

CENTRAL INFORMATION COMMISSION  
Appeal No. CIC/AT/A/2009/000964 dated 22-07-2008  
Right to Information Act 2005 - Section 19

PARTIES TO THE CASE:

Appellants : Shri Navroz Mody  
Public Authority : Mumbai Port Trust  
Third-party : M/s.Indira Container Terminal Pvt. Limited,  
Mumbai (a Consortium of M/s.Gammon India  
Limited, M/s.Gammon Infrastructure Projects  
Ltd. and M/s.Dragados SPL, Spain.)  
Date of Decision : 03.09.2009

FACTS OF THE CASE:

This second-appeal now before the Three-Member-Bench of the Commission is against the decision of the Appellate Authority, Mumbai Port Trust, dated 12.06.2008, which was pronounced on the validity of the CPIO's reply dated 16.04.2008 to the RTI-application of the appellant dated 17.03.2008. The operative portion of the Appellate Authority's decision read as follows:-

*"It is seen that substantial part of the information sought have already been furnished to the appellant. Moreover, the information not furnished to the appellant attracts the exemption specified at section 8(1)(d) of the RTI Act, 2005 in view of the specific contractual provisions as detailed above."*

2. The queries of the appellant were for the following information:-

*"1. Copy of the Detailed Project Report for construction of the Offshore Container Terminal."*

2. *Terms and conditions contained in the approvals of the DPR by the Ministry of Shipping and Transport.*
3. *Copy of the Agreements signed with Gammon Infrastructure Projects Limited.*
4. *A copy of other documents signed with any other agencies executing the OCT project.*
5. *Please indicate the number and capacities of the dredgers to be employed for dredging 14 million cum to be undertaken within 14 months for the OCT project.*
6. *Indicate the estimate of the quantum and cost of maintenance dredging required to provide an assured depth of 13.5m at the berthing area of the OCT, and basis for the assumption.*
7. *A copy of the approval of the Maharashtra Maritime Board authorizing dredging of sand from Dharmatar creek / Amba river for filling up of the docks."*

3. The present second-appeal is in respect of only one item of the appellant's original query, which was item No.3, which read as follows:-

*"A copy of the License Agreement signed with Gammon Infrastructure Projects Ltd."*

4. CPIO declined to disclose this information citing exemption under Section 8(1)(d) of the RTI Act for, according to him, this comprised commercial confidence of both contracting parties to the License Agreement.

5. Initially, this second-appeal came up for hearing before a Single Bench (of Shri A.N. Tiwari) of the Commission on 12.01.2009, which referred it to a larger Bench as the matter related to determination of scope of disclosure of Public Private Partnership (PPP) Agreements, which are now becoming common.

6. The first hearing of the Full Bench (Three Member Bench) took place on 06.03.2009 at 11.00 a.m. in the presence of the following:-

## Appellants

Shri Navroz Mody  
Shri Shyam Chainani — Appellant's representative

## Respondents

Shri Ashok Bal, Deputy Chairman & Appellate Authority  
Shri M.V. Patwardhan, Deputy Chief Engineer  
Shri Mohan Chandran, Secretary.  
Shri Rakesh Srivastava, Joint Secretary (Ports), Dept. of Shipping

7. The following directions were issued to the respondents:-

*“(I) To re-examine the entire issue in the context of provisions of the RTI Act and clearly indicate as to (i) which part(s) of the Agreement can be disclosed by them; and (ii) which part(s) of the Agreement cannot be disclosed.*

*(II) With regard to the part(s) which cannot be disclosed, the Public Authority should clearly indicate under which section of the RTI Act they are seeking exemption and in case, the same are disclosed, to what extent it would adversely affect the interests of the public authority.*

*The respondents were also directed to file their written submissions, within 1 month, and a copy of their written submission be forwarded to the appellant. After receipt of written submissions from the respondents the matter would be re-heard by the Full Bench. Third-party be also invited to the hearing.”*

## ISSUE FOR DETERMINATION:

Whether Public-Private Partnership Agreements can be disclosed to third-parties under RTI Act?

8. The second hearing in this matter was held on 24.04.2009 in the presence of the following:-

### Appellants

Shri Navroz Mody

### Respondents

Shri M.V. Patwardhan, Deputy Chief Engineer  
Shri Mohan Chandran, Secretary.  
Shri Rakesh Srivastava, Joint Secretary (Ports), Dept. of Shipping

### Third-party

Absent

9. It was the observation of the Bench that the written-submissions filed by the respondents did not specifically answer the points Commission had earlier raised. It was decided to issue notice to the third-party for it to present its case before the Commission. Assistance was also to be sought from the Planning Commission and the Comptroller & Auditor General of India to clarify the points which were raised in the second-appeal by the appellant. Accordingly, notice dated 14.05.2009 was issued to the third-party, and requests dated 29.05.2009 were issued to the Planning Commission and the C&AG.

10. Final hearing was held on 30.07.2009 in the presence of the following:-

### Appellants

Absent

### Respondents

Shri M.V. Patwardhan, Deputy Chief Engineer  
Shri Mohan Chandran, Secretary.  
Shri Ashwani Kumar, Deputy Secretary (Ports), Dept. of Shipping

### Third-party

Absent

### Special Invitees:

1. Shri S.K. Saha, Director, Planning Commission
2. Shri R. Srinivasan, Director (Legal), Comptroller & Auditor General of India

11. The third-party's written-statement received in the Commission on 12.06.2009 is a part of the file. The written-advice / views of the Planning Commission and the C&AG, through their communications dated 30.07.2009 and 04.08.2009 respectively, have been received in the Commission and taken on file.

12. During this hearing, representatives of the respondents were pointedly asked by the Commission about their stand regarding the portions of the PPP Agreement, they would consider confidential and those they would wish to disclose. They stated that, after consideration at 'the highest level' of the Ministry and the Port Trust Authority, it was decided that it was not necessary for the respondents to make such a determination.

13. The advice/views received from the Planning Commission and the C&AG read as follows:-

### Planning Commission:

*"Public Private Partnership requires a framework that can enable the private investor to secure a reasonable return at manageable levels of risk, assure the user of adequate service quality at an affordable cost, and facilitate the government in procuring value for public money. These preconditions are more difficult to fulfill than is commonly realized. Because of the multiplicity of*

*stakeholders pursuing conflict of interests, risk mitigation arrangements are usually complex. They involve detailed legal and contractual agreements that specify the obligations of different participants, set forth clear penalties for non performance, and offer protection to investors against actions beyond their control. It is therefore vitally important to address the problems associated with risk allocation, standard setting and transparency in a way which reassures all stakeholders. All these issues are addressed in a Concession Agreement.*

*2. The Planning Commission has published 11 Model Concession Agreements in various sectors for adoption in PPP projects. These documents have been used for many PPP projects across different sectors. Specific provision is provided in all these documents relating to disclosure of specified documents which reads as under:-*

#### ***'Disclosure of Specified Documents***

*The Concessionaire shall make available for inspection by any person, copies of this Concession Agreement, the Maintenance Manual, the Maintenance Programme and the Maintenance Requirements (hereinafter collectively referred to as to the "Specified Documents"), free of charge, during normal business hours on all working days at the Site and Concessionaire's Registered Office. The Concessionaire shall make copies of the same available to any person upon payment of copying charges on a 'no profit no loss' basis.*

*3. On the basis of the above provision the concessionaire is required to provide copies of the concession agreement to any person who seeks to obtain the same. The Planning Commission is of the view that disclosure of the concession agreement should not be withheld."*

#### **Comptroller & Auditor General:**

*"The issue is whether Concession Agreement entered into between a government entity and a private entity as part of PPP is to be disclosed. PPP is generally a standard document indicating the various concession that are admissible to the private entity while entering into a partnership with a public entity. Various clauses in a concession agreement generally do*

*not indicate the commercial interest of the parties. Under Section 8(1)(d) of the RTI Act information in the nature of commercial confidential [sic] is exempt information. As concession agreements do not contain commercial interest there should be no objection in furnishing the same under RTI Act. In case, there are certain clauses the disclosure of which may harm the competitive position of the parties to the agreement, the provision of severability in terms of the Section 10 can be applied."*

14. During the hearing, the representatives of the Planning Commission and the C&AG informed Commission that it was their considered view that no PPP Agreements should be held confidential and should be made available in the public domain. They discounted any possibility of commercial information getting exposed due to this disclosure.

15. Commission noted that the respondents had repeatedly stressed the confidentiality provision in the Agreement to demand that any disclosure of the PPP Agreement would be a breach of trust, especially in respect of the private contracting party. Respondents were further asked to explain whether a mere arrangement between two contracting parties — one of which was the Government — to keep the document confidential was sufficient to decline its disclosure under the RTI Act. Respondents were also asked to clearly state as to how could a plea of exemption under Section 8(1)(d) be taken without apprising the Commission about the contents of the document about which the privilege of confidentiality was claimed. They made no response except to say that 'the highest authority' had decided that the entire document should be held confidential. Respondents' representatives were informed that Commission had given to the Department of Shipping and the Mumbai Port Trust full opportunity to clearly state

their position regarding what portions of the PPP Agreement could be held confidential and the reasons thereof, and it was they who chose not to make a response.

16. The third-party (viz. M/s.Indira Container Terminal Pvt. Limited, Mumbai), in their written-submission dated 02.06.2009 took the position that disclosing the terms of the License Agreement to the appellant or any third-person, would adversely affect their (third-party's) interest and harm the competitive position of their Company. The text of their reply is as follows:-

*"We further state that if the terms of the License Agreement are disclosed to any third person, it will adversely affect our interest and harm the competitive position of our Company and third person may take undue advantage of the same for discouraging the entry of the private players in the business with malafide intention*

*We agree with opinion of Mumbai Port Trust and request your goodself that the copy of the License Agreement should not be provided to Shri Navroz Mody."*

#### **DECISIONS & REASONS:**

17. The position taken by the respondents that the confidentiality arrangement they had entered into with the private entity as part of the PPP Agreement must be respected, the RTI Act notwithstanding, is entirely untenable. Any public document must stand the scrutiny of the RTI Act for a plea of confidentiality to be sustained. Commission noted with dismay the uncooperative attitude of the respondents in obdurately declining to share even with the Commission, the specific contents of the PPP License Agreement on which the plea of breach of commercial confidence under Section 8(1)(d) was based. The

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responsibility for taking such a plea is entirely the respondents' — or of the 'highest authority' they repeatedly alluded to.

18. Planning Commission — which has a separate Department / Section dedicated to Public Private Partnerships and is known to have prepared the Model PPP Agreements for the Government — has categorically stated that any plea of confidentiality of those documents (PPP Agreements) was insubstantial and deserved to be rejected. Comptroller & Auditor General of India also advised the Commission that there was no room for confidentiality in matters such as PPP Agreements.

19. This advice of the Planning Commission and the C&AG to the Commission is contrary to the rather facile submission of the respondents that *“furnishing such agreement will have implications for various PPP projects being encouraged as a matter of Government policy where the private parties need to be assured of confidentiality of their Business Plans, including Preliminary Design criteria, Financing Plan, operation and maintenance plan and several other details which form part of such Agreements.”*

20. The appellant has forcefully brought out that a PPP Agreement involving the nation's physical resources and its infrastructure, which had critical environmental, social and human aspects, apart from its technical and financial aspects, could not be a matter between the bureaucracy of the government and the private party alone. The people of the country are entitled to know the truth about the PPP Agreements, in general as well as in their specific details. The logic that the private party could not be forced to share with others the technical and financial details it handed over to the Government is not

a persuasive argument. Such private parties frequently win the right to participate in the PPP Agreement in open competition, or are selected for their exclusive and extra-ordinary competence in specified areas of activity. In either case, it is necessary that there is complete transparency about whether the selection of the Private Partner by the Government was made correctly and carefully and, that all aspects of the issue — environmental, social and human included — were seriously considered by the Government in making the choice. A matter of such critical importance to the country cannot be negotiated and settled behind the back of its people. The third-party cannot take recourse to the argument of its vital commercial and technical details being disclosed to its rivals for the simple reason that it is the consideration of these very details that won him the competitive bidding in the first place. It is important and crucial that the choice of the Private Partner by the Government is not cloaked in undue secrecy.

21. The Department of Shipping and the Mumbai Port Trust authorities' arguments that as the PPP License Agreement, which was entered into with the third-party, M/s.Indira Container Terminal Pvt. Limited, Mumbai, contained a confidentiality clause, which was sufficient reason for the entire Agreement to be kept secret, is not a sound plea. It was pointed out to the respondents from the Bench that while this Agreement was concluded in the year 2007, the RTI Act was already in place. The respondents agreed to the confidentiality clause in regard to the License Agreement with the third-party-Private-Partner knowing full well that such omnibus confidentiality provision had to be open to scrutiny under the RTI Act. Their plea, therefore, that the mere fact of the presence of the confidentiality provision in the License Agreement was a sufficient condition to keep the Agreement secret,

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was untenable. Section 22 of the RTI Act clearly states that "*provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained ..... in instrument having effect by virtue of any law other than this Act.*" In the light of this provision as well, the confidentiality provision in the License Agreement is to be critiqued in regard to its consistency with the provisions of the RTI Act. This was precisely what we have done in the course of the present second-appeal proceeding, and we have found the position taken by the respondents to be severely flawed. It is quite obvious that an omnibus confidentiality clause in an Agreement does not bear scrutiny of the RTI Act and the respondents were entirely wrong in entering into it without any reference to RTI Act provisions. We are, therefore, not in a position to accept this plea.

22. The Comptroller & Auditor General of India, in their advice to the Commission during the hearing and through their written-communication, stated that in specific cases, severability provision of Section 10(1) may be used to withhold from disclosure, parts of the PPP Agreement which may attract any of the Section 8(1) provisions or other provision of the Act. There was no scope for us to consider whether Section 10(1) could be invoked for parts of the License Agreement because of the respondents' and the third-parties' plea that every single word which formed part of the Agreement was to be held secret on account of their having mutually agreed to.

23. In overall consideration, it is our view that the present information cannot be said to be barred by Section 8(1)(d) of the RTI Act because regardless of the status of this information, there is unmistakable public interest, which warrants and merits its disclosure.

We, therefore, hold that Section 8(1)(d) does not bar disclosure in the present case.

24. We are also not persuaded by the respondents' plea that disclosure of PPP Agreement would discourage private parties from entering into such agreements with the Government in future. This proposition is not borne out by any evidence produced before us and seems to be more a surmise than fact. It flies in the face of the categorical assertion of both the Planning Commission and the C&AG that there was nothing inappropriate about disclosure of PPP Agreements and that there was a distinct public interest to be served by making these Agreements public.

25. We have also examined this matter under Section 8(2) of the RTI Act in the light of submissions of all three parties in the second-appeal as well as the advice of the Planning Commission and the C&AG. We note that respondents have stated that the PPP Agreements are likely to become progressively common. In other words, a substantial part of the commercial and infrastructure development role of the Government shall now be entrusted to private parties, who in conjunction with the Government agencies, would deliver on specific projects. These Agreements would involve commitment of the Government's financial and physical resources. If PPPs were not the mode of project execution, the entire operation would then be conducted by the Government and would have been subject to the provisions of the RTI Act, and all information thereof would be disclosable. It would be vain to argue that functions which were earlier transparent when performed by Government exclusively, should become opaque now that these are

to be performed through PPP. This will amount to reversal of transparency and would be antithetical to public interest.

26. It is, therefore, imperative that the PPP Agreements are made to embrace transparency rather than be kept cloaked in secrecy.

27. We accordingly direct that the information requested in appellant's RTI-application be disclosed to him by the respondents — Mumbai Port Trust, within 4 weeks of the receipt of this order — on payment of admissible fees.

28. Appeal disposed of with these directions.

( **SHAILESH GANDHI** )      ( **MS. ANNAPURNA DIXIT** )      ( **A.N. TIWARI** )  
Information Commissioner      Information Commissioner      Information Commissioner

Authenticated true copy. Additional copies of orders shall be supplied against application and payment of the charges, prescribed under the Act, to the CPIO of this Commission.

(D.C. SINGH)  
Asst. Registrar