taken up before the Commission. By order dated 18.01.2022, the Commission has dismissed that position. By

order dated 27.07.2022 it has directed Litro Gas to provide the requested information. Litro Gas Lanka Ltd., has come before this Court under section 34(1) of the Act.

The learned counsel for Litro Gas has taken up that objection.

He says, that,

(i) Public Authority is defined in section 43 of the Act to say, that,

> "public authority" means
>
> (a) a Ministry of the Government;
>
> (b) any body or office created or established by or under the Constitution, any written law, **other than the Companies Act No. 7 of 2007,** except to the extent specified in paragraph (e), or a statute of a Provincial Council;
>
> (c) a Government Department;
>
> (d) a public corporation;
>
> (e) a company incorporated under the Companies Act, No. 7 of 2007, in which the State, or a public corporation or the State and a public corporation together hold twenty five per centum or more of the shares or otherwise has a controlling interest;…."

Mr. Karunarathne says in written submissions filed on his behalf, that, it is undisputed, that, Litro Gas Lanka Limited and Litro Gas Terminal Lanka are companies incorporated under the Companies Act No. 07 of 2007.

It is submitted at page 05 of the written submissions filed on behalf of Litro Gas (the appellant or the petitioner – as the procedure is that of a revision application it could be considered as a petitioner in a revision application too) the petitioner (Litro Gas) is owned by Sri Lanka Insurance Corporation Limited. It is also stated at paragraph 22 at

page 05 of the said written submission, that, the Sri Lanka Insurance Corporation Limited owns 99.94% of the petitioner company.

It is the position of the petitioner (Litro Gas) that,

(ii) There is no confusion that Sri Lanka Insurance Corporation Limited does not fall within the meaning of the state (paragraph 23 of the above written submission)

However, the question is not, whether Sri Lanka Insurance Limited means the state, but whether it means a public authority.

Section 43(e) is material. It says,

> **"(e) a company incorporated under the Companies Act, No. 7 of 2007, in which the State, or a public corporation or the State and a public corporation together hold twenty five per centum or more of the shares or <u>otherwise</u> has a controlling interest;..."**

The respondent petitioners before this Court are,

(i) Litro Gas Lanka Limited and
(ii) Litro Gas Terminal Lanka (Private) Limited

There is no doubt whatsoever, that, they are companies incorporated under the Companies Act.

The sub heading under 43(b) says,

> "(b) any body or office created or established by or under the Constitution, any written law, **other than the Companies Act No. 7 of 2007,** <u>except to the extent specified in paragraph (e)</u>, or a statute of a Provincial Council;..."

(B)The parts of section 43(e):

Under section 43(e) a company incorporated under the Companies Act falls within the definition of a public authority, if, the Company is one,

(a) in which the state holds twenty five per centum or more of the shares,
(b) in which the state **otherwise** has a controlling interest,
(c) in which a public corporation holds twenty five per centum of the shares
(d) in which a public corporation otherwise has a controlling interest,
(e) in which the state and a public corporation together hold twenty five per centum of the shares,
(f) in which the state and a public corporation together otherwise has a controlling interest

The petitioner has stated in paragraphs 26 and 27 of written submissions at page 05, that, the section 43(e) consists of two limbs, which it has nominated as (i) and (ii).

But there are six ((a) to (f)) limbs.

On a cursory look, it might appear, that, the maximum number of limbs is four. That is, a company incorporated under Companies Act No. 07 of 2007,

(i) in which the state **or** a public corporation hold twenty per centum or more of shares,
(ii) in which the state **or** a public corporation otherwise has a controlling interest,
(iii) in which the state **and** a public corporation hold twenty per centum or more of shares,
(iv) in which the state **and** a public corporation otherwise has a controlling interest

But as the word "or" indicates and the "comma" after the words "in which the state," clearly says, (although the above (i) to (iv) are not strictly wrong) the more accurate way is to understand section 43(e) as containing six limbs, but not four.

That is as in (a) to (f) above.

Professor Nathenson[1] says,

> "Pay close attention to punctuation. For example, a comma's presence or absence may completely change the meaning of a statute or rule."

Then there is limb (b) which says, a company,

(b) In which the state otherwise has a controlling interest,

Therefore, section 43(e) must be construed to include the alternative of the state, (without there being a public corporation) without having at least 25 per centum of the shares still can otherwise has a controlling interest. There must be a meaning to the word "otherwise".

Therefore even without having to resolve the question of a "public corporation" the state otherwise (note the meaning of the word "otherwise" it means without having twenty five per centum or more shares) can have a controlling interest on a company incorporated under the Companies Act No. 07 of 2007 making it a "public authority".

(C) The meaning of the term "public corporation":

The petitioner submits, that,

(i) the Sri Lanka Insurance Corporation Limited is not a "public corporation,"

(ii) the term "controlling interest" has not been defined in the Right to Information Act,

But as it appears to this Court, having said, that, Sri Lanka Insurance Corporation is not a "public corporation" what should have been referred to (at least before coming to the term "controlling interest") is to the meaning of the term "public corporation."

[1] How to read a Rule or Statute – Professor Nathenson

The Right to Information Act refers to the term "public authority" 54 times. It refers to the term "public corporation" 06 times. But it never defines the latter.

The sub heading (d) under the term "public authority", under section 43 of the Right to Information Act, on "Interpretation" is a "public corporation."

The petitioner further submits, that,

(iii) that Sri Lanka Insurance Corporation Limited is neither the "state" nor a "public corporation" (paragraph 38 of page 07 of the written submissions)

As this Court sees, neither the word "state" nor "public corporation" has been defined up to now.

We can, at least for the time being, leave the "state" aside. That word is referred to in the Act only 08 times compared to the term "public authority" that occurs 54 times.

The Constitution by its Article 170 defines the term "public corporation" to mean any corporation, board or other body which was or is established by or under any written law other than the Companies Ordinance, with funds or capital wholly or partly provided by the Government by way of grant, loan or otherwise.

At the time the Constitution was promulgated in 1978 the Companies Act No. 17 of 1982 or the present Companies Act No. 07 of 2007 has not come into force.

The above definition in Article 170 of the Constitution is not the only one.

The Civil Procedure Code (Amendment) Act, No. 8 of 2017 defines a "public corporation" as any corporation, board or other body which was or is established by or under any written law other than the Companies Act, No. 7 of 2007, with funds or capital wholly or partly provided by the Government by way of grant, loan or otherwise.

This is the same as in the Constitution, except, that, the reference in article 170 is to the Companies Ordinance whereas in the Amendment to the Civil Procedure Code it is to the Companies Act No. 07 of 2007.

The Companies Act No. 07 of 2007 only refers to Public Companies and Private Companies.

Its section 201 says,

> "201. A company shall have at least one director, except a public company which should have at least two directors."

Section 210(4) says,

> "In this section "public company" means a limited company which is not a private company."

As already said, even the original applicant Mr. Sudarshan Karunarathne accepts, that, Sri Lanka Insurance Corporation Limited, (despite it retaining the term "corporation" which it had before becoming a limited liability company) is a company incorporated under the Companies Act.

Its official website says,

> "We are Sri Lanka Insurance Corporation, the largest state-owned insurer in Sri Lanka anchored to a pioneering legacy of financial stability and trust spanning over six decades.
>
> Established in 1962 as a state owned corporation and the pioneer insurer in the country, Sri Lanka Insurance today manages an asset base of over LKR 274 billion which is the largest in the industry, the largest life insurance fund in the local insurance industry amounting in excess of LKR 156.7 billion, and a LKR 6 billion strong capitalization, making us one of

the most secure and reliable insurance solutions providers in the country[2]".

Let us consider section 43(e) once again. It reads,

> **"(e) a company incorporated under the Companies Act, No. 7 of 2007, in which the State, or a public corporation or the State and a public corporation together hold twenty five per centum or more of the shares or otherwise has a controlling interest;..."**

Now the Appellants or as they style themselves the Respondent Petitioners before me are,

(i) Litro Gas Lanka Limited and
(ii) Litro Gas Terminal Lanka (Private) Limited

The petitioners state in paragraph 18 of their written submissions that the said two companies (i.e., the petitioners) were incorporated under Companies Act No. 07 of 2007.

The same paragraph 18 says, therefore, a citizen can request information under the Right to Information Act if (and only if) the petitioners come under the term "public corporation" section 43(b).

Section 43(b) which was reproduced earlier too says,

"The sub heading under 43(b) says,

> "(b) any body or office created or established by or under the Constitution, any written law, **other than the Companies Act No. 7 of 2007,** except to the extent specified in paragraph (e), or a statute of a Provincial Council;..."

So it is section 43(b) that introduces section 43(e). And section 43(e) that defines, as to when a company incorporated under Companies Act No. 07 of 2007 becomes a "public authority".

[2] About Us | Sri Lanka Insurance

The Sri Lanka Insurance Corporation Limited is not a public corporation. The petitioners say in paragraph 24 of the above written submissions, that, it was incorporated under the Companies Act No. 17 of 1982 and re registered under the Companies Act No. 07 of 2007.

But, as it was seen above, there is a limb in section 43(e) which says,

"a company incorporated under the Companies Act falls within the definition of a public authority, if, the Company is one,

(a) .....

(b) in which the state otherwise has a controlling interest,..."

Now, the petitioners say at paragraph 47 of the same written submission, that,

> "In an existing matter before the Court of Appeal bearing No. CA/Writ/158/2020 and CA/Writ/159/2020 the Court of Appeal has issued interim orders preventing the Auditor General from exercising its powers in terms of the Constitution read with the National Audit Act from auditing the affairs of the company on the basis that the said companies though owned by the Ceylon Electricity Board did not fall within the meaning of company which qualifies to be audited by the Auditor General".
>
> "In view of the time constraints the respondent has not been thus far able to obtain a copy of the petition and the relevant proceeding that demonstrates the interim order and will reserve the right to furnish copies if deemed necessary."

They only had to type one of the above case numbers in a web browser.

What was said by another division of this court vacating those interim orders would have been auto downloaded.

The order dated 10.10.2022 jointly given in both cases says, among other things,

"The Interim Orders as prayed for in the prayers to the Petition have been issued on the application made by the learned President's Counsel for the Petitioners restraining the 1st Respondent from auditing the financial statements and accounts of the 2nd Respondent and 7th to 22nd Respondents. Since, it is the contention of the learned President's Counsel for the Petitioner, that after the promulgation of the 20th Amendment to the Constitution, the 1st Respondent assumes jurisdiction from 29/10/2020 to audit the accounts of the 2nd Respondent Company, it appears to this Court that the Petitioners are not pursuing to extend the said Interim Orders that is issued in favour of the 2nd Respondent. In this scenario, the learned Counsel for the 2nd Respondent has no right to object the vacation of the said Interim Orders, and the said Interim Orders are liable to be vacated forthwith.

In these circumstances, it is the view of this Court that the Interim Orders issued against the 1st Respondent preventing him from auditing the accounts of the 2nd Respondent are liable to be vacated. Thus, the Interim Orders issued against the 1st Respondent retraining (sic) him from auditing the 2nd Respondent Company are vacated".

Hence the petitioners, at present, cannot rely upon the two cases above before another division of this Court.

The citizen Mr. Sudarshan Karunarathne says at page 05 of the written submissions filed on his behalf, that, the Government of Sri Lanka or the state through the Secretary to the Treasury holds 99.7 per cent shares of Sri Lanka Insurance Corporation Limited and the Sri Lanka Insurance Corporation Limited in turn holds 99.93 per cent shares of Litro Gas Lanka Limited and 100 per cent shares of Litro Gas Terminal Lanka (Private) Limited.

The petitioners also accept at paragraph 22 of their written submissions, that, the Sri Lanka Insurance Corporation owns 99.94 per cent shares of the petitioner company, which undoubtedly is a reference to Litro Gas Lanka Limited.

It is also submitted at paragraph 25 of the above written submission, that, the phrase "controlling interest" has not been defined in the Right to Information Act.

One of the basic methods of having a controlling interest is auditing of the accounts. As it was seen, in the example relied upon by the petitioners, in CA/Writ/158/2020 and CA/Writ/159/2020 too, the learned president's counsel for the petitioners has admitted and the court (that other division of this Court) has determined, that, the Auditor General can audit the financial statements and accounts of the 2nd Respondent and 7th to 22nd Respondents, among whom were LTL Holdings (Pvt) Limited, Raj Lanka Power Company Ltd. and Lakdhanavi Bangladesh Power Company Ltd.

The citizen Mr. Sudarshan Karunarathne, by written submissions filed on his behalf, also brings to the attention of this Court, that, the Right to Information Commission has considered that according to the Annual Report 2020 of the Sri Lanka Insurance Corporation Limited., the petitioners have been audited by the Auditor General.

In the order of the Right to Information Commission, marked as P.08, reference has been made at page 06 to the url https://www.srilankainsurance.com/en/about-us/annual-reports.

The examination of the Annual Report for 2020 in Sri Lanka Insurance Corporation Limited, however, shows, that the situation is not exactly the same, but, nevertheless, favourable to the citizen.

At page 265 of that report, under paragraph 51 it is stated, that,

> "51. APPOINTMENT OF AUDITOR FOR LITRO GAS LANKA LTD AND LITRO GAS TERMINAL LANKA (PVT) LTD FOR THE YEAR 2020 **The Auditor General conducted the audits of Litro Gas Lanka Ltd (LGLL) and Litro Gas Terminal Lanka (Pvt) Ltd (LGTLL) for the years 2018 and 2019 in terms of Article 154(1) of the Constitution (as amended**

by the 19th Amendment) and the provisions in the National Audit Act No. 19 of 2018.

However, at the Annual General Meeting of LGLL and LGTLL, held on 07th December 2020 a private Auditor was appointed as the Auditor for LGLL and LGTLL for the year 2020 based on a legal opinion obtained from a private legal firm on the basis that Article 154(1) of the Constitution (as amended by 20th Amendment) does not sanction Auditor General to conduct audits of companies registered under the Companies Act No. 7 of 2007 in which a Government owned Company holds fifty per centum or more of the shares of that company. Further, the LGLL and LGTLL was of the view that the provisions in Section 55 of the National Audit Act does not grant the power to the Auditor General to carryout audits other than the entities identified therein.

On the request of the Auditor General, the Attorney General by his opinion dated 22nd January 2021 has opined that 20th amendment does not preclude the powers of the Auditor General to conduct audits of Companies in which the Majority shareholder is another Company owned by the Government.

The Auditor General has communicated the Attorney General's view on appointment of auditors to the Chairman of SLIC. In response, the Chairman of SLIC by his letter dated 07th January 2021 has requested the Chairman and the Members of the Board of Directors of LGLL and LGTLL to follow the correct procedures in accordance with the law when appointing Auditors of the said Companies.

Again by letter dated 05th February 2021, the Chairman of SLIC has advised the Board of LGLL and LGTLL to follow the correct legal procedure set out in the National Audit Act No.19 of 2018 and the Companies Act No. 07 of 2007 when appointing Auditors to their companies.

The Chairman of Litro Gas Lanka Ltd and Litro Gas Terminal Lanka (Pvt) Ltd has by his letter dated 16th February 2021 informed the Chairman of SLIC the law on which they relied when appointing an external Auditor".

Hence, it appears, that, according to the opinion of the Attorney General dated 22nd January 2021 the Auditor General is the authority who is vested with the power to audit financial statements and accounts of Litro Gas Lanka Limited and Litro Gas Terminal Lanka (Private) Limited although the Auditor General can delegate that authority to another auditor. If the petitioners do not comply with this requirement it will amount to a defiance of the opinion of the Attorney General. But it will not change the law as interpreted by the Attorney General with which this Court agrees in view of the provisions of Article 154(1) of the Constitution as amended by 19th and 20th amendments to the Constitution. It reads,

"154 (1) The Auditor General shall audit all departments of the Government, the Office of the Secretary to the President, the Office of the Secretary to the Prime Minister[3], [the Office of the Secretary to the Cabinet of Ministers, the Offices of the Ministers appointed under Article 44 or 45, the Judicial Service Commission[4], the Parliamentary Council, the Commissions referred to in Schedule 1 to Article 41A, the Provincial Public Service Commissions, the Parliamentary Commissioner for Administration, the Secretary General of Parliament, local authorities, public corporations, business and other undertakings vested in the government under any written law **and companies registered or deemed to be registered under the Companies Act No. 07 of 2007 in which <u>the government</u> or a public corporation or local authority holds fifty per**

[3] Substituted by the 19th amendment to the Constitution section 36.
[4] A more accurate way of saying this was "the Office of the Judicial Service Commission", because "Judicial Service Commission" refers to the three judges of the Supreme Court amongst whom is the Chief Justice.

centum or more of the shares of that company, including the accounts thereof][5]".

In the phrase,

> "…**and companies registered or deemed to be registered under the Companies Act No. 07 of 2007 in which <u>the government</u> or a public corporation or local authority holds fifty per centum or more of the shares of that company,**

the words, "the government" and "a public corporation" are separated by the word "or" signifying that they are two independent limbs. The words "a public corporation" and "local authority" are also separated by "or." Hence this must be understood as,

(i) Companies registered or deemed to be registered under the Companies Act No. 07 of 2017 in which the government holds fifty per centum or more of the shares of that company,

(ii) Companies registered or deemed to be registered under the Companies Act No. 07 of 2007 in which a public corporation holds fifty per centum or more of the shares of that company,

(iii) Companies registered or deemed to be registered under the Companies Act No. 07 of 2007 in which a local authority holds fifty per centum or more of the shares of that company

It was seen above, that, although the Sri Lanka Insurance Corporation Limited is not a "public corporation" under and in terms of limb (b)[6] of section 43(e) when the state otherwise has a controlling interest it becomes a "public authority" under the Right to Information Act. In as much as the authority of the Auditor General to audit either directly or by delegation is a "controlling interest" the state and the government are having a "controlling interest", it is

[5] Substituted by the 20th amendment to the Constitution section 41.

[6] This is not a reference to sub section (b) of section 43 but a reference to the six limbs (a) to (f) which this Court divided section 43(e).

seen, that, in respect of a company registered or deemed to be registered under the Companies Act No. 07 of 2017 in which the government holds fifty per centum or more of the shares of that company, under and in terms of Article 154(1) of the Constitution the Auditor General is vested with the power of auditing. It says, "The Auditor General shall audit…"

The same report in 2020 at page 22 gives the structure of the Sri Lanka Insurance Corporation Limited Group.

That page of the report says,

> "SLIC is the primary shareholder of Litro Gas Lanka Ltd with 99.94% shareholding. Litro Gas Lanka Ltd is the leading LP Gas importer and distributor in Sri Lanka."

It further says,

> "Litro Gas Terminal Lanka (Pvt) Ltd is a fully-owned subsidiary of SLIC and is involved in storing LP Gas for domestic, commercial and bulk customers".

In turn, the Secretary to the Treasury holds 99.97 per cent shares of the Sri Lanka Insurance Corporation Limited. The same 2020 report says at page 118,

> "As at 31st December 2020, 99.97% shares are vested with the Secretary to the Treasury on behalf of the Government of Sri Lanka". [This is in respect of the Sri Lanka Insurance Corporation Limited]

So, the Secretary to the Treasury holds those 99.97 per cent shares on behalf of the government of Sri Lanka.

When **A** [Secretary to the Treasury] is the Government of Sri Lanka which holds 99.97% of **B** [SLIC] which in turn holds 99.94% of **C** [LGLL] and 100% of **D** [LGTLPL] under,

(a) Section 43(e) of the Right to Information Act,

(b) Article 154(1) of the Constitution and

(c) The fact that having financial control is a "controlling interest"

the petitioners Litro Gas Lanka Limited and Litro Gas Terminal Lanka (Private) Limited are "public authorities" under the Right to Information Act.

For a moment, if it is assumed that the state is company A, SLIC is company B and the present petitioners are company C, we are dealing with a hierarchical structure of companies. Let us break it down:

Company A: This is the parent company. It directly owns the majority shares in Company B.

We can think of it like a family tree: Company A is the grandparent, Company B is the parent, and Company C is the child. Each level of ownership and influence cascades down the chain.

For instance, if Company A holds a majority stake in Company B, it can appoint members to Company B's board of directors, participate in significant decisions, and provide financial support when needed. Similarly, Company B exerts similar influence over Company C.

Here the state holds 99.7 per cent shares of SLIC which in turn holds 99.3 per centum share of Litro Gas Lanka Limited and 100 per cent shares of Litro Gas Terminal Lanka (Private) Limited.

Hence the petitioners come under the provision in article 154 which says,

> "…companies registered or deemed to be registered under the Companies Act, No. 7 of 2007 **in which the Government** or a public corporation or local authority **holds fifty per centum or more of the shares of that company**, including the accounts thereof".

If further clarification is needed, if A holds 99.97 shares of B, the 99.97 of B is held by A. When B holds 99.94 of C, more than 50% of C is held by A.

Whereas the dicta of Baron Diplock quoted in Stassen Exports Limited vs. Brook Bond Ceylon Limited and another 1990 (2) SLR 63 at page 72 [cited for the petitioners] with Maxwell and what was said in the case of Rex[7] vs. City of London Court Judges (1892) 1 Q. B. 273 by Lopes L. J. [cited for the citizen] and N. S. Bindra Interpretation of Statutes (Tenth Edition 2007) at page 279 are relevant, Narotom Singh Bindra in the 12th Edition of his book at page 317 says,

> "…If the words of the section are plain and unambiguous, then there is no question of interpretation or construction."

(D) The effect of sections 5(1)(a) and 5(1)(d):

The petitioners further argue, that, [assuming but not conceding, that, they are a public authority] sections 5(1)(a) and 5(1)(d) will prevent the requested information being released.

The two sub sections say,

"5. (1) Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where

(a) the information relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure;

(d) information, including commercial confidence, trade secrets or intellectual property, protected under the Intellectual Property Act, No. 36 of 2003, the disclosure of which would harm the competitive position of a

[7] In 1892, King Edward VII (Albert Edward), the eldest son of Queen Victoria and Prince Albert, reigned over England.

third party, unless the public authority is satisfied that larger public interest warrants the disclosure of such information;…"

Section 5(1)(a) has several parts. They are,

(a) The information relates to personal information:

Does the above contain personal information? The answer is "yes." The salaries paid to each person is their personal information also. But is it only "personal" information? If the government has an interest (it was seen, that, the government – state – has a controlling interest) then the public has an interest.

The next part is,

(b) The disclosure of which has no relationship to any public activity or interest:

Is it not in the interest of public, that, public should know how in institutions (as in the above explanation "A" "B" and "C") in which the Treasury is the final financial authority the money is being spent? Hence the disclosure has a relationship to a public activity and public interest.

So although there is a personal aspect of the information sought, it cannot be said, that, the disclosure of them has no relationship to any public activity or interest.

The next part is,

(c) Or which would cause unwarranted invasion of the privacy of the individual:

In circumstances discussed under (b) above the disclosure of the information is not an "unwarranted invasion of the privacy." It is an invasion on privacy. But it is warranted but not unwarranted.

But this must be analysed further. What is in (c) above is subject to the next part that is in (d).

(d) Unless the larger public interest justifies the disclosure of such information:

The citizen concerned in this case is one of the public. He represents the public and its larger interest.

The next part of the above section (e) or the person concerned has consented in writing to such disclosure does not apply in this case.

While the consideration of limb (d) above, "(d) Unless the larger public interest justifies the disclosure of such information:…: shall be considered in turn, it is apt to see whether there is an impediment to the release of the information sought under section 05(1)(d).

This sub section has the following limbs.

At first it refers to "information" and such information includes (not means)

(i) Information of commercial confidence,
(ii) Information pertaining to trade secrets,
(iii) Information pertaining to intellectual property protected under Intellectual Property Act No. 36 of 2003

The term "including" signifies, that, there could be other information, not coming within the above (i) (ii) and (iii) too coming under this section.

The next part of the section says,

(iv) The disclosure of which would harm the competitive position of a third party

Hence just because the information comes under (i) (ii) or (iii) above is not a reason not to disclose them. Such information if disclosed should "**harm the competitive position of a third party**" too.

And under the next part,

> (v) Unless the public authority is satisfied that larger public interest warrants the disclosure of such information

shows, that, this sub section (sub section 05(1)(d)) refers to such information, **that, the public authority must satisfy itself,** that, the disclosure of such information will (a) either not harm the competitive position of a third party or (b) even if it does so, the larger public interest warrants the disclosure of such information.

The position taken for the petitioners in regard to section 05(1)(d) in oral and written submissions show the lack of appreciation of the true nature of this sub section.

For example paragraph 67 of petitioner's written submission says, that, the citizen in this case is an ex employee of the petitioner who is involved in pending litigation with the petitioner in a labour dispute.

Paragraph 68 says, that, hence he seeks this information with a malicious intention and not for any larger public interest.

There is no provision in the Right to Information Act which requires the court to find the intention of the seeker of information. The Constitution has recognized it (right to information) as a right. When rights are recognized under the Constitution either directly or indirectly, the intention of the citizen is not material, unless it is specifically provided by law.

In **Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala [2003] 2 Sri LR 6** the Supreme Court recognized an implied right to life protected by the Constitution. It was said,

"Article 11 (read with Article 13(4)), recognises a right not to deprive life whether by way of punishment or otherwise and by necessary implication, recognises a right to life. That right must be interpreted broadly, and the jurisdiction conferred by the Constitution on this Court for the sole purpose of protecting fundamental rights against executive action must be deemed to have conferred all that is reasonably necessary for this Court to protect those rights effectively."

Thus a citizen has a right to live and so he or she may live having any intention in his or her mind, including malicious intentions,; and until and unless such malicious intentions are executed to harm another, either in body, mind or reputation, such intentions do not become a concern for the law.

This is more so, because, the Constitution which recognizes a right to life only by implication has expressly recognized the rights of freedom of thought and a right to conscience by Article 10, its first article in the Chapter on Fundamental Rights. So citizens are free to have malicious thoughts too. In any event, the state (or for that matter perhaps except a very few number of citizens who may be having a very advanced and trained state of mind) cannot control what they think.

The intention of the seeker of the information is, thus, no concern of the law. If he, having obtained that information, uses it to the detriment of anyone (including the public authority which provided that information) which if amounts to a "wrong" in law, he shall be dealt with.

In as much as paragraph 68 above refers to that there is no any larger public interest the seeker of information is having, it has to be decided according to the material provisions of the Right to Information Act. **In so far as section 05(1)(d) is concerned, the term "larger public interest" refers to the satisfaction of the public authority**, (not anyone else) that, the disclosure of the information sought although would harm the competitive position of a third party, its disclosure is required for the larger public interest.

In the previous sub section, however, (**sub section 05(1)(a)**) the term "unless the larger public interest justifies" was to justify an unwarranted invasion of the privacy of the individual[8]. There too, as discussed above, if the "invasion of the privacy" is not "unwarranted" but "warranted," the phrase in respect of "larger public interest" does not arise. This is the only meaning that is possible having regard to the words "unwarranted" and "unless" in sub section 05(1)(a). **If the rights of man vis a vis the state could be mathematically depicted by way of a Venn Diagram, the interpretation of a statute too requires such precision in law for if not it becomes policy for which the law has no concern.**

Information regarding the monthly salaries and monthly allowances of the top management do not come under (i) (ii) and (iii) above, i.e., commercial confidence, trade secrets or protected intellectual property. Hence the rest of the sub section, i.e., regarding harming a third party and larger public interest will arise for consideration if and only if the information sought does come within sub section 05(1)(d) **otherwise**. As it was said above, due to the word "including" in this sub section it is not only the categories of information mentioned under (i) (ii) and (iii) that is governed under this sub section.

Although in view of what this Court said under section 05(1)(d) the term "larger public interest" does not arise for interpretation, (because under that sub section it is for the public authority to satisfy on it) as it was said, at the end of the discussion under the previous sub section (sub section 05(1)(a)) that it will be addressed in due course, it is considered below. Having done that, the question whether information in regard to salaries and allowances in any way under the Right to Information Act forms part of information that should not be divulged will be considered.

[88] There is a very significant difference in the way the words, "unless the larger public interest" operates in sub section 5(1)(a) and sub section 5(1)(d).

(E) The larger question of balancing between the right to privacy and the larger public interest:

The sub sections 5(1)(a) [and to a certain extent sub section 5(1)(d)] refer to the larger question of balancing between the right to privacy and the larger public interest.

The origin of the mid 18th century word "**Panopticon**" is from "all" + Greek optikon, neuter of optikos 'optic'. It means "a circular prison with cells arranged around a central well, from which prisoners could at all times be observed."

The idea is attributed to the philosopher **Jeremy Bentham**. But according to Philip Schofield, professor of the History of Legal and Political Thought and the Director of the Bentham Project at UCL (University College London), it was originally the idea of Bentham's brother Samuel who was working in Russia on the estate in Kirchev. As he had a relatively unskilled workforce, he sat himself in the middle of the factory and arranged his workforce in a circle around his central desk so he could keep an eye on what everyone was doing. Bentham went to visit his brother in 1780s and decided that the concept could be extended to prisons, schools and hospitals.

Despite Bentham persuading the prime minister, William Pitt the Younger to fund a panopticon National Penitentiary, it could not be accomplished during Bentham's life time.

The French philosopher **Michel Foucault** in his book **Discipline and Punish 1975** revitalised the idea of the panopticon. He describes the prisoner of a panopticon as being at the receiving end of asymmetrical surveillance:

> "He is seen, but he does not see; he is an object of information, never a subject in communication[9]."

[9] What does the panopticon mean in the age of digital surveillance? | Technology | The Guardian

As a consequence, the inmate polices himself for fear of punishment.

According to Schofield "The principle is central inspection." As there is Closed Circuit Television (CCTV) the round building is no longer a must.

Hence the Right to Information Act brings the state into the receiving end of asymmetrical surveillance and the citizens are placed in the central well of the "panopticon." The state is the unskilled workers in 1870 Russia and the citizen is Bentham's brother. The state now has to police itself for fear of punishment which it faces on adverse public opinion.

But Bentham, the founder of utilitarianism and a leading advocate of the separation of church and state, freedom of expression and individual right, did not want the panopticon to be a tool of oppression. This led him to develop, later in his life, a type of **anti panopticon** – where a minister sits in an exposed room and surrounded by the members of the public who listen and ask questions[10].

This is the opposite of the "surveillance state" of Michel Foucault's Discipline and Punish. The roles have been exchanged. <u>The observer has become the observed</u>. This is based on the simple propagation of light[11], a law in physics. As Bentham's brother observed his workers, they could also observe him. This was not the case in every penitentiary built according to panopticon model[12]. But an Act on Right to Information on this theory must make the state, the government and the public bodies police themselves on the peril of being exposed.

It is said,

[10] The philosopher Jeremy Bentham famously requested in his will that his body be dissected and put on public display. This came to pass, and his skeleton now sits in a glass case at University College London, adorned with a wax head, waistcoat and jacket and sat on a wooden stool, staring out at students from its glass case. What does the panopticon mean in the age of digital surveillance? | Technology | The Guardian

[11] ආලෝකයේ සරල රැකීය ප්‍රචාරණය

[12] The first prison that adopted the model was Presidio Modelo complex in Cuba, infamous for corruption and cruelty, now abandoned.

"Communities can play an active role in promoting good governance, because public opinion provides some of the incentives needed to make egotistical politicians serve our collective interest. The threat of being discovered and exposed should, in principle, scare the corrupt or inept. In his essay 'On Packing', Bentham argued that libel laws work against the public interest because they prevent corruption being held up to public view. These criticisms have particular resonance in Britain given the exploitation of the country's famously tough libel laws to protect commercial interests. Specialist media lawyers such as Carter-Ruck have recently used super injunctions to stifle public criticism of their corporate clients. The paperwork for these injunctions (proceedings for which often take place in secret) are anonymous, so that no researcher going through court records could ever learn of what happened[13]."

And also,

"**The idea is that this transparency holds power to account, because the most dangerous people in society can be rulers. It is important that they, as well as prisoners, workers and children, feel watched**[14]".

(F) How much in a salary is information and how much privacy:

Now the last (but not the least) question whether information with regard to salaries and other emoluments should not be disclosed.

The petitioner cites at paragraph 70 of the written submissions the Indian case **Canara Bank vs C.S. Shyam**[15] decided on 31 August, 2017 by the Supreme Court of India. It has been said, in the case **Girish Ramchandra Deshpande vs Cen. Information Commr. & Ors**[16] on 3 October, 2012, which the Supreme Court cited with approval in Shyam's case, that,

[13] Sinister interests: Bentham's warning about politicians | UCL News - UCL – University College London
[14] What does the panopticon mean in the age of digital surveillance? | Technology | The Guardian
[15] Canara Bank vs C.S. Shyam . on 31 August, 2017 (indiankanoon.org)
[16] Girish Ramchandra Deshpande vs Cen.Information Commr.& Ors on 3 October, 2012 (indiankanoon.org)

> "The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, **unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information**."

The Indian Newspaper "**The Tribune**[17]" reported this judgment (Shyam's case) on the following day 01st September 2017 to say that,

> "The Supreme Court has ruled that service details of an employee can't be shared with an RTI applicant as 'personal information' is exempt from disclosure under the Right to Information Act, unless there was larger public interest involved".

Hence that decision is subject to "the larger public interest".

It was explained above in this judgment the interest the state (the Treasury) is having in the petitioners and thus the citizens.

The information sought in Shyam's case was with regard to various aspects of transfers of clerical staff and staff of the Bank with regard to individual employees.

It appears, that, the standing of the Bank in question in that case was not as same as the standing of the petitioners in this case in relation to their connection with the Treasury, government, state and the public.

There is also a difference in the scope under which the Indian Act of 2005 and Sri Lankan one of 2016 functions.

Section 08 of the Indian Act refers to "Exemption from disclosure of information". It says,

[17] Personal information of employees can't be disclosed under RTI: SC : The Tribune India

"8. Exemption from disclosure of information.—(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act".

The corresponding section in the Sri Lankan Act is section 05 which has a side entry "**When right of access may be denied**", which comes under Part II "**DENIAL OF ACCESS TO INFORMATION**", which has one more section, that is, section 06, which deals with "**Severability under certain circumstances**".

The applicable sub sections of section 05 of the Sri Lankan Act, according to the petitioners, is sub sections 05(1)(a) and 05(1)(d), which were already dealt with.

It appears, that, the Indian section 08 is wider in scope in prohibiting disclosure of information than the Sri Lankan section 05[18]. Besides, section 06 of the Sri Lankan Act still within the Chapter "Denial of Access to Information" provides severability of information that could be disclosed even in instances where there is an objection for the disclosure. It says,

> "6. 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 exempted from being disclosed under that section, and which can reasonably be severed from any part that contains information exempted from being disclosed".

This shows the intention of the legislature to provide information as much as possible, segregating the allowable from the denied, even when there is a valid objection to the disclosure of the information.

The legislature, in its wisdom, embodied its intention in the Constitution itself, so much so that, it cannot be altered unless with the two thirds majority of legislators, including those who are absent[19].

Article 14A(2) which was reproduced at the commencement of this judgment says,

> "(2) **No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the**

[18] Although it is obvious that the present Sri Lankan Act has certain provisions taken from the Indian Act of 2005
[19] Article 82(5) of the Constitution says,

(5) A Bill for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and upon a certificate by the President or the Speaker, as the case may be, being endorsed thereon in accordance with the provisions of Article 80 or 79.

prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary".

Hence the restrictions are,

(01) restrictions prescribed by law as are necessary in a democratic society,

(i) in the interests of national security,

(ii) territorial integrity or

(iii) public safety,

and restrictions prescribed by law as are necessary in a democratic society, [repeated here for clarity]

(a) for the prevention of disorder or crime,

(b) for the protection of health or morals and

(c) of the reputation or the rights of others,

(d) privacy,

(e) prevention of contempt of court,

(f) protection of parliamentary privilege,

(g) for preventing the disclosure of information communicated in confidence,

(02) **or** for maintaining the authority and impartiality of the judiciary.

For (i) (ii) and (iii) as well as for (a) to (g) the phrase "restrictions prescribed by law as are necessary in a democratic society" applies. It does not apply, due to the word "or" for maintaining the authority and impartiality of the judiciary.

There is a standalone significance for the maintaining of the authority and impartiality of the judiciary[20].

(G) The history of freedom of information legislation in Sri Lanka, considered here to gauge the approach to be taken in the application of the same:

According to "**Legislative Brief: Right to Information Bill 2015**", published by Transparency International of Sri Lanka, there had been three other legislative attempts to bring a statute on Right to Information prior to 2016 statute.

It is said,

> "(i) Freedom of Information Bill[21]
>
> In 1996 the Sri Lanka Law Commission presented a Draft Freedom of Information Bill. The Draft although circulated, was never presented in Parliament
>
> (ii) Constitutional Reform Package
>
> From 1995 to 2000 there were a number of attempts to introduce constitutional reform. In 2000, a Draft Constitutional Bill gave the right to information the status of constitutional protection under the fundamental rights chapter. However the Bill was never introduced in Parliament.
>
> (iii) Right to Information Bill
>
> In 2002 there was a bi-partisan effort to introduce a freedom of information law. Further, media and civil society organisations such as the Editor's Guild partnered with the government in the drafting and design stages of the Bill. This process

[20] The Judicial Service Commission, as it was done up to 2009,; and perhaps thereafter too has not issued the reasons for a finding of guilt or otherwise against a judicial officer at the end of disciplinary action, not even to that judicial officer who was on "trial", but only the finding whether guilty or not, on the basis of the principle that the faith people have in the judiciary (on which it runs) will be adversely affected if the judiciary (represented even by one member) is publicly on trial. (This position was expounded by late Dr. A. R. B. Amerasinghe when his lordship was the Secretary to the Ministry of Justice as well as a Judge of the Supreme Court, which his lordship once even said to the then President of the Republic (from 1988 to 1993) – as Dr. Amersainghe himself once in 1998 said - which the latter accepted.

[21] Legislative-Brief-FINAL.pdf (tisrilanka.org)

culminated in a draft Right to Information Bill that was approved by Cabinet in 2004.

However, the United National Party (UNP) government collapsed shortly after the Bill gained Cabinet approval, and hence it was not presented in Parliament.

In 2011 UNP MP Karu Jayasuriya attempted to pass the 2003 draft RTI Bill as a Private Member's Bill in Parliament. Initially, the government persuaded Jayasuriya to withdraw the Bill on account of its own efforts to introduce legislation targeted at promoting the freedom of information.

As this legislation was not forthcoming, in June 2011 Jayasuriya re-introduced the Bill in Parliament. However it was defeated, with 97 members voting against the Bill, and 34 members voting in its favour.

(iv) 19th Amendment to the Constitution

The recently enacted 19th Amendment explicitly guarantees a citizen's right of access to information held by a number of public bodies including Ministers, government departments and local authorities. However, under Article 14A, this right is only enforceable as provided by law. Therefore, in the absence of specific Right to Information legislation – the constitutional protection of the right to information cannot be applied in practice."

The above shows, that, the legislation pertaining to Right to Information have been born having struggled for the same for twenty years from 1996 to 2016.

"The phrase "**scientia potentia est**" (or "**scientia est potentia**" or also "**scientia potestas est**") is a Latin aphorism meaning "knowledge is power", commonly attributed to Sir Francis Bacon. The expression "**ipsa scientia potestas est**" ('knowledge itself is power') occurs in Bacon's Meditationes Sacrae (1597). The exact phrase "scientia potentia est" (knowledge is power) was written for the first time in the **1668 version of Leviathan** by **Thomas Hobbes**, who was a secretary

to Bacon as a young man. The related phrase "sapientia est potentia" is often translated as "wisdom is power"[22].

In the article, "**Right to Access to Information, is an Avenue for Strengthening the Sovereignty of People in Sri Lanka[23]**," C. S. Kodikara reproduces the following quotation,

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: **And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.**" - James Madison [1822]

The above article has been published in November 2015 at the proceedings of 08th International Research Conference.

The present Act certified on 04th August 2016 was brough thereafter.

Kodikara also says, that, neither USA nor India provides direct constitutional guarantee over the Right to Information although both countries have a very strong culture of public information delivery and access.

It appears, that, the original home of the Freedom of Information Act in **USA** is section 03 of **Administrative Procedure Act (APA)** enacted on 11th June 1946. The APA was necessitated by the creation of several federal agencies beginning from 1933 as part of the New Deal of President Franklin D. Roosevelt and the Democratic Congress after the social and economic hardships caused by the great depression.

The Indian Right to Information Act No. 22 of 2005 replaced its Freedom of Information Act of 2002. As already said Right to Information is not a fundamental right in India but the constitution protects Freedom of Expression

[22] Dario Fo (June 13, 2004). "Knowledge like challenge to every form of powers". *repubblica.it* (in Italian).
[23] law-045.pdf (kdu.ac.lk)

and Speech under Article 19(1)(a) of the Constitution and Right to Life and Personal Liberty under Article 21.

Its origin in USA as a by product of Administrative Procedure Act and in India to protect Freedom of Expression and Speech, Right to Life and personal liberty show that Right to Information is a public law remedy. It could be an extension of **Right to Know Reasons**[24] for a Decision. Furthermore, the basis of the maxim audi alteram partem is also the free flow of information.

It has been said, that,

> "The object of judicial process is arriving at the correct decision. The decision maker should have an objective mind. This is twofold. He or she must be open in mind so as to allow the free inflow of all facts and circumstances the presence of which is necessary to arrive at the right decision. He or she must also have an unfettered ability to discern good from evil. This is the ability to take logical, independent and unbiased decisions. But it goes deeper. Ability to discern good from evil is not what anybody and everybody think good or evil, for it could be different from one person to another. This stands on a harder surface than it may appear, because, it is so connected with the rationality of human mind. It may be called "first principles" or "fundamental principles" but whatever it may be

[24] Reasons is considered the third pillar of natural justice. Speaking Orders: Reasoned Decision (legalserviceindia.com)

called it is that which arises by cause following effect, inseparably and inevitably, unerring in judgment[25], i.e., reason[26]."

The book "**Administrative Law**" of **Sir William Wade and Christopher Forsyth (12th Edition) 2023** says at page 396, that, "The mere fact that the power affects rights or interests is what makes it "judicial" …"

Sovereignty is the ultimate power that runs the nation state which comprises of what belongs to the public and what is in respect of the public and to which the public is having a controlling interest. Under article 03 sovereignty is in the People and inalienable. This ultimate sovereign power therefore affects rights and interests. Hence it is "judicial" and must be exercised judiciously. It was seen in the paragraph quoted before the last, that, the judicious exercise of power needs, as one ingredient, the free flow of information. The right to information is based on this. **Therefore, the right to information or freedom of information, whatever may be the manner in which it is described, is not only necessary to effectively exercise the right to freedom of speech and expression recognized by article 14(1)(a) of the Constitution, as Sarath N. Silva C. J., said in Environmental Foundation Limited vs. Urban Development Authority of Sri Lanka and others (Gall Face Green Case) S. C. F. R. 47/2004** (which the writer Kodikara as well as Chief Justice Kanagasabapathy Sripavan in the Special Determination in 2016 pertaining to the Right to Information Bill quotes) **but, with respect,**

[25] "The Laws of Nature are just, but terrible.
There is no weak mercy in them.
Cause and consequence are inseparable and inevitable.
The elements have no forbearance.
The fire burns, the water drowns, the air consumes, the earth buries.
And perhaps it would be well for our race
If punishment of crimes against the Laws of Man
were as inevitable as the punishment of crimes
against the laws of Nature - - - -
were Man as unerring in his judgments as Nature –
Henry Wadsworth Longfellow 27 February 1807 – 24 March 1882
American poet and educator.

[26] Rediscovering the Roots of Judicial Review, 2007 – D. N. Samarakoon.

has a deeper base and a firmer foundation on the right to exercise the power of sovereignty. Kodikara refers to a result in so doing in his above article as follows,

> "Sweden was the first country in the world which legislate a freedom of information act and to provide constitutional protection for this right. Then Finland inherited the right from Sweden. Today, Sweden and Finland are considered the least-corrupt countries in the world. The corruption-free character of these countries has arguably fostered a culture of transparency. It is important to mention the considerable weight that these states attach to administrative transparency as well. Conversely, totalitarian and corrupt regimes exert immense efforts designed to conceal information".

Kodikara traces the origin of freedom of information legislation in Sri Lanka to the committee to advice on the reform of laws affecting media freedom and the freedom of expression in 1995 chaired by **Mr. R. K. W. Goonesekere**, which recommended, among other things, that, **the burden of justification for withholding information must rest with the government, not the burden of justification for disclosure with the person requesting information.** He says, that, notwithstanding these recommendations the Law Commission of Sri Lanka in 1996 introduced a conservative Access to Information Draft Bill. The next phase to which he refers to is, that, which there was a UPFA executive President and a UNP Prime Minister in the early days of the first decade of the (then) new millennium (2000) the Editors' Guild, Free Media Movement and the Center for Policy Alternatives presented an alternative draft which was more in keeping with the international practice. After a series of meetings headed by the Prime Minister a compromise third draft was agreed to. This was approved by the Cabinet of Ministers in February 2004. However on 07th February 2004 the President dissolved the parliament as there was a rift among the cohabitating political parties. What happened from 2004 to 2016 was referred to above in the

report of the Transparency International, the facts referred to in which have been referred to by Kodikara too.

The **Special Determination (Judicial Preview) of the Right to Information Bill** was conducted before the Supreme Court on 05.04.2016 and 06.04.2016. Writing the opinion of the Court Chief Justice Sripavan said, among other things, that,

> "Thus, the "freedom of speech and expression including publication" which includes an implicit right to secure relevant information should be broadly interpreted in the light of fundamental principles of democracy and the Rule of Law which form the foundation of the Constitution, **subject however to such restrictions and to the extent provided in the Constitution**."

The rights do not flow from the Constitution. On the contrary, the constitution arises as a consequence of the people having rights. The French Economist **Claude Frederick Bastiat** (pronounced bastya) who wrote in 1850 the book "The Law" said,

> "Life, liberty and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty and property existed beforehand that caused men to make laws in the first place[27]".

Bastiat also said,

> "**the freedom of every person to make full use of his faculties, so long as he does not harm other persons while doing so…**[and] the restricting of the law only to its rational sphere of organizing the right of the individual to lawful self defence…"

[27] Frederick Bastiat, The Law (Dean Russel Translation, The Foundation for Economic Education, Inc.

The statements of Bastiat above referred to and particularly what is in "bold" print (and its condition in "bold" print and underlined) in the last referred to quotation shows, that,

(i)a right remains a right, so long as, the exercise of it does not harm another [that is the condition and the only condition]

(ii) when it starts to harm another, it is, hence, no longer a right, but an abuse of it

(iii)therefore it is only the abuse of the right, but not the exercise of it, that can be restricted

Hence, the law, be it the constitution or any other law, can, within the bounds of legality, **can restrict only the abuse of a right and not the exercise of the right.**

When it is abused it is no longer a right. "the freedom of every person to make full use of his faculties, so long as he does not harm other persons while doing so" is its definition.

But when constitutions and other bills of rights reduces the expression and the manifestation of the right to a writing, they can, impose various qualifications to the same, which are not warranted as per the dictates of liberty.

This concern was expressed by no other person than Alexander Hamilton himself in Federalist Papers[28] No 84 saying,

[28] The Federalist, commonly referred to as the Federalist Papers, is a series of 85 essays written by Alexander Hamilton, John Jay, and James Madison between October 1787 and May 1788. The essays were published anonymously, under the pen name "Publius," in various New York state newspapers of the time.

The Federalist Papers were written and published to urge New Yorkers to ratify the proposed United States Constitution, which was drafted in Philadelphia in the summer of 1787. In lobbying for adoption of the Constitution over the existing Articles of Confederation, the essays explain particular provisions of the Constitution in detail. For this reason, and because Hamilton and Madison were each members of the Constitutional Convention, the Federalist Papers are often used today to help interpret the intentions of those drafting the Constitution. https://guides.loc.gov/federalist-papers/full-text

'**I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.** For why declare that things shall not be done which there is no power to do[29]? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; **but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.** They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was

[29] Hamilton here refers to (not to any declaration of rights) statements expressed in the negative in it, such as, the First Amendment, which says, that, "Congress shall make no law ... abridging the freedom of speech, or of the press." For example, according to Hamilton, this is something that the congress anyway has no power to do and when it is declared, in this form, the congress can even state "exceptions" to the same, which will be not a restriction on an abuse of a right, but a restriction on the exercise of a right even when that exercise does not harm another.

Hamilton also said,

'It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the PETITION OF RIGHT assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ORDAIN and ESTABLISH this Constitution for the United States of America." Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government'.

intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, **by the indulgence of an injudicious zeal[30] for bills of rights'.**

It is also in the above context of the writings of Bastiat and Hamilton, that, matters argued at the Special Determination, especially, in respect of the clause 5(1)(c) of the Bill must be understood. The said clause said,

"5. (1) Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where…

(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:

……(refers to exchange rates, control of overseas transactions, taxation, control and adjustment of prices of goods and services, etc.)

(v)the entering into of overseas trade agreements;…"

The argument of the petitioners were, that, the matters pertaining to "economy" does not fall within the permitted restrictions stipulated under article 14A(2). The examination of article 14A(2) shows, that, there is no reference to "**economy**" in that article.

The argument for the state, before the Supreme Court, was that the term "national security" in article 14A(2) should not be understood as "military security" but it includes "economic solidarity and strength" as decided in the case of Ex - Armymen's Protection Services private Limited Vs. Union of India and Others [(2014) no. 2876/14] decided by the Indian Supreme Court.

[30] The Bible warns of wrong zeal, but it also extols righteous, fervent zeal as necessary for pleasing God - Religious Zeal: The Bad and the Good (lifehopeandtruth.com)

Dr. Jayampathy Wickramaratne (who appeared for intervenient petitioners Lokupitumpage Roshan Namal Wijethunga and Dr. Ranga Prasanna Kalansooriya) had placed his argument on a different basis that the above clauses have been included to ensure a balance between the right to information and the wider interests of the public, especially with respect of economic wellbeing and security of the state to prevent "public disorder and crime" and to protect "the rights of others."

It must be said, that, in so far as to protect "the rights of others" which presupposes (according to what was discussed above) an abuse of a right, there could be a restriction. But it has not been explained, as to how, information in respect of "the entering into of overseas trade agreements;..." can cause public disorder and crime.

The Supreme Court said,

> "It may thus be noted that in the case of overseas trade agreements, a premature disclosure may benefit the person who requested such information but may adversely affect the economy of the country and thus the rights of the other people. Releasing the details of various reports, notes, letters, and other forms of written evidence **while the negotiations are going on** may help the party or his personal self-interest but adversely affects the interest of the public and create a disorder by failing to protect the rights of others. The impugned restrictions can even be prescribed under Articles 15 (2) and 15 (5) not only to protect the right of others but also to regulate the exercise and operation of the fundamental rights declared and recognized by Article 14 (1) (a) and 14 (1) (g) in the interest of national economy".

It may be noted, that, Mr. Thishya Weragoda (who appeared for Benthara Gamage Indika Gamage and Gonsalge Isuru Buddhika Sirinimal, the President and the Secretary of the Sri Lanka Information Technology Professionals Association) argue, that, clauses 5(1)(c)(v) and 5(3) are in violation of article 12(1) and 14(1)(g) of the constitution. Article 12(1) says "All persons are equal before

the law and are entitled to the equal protection of the law". Article 14(1)(g) says "Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;..."

It appears to this Court, that, Mr. Weragoda had a valid point there, because, especially clause 5(3) was not in regard to the ongoing negotiations but in regard to negotiations that has not been concluded even after a lapse of ten years. The said clause says,

> "Any information relating to any overseas trade agreement referred to in subsection (1) (c) (v) of this section, where the negotiations have not concluded even after a lapse of ten years shall not be disclosed".

The said clauses 5(1)(c)(v) and 5(3) are presently the corresponding sections of the Right to Information Act No. 12 of 2016.

Kodikara raises an important point referring to the American case of **Stanley vs. Georgia** in respect of privacy. He says, that,

> "In the Galle Face Green Case the Court held that denial of access to official information is a violation of Article 14(1)(a) of the constitution, therefore suggesting that this article indirectly includes one's freedom of information. There is also strong judicial thinking that freedom of information is not a right simpliciter but an integral part of Article 10 relating to thought and conscience on the basis that information is the "staple food for thought".
>
> The observation in Stanley vs. Georgia suggests a better rationale that information is the staple food of thought and the right to information simpliciter is a corollary of the freedom of thought guaranteed by article 10. Article 10 denies government the power to control men's minds, while Article 14(1)(a) excludes the power to curb their tongues. And that may explain and justify differences in regard to restrictions: eg. that less

restrictions are permissible in regard to possession of obscene material for private use than for distribution".

In **Robert Eli Stanley vs. The State of Georgia 394 U.S. 557**[31] **(1969)** the home of Robert Eli Stanley, a suspected and previously convicted bookmaker, was searched by police with a federal warrant to seize betting paraphernalia. As they found none, they instead seized three reels of pornographic material from a desk drawer in an upstairs bedroom, and later charged Stanley with the possession of obscene materials, a crime under Georgia law. The conviction was upheld by the Supreme Court of Georgia.

In the Supreme Court, [of the United States] Justice Thurgood Marshall wrote the unanimous opinion that overturned the earlier decision and invalidated all state laws that forbade the private possession of materials judged obscene on the grounds of the First and Fourteenth amendments to the U.S. Constitution. Justices Potter Stewart, William J. Brennan, and Byron White contributed a joint concurring opinion with a separate opinion having to do with the Fourth Amendment search and seizure provision. Justice Hugo Black also concurred expressing the view that all obscenity laws were unconstitutional.

What is important in the unanimous decision of the Supreme Court of the United States in Stanley's case to the Right to Information legislation in Sri Lanka is crystalized in Kodikara's statement, that, "article 10 denies the [state] the power to control men's minds…" The only basis of the decision of the Supreme Court of United States of America in Stanley's case is, that, in as much as the thoughts of one individual (which the state has no power to control – and as per article 10 expressly recognized in Sri Lanka) cannot be controlled by the state – which is the fundamental manifestation of the right to privacy – **there cannot be obscenity in privacy.** Having deduced that, now, it must be applied in "reverse" to the state and see whether it can stand. It is because **what**

[31] The case was argued on 14th and 15th January 1969 and was decided on 07th April 1969. The audio of the arguments is found here Stanley v. Georgia | Oyez

is applicable in obverse[32] to citizens applies in reverse[33] to the state. The argument is this: the state is run by a government, which derived its authority by a mandate given by the People freely exercising the franchise – one of the forms of sovereignty – the said franchise backed by the freedom of thought of the People, which mandate is necessarily limited – should be exercised by the government without exceeding the limits so set on its delegated power, by the People – and therefore (the most important thing) **there is no right of privacy for the government (state)**".

According to the discussion based on the findings of Claude Frederick Bastiat and Alexander Hamilton above, it should be noted, that, although the constitution in article 10 recognises a freedom of thought, it is not a right given by the state or the constitution. On the other hand, unless the People have conferred a power on the state to do something, it has no power to do so and the state doing so will be ultra vires its authority.

The source of the principle which underscores that the State should have legal authority for its actions to be held valid is the Rule of Law. The supremacy of law is the hallmark of the principle. From this emanates the Principle of Legality, that is every action of any public authority should show a legal authorization for it to be legal and valid. If the principle of legality is violated then the Rule of Law is breached. If the governmental action cannot demonstrate a legal source - it could be statutory, common law or prerogative - then it violates the principle of legality which in turn compromises the Rule of Law. Then the action cannot be considered to be consistent with the Rule of Law, which is one of the cardinal principles subject to which a constitutional democracy is recognized.

In this regard what was said in the following case must be appreciated.

[32] If citizens are entitled to certain freedoms (such as freedom of speech, assembly, or privacy), the state should respect and protect those rights.

[33] Conversely, if citizens are subject to certain duties (such as paying taxes or following laws), the state should also adhere to its responsibilities (such as providing essential services, maintaining law and order, and safeguarding citizens' well-being).

It is reported as *Regina (on the application of UNISON) vs. Lord Chancellor [2017] 4 All E R 903* and Lord Reed in the Supreme Court of the United Kingdom (with whom Lord Neuberger P, Lord Mance, Lord Kerr, Lord Wilson and Lord Hughes agreed) said about "The Constitutional right of access to the courts", that,

> "66. The constitutional right of access to the courts is inherent in the rule of law. **The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings. The extent to which that viewpoint has gained currency in recent times is apparent from the consultation papers and reports discussed earlier.** It is epitomised in the assumption that the consumption of ET and EAT services without full cost recovery results in a loss to society, since "ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services".

Hence, the two pillars on which the freedom of information or the right to information is based are (i) the component of franchise in the sovereignty and (ii) the freedom of thought, which confers a right to privacy on the citizen which in turn on the principle of reciprocity dictates that the business of the state and its multifarious organs conducted in transparency. The appearance that right to information is based on freedom of expression is only an outer manifestation of these two deep rooted foundations. (The only exceptions are those provided in the Act itself, which according to the principle discussed above that there cannot be restrictions to rights but restrictions are limited only to the abuse of a right – which makes it no longer a right – which prevents the abuse of the right to information)

Kodikara says, that, many of the existing laws and statutes contain provisions that are inconsistent with the chapter on fundamental rights including the right to information. This is correct. The fundamental rights chapter in the 1978 constitution makes that in many ways similar to the bills of rights in the United States constitution. I observed this in my dissenting judgment in "Judges' Salary Tax Case" (CA/WRIT/35/2023,Writ/36/2023,Writ/73/2023 dated 02.11.2023) in which 10 propositions were deduced from United States cases on similar tax legislation. Hence, as the principle enunciated by the United States Supreme Court in Stanley vs. Georgia 1969 directly applies to Sri Lanka Obscene Publications Ordinance No. 4 of 1927, which was promulgated during the British colonial period when Ceylon was under the British rule, which aims to regulate and control the possession of obscene material is contrary to article 10 of the constitution, in so far as such possession is private. Kodikara refers to several legislation of this nature which directly affect the right to know, such as, Official Secrets Act No. 32 of 1955 and Press Council Law No. 05 of 1973 which makes it an offence to publish or cause to publish an official secret. As it was earlier said, the article written by Kodikara was published in November 2015 prior to the enactment of the present Right to Information Act. Now section 04 of the Act provides, that,

> "The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail,"

thus making the restrictions on information imposed in the Act itself to be the only restrictions. There are no such restrictions in respect of the information sought under this Act in this case.

In regard to the salaries and other emoluments of the top management of the petitioners, national security, territorial integrity or public safety will not apply. Hence (i) to (iii) above are out. Out of (a) to (g) above, (c) reputation and rights

and (d) privacy apply. But they yield to the larger public interest as discussed above.

Therefore the citizen in this appeal is entitled to obtain the information he requested. The determination of the Right to Information Commission is right.

The appeal (which can also be regarded as an application for revision as until rules are made the procedure is that of an application for revision) of the petitioners is dismissed with costs.

Judge of the Court of Appeal.