

CENTRAL INFORMATION COMMISSION
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Decision No. CIC/SG/C/2009/001472+001312/7047
Complaint No. CIC/SG/C/2009/001472+001312

Relevant Facts emerging from the Complaint:

Complainant : Mr. Rakesh Agarwal,
House No. B-24, Vikram Nagar,
New Delhi – 110002.

Respondent : Mr. Suneet Mudgal
AGM (HR)
Delhi Integrated Multi-Modal Transit System,
First Floor, I.S.B.T.
Kashmere Gate, Delhi – 110006.

Background:

The Complainant filed two RTI Applications dated 03/09/2009 and 14/10/2009 with the Delhi Integrated Multi-Modal Transit System (DIMTS) seeking certain information. In **RTI Application dated 03/09/2009** the following information had been sought:

1. A full set of information free of cost as required to be disclosed u/s 4.
2. Reasons for not publishing the information as required u/s 4.
3. A copy of the shareholders agreement signed with Delhi Government.
4. Copy of disinvestment agreement signed with Delhi Govt. when disinvesting.
5. Copies of documents & records evidencing process/method of disinvestment.
6. Your annual accounts together with auditors reports for the last five years.
7. Copies of the minutes of board meetings since disinvestment.
8. Are you covered by the audit by CAG?
9. Are your accounts examined by PAC or Committee on Public Undertakings?
10. How much of your revenues come from the government?
11. A list of all major and minor projects received from Transport Department, Delhi upto the date of disinvestment by Delhi Government.
12. A separate list of all major and minor projects received from Transport Department after the date of such disinvestment.
13. Copies of all project / study Reports prepared by you or received from Delhi Govt.
14. Copies of all agreements, contracts, tenders, MOUs, etc. signed with Tpt. Deptt.
15. Copies of all agreements, contracts, tenders, MOUs, etc. signed with external agencies in pursuance of or for the execution of projects or works given to you by Delhi Govt.
16. Copies of all notices inviting EOLs, tenders, etc. together with the EOI and tender documents.
17. Kindly provide details as to the process and methods adopted by Transport Department through which projects are given to you.
18. Kindly provide details as to the process and methods adopted by you for the selection of contractors.

19. Kindly advise the present status of all projects underway and the expected date of start and /or completion together with timeliness for different stages.
20. A copy of the complete file including all notings correspondence, deliberations, study reports, agenda and notices of meetings, minutes of meetings, decisions, etc. that records and decision to shift BRT corridor to the left of the road from the centre of the road.

The RTI Application was returned by the Respondent along with his letter dated 07/09/2009 stating that the DIMTS is not a public authority and that the Complainant may direct his questions to the Transport Department.

The Complainant approached the Commission on 10/09/2009 and Complaint No. CIC/SG/C/2009/001312 was registered by the Commission. A notice dated 16/09/2009 was sent to the Respondent stating that prima facie it appeared that information had not been provided without reasonable cause. The Commission directed the Respondent to send his explanation for not supplying the information to the Complainant within the mandated time. The Commission received a letter dated 05/10/2009 from the Respondent contending that the DIMTS Ltd. is not a Public Authority and therefore there is no post for Public Information Officer. It was further stated that the Complainant could seek the information from the Transport Department.

The Commission sent a notice dated 09/11/2009 to the Respondent to give his submissions before 29/11/2009 to show that DIMTS is not a public authority when out of the eight Directors of the Board of Directors, four Directors nominated by the Government of Delhi. The Commission issued a notice of hearing on the matter on 18/11/2009 directing the parties to appear before the Commission on 21/12/2009.

In **RTI Application dated 14/10/2009** the following information had been sought:

1. Current status of Clusters policy for buses.
2. Information in the following format for all clusters:

No of cluster	Name	Status (Whether proposed planned, approved under construction or completed.	Amount of money received so far from Delhi Govt.

3. Inspection of all data in respect of the above clusters and all files in respect of each cluster.
4. Inspection of all clusters on which work has started.

The RTI application was returned vide letter dated 13 October 2009 with the comment “in this regard, you are advised to take up the request with the Transport Department, GNCTD as the information sought by you is about the policies and projects of the Transport Department.”

The Complainant approached the Commission on 20/10/2009 and the Commission registered Complaint CIC/SG/C/2009/001472. The Commission issued a notice of hearing on the matter on 04/11/2009 directing the parties to appear before the Commission on **16/12/2009**.

Relevant Facts emerging during Hearing on 16 December 2009 for CIC/SG/C/2009/001472:

The following were present:

Complainant : Mr. Rakesh Agarwal;

Respondent : Mr. Suneet Mudgal, AGM (HR); Mr. Rajnish Gautam, Advocate;

The Respondent states that DIMTS is not a public authority. The Respondent has given detailed reasons arguing why DIMTS is not a public authority in response to the Commission's notice for complaint number CIC/SG/C/2009/001312. The letters of the Respondent dated 05/10/2009 and 23/11/2009 are taken on record. They have effectively argued that the company is not controlled by the appropriate Government. The Company is 50/50 joint venture of the GNCTD and IDFC Limited.

The Complainant states, "The Company came into being by an order of the GNCTD. Moreover, 49.993% of the shares in the company are held by the GNCTD and another 49.993% are held by IDFC Limited. The rest of the shares are held by the Government Nominees i.e. The Chief Secretary of Delhi, Principal Secretary (Transport), Principal Secretary (Finance) and one more nominee. The money paid by Government nominees towards the value of the shares was reimbursed by the GNCTD effectively the share holding of the Government beyond 50%.

The matter was adjourned and the Commission observed that the submissions will be taken from both parties on 21/12/2009 at 10.00am in the Complaint No. CIC/SG/C/2009/001312.

Relevant Facts emerging during Hearing on 21 December 2009 for Complaint No. CIC/SG/C/2009/001472 and CIC/SG/C/2009/001312:

The following were present:

Complainant : Mr. Rakesh Agarwal;

Respondent : Mr. Suneet Mudgal, AGM (HR); Mr. Rajnish Gautam, Advocate;

Mr. Rajnish Gautam, Advocate for the Company alleges that the bench is prejudiced and he does not expect to get justice from this bench. It is curious that he had appeared before this bench earlier and had said that he should like to argue the matter at the next hearing and has now come up with the allegation of the bench being prejudiced. He was asked by the Commission to give reason why he believes the bench was prejudiced against the company and whether the bench had any known bias against the Company. He states, "That the Commission already held DIMTS to be a public authority vide its letter dated 16 September 2009 wherein the Hon'ble commissioner had instructed it to provide the information or face penal consequences as provided under the Act which is against the principle of natural justice and the very basic tenets of audi alteram partem which categorically states that no one should be condemned unheard and also in view of the observation made by the Hon'ble commissioner at the end of the proceeding dated 16 December 2009 wherein the Hon'ble Commissioner had opined that it would be extremely difficult for DIMTS to prove this case and therefore in view thereof and also for a better appreciation of facts and law I am requesting that the case may be referred to a larger bench."

The Complainant states, "Leveling of allegations by the Respondent is just a tactic to delay the decision in the matter. The Respondent has not come to the Commission with clean hands. On its website as well as during the hearing dated 16 December 2009, the respondent stated that the Company DIMTS is a 50/50 Joint venture company in partnership with GNCTD. The fact is that by their own letter dated 01 October 2009 addressed to the finance department of GNCTD, the Respondent has given a list of shareholders wherein it has shown that IDFC holds 49.998% of the shares whereas rest of the shares amounting to more than 50% are held by the Government of Delhi and Government nominees. Therefore, it is my request that the request of the respondent to refer the matter to a larger bench may not be acceded to. If there is any bias in the mind of the information commissioner, it should be against me because I am contemplating filing a writ in Delhi High Court against the order of Hon'ble Commissioner in another matter and this fact was mentioned to him when I was not satisfied with the decision."

The Respondent states, “The contentions of the Complainant as raised are without any merit and the plea as taken by the Complainant about contemplating and filling of a writ does not necessarily require to be brought in the proceedings of the case as it does not have any relation with the case.”

The Commission notes that an allegation of prejudice has been leveled by an advocate against the statutory authority without any basis at all. It is distressing that the minimum requirement of respect for statutory authority is lacking and no evidence has been produced to show any bias of the Commission. However, the Commission is adjourning the matter to contemplate further action. The respondent states he has not brought any written submission but has given his preliminary objection to the Commission against hearing the matter. The Complainant states that this is urgency since many major public projects are being handled by the DIMTS.

The matter was adjourned.

Commission’s decision on the matter of the allegations by Mr. Rajnish Gautam on 22 December 2009:

The bench went through the papers and the submissions of Mr. Rajnish Gautam to see if the allegation of prejudice against the Commissioner had any merit. The Commission notes that on the first hearing on 16/12/2009 the advocate Mr. Rajnish Gautam had first sought an adjournment of the proceedings and only very reluctantly agreed to admit that information was not being given since they claimed that DIMTS was not a public authority. The Commission’s notice dated 16/09/2009 stated that from the facts it appeared *prima facie* that the information had been denied without any reason. The Law Lexicon defines ‘prima facie’ as at first sight or on first appearance. No decision was made by the Commission through its notice. In fact the notice also gave the Respondent an opportunity to explain why the information was provided to the Complainant. After receiving the submissions on behalf of the Respondent, in both cases, the Commission did not decide the Complaint but gave the Respondent an opportunity to prove that it was not a public authority. A charge of bias appears to be inappropriate when a proper opportunity of hearing has been provided to both sides.

Furthermore, after the Complainant had given his statement that DIMTS has a Government stake of over 50%, the Commission had only made an observation that if this was the case the Respondent would have to give its arguments showing how it was not a public authority by countering the claim of the Complainant. Asking the Respondent to place its arguments on this matter cannot be construed as bias. Looking at the overall conduct of Mr. Suneet Mudgal and Mr. Rajnish Gautam it appears to the Commission that their sole objective is to delay any decision in the matter. They have been unwilling to offer any rational explanations. Given these circumstances the bench decides that since no rational charge of bias or prejudice has been established, the bench will hear the matter and decide on the merits of the case.

The Commission issued a notice of hearing in both the matters on 22/12/2009 directing the parties to appear before it on 07/01/2009 at 4 pm.

On 07/01/2010 at around 2 p.m., Mr. Suneet Mudgal submitted a letter to the Commission stating that an application dated 07/01/2010 had been moved by the Respondent before the Chief Information Commission to reconstitute the Bench of the Commission to hear the matter. Therefore, it was requested that the matter be adjourned.

Relevant facts arising during the hearing on 07/01/2010:

The following persons were present:

Complainant: Mr. Rakesh Agarwal

Respondent: Absent

Mr. Rakesh Agarwal submitted a letter issued by the DIMTS to the Finance Department dated 01/10/2009 which shows that the shareholding of DIMTS. He also submitted a copy of the Office Memorandum dated 30/07/2009 issued by the Transport Department of the Government of Delhi stating the Terms of Engagement of DIMTS. He further submitted that every single project of the DIMTS is that of the government and therefore it is fully financed by the public funds.

The matter was adjourned for further consideration.

The Commission received the Chief Information Commissioner's decision dated 21/01/2010 rejecting the application moved by the Respondent for re-constitution of the Commission's Bench. On receiving this decision, the Commission issued a notice of hearing dated 08/02/2010, informing both parties of the Chief Information Commissioner's decision and directing both parties to appear before the Commission on 03 March 2010 at 4 pm for a final hearing in the matter.

Relevant facts arising during the hearing on 03/03/2010:

The following persons were present:

Complainant: Mr. Rakesh Agarwal;

Respondent: Mr. Suneet Mudgal, AGM (HR); Mr. Rajnish Gautam, Advocate;

The Respondents has given written submission to the Commission. The Commission asked the Respondents if they want to say anything. The Respondent states, "We have submitted our written submission in case the Hon'ble Commission desires to have some other clarifications the we would be happy to provide the same."

The Respondent was asked if they have got the list of Directors DIMTS. The Respondent states that he is unable to provide the names of the Directors of DIMTS. The Respondent is directed to provide the names of the Directors giving details of their employment. If any of the Directors are Government Employees this would be indicated even if they are on deputation. The Respondent will provide the information by 5.00PM on 04/03/2010.

The Appellant states that the Managing Director is Mr. S. N. Sahai who is an IAS officer on deputation from the Government. The Respondents volunteer the information that there are eight directors in DIMTS out of whom seven are non-executive Directors. The Respondents do not dispute the fact that Mr. S. N. Sahai is a Managing Director of DIMTS.

Decision announced on 05 March 2010:

The Respondent has submitted additional submissions to the Commission on 04/03/2010 in which they have enclosed a list of Directors of DIMTS, copies of two decisions of the Commission – CIC/AT/A/2006/00123 dated 29/01/2007 (AWHO case) and CIC/AT/A/2007/00389 dated 27/12/2007 (BALCO case). The Commission has perused all submissions made by the parties during the hearings and in writing.

The issue before the Commission is whether DIMTS is a public authority as per Section 2(h) of the Right to Information Act 2005. Section 2(h) of the RTI Act defines public authority as

2 (h) "public authority" means any authority or body or institution of self government

established or constituted-

- (a) *by or under the Constitution ;*
- (b) *by any other law made by Parliament;*
- (c) *by any other law made by State Legislature;*
- (d) *by notification issued or order made by the appropriate Government,*

and includes any-

- (i) *body owned, controlled or substantially financed;*
- (ii) *non-Government organisation substantially financed,*
directly or indirectly by funds provided by the appropriate Government;

The DIMTS is not established by or under the Constitution; by any law made by the Parliament or State Legislature or by a notification or order made by the appropriate Government. It is a Joint Venture Company set up by the Government of Delhi and the Infrastructure Development Finance Company Ltd. and it is governed by the provisions of the Companies Act. Therefore, for the DIMTS to be considered as a public authority it has to be established that it is a body owned, controlled or substantially financed directly or indirectly by the funds provided by the appropriate Government.

The Parliament in its wisdom has deliberately chosen to use the words 'owned', 'controlled' or 'substantially financed' with the conjunction 'or'. Therefore each of these words must be given an independent meaning and if *any* one of them is applicable, the body would be considered to be a public authority. The word 'control' has not been defined in the RTI Act. Furthermore, the Act does not require pervasive control.

The Respondents has stated -

For want of definition of the work "Control" within the RTI Act, reliance is placed upon other statutes which define the term as under:

- i) *Accounting Standard Interpretation (ASI) 24, Definition of "Control" – Accounting Standard (AS) 21, Consolidated Financial Statement, defines Control as under:-*
 - a) *The ownership, directly or indirectly through subsidiary (ies), of more than one half of the voting powers of an enterprise; or*
 - b) *Control of the composition of the board of directors in the case of a company or the composition of the corresponding governing body in case of any other enterprise so as to obtain economic benefits from its activities.*
- ii) *Regulation 2(i) (c) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the "Regulations") defines Control as under:*
 - *Control includes the right to appoint a majority of Directors, or to control the management or policy decisions exercisable by a person acting individually or in concert, directly or indirectly, including by virtue of Shareholding or management rights or shareholders agreement or voting agreement or in any other manner.*

It would imply that the word Control includes (i) the right to appoint majority of the Directors or (ii) exercise control over management or policy decisions, directly or indirectly.

Therefore, upon a bare perusal of the available definition of the word 'Control', it is abundantly clear that the work Control would mean a stake excess of 50% or the management control of the company. Management Control means and includes the act of managing and controlling the affairs and / or business by direction or regulation or administration or control or superintendence. As per and in accordance with Section 2(26) of the Companies Act, 1956, which defines and vest the substantial powers of management with the Managing Director, the

management of DIMTS vests with MD & CEO of the company who is a nominee of IDFC. According to the Indian Corporate Law also, 'Control' is defined by direct ownership of a majority stake or at least 51% of the total shareholdings.

Any company where over 50% shareholding is held by one entity, it would said to be owned by such an entity and logically follows that such an entity would have the power to appoint over 50% of the Directors. This in common parlance would be clearly understood as 'owned'. Parliament has not used the word fully owned as a separate category. Therefore, in interpreting the RTI Act we would accept that when the appropriate government holds over 50% of the shares, it would be construed as being owned by the government. The phrase 'substantially financed' may then therefore be applied to a company where the shareholding of the appropriate government is 50% or less.

The Respondent has stated the following in his submissions:

"In pursuance of SHA, (approx.) 50% shares were allotted to IDFC on 1.8.2007. it is pertinent to mention that at the time of incorporation of SPV, as required under law, six shares were held by six government nominees and 494 shares were held by another government nominee for an on behalf of Lieutenant Governor of Delhi. The shareholding of the company, pursuant to the allotment of shares to IDFC, was increased to total paid up capital of 1,46,084 shares. Thereafter, vide a Board Meeting of the Directors dated 14th October 2009, six more shares were allotted to IDFC nominees and accordingly the shareholding of GNCTD and IDFC in the Company, in accordance with the SHA, became 50% each with paid up share capital of 1,46,090 shares of Rs.1,000/- each."

From the submissions of the Respondent it is clear that the shareholding of the DIMTS is equally shared by the Government of Delhi and the IDFC. According to the Respondent, the entity with over 51% share holding exercise control over the company. This would mean that the DIMTS is not controlled by any entity which is certainly not an acceptable conclusion. Since, the Respondent has admitted that the government's shareholding is 50% DIMTS is a company in which government has a substantial finance.

The Respondent in his submissions to the Commission has stated that the DIMTS is managed and controlled by the Board of Management of the DIMTS which has eight Directors of which four are nominated by the Government of Delhi as ex-officio members. He has further stated-

"All Directors of the Company including the Chairman, except the Managing Director & Chief Executive officer who is the sole Executive Director, are Non-Executive Directors and no salary is paid to them.

The position that four Director of DIMTS Limited are nominated by GNCTD does not imply control over the affairs of the Company. A Non-Executive Director is defined as a non-working director of the Company who is not an Executive Director and, therefore, does not participate in day-to-day management of the Company. A Non-Executive Director is, therefore a part time office holder, without day-to-day operational responsibility of a Company."

As fifty percent of the Directors are government nominees, the Government can undoubtedly exercise significant control over the management of the company through the Directors of the company who are government nominees. Four of the eight members of the Board of the DIMTS are Government officers; therefore four of the eight members of the Board ***owe their positions on the board due to their nomination by the Government.*** The four Government officers are expected to represent the Government. If 50% of the Board is made up of Government officers who are nominated by the Government, they are so nominated to represent the views of the Government and it is not necessary for the Government to issue daily directions to such

nominees. A Government officer, once nominated by the Government to perform certain functions, is expected to act in accordance with the government's position. The fact that he is an Executive or Non-executive Director is not a relevant consideration. A vote of a Director in a Board of Directors meeting is not affected by whether he is a Executive or Non-Executive Director. The Government nominee discharges his duties not in a private capacity but as a representative of the Government. Like any other Government officer, he does not require directions from the government to carry out each of his duties – as a Government officer he is assumed to be acting on behalf of the Government. Thus it can certainly be stated that the Government is in control of the Board of DIMTS through its nominees.

The BALCO decision relied on by the Respondent is not a relevant precedent as the Commission in that case clearly held that *“it was not necessary to determine and say a final as to whether BALCO is “Public Authority” or not under the Act”*.

The Commission therefore finds that DIMTS is substantially financed by the Government. It is also controlled by the Government of Delhi. If any one of these conditions were satisfied, DIMTS would be a public authority as defined in the RTI Act. Here it satisfies two conditions laid down in Section 2(h)(i) of the RTI Act.

Complaint is allowed.

DIMTS is a public authority as defined under Section 2(h) of the RTI Act. DIMTS is directed to appoint a Public Information Officer and First Appellate Authority before 31 March 2010. It is further directed to provide the information sought by the Complainant in both his RTI Applications before 15 April 2010. If the information in response to certain queries is not held by DIMTS, it is directed to transfer those particular queries to the concerned public authority within five days of receiving this order with intimation to the Complainant and the Commission.

This decision is announced in open chamber.

Notice of this decision be given free of cost to the parties.

Any information in compliance with this Order will be provided free of cost as per Section 7(6) of RTI Act.

Shailesh Gandhi
Information Commissioner
05 March 2010

(In any correspondence on this decision, mention the complete decision number.) (BK)