

**Pakistan Information Commission**  
**Government of Pakistan**

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**In the Pakistan Information Commission, Islamabad**

**Appeal No 1111-05/21**

**Mian Suhail Husain**

**(Appellant)**

Vs.

**Pak Arab Refinery Company Limited**

**(Respondent)**

**Order**

**Date:** September 28, 2021

**Zahid Abdullah:** Information Commissioner

**A. The Appeal**

1. The Appellant filed an appeal, dated May 28, 2021, to the Commission, stating that he submitted multiple information requests to the Managing Director, Pak Arab Refinery Company Limited on April 21, 2021, April 27, 2021 and May 06, 2021 under the Right of Access to Information Act 2017 but did not receive the requested information from the public body.

2. The information sought by the Appellant on April 21, 2021 is as under:

*“We have written letters to your Manager Material for which no response has been given. As Parco is Federal Government entity appearing in the Ministry of Energy Portfolio and within the definition of 2(ix)(d) of Rights to Information Act 2017, we request the following certified files under article 3 of Rights to Information Act 2017:*

1. *File relating to second tender no. Revamp bulk-44 where Gresham was the lowest bidder and tender was cancelled with no reason extended.*
2. *File relating to the current Prequalification where Parco has refused to provide information in terms of Clause No. 16(3) & 16(4) of PPRA Rules 2004, despite availability of PPRA letter dated 02-05-2018.”*

3. The information sought by the Appellant on April 27, 2021 is as under:

*“Whether PPRA is applicable to PARCO has already been decided by PPRA in its letter dated 02-05 2018 leaving little to ponder and argue about.*

*PPRA allows Pre-Qualifications as per Article No 15 which reads:*

*“(1) A procuring agency, prior to the floating of tenders, invitation to proposals or offers in procurement proceedings, may engage in pre-qualification of bidders in case of services, civil works, turnkey projects and in case of procurement of expensive and technically complex equipment to ensure that only technically and financially capable firms having adequate managerial capability are invited to submit bids. Such pre-qualification shall*

*solely be based upon the ability of the interested parties to perform that particular work satisfactorily.*

*(2) A procuring agency while engaging in pre-qualification may take into consideration the following factors, namely: -*

*(a) relevant experience and past performance; (b) capabilities with respect to personnel, equipment, and plant;*

*(c) financial position;*

*(d) appropriate managerial capability; and (e) any other factor that a procuring agency may deem relevant, not inconsistent with these rules."*

*There is nothing in the procurement of the Boiler of a generic nature which would invite pre qualification under article 15 of PPRA in view of the fact that the Boiler tender was floated twice and Gresham successfully passed all milestones.*

*Again, Article 16 And Article 17 are self-explanatory and need no amplification.*

*The Boiler procurement was cancelled in Tender No. Revamp bulk-44 (2018) for unexplained reasons and now refloated for the same supply under a "pre-qualification" regime which opens many many questions why same roadmap was not followed in Tender No. Revamp bulk-44 (2017) and Tender No. Revamp bulk-44 (2018) (2 times for the same job)*

*We have requested under the RTI 2017 certified copies of all the files including file notes as per RTI 2017 and would like to know whether the same will be provided as within the Law, we would be left with no choice but to file a reference with the Chairman, Information Commission under the relative sections to acquire the said files.*

*As PARCO has foreign investment the ramifications should be considered and all further actions for procurement of the boiler be stopped."*

4. The information sought by the Appellant on May 06, 2021 is as under:

*"Under article 3 of Right to Information Act 2017.*

*Kindly provide us with certified copies of the file notes in respect of the following:*

- 1. Revamp bulk-44 (2017) for the procurement of boiler.*
- 2. Revamp bulk-44 (2018) for the procurement of boiler.*
- 3. Revamp bulk-44 (2020) for procurement of boiler."*

## **B. Proceedings**

3. Through a notice dated June 10, 2021 sent to the Managing Director, Pak Arab Refinery Company Limited called upon the Respondent to submit reasons for not providing the requested information.

4. The Respondent through a letter dated June 23, 2021 submitted its response which is as under:

*"We refer to your letter dated June 10, 2021 received in our office on June 18, 2021 relating to an Appeal No. 1111-05/21 under the Act, filed by Mr. Mian Sohail Hussain.*

*At the outset, we would like to advise that PARCO is a commercial joint venture between the Government of Pakistan and the Emirate of Abu Dhabi, being an independent legal entity, separate and distinct from the Government of Pakistan and hence, cannot be classified as a "federal public body under the Act.*

*As a result of its distinct legal status, it is neither a Division, nor Department nor office of the Federal Government nor is it a Corporation or Authority established by statute, nor is it a Public Sector Company.*

*Without prejudice to the above, even otherwise, the information requested by Mr. Hussain relates to a procurement. PARCO does not fall within the definition of Procuring Agency as defined under Section 2 () of the Public Procurement Regulatory Authority Ordinance, 2002 ("Ordinance). Therefore, neither the Ordinance nor the Public Procurement Regulatory Authority Rules, 2004 are applicable to PARCO as confirmed by the Hon'ble Lahore High Court in terms of its Judgment reported as PLD 2016 Lahore 207, which has attained finality.*

*Significantly, Mr. Husain (the Appellant) has approached various forums, including filing a Complaint before the Wafaqi Mohtasib (Ombudsman). The said Complaint was disposed off in terms of the Ombudsman's Order dated June 7, 2021. (A copy of the Ombudsman's Order is attached Therefore, PARCO is not obligated to provide the information / documents as demanded by Mr. Hussain We trust that this clarifies the position and the Commission will accordingly close the matter."*

5. The response submitted by the public body was shared with the appellant on June 28, 2021.
6. The appellant through a letter dated July 16, 2021 submitted rejoinder to the information shared by the public body, which is as under;

*"The Admitted position as outlined and confirmed by PARCO is:*

*60% ownership is with the Government of Pakistan.*

*40% ownership is with the UAE Government.*

*Since 60% of the funds have been invested by, the People of Pakistan PARCO is subject to:*

*1. PPRA Rules... wherein the description of Public Entity is thus:*

*"i. Any Ministry, Division, Department or any Office of the Federal Government;*

*ii. Any authority, corporation, body or organization established by or under a Federal law or which is owned or controlled by the Federal Government;"*

**2. NAB whose Rule 33-B reads:**

*"All Ministries, Divisions and Attached Departments of the Federal Government, all departments of Provincial and local governments, statutory corporations or authorities established by the Federal Government or Provincial Government and holders of public office shall furnish to NAB a copy of any contract, entered into by such Ministries, Divisions and Attached Departments of the Federal Government, all departments of Provincial Government or local government, statutory corporations or authorities established by the Federal Government or Provincial Government or such holder of public office on its behalf, as the case may be, of the minimum monetary value of fifty million rupees or more, within such time as is reasonably practicable from the date of signing such contract.*

**3. Rights to Information Act Clause No. 2(ix) and 3 which reads:**

*"Public body" means (a) Any Ministry, Division, attached department or subordinate office, including autonomous bodies of the Federal Government;*

*There was no cause of action before us to initiate any appeal against the said judgement of a Single Bench of Lahore High Court and we are in contact with PPRA as well as Lahore High Court for certified copies and knowledge whether any appeals took place. The Said order is in limine defective and is at best related to the specific matter before the Court and it cannot be termed to read as "replacement of the Laws of Pakistan. Legally, only the Supreme Court of Pakistan would have the right to make such an interpretation. If Parco wanted an all-round encompassing order exempting them from PPRA, NAB Ordinance, CCP... Right to Information Act, it should have obtained such specific orders from the Superior Courts.*

*2. PPRA letter dated 02-05-2018 is self-explanatory and rejects any exemptions for PARCO Procurement being outside the ambit of PPRA Rules.*

*3. The Findings of the Wafaqi Mohtasib are inconclusive and have been appealed before the President of Pakistan Parco has not responded. (Annex 1) In accordance with article 3 of the RTI, we have filed our request for the concerned documents and there is no Law of Pakistan that exempts an organization, which has 60% Public Funding to deny our request. Parco claim of exemption tantamount to challenging the Sovereignty of Pakistan."*

7. The respondent did not respond to the notice of the commission. The appeal was fixed for hearing on August 26, 2021 and both parties were informed through notices sent on June 09, 2021. Hearing Summon dated July 27, 2021 sent to Additional DG (Legal and Labour), SEPCO, states, *"failure to attend the hearing will result in ex Parte decision and the responsible will be dealt with in accordance with the relevant provisions of the Act"*.
8. The appeal was fixed for hearing on August 26, 2021 and both parties were informed through notices sent on August 02, 2021.
9. Mr. Taha Alizai Advocate and Mr. Amin Fahir Advocate attended the hearing on behalf of Respondent and requested time to submit response. Hearing was adjourned for September 16, 2021.
10. Mr. Taha Alizai Advocate attended the hearing held on September 16, 2021 and submitted response, along with a letter of Cabinet Division letter No. 1/92/2019/IRC dated 19th May, 2020 as reference. Content of the said letter is as under:

*"Reference Ministry of Energy, Petroleum Division's letter No 7(5)/91-Oil2019, dated 4th May, 2020 on the subject noted above.*

*2. It is informed that para-2 of annex-I of the report on Reorganization of the Federal Government clearly states that the existing legal status of an entity will remain unchanged and only for administrative purpose such bodies have been classified as Autonomous Bodies. All wholly or partly Government owned companies / statutory bodies / corporates etc have therefore been classified into two broad categories of Autonomous Bodies and Executive Departments in place of the existing sixteen type of organizational entities after privatization, mergers, devolution, liquidation etc.*

*3. Rules of Business of Petroleum Division Section 4(ii) state that the Division shall Administer Matters relating to Federal investments and undertakings wholly or partly owned by the Government in the field of oil, gas and minerals, excepting those assigned to the Industries and Production Division. In view of the foregoing it is clarified that*

*(a) PARCO would continue to operate under its existing unique and special legal frame work as outlines in para 3(i) of the reference letter.*

*(b) PPRA Rules would not be applicable in the case of PARCO as already decided by Laws and Justice Division vide U.O. No 176-2016-Law-1 dated 15-03-2016 c) SECP's ruling conveyed vide its letter IAN No. 58/2016-CLD/RD/ROC/CG/2004-4040 dated 17 May, 2018 that Public Sector Companies (Corporate Governance) Rules 2013 amended would not apply to PARCO is affirmed*

*d) The appointment of the Board of Directors would take place as under the joint venture agreement;*

*e) PARCO's account would not be audited by the Auditor General of Pakistan. Therefore, PARCO's would remain exempt from appearing at the DAC/PAC*

*f) The Board, rather than the Federal Ministry would enter into agreement with the management of PARCO consequently, there would be no need to place the Annual Report before the Parliament.*

*4. We would like to assure you that there no intention to deviate from the Joint Venture agreement, and PARCO for all practical purposes, would continue to operate as it doing at present."*

11. The Respondent has also shared a judgment PLD 2016 Lahore of Lahore High Court title M.S. Ghani Gases Limited versus Federation of Pakistan. Relevant part of the the said judgment is as under:

*".....The next question is whether PARCO comes within the definition of procuring agency in terms of Pakistan Procurement Regulatory Authority Ordinance, 2002. Section 2 (j) of the Public Procurement Regulatory Authority Ordinance, 2002 defines "procuring E agency" to mean, amongst others, any corporation, body or organization established by or under a Federal law or which is owned or controlled by the Federal Government. Similarly, the definition of "Public Fund" includes the funds of enterprises which are owned and controlled by the Federal Government. The catchword in both the definitions is owned and controlled by Federal Government". The reading of the aforementioned provisions of Public Procurement Regulatory Authority Ordinance, 2002 leaves no room for doubt that both the expressions "owned" and "controlled" have been used disjunctively and both need to be present in a corporation before it can be said to fall in the definition of a procuring agency. In a limited liability company, as PARCO is, there is some divorce of ownership from the control. This is particularly so in public limited companies where the ownership (theoretically) rests with a large and diverse body of shareholders but the control (management) of the company rests with the directors. As stated earlier, the two groups of shareholder through Memorandum of Understanding dated 31.03.1986 brought about a change in the corporate governance structure of PARCO by deciding to take all the decisions through E consensus. This consensual arrangement over decision making in PARCO makes it impossible for PARCO to be termed as enterprise owned and controlled by Government. PARCO, therefore, does not fall in the definition of "procuring agency" and its funds cannot be termed as "Public Fund". Pakistan Procurement Regulatory Authority Ordinance, 2002, which regulates 'public procurement' i.e. acquisition of goods, services, etc financed wholly or partly out of the Public Fund, is not applicable to contracts entered into by PARCO.*

*10. There is yet another important aspect of the matter to which Ms. Ayesha Hamid, the learned counsel for Linde drew the attention of this Court. She described contract dated 15.01.2013 as merely an extension of original agreement dated 12.01.1999 executed initially between PARCO and Linde. As stated in the earlier part of this judgment, PARCO and Linde had entered into an Agreement dated 12.1.1999 whereby Linde had agreed to design, build, own and operate a plant for production of nitrogen at the premises of PARCO at Mehmood Kot and agreed to make available, and to supply, to PARCO Nitrogen for the safe operations of its refinery. The term of the agreement extended up to 15 years from date of commissioning i.e. 31.3.2000 of the facility/plant. Linde constructed/installed*

*the entire facility comprising (i) nitrogen plant having a capacity to produce 800 NM<sup>3</sup>/HR of gaseous nitrogen, (ii) liquid nitrogen storage having a capacity of about 110 tons and (iii) vaporizing facility to meet PARCO's nitrogen requirements entirely at its own expense. In terms of clause 10 of agreement dated 12.01.1999, the agreement could be extended for a further period of 15 years. The only question is whether agreement dated 15.01.2013 is an altogether new agreement or forms part of agreement dated 12.01.1999 having been executed in terms of clause 10 thereof. The purpose for executing Agreement dated 12.01.1999 between PARCO and Linde (then BOC Pakistan Limited) was the supply of Nitrogen by Linde to PARCO. In terms of Clause 3 of the said agreement, PARCO shall have the right, during the initial term, to request for additional plant to balance the production and consumption of Nitrogen. With the expansion in production capacity of the refinery being run by PARCO, its requirement for Nitrogen also increased. In this regard, PARCO decided to extend the term of the principal agreement with Linde in terms of clause 10 thereof. A review of the various provisions of addendum agreement dated 15.01.2013 makes it apparent that it was executed in pursuance of clause 10 of the principal agreement. The building of new plant for supply of Nitrogen under addendum agreement dated 15.01.2013 does not make it a new agreement. Clearly, both PARCO and Linde proceeded with the execution of addendum agreement for building of the new plant on the basis of clause 10 of the principal agreement. With its roots in clause 10 of the principal agreement, the addendum agreement thus became its part and cannot be termed as a new agreement even if the argument is accepted that PARCO falls in the definition of "procuring agency", which it does not as has been held in the earlier part of this judgment.*

*11. In the result, this writ petition fails and is accordingly dismissed.”*

### **C. Issues**

12. The instant appeal has brought to the fore following issue:

Does the Respondent, PARCO come within the definition of public body under the Right of Access to Information Act 2017, henceforth referred to as Act?

b. Commission's View on Relevant Issues

13. In the instant appeal, this commission holds that with regard to the definitional purposes of the Respondent as a public body under the Act, the key determinants are the involvement of public funds of the Government of Pakistan and that a public body should be “owned”, and “controlled by the federal government.

14. This commission is of the view that the Respondent PARCO is neither owned and controlled by the federal government nor public funds are involved in the running of the affairs of the Respondent PARCO.

15. This commission is of the view that the determination of Honourable Lahore High Court in PLD 2016 title M.S. Ghani Gases Limited versus Federation of Pakistan, that “both the expressions "owned" and "controlled" have been used disjunctively and both need to be present in a corporation before it can be said to fall in the definition of a procuring agency” is also relevant with regard to the declaration of the Respondent as a public body for the purposes under this Act. In a limited liability company, as PARCO is, there is some divorce of ownership from the control. This is particularly so in public limited companies where the ownership (theoretically) rests with a large and diverse body of shareholders but the control (management) of the company rests with the directors.

16. In The Cabinet Division Letter No. 1/92/2019/IRC dated 19th May, 2020, the federal government has maintained that “PARCO's account would not be audited by the Auditor General of Pakistan” and that “PARCO's would remain exempt from appearing at the

DAC/PAC” And that PARCO would not be required to place the Annual Report before the Parliament.

17. It is evident from the Cabinet Division letter that the commitments made to the entity in Joint Venture agreement, the federal government is not treating the Respondent as a public body and has reiterated that *“para-2 of annex-I of the report on Reorganization of the Federal Government clearly states that the existing legal status of an entity will remain unchanged and only for administrative purpose such bodies have been classified as Autonomous Bodies”*.

**E. Order**

18. The Appeal is dismissed as the Respondent PARCO is neither owned and controlled by the federal government nor public funds are involved in the running of the affairs of the Respondent.
19. Copies of this order be sent to the Appellant and the Respondent.

**Mohammad Azam**

Chief Information Commissioner

**Fawad Malik**

Information Commissioner

**Zahid Abdullah**

Information Commissioner

Announced on:

September 28, 2021

This order consists of 7 (seven) pages, each page has been read and signed