REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. NO. 991 OF 2005

IN THE MATTER OF AN APPLICATION BY
CHANDRESH SHARMA OPPOSITION MEMBER
OF PARLIAMENT FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW PURSUANT TO
THE PROVISIONS OF THE JUDICIAL
REVIEW ACT 2000

AND

IN THE MATTER OF THE CONTINUING
OMMISSION, FAILURE BY AND/OR REFUSAL
OF THE MINISTRY OF PUBLIC ADMINISTRATION
AND INFORMATION TO PERFORM HIS STATUTORY
DUTY UNDER SECTION 40 OF THE
FREEDOM OF INFORMATION ACT ("FOIA")

IN THE UNREASONABLE AND/OR IMPROPER
INACTION ON THE PART OF THE SAID
MINISTER TO PERFORM HIS STATUTORY
DUTY UNDER THE SAID SECTION 40
OF THE FOIA

BETWEEN

CHANDRESH SHARMA

APPLICANT

AND

DR. LENNY SAITH

MINISTER OF PUBLIC ADMINISTRATION
AND INFORMATION

RESPONDENT

****

JUDGMENT

Before the Honourable Mr. Justice V. Kokaram

Appearances:

Mr. Anand Ramlogan, Ms. J.Kublalsingh, and Mr. N Lalbeharry, instructed by Mr. S. Ramnanan and for the Applicant

Mr. Fyard Hosein S.C. and Ms. Bridgemohansingh for the Respondent

1. INTRODUCTORY FACTS

Before the Court is an application for judicial review filed on 1st June 2005 involving an aspect of the Freedom of Information Act (FOIA). It involves the obligation of the Minister of Public Administration and Information, the Respondent, to prepare a report on the operation of the FOIA for any and/or all of the years of 2001, 2002, 2003 and 2004 and cause a copy of same to be laid before each House of Parliament pursuant to section 40 of the FOIA.[1]

Mr Chandresh Sharma, the Applicant, acting in his capacity as a citizen of Trinidad and Tobago, Opposition Member of Parliament and taxpayer, wrote the Respondent by letter dated 16th February 2005 making the following inquiries:

> *"I write in my capacity as a citizen, Opposition Member of Parliament and taxpayer.*
>
> *As you are aware, the Freedom of Information Act **("FOIA")** was passed by the United National Congress with the aim of ensuring transparency in the conduct of government and integrity in public administration. Your party, the People National Movement **("PNM")** held power for some thirty(30) years (1956-1986) and during that time citizens were unable to properly participate in the process of governance or scrutinize government action because*

[1] The full text of section 40 of the FOIA is set out below in Appendix 1

they did not have a legal right to access information in the manner provided for by this Act.

The FOIA therefore represents a revolution in the concept of participatory democracy. It will allow and encourage citizens to scrutinize the performance of public officers and deter abuse of power and corruption.

"I have received numerous complaints from my constituents that the benefits of the FOIA are being systematically frustrated and undermined by your administration. The complaint is that the large majority of public authorities have not complied with the requirement of Part II of the Act. My research has indeed substantiated these claims.

I note that under Section 40 of the FOIA you are supposed to "prepare and report on the operation of this Act" to each House of Parliament. According to my records that you have never done so and no reason or explanation for this inaction has ever been given. The report to Parliament is to be provided "as soon as practicable after the end of each year" and I write to make the following specific inquiries:-

(1) Whether you have ever laid a report in Parliament concerning the operation of the FOIA?

(2) Whether you intend to do so for the year 2005, and if so, by when?

(3) The reason(s) if any, for your neglect of this public duty to report on this important matter;

This matter is of some urgency because my constituents are being deprived of their rights. Furthermore, as an Opposition MP, the legal right to access government information is crucial to the proper performance of my duties."[2]

1.3 The Respondent responded by letter dated 25th February 2005 stating:

> *"Thank you for your correspondence of February 16th, 2005 on the subject at caption.*
>
> *I am pleased to inform that the Ministry of Public Administration and Information has prepared an annual report on the operation of the Freedom of Information Act, 2001 for the period 2001-2003. The report will be submitted to Cabinet shortly, and thereafter laid in both Houses of Parliament, pursuant to Section 40 of the Act.*
>
> *In response to your inquires, I wish to indicate that the re-organization of portfolios during the period under review posed a challenge to the reporting exercise required for the collection of relevant data for this report. Further details pertaining to the overall implementation and monitoring of the Act are captured in the Annual Report to be laid in Parliament in the coming weeks."*[3]

1.4 Mr. Sharma however persisted in his request for the 2004 report. By letter dated 15th March 2005 he wrote the Respondent:

> "*While it is commendable that you will now lay annual reports for 2001 to 2003 I wish to know whether you intend to lay a report for 2004 and if so by when".*[4]

1.5 There was no response by the Respondent to this request and the Applicant subsequently instituted these judicial review proceedings on June 2005.

1.6 As at the date the Applicant obtained leave to apply for judicial review on 1st June 2004 the Respondent had not yet laid before Parliament any reports on the operation of the FOIA pursuant to section 40 for the years 2001, 2002, 2003 and 2004.

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[2] See exhibit C.S.1 annexed to the affidavit of the Applicant sworn on 1st June 2005

[3] See exhibit CS2

1.7 These reports however were completed and laid before both Houses of the Parliament in October and November 2005 prior to the hearing of the application for judicial review and incidentally making good of its promise in its letter dated 25th February 2005.

1.8 There has been no complaint made to this Court as to the contents of these reports and indeed it is accepted that the Applicant has embraced them. Nevertheless the Applicant persisted with its application seeking certain declaratory relief with regard to the obligations of the Minister under section 40 of the FOIA.

2. <u>THE APPLICATION:</u>

2.1 By order of the Honorable Mr. Justice Best dated 8th June 2005, leave was granted to the Applicant to apply for judicial review pursuant to the Judicial Review Act 2000 for the following relief:

> *(b) An order of mandamus directing the Respondent to prepare a report on the operation of the Freedom of Information Act for any and/or all of the years: 2001, 2002, 2003 and 2004 and cause a copy of same to be laid before each House of Parliament in accordance with section 40 of the Freedom of Information Act.*
>
> *(c) A declaration that the said Minister has acted illegally and/or in breach of section 40 of the FOIA.*
>
> *(d) A further declaration that the said Minister has been guilty of unreasonable delay in the performance of his statutory duty under section 40 of the FOIA."*

2.2 The grounds of review advanced by the Applicant in challenging the omission and/or delay of the Respondent included inter alia that the omission or failure of the Respondent to act was contrary to law; an abuse of power; in conflict with the

[4] See exhibit CS3

policy of the Act; breach of a duty or omission to perform a duty and that the delay of the Respondent was unreasonable.[5]

3. DEVELOPMENTS POST APPLICATION FOR LEAVE:

3.1 As noted in the summary of the facts above, certain developments took place subsequent to the order granting leave to apply for judicial review which are material to the outcome of this application.

3.2 Donna Ferraz, Acting Director of the Public Service Transformation Division of the Respondent deposed in her affidavit of 13th October 2005, that the reports on the operation of the FOIA for the period February 20 2001 to December 31 2003 were laid before both Houses in Parliament in June 2005 (just over a week after the Applicant obtained leave to apply for judicial review and before the first date of hearing of this application of 4th July 2005).

3.3 For convenience, the relevant dates are as follows. The report on the operation of the Act during the years 2001, 2002 and 2003 were laid before both Houses of Parliament by 17th June 2005. The report on the operation of the Act during these years were contained in one document which clearly identified the Respondent's report on the operation of the Act within the relevant years.

3.4 The report on the operation of the Act during 2004 was laid before both Houses of Parliament by 16th November 2005 as promised by Ms Ferraz. See paragraph 12 of her affidavit.

3.5 Attorney-at-Law for the Applicant conceded that a report to be published pursuant to section 40 of the Act should for the latest be published before the end of the year subsequent to the year that is the subject of the report. This being the case there can be no legitimate complaint with regard to the publication of the 2004 report in November 2005.

[5] See paragraph 4(6) of the Applicant's Statement

3.6 The Applicant's main concern therefore really is over the failure of the Respondent to publish the reports for the years 2001 to 2003 as soon as practicable after the end of those years.

3.7 In the Ferraz affidavit the Respondent condescended to certain particulars which explained the reason for the delay in the laying of these reports in Parliament. It is a pity that these reasons were not advanced prior to the commencement of these proceedings. Hopefully the obligations on proposed respondents imposed by the pre action protocols under the Civil Proceedings Rules (1998) to advise applicants of the nature of the respondent's case prior to the initiation of proceedings may bring an end to the recurrence of belated explanations by Respondent and give Applicant's an earlier opportunity to assess the merits of its case. However it is doubtful in light of the arguments advanced in this case whether the Applicant would have been content with such advanced warning.

3.8 The Respondent stated that inter alia the following matters made it impracticable for it to publish and lay these reports at any time prior to November 2005:

(a)the establishment of a Freedom of Information Unit in May 2001;

(b)the logistical difficulties of collecting information from 117 public authorities;

(c)the inability of public authorities to provide the relevant information to be compiled in the relevant reports in a timely and clear manner;

(d)serious human resource constraints;

(e)The novel demands of the FOIA necessitating a re assessment of the system in place and reassignment of the responsibilities of the Unit to the Public Service Transportation Division.

3.9 The upshot of this evidence is that for the reasons advanced by the Respondent:

The 2001 report was published approximately four years later in September 2005;

The 2002 report was published approximately three years later in September 2005;

The 2003 report was published approximately two years later in September 2005 and

The 2004 report was published some 11 months later in November 2005.

Viewed in this perspective, there is some validity to the claim by Attorney for the Respondent that the Respondent is "getting its act together".[6]

4. THE ISSUES:

4.1 The issues that arise for determination on this application are as follows:

(a) Whether the Respondent is in breach of its obligations under section 40(1) of the FOIA;

(b) Whether the Applicant has established that the Respondent delayed unreasonably in the publication of the reports;

(c) Whether the Respondent acted contrary to the law, abused its powers or unreasonably exercised its powers in the late publication of the said reports;

(d) Whether in any event the Court should not exercise its discretion to grant any relief on this application on the basis that (i) there is no sufficient interest shown by the Applicant in this application or (ii) no real purpose is served in granting any declarations and it is not just and convenient so to do.

SUMMARY OF FINDINGS

4.2 For the reasons set out below this Court dismisses this application. It is not just and convenient in the circumstances of this case to grant any declaratory relief and in any event the Respondent on the facts of this case is not in breach of its obligations under section 40 of the Act. It will be incautious of this Court to prescribe a definition of "as soon as practicable", referred to in section 40 of the FOIA, by setting fixed timetables or deadlines for the Respondent in a factual vacuum where Parliament has chosen itself not to do so. The words in its literal meaning suggests that the deadline is a moving target and the timeliness of the

[6] In paragraph 6 of the Farazz statement she deposes: "With the passage of time however the degree of initial problems in obtaining information from publc authorities has been reduced.."

laying of a report will vary from case to case. Indeed the circumstances that may allow for the early or late reporting are endless and the difficulties encountered by Ms Farraz are just an example of such events that make for the impractability of laying a report at an earlier time.

4.3 Further, although it is not necessary to determine this issue, this Court finds that the Applicant did not demonstrate that he had a "sufficient interest" in making this application.

4.4 Both parties contended that the issue of locus or standing be determined as a preliminary issue however for the reasons set out herein the issue of "sufficiency of interest" at the substantive hearing must be viewed in the context of the legal and factual matrix of the application. The starting point in this analysis therefore in determining both the issue of standing and the validity of this challenge begins with a consideration of the obligations under section 40 of the FOIA and the nature of the relief sought.

5. THE "SECTION 40" OBLIGATION

5.1 On 4th November 1999, the Freedom of Information Act 1999 (FOIA) was enacted. It came into effect in two tranches. First, Part I of the Act was proclaimed on 20th November 2000 and the remaining part of the Act was proclaimed on 20th February 2001.

5.2 The FOIA extends the right of members of the public to access to information in the possession of public authorities subject to certain limitations. It imposes a duty upon certain public authorities to make information available to the public on request. It seeks to enhance governance through increased transparency and accountability and to facilitate increased public participation in the development of national policy. Both parties acknowledge this legislation as "revolutionary" in its impact on the provision of information to members of the public.

Unfortunately, it would seem from the evidence of Ms Ferazz, for public authorities such revolutions do not take effect overnight.

5.3 Section 40 of the FOIA sets out a procedural requirement to be observed by the Respondent. Pursuant to section 40 of the said Act, the Respondent is charged with the responsibility of laying before both houses of Parliament a report on the activities of public authorities under the FOIA "*as soon as practicable after the end of each year".* The complete procedural requirement of the Minister is set out in Appendix 1 to this judgment:

5.4 The obligations created by section 40 are as follows:

(a) The Ministers responsible for the public authorities shall furnish the Respondent with such information the Respondent requires for the purposes of preparing a report on the operation of the Act;

(b) That Minister shall also comply with any prescribed requirements concerning the furnishing of that information and keeping of records;

(c) The Respondent shall *as soon as practicable after the end of each year* prepare and cause a copy of a report on the operation of the Act during that year to be laid before each House of Parliament;

(d) That report shall include the matters listed in sections 3(a) to (h) for each reporting year.

5.5 Both parties have accepted in these proceedings that there is no prescribed time limit on the Respondent to comply with its obligation to lay a report pursuant to section 40(1) of the Act. The obligation to do so is "as soon as practicable." Both parties agree that such a report must be laid within a reasonable period of time. See the Interpretation Act Chapter 3:01. Both parties contended that a determination of unreasonable delay is an objective (the Applicant's submission) or subjective test (the Respondent's submission). In any view of this issue one must determine whether the Respondent acted reasonably in the circumstances.

5.6 Attorney at law for the Applicant contended that the Minster for the very least could have prepared a report with what little or no information he had at the end of the succeeding year and let Parliament comment on the sufficiency of the information and the progress of the compliance with the Act. In the Court's view such an argument is unrealistic. The report shall include all the matters set out in section 40 (3) of the Act. Indeed had the Minister no information to report, one will be speculating as to the effect and purport such a report to Parliament would have had which simply stated "no information obtained" as suggested by Attorney for the Applicant. It is an over simplistic view of the obligations cast upon the Respondent within the context of section 40 of the Act. In spite of the importance of the Act, public functionaries must not act in vain and it becomes a moot question of whether one should await the receipt of relevant information before reporting or simply reporting that there is not yet any relevant information at hand. Shorn of all its niceties it is too perfect a view of what is required of the Respondent within the nature of its obligations under section 40. The better view would be to examine the impact non compliance or delayed compliance with this procedural requirement has had on the Respondent.

COMPLIANCE WITH PROCEDURAL REQUIREMENTS/DELAY

5.7 The Court agrees with both counsel that it is now useless to analyse compliance with procedural requirements in a statute or to measure the failure to comply by compartmentalizing actions into "mandatory" or "directory" requirements. Such an approach is undesirable. See Lord Halisham in ***London and Clydesdale Estates Limited v Aberdeen District Council***[7] : "*language like "mandatory," directory ""void" "voidable "nullity" and so forth may be helpful in argument it may be misleading in effect if relied on to show that the Courts in deciding the consequences of a defect in the exercise of power are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition*."

5.8 Lord Slynn in ***Wang v the Commissioner of Inland Revenue***[8] agreed that the use of rigid legal classifications should be discouraged:

"*Their Lordships consider that when a question like the present one arises- an alleged failure to comply with a time provision-it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provisions. Secondly if so did the legislature intend that a failure to comply with such a provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?"*

The answer to the latter question in this case is clearly in the negative.

The Court agrees that there is no need to stretch or decapitate the facts of this case to fit on a bed of Procrustes to determine whether the Respondent is in breach of its section 40 obligation. Indeed the question of whether the delay was unreasonable must be judged based on the ***Wednesbury*** standard. In ***R v Secretary of State for the Home department ex p Rofathullah*** [1989] QB 219 Purchas LJ stated:

"It is not necessary for the court to consider what the position might have been if there was in accordance with the rules an application for an entry certificate at the point of departure and thereafter through maladministration or other causes delay occurs….Each case would have to be determined on its own merits and although it is not necessary for this decision I myself would be minded to agree…that in considering the executive administration of the rules, the Court will only interfere on the Wednesbury principles otherwise the court will be dictating to the Secretary of State how he should carry out his executive functions and deploy such finance as may be available to him of the purposes of the immigration process."

[7] [1980] 1 WLR 182
[8] [1994]1WLR 1286

5.9 See also ***Hubert Charles v The Judicial and Legal Service Commission***. Relevant questions to be asked will be: are the delays in good faith, were they lengthy, were they entirely understandable, did the applicant suffer material prejudice are there any fair trial considerations or fundamental human rights issue?

5.10 In ***ex p Jeyeanthan*** [1999] 3 AER 231 Lord Woolf MR indicated that the critical factor is to determine what the legislator should be judged to have intended should be the consequence of non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of non-compliance. The questions to be asked are: (a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and <u>if so has there been substantial compliance in the case even though there has not been strict compliance</u>. (b) Is the non-compliance capable of being waived and if so has or can it and should it be waived in this case (c) If it is not capable of being waived what is the consequence of non-compliance. This determination is fact based and will vary from case to case.

5.11 All these are attempts to examine the reasonableness of administrative actions in the light of the nature of the statutory duty imposed. In this case the Respondent condescended to providing particulars of its attempt to achieve substantial compliance with its statutory obligations. It will be dangerous for this Court to lay or attempt to lay down a yard stick for the performance of an act which is dependant on a myriad of circumstances and which the legislature acknowledged is not entirely within the control of the Respondent.

5.12 Furthermore it cannot be said in this case that there is a fundamental obligation, which has been outrageously and flagrantly ignored or defied. The Respondent does not fall within that end of the spectrum. The Respondent, the Applicant submits, has admitted that the fault is due to its own maladministration. However, a critical feature in measuring the effect of non compliance in this case is the fact that the reports have been laid in Parliament and the Applicant has not

demonstrated neither in argument nor in evidence the prejudice or inconvenience suffered by him by the late issue of these reports. Indeed there is no certiorari to quash the laying of the reports. In the absence of prejudice this Court is entitled to treat the section 40(1) obligation as merely directory or that failure or delayed compliance with the obligation does not adversely affect the Applicant or that there has been substantial compliance with this procedural requirement.

5.13 The Court agrees entirely with Attorney for the Applicant, this is not a rights issue. Indeed no right of the Applicant is being impinged or impugned. It would appear that the Applicant is asserting a more general right...a right to know without more. At one point Attorney at law for the Applicant likened the section 40(1) obligation to the statutory obligation under section 11 of the FOIA. It is clear however that in those provisions Parliament lay specific deadlines for public authorities to comply with requests for information. Further section 11 of the Act specifically creates a sufficiency of interest in any person to obtain access to an official document and eventually to seek judicial review to vindicate that right. However as Attorney at Law admitted this application is not an assertion of such a right. This is not a "section 11 request".

5.14 A delay is only unreasonable if there is no good or acceptable reason for it. See ***Amherst v Walker*** [9]and ***Cooper and Balbosa v DPP.*** The answer as to whether good reason exists must turn on the factual matrix and consequences of failure to comply in each case. Indeed where rights and expectations to substantive relief are at stake administrative delay may be a poor excuse, however this is not such a case. Any administrative bungling on the part of the Respondent and other Ministries did not interfere with the actual production of and setting in place mechanisms for the production of annual reports to be laid before Parliament. There has been substantial compliance with the section 40 obligation.

[9] [1983] 2AER 1067

5.15 In the circumstances of this case, more so in the absence of any evidence of prejudice, administrative bungling taking the Applicants criticism of the Respondent at its highest, does not shut the Respondent out from demonstrating good reason. The Court accepts that the Respondent is getting better at and is improving its reporting function. Further there is an express acknowledgment by the Respondent of its reporting functions under section 40 of the Act. See paragraph 3 of the Ferazz affidavit.

5.16 The Applicant submitted that this delay is not the act of a developed nation. Indeed there is no evidence before this Court as to the timeliness of reporting by developed nations upon the introduction of such a piece of legislation. This is a pious though not misplaced hope of the Applicant.[10]

5.17 The Court therefore accepts that the reasons advanced by Ms Ferraz are good reasons or reasonable grounds that made it impracticable for the Respondent to produce his "section 40 report" prior to June 2005. What the Applicant simply required in this case is for the Respondent to have reported earlier with less information than later with more information. Assuming the Applicant had a genuine interest in this information, it would have been in his interest to obtain all the information available under section 40(3) of the FOIA rather that look at blank pieces of paper.[11]

5.18 Having regard to this finding it follows that the other grounds of review set out in the Applicant's Statement also fail.

6. THE NATURE OF THE RELIEF CLAIMED:

6.1 The Applicant having abandoned his claim for mandamus proceeded to convince the Court that it is just and convenient to grant the declaratory relief claimed or to

[10] Attorney at Law for the Applicant also criticised the Respondents decision to take the report to Cabinet. There is no provision prohibiting him from so doing and indeed this is a matter of internal management and a responsible minister charged by the government for producing such a report cannot be faulted for utilizing the machinery of parliamentary democracy.

[11] If the Applicant's complaint was that the public authorities were in breach of the Act that is another matter and not an issue before this Court.

fashion its own declarations to set a benchmark in the interest of the public to guide the Respondent with regard to its obligations under the Act. This Court is not so convinced that this is a case that justifies the grant of declaratory relief.

6.2 There is no issue that the Respondent is unaware of its reporting functions under section 40 of the Act.

6.3 The Respondent has published its reports on the operation of the FOIA for the years 2001 to 2004 inclusive.

6.4 The Court will not readily make declarations which are of academic interest[12] and which does not serve to remedy any wrong. Judicial Remedies in Public Law 2nd ed Clive Lewis states:

"Over the years it has become clear that the Court will grant declaratory relief ***wherever there is a real live issue*** *arises between the parties who have a genuine interest in contesting the issue and where there is need for some relief to be granted".* See also ***Eastham v Newcastle United Footbal Club Limited*** [1964] 1 Ch at pg 450.

6.5 Having regard to this Court's view that the section 40 obligation is a flexible one, the Applicant has indeed acknowledged as much, the degree of flexibility is not something to be prescribed by this Court absent real facts and live issues for determination. The Court will not be easily drawn into a commentary for past events. See ***R v Gloucestershire County Council ex part P*** [1994] ELR 334; ***R v Inner London Education Authority ex p Al***i [1990] COD 317 at pg 11 per Lord Wolf.

6.6 Furthermore because the nature of the inquiry is fact driven it is difficult to make any declaration to fasten future rights which themselves depend on the precise

[12] See Gordon: Judicial Review Law and Procedure 2nd ed p 68 paragraph 6-019

factual context of its case. See ***R v Secretary of State for the Home Department ex p Salem***[13]

6.7 In these circumstances even if the Court was minded to find that there was unreasonable delay, it is not just and convenient to grant any declaratory relief in this case.

7. STANDING

7.1 The issue of standing can now be examined having analyzed the nature of the case of the Applicant. The Court is of the view that the Applicant has not demonstrated sufficient standing that entitles him to relief under the Judicial Review Act. There is no sufficient nexus between the Applicant and the Minister's duty to publish reports.

7.2 Standing is determined in judicial review applications in two stages. At the leave stage and subsequently at the hearing.[14] It is accepted that at the leave stage the requirement of standing is merely a filtering exercise and the threshold is lower for an applicant as (a) the main enquiry is to ensure there are no "busy bodies" before the Court (b) the Court cannot make a proper assessment of the case as it grants leave ex parte and (c) not all the evidence had been tendered.

7.3 Both parties referred to the authority of ***Dennis Graham v the Commissioner of Police***[15]. In that case there was an application to set aside the grant of leave. Therefore the Court was at that stage considering the issue of standing at the leave stage and not at the substantive hearing. This case is however useful as it refers to the test at the substantive stage of the proceedings as "whether the application can show a strong enough case on the merits judged in relation to his own concern with it". See ***CA 37/03 AG v Martinus François***. This Court agrees with the observations of Pemberton J that the local legislation provides a different

[13] [1999] 1 AC 450
[14] See WaDE "ADMINSTRATIVE LAW" PAGE 692; R V IRC EX P NATIONAL FEDERATION of Self Employed and Small Business Limited [1982] AC 617
[15] HCA S 156/2005

mechanism altogether to litigate pubic interest applications and it would be procedurally and substantially wrong for a litigant claiming to be adversely affected by a decision to also say that the matter has a sufficient public interest to give him locus or this Court jurisdiction to hear the application. See pages 12 and 13 of the judgment. This Court on hearing the present application is not clothed with any jurisdiction under section 7 of the Judicial Review Act.

7.4 Attorney at law for the Applicant referred to the judgment of Nelson JA in CA 115 of 2003 and Jones J in ***HCA S 339 of 2005 Sharma v Patrick Manning and ors.*** However in both cases the Court was concerned with the issue of standing at the leave stage, the filtering exercise and not at the full hearing. Indeed Jones J stated in ***Sharma v Manning***: *"It may well be that, if leave is granted, at the hearing of the substantive application the question of sufficient interest will fall to be assessed against the whole legal and factual context of the application before the Court. At this stage that is not my concern."*

7.5 To properly assess the standing of Mr. Sharma the Court must therefore examine the legal and factual context of this application and determine the extent to which he has demonstrated that he has a sufficient interest in the matter complained of or is adversely affected by the omission of the Respondent. A person who may not be a meddlesome busybody may turn out to be a mere enthusiast without the necessary standing to be deserving of relief in the exercise of the Court's discretion. It was not necessary for the Court of Appeal in CA 115 of 2003 to conduct this analysis.

7.6 Admittedly there is a liberal approach to standing that has been attributed to the judgment of Rose LJ in ***R v Sec of State ex p World Development Movement*** as well as Sedley J in ***R v Somerset County Council*** (unreported) 18 April 1992. This liberal approach infuses a public interest element in an applicant's standing to apply for judicial review. In most of these cases the applicants are lobbying or pressure groups or groups representing a community or interest. For instance in

World Development there were many indices in favor of standing for the pressure group: the nature of the dispute involved the use of public funds in aid programmers to which the applicants were strong lobbyists on the quantity and quality of aid funding. The issue before the Court revolved essentially on the manner in which the Parliament was to utilize funds in an aid programme which were against the basic objectives of the aid programme. Its supporters had a direct interest in ensuring that funds furnished by the UK were used for a legitimate purpose and sought to ensure that disbursement of aid budgets is made where that aid is most needed. It seeks to represent people in developing countries who might benefit from the funds which otherwise might go elsewhere. Indeed with such an applicant whose interest is in the promotion and protection of aid from the diversion of funds, one can see the force of the argument that there was a genuine interest in the subject matter and the importance of the issue raised.

7.7 There is no need however in this jurisdiction to stretch the test of locus standi to include persons who share an interest with the public or who raises an issue in the public's interest or benefit without reference to the Judicial Review Act. Unlike the United Kingdom, the categories of persons who can apply for judicial review in their personal capacity or in the public interest are now the subject of legislation. Sections 5(2) (b) and 7 of the Judicial Review Act provides a unique procedure for litigants to seek the leave of the Court to pursue an application for judicial review in the public interest. Litigants cannot be allowed to abuse the process of the Court by applying for judicial review in their own right under section 5(2) (a) and seek to argue that relief ought to be granted in the interest of the public absent any adverse effects on the litigant himself.

7.8 For the purposes of this judgment the Court restates the principles that will guide the Court in examining the issue of standing at the hearing of the substantive application**.** These principles do not detract nor dilute from the established principles in ***R v Secretary of State ex parte Rose*** which summarized the propositions of law in the ***IRC v National Federation of Self Employed and***

Small Business Limited [1981] 2 AER 93 and which are applicable under section 5 (2) (a) of the Judicial Review Act:

(a) Once leave has been given to move for judicial review, the court, which hears the application ought still to examine, whether the applicant has a sufficient interest;

(b) Whether an Applicant has a sufficient interest is not purely a matter of discretion in the Court.

(c)Not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision by that statute. To rule otherwise would be to deprive the phrase a "sufficient interest" of all meaning;

(d)However a direct financial or legal interest is not required;

(e)Where one is examining an alleged failure to perform a duty imposed by statute it is useful to look at the statue and see whether it gives the applicant a right enabling him to have that duty performed;

(f)Merely to assert that one has an interest does not give one an interest;

(g)The fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have an interest;

(h)The fact that those without an interest incorporate themselves and give the company in its memorandum power to pursue a particular object does not give the company an interest.[16]

7.9 Even if one is to consider the further factors identified in **ex parte World Development** the Applicant would not have been able to cross the locus standi hurdle.[17]

7.10 In this case there is no adverse effect on the Applicant; the merits of the challenge in light of the Court's finding above is not strong, there is little importance in vindicating or ventilating this aspect of the case; the issue raised is theoretically

[16] See ex parte Rose at page 766

[17] The merits of the challenge; The importance of vindicating the rules of law; The importance of the issue raised; The likely absence of any other responsible challenge; The nature of the breach of duty against which relief is sought. See ex p World Development

but not practically important; the Applicant equates himself to any other member of the public and a fortiori by his reasoning any other member could have made this application rendering the phrase "sufficient interest" devoid of all meaning; there is no breach of duty but substantial compliance with that duty. A consideration of these factors weigh against the Applicant in this case. There is no doubt that Mr. Sharma holds a prominent role in Parliament however there is no evidence with regard to the guidance and assistance rendered by Mr. Sharma generally in relation to matters concerning the FOIA. Simply put in the context of the facts in this case he is monitoring the Act like any other member of the public.

7.11 In these circumstances the Applicant has not established that his interests are adversely affected by the acts of the Respondent.

8. CONCLUSION AND ORDER:

8.1 The Court's findings are as set out in paragraph 4.2 hereinabove. The Respondent is not guilty of unreasonable delay. There is no need to grant any relief in this matter. In the circumstances the Applicant's application is dismissed.

8.2 When judgment was reserved in this matter the Court indicated that it will hear further submissions from Counsel with regard to the issue of costs. After hearing arguments from the Applicant with regard to the issue of costs the Court holds that there will be no Order as to Costs. The Court exercised its discretion in that manner by taking into account (a) the coincidence in timing with the request by the Applicant for the reports and the publication of the reports for all the years 2001, 2002, 2003 and 2004 in the years the request was made. (b) The fact that the 2001, 2002, 2003 reports were published in June, 2005 and there is nothing on the record bringing this to the attention of the Applicant, not even a letter, prior to the filing of the Respondent's affidavit in October, 2005. (c) Furthermore earlier communication of the reasons prior to the commencement of these proceedings for the delay in laying the report would have put the Respondent in a much stronger position to insist upon its costs in this matter.

Dated this 6th day of March, 2006.

Vasheist Kokaram
Judge