

Pakistan Information Commission

Government of Pakistan

1st Floor, National Arcade, 4-A Plaza

F-8 Markaz, Islamabad

Website: www.rti.gov.pk

Phone: 051-9261014

Email: appeals@rti.gov.pk

📱 @PkInfoComm



In The Pakistan Information Commission, Islamabad

Appeal No 512-08/20

M. Tariq Mansoor

(Appellant)

Vs.

Ministry of Privatisation

Through its Secretary

(Respondent)

ORDER

Date: June 22, 2021

Zahid Abdullah: Information Commissioner

A. The Appeal

1. The Appellant filed an appeal, dated 15-08-2020, to the Commission, stating that “With reference to this letter, I as a legitimate citizen of the Islamic Republic of Pakistan, working a practicing Advocate of High Court of Sindh, a reputable Member Human Rights Commission of Pakistan, and Member Amnesty International, a Public Interest Litigation Counsel, based at Karachi, Pakistan, in exercise of my guaranteed Constitutional and Fundamental Rights in the larger Public interest, as a matter of urgent Public Interest & Importance, relating to the non supply and no response from the M/s. Secretary Privatization Commission, since last 13 days till date against our formal letter dated 29th July, 2020, for supply of "true copy" of the following "PUBLIC DOCUMENTS" as PUBLIC RECORD" U/S 11 of the R.T.I. Act, 2017, R/W Article-9,5(2) & 19 A of the Constitution of the Islamic Republic of Pakistan, 1973 accordingly.

"Copy of the said letter and courier slip is marked and annexed herewith as Annex. "A"2 & "B" respectively."

You are therefore, requested, as a "COMPETANT AUTHORITY AND PUBLIC FUNCTIONARY" to kindly consider the above said "APPEAL" U/S 17(1) OF THE RTI ACT, 2017, in the larger Public interest as a matter of extreme public interest and importance affecting the daily live and well being of approx. 20.2 million plus citizens and Karachities including the undersigned R/W Art.9,19A & 5(2) of the CoP, 1973, R/W Sec. 14(1), 17(1), 20(e)(1) of the Right to Information Act, 2017, and thereby kindly grant directions to the Secretary Privatization Commission, GoP, etc., for supply of the true copy of each of the enclosed list of documents(S)] first mentioned above accompanied by the certificate of Same to the undersigned as soon as possible of the receipt of this letter at your earliest.”

2. The information sought by the Appellant is as follows:
 1. *“The Offer letter being issued to M/s. Hassan Associates led Consortium by the GoP, through Privatization Commission in 2005.*
 2. *The Share Purchase Agreement (SPA), dated 14th Nov, 2005, relating to M/s. KESC LTD., between GoP (through President of Islamic Republic of Pakistan)*

- and M/s. KES Power Ltd., M/s. Hassan Associates (Pvt.) Ltd., M/s. Premier Merchantile Services (Pvt.) Ltd.;*
3. *The Implementation Agreement (IA), dated 14th Nov, 2005, signed by the GoP and M/s. KES Power Limited;*
 4. *The Irrevocable Waiver and Consent, dated 27th Nov, 2008, signed between GoP (President of the Islamic Republic of Pakistan) represented by Ministry of Privatisation, GoP, and M/s. KES Power Ltd., M/s. Hassan Associates Ltd., and M/s. Premier Mercantile Services Ltd.;*
 5. *The Amendment Agreement (AA), dated 13th April, 2009 signed between KESC and the GoP;*
 6. *The KES Power Limited (KESP) Agreement with M/s. Abraaj Investment Management Limited (Abraaj) dated ____, 2007 for taking the Management Control of KESC;*
 7. *The Operations and Management (O&M) Agreement dated ____, 2005 signed between M/s. KES Power Limited and M/s. Siemens Pakistan Ltd.;*
 8. *Valuation of KESC and its due diligence reports”*

B. Proceedings

3. Through a notice dated August 21, 2020 sent to Secretary, Ministry of Privatisation called upon the Respondent to submit reasons for not providing the requested information.
4. The Respondent through a letter vide No. 1(1) KESC/PP/PC/2019 dated August 31, 2020 submitted its response. The text of the response is as under:

“The Privatisation Commission has received your letter dated August 21, 2020, whereby, regarding the captioned subject matter, you have asked the Privatisation Commission the reasons as to why the requested information was not provided to the Applicant.

 2. *At the outset, it is imperative to note that although Section 3 of the Right of Access to Information Act, 2017 (hereinafter referred to as the "Act") mandates that no Applicant shall be denied the right to access of information, by a public body. however, the Act itself delineates certain exceptions, under which a public body may choose to not disclose particular information.*
 3. *Specifically, Section 16 () () of the Act provides that information may be exempted from disclosure, if, "the information was obtained from a third party and on its communication, it would constitute an actionable breach of confidence. " Further, Section 16 (9) (Gi) of the Act goes on to state that information may be exempt from disclosure, if, "the information was obtained in confidence from a third party and it contains a trade secret or if communicated it may prejudice the commercial or financial interests of that third party. "*
 4. *In view of the foregoing provisions of the Act, it is evident that in cases where there exists an implicit or explicit understanding of confidentiality between the parties, information coming under the ambit of such confidentiality may not be disclosed. The Act itself has placed importance upon maintaining the confidentiality of the involved parties.*
 5. *The Privatisation of KESC was conducted through the execution of Share Purchase Agreement dated 14.11.2005, which contains a strict confidentiality clause. Further, other documents and agreement, requested by the Applicant also contain strict confidentiality clauses, and such clauses are applicable upon the Privatisation Commission. Moreover, these confidentiality clauses are not limited to the Agreements in which they are contained, as these confidentiality clauses include the entire exchange of information between the concerned parties. Therefore, the Privatisation Commission is bound to uphold its legal obligations and maintain confidentiality of the documents / agreements under question.*

6. Hence, in view of the foregoing averments, it is evident that due to the confidentiality clauses enshrined under the documents/agreements in question, the Privatisation Commission is unable to provide the Applicant with the required information.”
5. The Appeal was fixed for hearing on October 08, 2020; both parties were informed accordingly through the hearing notice sent on September 22, 2020.
6. Mr. Mohsin Abbas Syed, Senior Legal Consultant and Mr. Muneeb Mukhtar, Legal Consultant attended the hearing and requested time to submit report. The Respondent was directed to submit response before 15-10-2020.
7. The Respondent submitted its response on 21-10-2020. Text of the response is as under;
- “That 66.4% shares of K-Electric (the erstwhile KESC) were privatised, after the completion of its seller and buyer sides due diligence vide Share Purchase Agreement dated 14.11.2005. The Share Purchase Agreement was executed by the Ministry of Privatisation. In addition to the Share Purchase Agreement, an Implementation Agreement was also executed on 14.11.2005 by the Ministry of Water and Power. Subsequently, the Implementation Agreement was amended vide Amendment Agreement dated 13.04.2009, which was executed by the Ministry of Water and Power.*

2. *That out of the requested documents, only the Offer Letter issued to M/s Hassan Associates, the Share Purchase Agreement and the Irrevocable Waiver and Consent were executed by the Ministry of Privatisation and the remaining requested documents were not executed by the Ministry of Privatisation. The Ministry of Privatisation is not a party to the other documents. The Privatisation Commission has no knowledge of some of the documents like especially the documents mentioned at Sr. No. 6 & 7 of the application of the Appellant. It is pertinent to note that the Valuation of KESC and its seller side Due Diligence Reports are not currently available with the Respondent. Effort is still being made to find these documents from the record room of the Respondent. The Ministry of Privatisation and the Privatisation Commission have already started a project for digitization of their important record in order to ensure swift availability of their record.*

PRELIMINARY OBJECTIONS

1. *That KESC was privatised vide Share Purchase Agreement dated 14.11.2005, before the promulgation of the Right to Access of information Act, 2017 (hereinafter referred to as the "Act"). Therefore, the Share Purchase Agreement and various other documents pertaining to the privatisation of KESC contained confidentiality clauses. The Act does not have retrospective effect, therefore, the confidentiality clauses contained within the requested documents are still valid and can legally be enforced. The confidentiality clause provided in the Share Purchase Agreement is reproduced below for convenience of reference:*

"Clause 8.13: The parties agree that they or their respective nominees or representatives shall treat all information acquired by them by virtue of or in the course of their working with one another as strictly confidential. The Purchaser and its nominees, representatives, consultants and agents shall, hold in confidence all documents and other information whether technical or commercial relating to the transactions and obligations contained in this Agreement and shall not (save as required by law or appropriate regulatory authorities; prospective lenders to, or investors in the Company and their professional advisers) publish or otherwise disclose or use the same for its own purposes of otherwise than as may be required to perform its obligations under this Agreement. Provided that, the provisions of this Section 8. 13 shall not apply to any information in the public domain otherwise than by breach of this Agreement. The Purchaser shall not issue any press release or announcement relating to the subject matter of this Agreement or the sale and transfer of the Equity Stake without the written approval of the Commission."

2. *That the provision of the requested documents will lead to breach of confidentiality, on part of the Respondent, as the requested documents contain confidentiality clauses that cover the entire exchange of information between the Respondent and other related parties to the privatisation of KESC. Therefore, by providing the requested documents, the Respondent may have to suffer adverse legal consequences as a result of breach of contract. It is pertinent to note that in case of a breach of the contract, a party can refer the matter to arbitration, in light of Clause 6.2 of the Share Purchase Agreement.*
3. *That section 16 (1) (d) (1)) of the Act clearly states that information is exempt if its disclosure is likely to cause damage to the lawful and commercial activities of the public body. It is imperative to note that the K-Electric (the erstwhile KESC) was and remains a very strategic and important commercial national asset. Therefore, the disclosure of the requested information is likely to cause severe commercial harm and as such, the requested information is exempt from disclosure.*
4. *That the request for the provisions of documents, before the Respondent was filed on 29.07.2020 and was received by the Respondent on 03.08.2020. According to section 14 (1) of the Act, the time limit for responding to a request / application under the Act is 10 working days from the receipt of the request, however, this time limit may be enhanced by another 10 working days where the request/ application requires a search through a large voluminous record. Since the request was received on 03.08.2020, the Respondent was bound to reply by 17.08.2020 (excluding) 14.08.2020, which was a national holiday). However, the Appellant filed the appeal before the Pakistan Information Commission on 15.08.2020 without waiting for the decision of his application. Therefore, the appeal is premature and infructuous.*

PARA WISE REPLY TO THE APPEAL

Paragraph of Appeal	Reply
<p><i>With reference to this letter, I as a legitimate citizen of the Islamic Republic of Pakistan, working a practicing Advocate of High of Sindh, a reputable Member Human Rights Commission of Pakistan, and Member Amnesty International, a Public Interest Litigation Counsel, based at Karachi, Pakistan, in exercise of my guaranteed Constitutional and Fundamental Rights in the larger Public interest, as a matter of urgent Public Interest & Importance, relating to the non supply and no response from the M/s. Secretary Privatization Commission, since last 13 days till date against our formal letter dated 29th July, 2020, for supply of "true copy" of the following "PUBLIC DOCUMENTS" as PUBLIC RECORD" U/S 11 of the R.T.I. Act, 2017, R/W Article-9,5(2) & 19 A of the Constitution of the Islamic Republic of Pakistan, 1973 accordingly.</i></p>	<p><i>1. Denied. That as per section 2 (ii) of the Act, an applicant is defined as a citizen of Pakistan. Further, section 11 of the Act states that a citizen of Pakistan may make a request for information before a public body. Therefore, the assertions made by the Appellant in this para cannot be verified due to lack of knowledge. It is reiterated that the request for the provisions of documents was received by the Respondent on 03.08.2020. According to section 14 (1) of the Act, which specifies the time limit for responding to a request/ application under the Act is 10 working days from the receipt of the request, however, this time limit may be enhanced by another 10 working days where the request / application requires a search through a large voluminous record. The Appellant has failed to take into consideration the various legal duties and obligations of the Respondent and has completely disregarded the facts. It is imperative to state that the provision of the request documents may cause severe commercial harm as envisaged under section 16 (1) (d) (ii) of the Act and may lead to breach of contract. Further, since the request documents contain</i></p>

	<p>confidentiality clauses, therefore, by providing these documents, the Respondent may be held liable for breach of contract. Appellant's contention that no reply was received for a period of 13 days holds no ground and is contrary to the provisions of the Act. Appellant filed the instant appeal without waiting for expiry of ten working days as mandated under section 14 of the Act.</p>
<p>You are therefore, requested, as a "COMPETANT AUTHORITY AND PUBLIC FUNCTIONARY" to kindly consider the above said "APPEAL" U/S 17(1) OF THE RTI ACT, 2017, in the larger Public interest as a matter of extreme public interest and importance affecting the daily live and well being of approx. 20.2 million plus citizens and Karachities including the undersigned R/W Art.9,19A & 5(2) of the CoP, 1973, R/W Sec. 14(1), 17(1), 20(e)(1) of the Right to Information Act, 2017, and thereby kindly grant directions to the Secretary Privatization Commission, GoP, etc., for supply of the true copy of each of the enclosed list of documents(S)] first mentioned above accompanied by the certificate of Same to the undersigned as soon as possible of the receipt of this letter at your earliest."</p>	<p>2. Denied. That the Appellant has failed to take into consideration the various legal duties and obligations of the Respondent and has completely disregarded the facts. That it is imperative to state that the provision of the request documents may cause severe commercial harm as envisaged under section 16 (1) (d) (iii) of the Act and may lead to breach of contract. Further, since the request documents contain confidentiality clauses therefore, by providing these documents, the Respondent may be held liable for breach of contract.</p>

8. The response of the Respondent was shared with the Appellant on November 02, 2020.

9. The respondent submitted rejoinder on November 15, 2020. Text of the rejoinder is as under;

"1. That the instant Appeal was filed by undersigned as on 17th, Aug,2020 with letter and posting dated as 15th, Aug,2020, hence was well within time since the matter pertains to LIFE" R/W Hon'able SC judgments 2020 SCMR 1488 etc., w.r.t CJP Sc order dated 11.08.2020 specifically para-5 as well as in order dated 13.08.2020 in CP 9/2019, and HRC No. 20883 of 2018 etc., R/W Art.9, & 19 A, 5(2),4, 38 of CoP, 1973, R/W S.14(3) of RAI, 2018, which clearly states that information relating to life and liberty has to be provided within three working days, hence denied Respondent baseless and unlawful argument possible due to ignorance of the respective law and nature of the instant matter, which has to be noted.

"copy of the order dated 11.08.2020 specifically para-5 as well as in order dated 13.08.2020 in CP 9/2019, and HRC No. 20883 of 2018 etc Hon'able Chief Justice, Supreme Court of Pakistan, are marked and annexed herewith as Annexure-A& B respectively".

2. That as per the respective statute i.e., The Right of Access to Information Act (RAI), 2018, R/W its S. 17(3), the instant Appeal has to be decided by M/s. PIC within sixty days as directed and declared as mandatory requirement of the instant Act, the said clause is reproduced hereas under:

"The Information Commission established under section 18 shall decide an appeal under Sub-section (1) within a period of sixty days.

.....S17(3) of the Right of Access to Information Act, 2018”

3. That however, on the contrary, actually the hearing was held by PIC as on 08th Oct, 2020 wherein Respondent has to filed its reply (if any), whereas, by unfortunately the Respondent were failed to file its reply at the said hearing and reportedly seeks time due to which the PIC has given extension in time following the principles of natural justice and fair Trial however, the deadline for such extension of reply to be filed by the Respondent has to be by law well within the set deadlines as mandated under the relevant statute being binding on all R/ W its S.17(3), which has to be noted. This means that the Respondent were bound to file its reply (If any) latest by 15th Oct, 2020 and thereby the PIC is by virtue of the instant clause are duty bound to decide the instant Appeal within the deadline i.e., 15th Oct, 2020, which has to be noted specifically, however, neither any such “enlargement of time order” for filing of Reply to the Respondent and its Application for Enlargement of Time Delay has been filed or Is being intimated or transmitted in writing to the undersigned nor any order passed by M/s. PIC as Competent Authority is communicated, till date despite of the undersigned several telephonic and email reminders to the outcome of the or "Condonation of hearing of 08th Oct, 2020 uptill 01st Week of Nov, 2020, since the Decision of the instant Appeal has to be decided by M/s. PIC latest by 15th Oct, 2020, whereas the Respondent Reply along with M/s. PIC covering letter has been send to the undersigned surprisingly alter a period of approx. 85 days of filing of the instant Appeal as posted as on 09m Nov, 2020 received by the undersigned as on 11 Nov, 2020), which is on record, and has to be noted in particular. Hence, in accordance with the law the Reply of the Respondent is deficient in terms of limitation principles and are thereby treated as **TIME BARRED**" and accordingly the Respondent has prima facie as well as ex facie as intentionally

Violated the respective law "without any justified and sufficient cause" for each and every day/date of delay of filing their reply in the instant Appeal, hence bad in the eyes of law, utter violation of respective law and liable to rejected forth with in accordance with the respective law whereas the M/s. PIC, as a Competent Authority may has to proceed and pass order in the instant, matter within the set time frame exparte R/W Sec.24 A of the General Clauses Act, 1897, accordingly.

4. That it is significant to mention here that the undersigned had sent the Request for the Required Information about the Public Documents in custody of the Respondent vide its letter dated 29 July, 2020, posted as on 30th July, 2020, received to the Respondent as on _____which is on record, and according to the Right of Access to Information Act, 2018 R/W S.12, the respondent has to inform within ten working days of the receipt of request that f it does not hold any information and record, however, its on record that no such Intormation or letter has neither being sent nor communicated in writing to the Appellant, hence, now the Respondent version in its own words that valuation of KESC and its Seller side Due Diligence Reports are not currently available with the Respondent", This shows a blatant violation and gross criminal professional negligence and misconduct as Public Functionary on the part of the Respondent for not only violating the respective law but also prima facie causing deliberate and pre-determined hindrance and causing obstruction to the guaranteed Fundamental Right to Access to Information to Public Records R/W Art. 19A of the Constitution of the Islamic Republic of Pakistan, 1973, and Respondent's an "AFTER THOUGHT" suspicious conduct, which has to be noted in particular.

5. That whereas, as per S.13 of the RAI Act, 2018, it is mandatory that the Respondent as a Public Body shall provide written acknowledgement to the Appellant in response to its request, or if refused to provide the said request but unfortunately no such thing is neither on record nor communicated to the Appellant till date, hence once again shows Respondent's deliberate, pre-determined and willful obstruction and causing hindrance to the Appellant's Fundamental Right to Access to Information relating to Public Documents of High Public Interest and Public Importance R/W Art.9 and 19 A, 5(2),4, 2

A of the Constitution of the Islamic Republic of Pakistan, 1973, hence strongly condemned such conduct and response of the Respondent and request from the Hon'able M/s. PIC to proceed in accordance with the law for providing of the required docs and information to the undersigned Appellant forthwith, failure EO Which we as citizens and consumers Fundamental, Constitutional and legal rights will be severely infringed and will also suffer irreparable loss on daily basis till the providing of the required INFORMATION and "PUBLIC DOCUMENTS, which otherwise could not be compensated.

6. That the clause 8.13 of the M/s. KESC Share Purchase Agreement dated 14.11.2005 is subjective, as itself says and is controlled by the wording (save as required by law or appropriate regulatory authorities; prospective lenders to, or investors in the Company and their professional advisers. ")

That now, we have to read Art. 19A and 9, 5(2), 4, 38, 18, 25 of the Constitution of the Islamic Republic of Pakistan, 1973 means it has to be read in conjunction with various Hon'able Supreme Court Judgments on Right to Information as guaranteed Fundamental Rights and access to Public Documents, even here the KESC matter is affecting the Right to Life R/W Art. 9 because of its high unjustified tariffs, poor infrastructure, load shedding, excessive billing, low quality services etc., hence it's a prima facie as well as ex-facie matter of Right to our life both as citizens and as consumers R/W Hon'able Supreme Court Order in HRC 20883/2018, CP 9/ 2010 order dated 11.08.2020 and Orde dated 13.08.2020 reported in 2020 SCMR 1488, etc., hence, according to S.14/3) when it's a matter of life and liberty than it has to be mandatory replied within three working days, which has to be specifically noted, hence the undersigned Appeal was well within time, and Respondent Objections are false, baseless, and against the will and spirit of both the law and the Constitution.

RELEVANT CASE LAWS:

PLD 2012 SC 292;

2012 CLC 16;

2010 YLR 2615;

PLD 2012 SC 664;

2013 SCMR 1880

2010 SCMR 1849.

8. That it is also important to mention here that there are numerous Case laws of Superior Courts on record, wherein, the Honable Courts has already settled principles of law being binding on all subordinate courts and judicial and quasi judicial forums in Pakistan, R/W 189 & 190 of the CoP, 1973 and whereas, Art. 8 clearly states that:

Laws inconsistent with or in derogation of Fundamental Rights to be void

8. (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the right conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges therights so conferred and any law made in contravention of this clause Shall to the extent of such contravention, be void.

**** ..Extract from Art. 8 of the CoP, 1973*

9. That hence, the mere unlawful, unconstitutional, and blatant excuse and refusal of the Respondent to provide the required information and to provide the Certificate thereof, is flagrant violation not only of the relevant law, statutes, but also of the

Fundamental Rights being guaranteed under the CoP, 1973 R/W Art.4,5(2),9, 19A, 38, 2A etc, but also of Right to Information Act 2017 and the other relevant statutes to ensure transparency and to eradicate corruption and also doing prima facie intentional and willful contempt of various Hon able Supreme Court Judgments on matters of Public Interest and Importance and Right to Information of Public Documents on record, which has to be noted.

10. That the Respondent arguments are one and another Contradictory and conflicting as per their conduct and track record in the instant request and to the instant appeal and thereby their assertion that the required Public Documents are exempt as per their own assumed interpretation within the purview of S.16(1)(d)(111) of RAI Act, 2017, will be liable for breach of contract, is totally unlawful, in utter and flagrant refusal and violation of Guaranteed Fundamental Rights as mandated the Constitution and thereby tantamount to as creating unlawful Obstruction and hindrances to hide the said information under the garb of "damage to commercial activities of the public body", and for that rebuttal the undersigned would like to inform that the M/s. KESC was a Public Body which is now M/s. KE Ltd., providing single handedly electricity to more than 25 lacs plus consumers and used by approx. 2.5 Crores plus citizens of Islamic Republic of Pakistan, their life, bread and butter is linked with KESC privatization, and they reserve their legal right to Know that under what authority Irrevocable Waiver Consent was given at the cost of citizen's national public exchequer, Why seven years tariff freeze clause was abolished who was the beneficiary, what were the terms and conditions, who has authorized the Amendment in the Share Purchase Agreement, and under what authority it been signed, what were the terms and conditions, why Implementation Agreement being signed at the time of sale was Amendment and under what Authority, Why some of the docs were Executed by the Ministry of Water and Power, GoP, and under what authority and authorization since the sale was done by Privatization Commission, Ministry of Privatization, GoP, Who had done the valuation of M/S. KESC what are the properties and their valuation since pubic property and Amenity Plots and Lands being given to M/s. KESC Since its est way back in 1913 onwards was for welfare purpose such grid stations, sub stations, power houses, Labour Colonies, etc etc, hence, their titles cannot be sold read With KDA Order, 1957, under what authority these were sold and by whom?, Who had done the due diligence? What are their estimations and assessments, and who is the Auditor and Valuator and what are their terms and conditions etc., which has to be noted, because ultimately the final and ultimate suffers of such agreements privatization and contracts are the poor citizens of the Islamic Republic of Pakistan, which has to be noted. Hence, the Respondent is failed/provide justifiable, lawful, transparent, logical, sufficient, constitutional and plausible excuse and refusal but prima facie from its contradictory statements trying and abetting to find and escape route to hide Possible Loss to National Public Exchequer" and its "Possible Beneficiaries Public Functionaries and Private Persons", and to obstruct and hinder transparency and accountability of those responsible in accordance with the law and the mandates of the Constitution accordingly.

RELEVANT SUPREME COURT CASE LAW(S):

"It is the duty of public functionaries to pass orders in accordance with law."

******2007 SCMR 289]*

"Any public functionary, how high so ever it may be, is subservient to the Constitution and law and has to act within the boundaries assigned by the Constitution and law framed thereunder.

******2015 SCMR 1449]*

"It is the duty of public functionary to act in accordance with law without fear, favour,

and

nepotism."

***[2007 SCMR 330

You are therefore, requested, "COMPETANT AUTHORITY AND PUBLIC FUNCTIONARY" to kindly consider the above said "APPEAL" U/S 17(1) OF THE RTI ACT, 2017, in the larger Public interest as a matter of extreme public interest and importance affecting the daily live and well being of approx. 20.2 million plus citizens and Karachities including the undersigned R/W Art.9,19A & 5(2),4,38 of the CoP, 1973, R/W Sec. 14(1),14(3) 17(1), 20(e)() of the Right to Information Act, 2017, and there by kindly pass appropriate orders and grant directions/orders to the Secretary Privatization Commission, GoP, etc.,(Respondent) for supply of the true copy of each of the enclosed list of documents(s)]first mentioned above accompanied by the certificate of same to the undersigned as soon as possible of the receipt of this letter at your earliest."

10. The appeal was again fixed for hearing on December 10, 2020 and both parties were informed accordingly through a notice sent on November 26, 2020.
11. Mr. Mohsin Abbas Syed, Legal Consultant, Privatisation Commission attended the hearing and appraised the commission that the information requested in Para 1, 2, 4 and 8 is already provided. Rest of the information such as agreement mention in Para 3 are not related to Ministry of Privatisation.
12. Through an Interim Order dated February 16, 2021, the commission convey the following to the Respondent:

"The Respondent is directed to initiate enquiry to determine how Valuation of KESC and its seller side Due Diligence Reports went missing and submit finalised enquiry report to this commission in the hearing to be held on March 25, 2021.

The Respondent is directed to recreate missing Valuation of KESC and its seller side Due Diligence Reports by collecting the same from relevant public bodies and submit compliance report to this commission in the hearing to be held on March 25, 2021 11:30 am".

13. The hearing to be held on March 25, 2021, was postponed and next hearing was held on April 14, 2021. Mr. Muneeb Mukhtar, Legal Consultant, Privatisation Commission submitted the enquiry report. He also apprised the commission that the Respondent had written to the private entity for its consent to disclose the requested information.
14. In the hearing held on May 26, 2021, Mr. Ikram Quraishi submitted before the commission that the Respondent had not received any response or consent for the disclosure of the requested information. He also submitted before the commission that the disclosure of the requested information is likely to drag the country into costly litigation because of the confidentiality clause in the contract.
15. Through an Interim Order dated May 27, 2021, the commission observed that "after the enactment of the Right of Access to Information Act 2017, records can only be classified and exempted from disclosure under Section 7 (f) of the Act which is as under:

"Records declared as classified by the Minister-in-charge of the Federal Government Provided that the Minister-in-Charge of the Federal Government shall have to record reasons as to why the harm from disclosure of information outweighs public interest and further that information pertaining to allegation of corruption and violation of human rights shall not be excluded".

The Respondent is directed to place the matter before the Minister-in-Charge for the review and to record reasons in writing as to how the harm from disclosure of information outweighs public interest and submit report to this effect before this commission in the hearing to be held on June 17, 2021".

16. Through a letter dated June 16, 2021, the Respondent shared its response in the hearing that was held on June 17, 2021 which is as under:
1. "This Report is submitted in compliance with the Interim Order dated May 27th, 2021 passed by the Pakistan Information Commission, Islamabad. The relevant portion of the direction is reproduced hereunder:
"The Respondent is directed to place the matter before the Minister-in- Charge for review and to record reasons in writing as to how the harm from disclosure of information outweighs public interest and submit report to this effect before this Commission in the hearing to be held on June 17, 2021."
 2. The matter was placed before the Hon 'ble Federal Minister for Privatisation who has reviewed the matter and is pleased to record the following reasons on the issues:
 - (i) "I have reviewed the relevant documents including the Share Purchase Agreement (SPA) of K-Electric, and the relevant laws i.e. Constitution of Pakistan, Privatisation Commission Ordinance, 2000 (the Ordinance) and the Right of Access to Information Act, 2017 (the Act) in this regard. I have also held meeting with the concerned officials in the Privatisation Commission including the Senior Legal Consultants and discussed the matter in detail. The findings of my review and reasoning for non-provision of the requested information are as under for consideration of Pakistan Information Commission (PIC):
 - (a) The Confidentiality Clause 8.13 of SPA is of imperative nature for making decision with respect to disclosure of information in the instant case. I am of the view that the Confidentiality Clause of SPA is abundantly clear and it does not contain any ambiguity that requires any interpretation other than already provided to PIC i.e. the inability of the Respondent to disclose the requested information. The sanctity of the SPA is of significance for transaction parties to avoid any legal complications i.e. Arbitration/Court Proceedings and financial claims in case of breach of the SPA. Moreover, the SPA is legally enforceable and not ultra vires to the Constitution of Pakistan or any other law. It may be highlighted that SPA was executed prior to promulgation of the Act.
 - (b) PIC while considering the Confidentiality Clause had directed the Respondent vide Order dated February 8th, 2021 to seek consent from the buyer of K-Electric for disclosure of information. In compliance with the directions, the Respondent had issued letters as well as emails for obtaining consent from the buyer of K-Electric, however, no reply has so far been received in this regard. If the buyer of K-Electric gives its consent for disclosing the requested information, the Respondent is directed to provide the same to the Appellant.
 - (c) In case the Respondent provides the requested information in breach of the SPA, there is likelihood that the buyer of K-Electric may invoke the Arbitration proceedings under the SPA and claim damages. The Arbitration proceedings themselves are very expensive (i.e. legal fee, arbitrators fee and other expenses) and may impose unnecessary financial burden for the exchequer. Therefore, I am of the considered opinion that harm from disclosure of any information which constitutes breach of any contract outweighs public interest for its disclosure.
 - (ii) The Respondent is directed to place my aforesaid review and reasoning before the PIC pursuant to the directions vide Interim Order dated May 27th, 2021."

C. Issues:

17. The instant appeal has brought to the fore following pertinent issues:
- imbalance between protecting commercial interests of private businesses and citizens' right of access to information in matters of public importance.

D. Discussion and Commission's View on Relevant Issues

18. The Respondent submitted before this commission that "The Privatization of KESC was conducted through the execution of Share Purchase Agreement dated 14.11.2005, which

contains a strict confidentiality clause. Further, other documents and agreement, requested by the Applicant also contain strict confidentiality clauses, and such clauses are applicable upon the Privatization Commission. Moreover, these confidentiality clauses are not limited to the Agreements in which they are contained, as these confidentiality clauses include the entire exchange of information between the concerned parties. Therefore, the Privatization Commission is bound to uphold its legal obligations and maintain confidentiality of the documents / agreements under question”.

19. The Respondent also submitted that “That the provision of the requested documents will lead to breach of confidentiality, on part of the Respondent, as the requested documents contain confidentiality clauses that cover the entire exchange of information between the Respondent and other related parties to the privatisation of KESC. Therefore, by providing the requested documents, the Respondent may have to suffer adverse legal consequences as a result of breach of contract. It is pertinent to note that in case of a breach of the contract, a party can refer the matter to arbitration, in light of Clause 6.2 of the Share Purchase Agreement”.
20. This commission takes strong exception to the fact that the Respondent agreed to a wide-ranging confidentiality clause which covers “entire exchange of information between the Respondent and other related parties to the privatisation of KESC”.
21. The purpose of the confidentiality clause in contract is to protect legitimate commercial interests of the private entities and not shrouding in the cloak of secrecy entire range of documents which have nothing to do with the commercial interests of the private entities. Especially, after the insertion of Article 19-A through 18th Amendment in the constitution, federal public bodies are expected to ensure that only reasonable restrictions are imposed on citizens’ right of access to matters of public importance through the confidentiality clauses in the contracts.
22. The instant appeal demonstrates that the relevant civil servants have been protecting commercial interests of the private business at the cost of transparency, openness and citizens’ right of access to information in matters of public importance. As such, while negotiating these contracts with wide-ranging confidentiality clauses, the officers have not been exercising powers vested in them “reasonably, fairly, justly, and for the advancement of the purposes of the enactment” as required under Section 24A of the General Clauses Act 1897.
23. Despite its strong reservation about this wide-ranging confidentiality clause, this commission is left with no option but to agree with reasons proffered by the Minister-in-charge that the disclosure of KESC privatisation agreement will tantamount to the breach of the contract in the presence of the confidentiality clause. As such, the disclosure of the agreement is likely to have grave legal and financial implication for the country if the private entity chooses the path of arbitration.
24. It is legal responsibility of officers of the federal government who negotiate contracts with private entities on the behalf of the federal government to protect public interest and citizens’ right of access to information in matters of public importance. As such, officers of the federal government should ensure that public interest and citizens’ right of access to information in matters of public interest is not compromised in negotiations with private entities and signing contracts with wide-ranging confidentiality clauses in the name of protecting commercial interests of these private entities. The officers of the federal government can and should create a balance between protecting public interest and citizens’ right of access to information in matters of public importance and protecting legitimate commercial interests of private entities while signing contracts.

E. Order

25. The Appeal is dismissed as harm from disclosure outweighs public interest if the private entity chooses the path of arbitration resulting in severe financial penalties for the country

because of the confidentiality clauses in Share Purchase Agreement dated 14.11.2005, other related documents, agreements and communication.

26. Secretary, Privatization Commission is directed to create balance between protecting public interest and citizens' right of access to information in matters of public importance and protecting legitimate commercial interests of private entities while signing contracts in the future.
27. Secretary, Privatization Commission is directed to take immediate steps to proactively share through the web site all categories of information mentioned in Section 5 of the Right of Access to Information Act 2017 and submit the compliance report to the commission in the Template for the Compliance Report-Proactive Disclosure of Information under Section 5 of the Right of Access to Information Act 2017'. This template is available under 'Information Desk' category at the web site of the commission www.rti.gov.pk. The compliance report be submitted to this commission within 30 days of the receipt of this Order.
28. Copies of this Order be sent to Public Information Officer, Privatization Commission, Secretary, Privatization Commission, Secretary to Prime Minister, and the Appellant for information and necessary action.

Mohammad Azam
Chief Information Commissioner

Fawad Malik
Information Commissioner

Zahid Abdullah
Information Commissioner

Announced on:

June 22, 2021

This order consists of 12 (three) pages, each page has been read and signed.