

CENTRAL INFORMATION COMMISSION
Club Building (Near Post Office)
Old JNU Campus, New Delhi - 110067
Tel: +91-11-26161796

Decision No. CIC/SG/C/2009/000341/7048
Appeal No. CIC/SG/C/2009/000341

Relevant Facts emerging from the Complaint:

Complainant : Mr. Sachin Sapra,
F-18, Back Lane, Rajouri Garden,
New Delhi – 110027.

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 had asked the Respondent via email dated 03/02/2009 for information about whom he should file a RTI Application and what is the address of such person as there was no RTI link on the website of Delhi Integrated Multi-Modal Transit System (DIMTS). He received a reply on 17/02/2009 from Mr. Suneet Mudgal, AGM(HR) in which he was informed that is to informed you that DIMTS Ltd. was not a Public Authority within the definition laid down in Section 2 (h) of the RTI Act, 2005. Therefore, there was no CPIO, APIO etc.

The Complainant then approached the Commission under Section 18(1)(a) as no PIO was appointed in DIMTS which according to him should be a public authority as it a joint venture company of the Government of Delhi and the Infrastructure Development Finance Company (IDFC).

The Commission issued a notice dated 29/07/2009 to the Respondent directing to them state before 20/08/2009 whether they fulfill any of the criteria laid down in Section 2(1)(h) of the RTI Act. The Commission received a copy of the Respondent's letter dated 13/08/2009 on 03/09/2009 in which the Respondent stated that DIMTS does not meet any of the criteria. It was further stated that the company had an ex-officio non-executive Chairman appointed by a Board consisting of eight members of which four are nominated by the Government of Delhi and four by IDFC Limited. The Managing Director and the Chief Executive Officer is a nominee of IDFC.

The Commission then issued a notice dated 09/11/2009 to the Respondent to explain before 29/11/2009 why it is not a public authority when four of its eight Board of Directors are government nominees. The Commission received a reply dated 03/11/2009 from the Respondent. It was stated that the four Directors nominated by the Government were non-Executive Directors and therefore did not participate in the day-to-day management of the Company. He further stated that all Directors except the Managing Director were not paid salaries.

The Commission issued a Notice of Hearing dated 18/11/2009 to both parties directing them to appear before the Commission on 21/12/2009 at 10 am.

Relevant Facts emerging during Hearing on 21/12/2009:

The following were present:

Complainant : Mr. Sachin Sapra;

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

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 an 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 during a hearing held in another matter 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. In that case, 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. Sachin Sapra

Respondent: Absent

Mr. Rakesh Agarwal in a related matter CIC/SG/A/2009/001472 and 001312 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. Sachin Sapra;

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

The Complainant and the Respondent agreed that the matter under consideration was identical to the one in Complaint No. CIC/SG/C/2009/001472+001312.

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 Respondent 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
5 March 2010

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