THE HIGH COURT

Record No.2020/53MCA

Between:

MAURICE D. LANDERS

Applicant / Appellant

-and

THE INFORMATION COMMISSIONER

Respondent

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Number 13 *of* 1997

FREEDOM OF INFORMATION ACT 1997

REVISED

Updated to 18 March 2014

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Number 13 *of* 1997

FREEDOM OF INFORMATION ACT 1997

REVISED

Updated to 18 March 2014

AN ACT TO ENABLE MEMBERS OF THE PUBLIC TO OBTAIN ACCESS, TO THE GREATEST EXTENT POSSIBLE CONSISTENT WITH THE PUBLIC INTEREST AND THE RIGHT TO PRIVACY, TO INFORMATION IN THE POSSESSION OF PUBLIC BODIES AND TO ENABLE PERSONS TO HAVE PERSONAL INFORMATION RELATING TO THEM IN THE POSSESSION OF SUCH BODIES CORRECTED AND, ACCORDINGLY, TO PROVIDE FOR A RIGHT OF ACCESS TO RECORDS HELD BY SUCH BODIES, FOR NECESSARY EXCEPTIONS TO THAT RIGHT AND FOR ASSISTANCE TO PERSONS TO ENABLE THEM TO EXERCISE IT, TO PROVIDE FOR THE INDEPENDENT REVIEW BOTH OF DECISIONS OF SUCH BODIES RELATING TO THAT RIGHT AND OF THE OPERATION OF THIS ACT GENERALLY (INCLUDING THE PROCEEDINGS OF SUCH BODIES PURSUANT TO THIS ACT) AND, FOR THOSE PURPOSES, TO PROVIDE FOR THE ESTABLISHMENT OF THE OFFICE OF INFORMATION COMMISSIONER AND TO DEFINE ITS FUNCTIONS, TO PROVIDE FOR THE PUBLICATION BY SUCH BODIES OF CERTAIN INFORMATION ABOUT THEM RELEVANT TO THE PURPOSES OF THIS ACT, TO AMEND THE OFFICIAL SECRETS ACT, 1963, AND TO PROVIDE FOR RELATED MATTERS. [21*st April*, 1997]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART II

Access to Records

Right of access to records.

6.—(1) Subject to the provisions of this Act, every person has a right to and shall, on request therefor, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access.

(2) It shall be the duty of a public body to give reasonable assistance to a person who is seeking a record under this Act—

(*a*) in relation to the making of the request under *section 7* for access to the record, and

(*b*) if the person has a disability, so as to facilitate the exercise by the person of his or her rights under this Act.

(3) The Minister shall, after consultation with such other (if any) Ministers of the Government as he or she considers appropriate, draw up and publish to public bodies guidelines in relation to compliance by public bodies with *subsection (2)(b)*, and public bodies shall have regard to any such guidelines.

(4) The records referred to in *subsection (1)* are records created after the commencement of this Act and—

(*a*) records created during such period (if any), or after such time (if any), before the commencement of this Act, and

(*b*) records created before such commencement and relating to such particular matters (if any), and

(*c*) records created during such period (if any) and relating to such particular matters (if any),

as may be prescribed, after consultation with such Ministers of the Government as the Minister considers appropriate.

(5) Notwithstanding *subsections (1)* and *(4)* but subject to *subsection (6)*, where—

(*a*) access to records created before the commencement of this Act is necessary or expedient in order to understand records created after such commencement, or

(*b*) records created before such commencement relate to personal information about the person seeking access to them,

subsection (1) shall be construed as conferring the right of access in respect of those records.

(6) *Subsection (5)* shall not be construed as applying, in relation to an individual who is a member of the staff of a public body, the right of access to a record held by a public body that—

(*a*) is a personnel record, that is to say, a record relating wholly or mainly to one or more of the following, that is to say, the competence or ability of the individual in his or her capacity as a member of the staff of a public body or his or her employment or employment history or an evaluation of the performance of his or her functions generally or a particular such function as such member,

(*b*) was created more than 3 years before the commencement of this Act, and

(*c*) is not being used or proposed to be used in a manner or for a purpose that affects, or will or may affect, adversely the interests of the person.

(7) Nothing in this section shall be construed as applying the right of access to an exempt record.

(8) Nothing in this Act shall be construed as prohibiting or restricting a public body from publishing or giving access to a record (including an exempt record) otherwise than under this Act where such publication or giving of access is not prohibited by law.

(9) A record in the possession of a person who is or was providing a service for a public body under a contract for services shall, if and in so far as it relates to the service, be deemed for the purposes of this Act to be held by the body, and there shall be deemed to be included in the contract a provision that the person shall, if so requested by the body for the purposes of this Act, give the record to the body for retention by it for such period as is reasonable in the particular circumstances.

(10) Where a request under *section 7* would fall to be granted by virtue of *subsection (9)* but for the fact that it relates to a record that contains, with the matter relating to the service concerned, other matter, the head of the public body concerned shall, if it is practicable to do so, prepare a copy, in such form as he or she considers appropriate of so much of the record as does not consist of the other matter aforesaid and the request shall be granted by offering the requester access to the copy.

F12[(11) (*a*) In subsection (4) to (6), 'commencement of this Act', in relation to local authorities and health boards, means 21 October, 1998.

(*b*) In subsection (9), 'person' does not include a public body or any other body, organisation or group that is specified in clauses (*a*) to (*g*) of subparagraph

(5) of paragraph 1 of the First Schedule and does not stand prescribed for the time being for the purposes of that subparagraph.**]**

Annotations

Amendments:

F12 Inserted (11.04.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 4, commenced on enactment.

Modifications (not altering text):

C21 References to "health boards" affected (1.01.2005) by *Health Act 2004* (42/2004), ss. 56 and 66, S.I. No. 887 of 2004.

Definitions (*Part 10*).

56.—In this Part "specified body" means—

(*a*) the health boards,

...

References to specified bodies.

66.—Subject to this Act, references (however expressed) to a specified body in any Act passed before the establishment day, or in any instrument made before that day under an Act, are to be read as references to the Executive, unless the context otherwise requires.

Editorial Notes:

E38 Power pursuant to section 3 and 6(4)(b) exercised (12.02.1999) by *Freedom of Information Act, 1997 (Section 6(4)(B)) Regulations 1999* (S.I. No. 46 of 1999), reg. 3.

E39 Previous affecting provision: *Freedom of Information Act, 1997 (Sections 6(4), 6(5), and 6(6)) Regulations 1998* (S.I. No. 516 of 1998), reg. 2, revoked (22.05.2003) by *Freedom of Information Act 1997 (Miscellaneous Revocations) Regulations 2003* (S.I. No. 206 of 2003), reg. 2(a).

E40 Previous affecting provision: *Freedom of Information Act, 1997 (Sections 6(9)) Regulations 1998* (S.I. No. 517 of 1998), reg. 3, revoked (22.05.2003) by *Freedom of Information Act 1997 (Miscellaneous Revocations) Regulations 2003* (S.I. No. 206 of 2003), reg. 2(b).

Requests for access to records.

7.—(1) A person who wishes to exercise the right of access shall make a request, in writing or in such other form as may be determined, addressed to the head of the public body concerned for access to the record concerned—

(*a*) stating that the request is made under this Act,

(*b*) containing sufficient particulars in relation to the information concerned to enable the record to be identified by the taking of reasonable steps, and

(*c*) if the person requires such access to be given in a particular form or manner (being a form or manner referred to in *section 12*), specifying the form or manner of access.

(2) The head shall cause the receipt by him or her of a request under *subsection (1)* to be notified, in writing or in such other form as may be determined, to the requester concerned as soon as may be but not later than 2 weeks after such receipt, and the notification shall include a summary of the provisions of *section 41* and particulars of the rights of review under this Act, the procedure governing the exercise of those rights, and the time limits governing such exercise, in a case to which that section applies.

(3) Where a request under this section is received by the head of a public body ("the head") and the record or records concerned is or are not held by the body ("the first-mentioned body") but, to the knowledge of the head, is or are held by one or more other public bodies, the head shall, as soon as may be, but not more than 2 weeks, after the receipt of the request, cause a copy of the request to be given to the head of the other body or, as the case may be, to the head of that one of the other bodies—

(*a*) whose functions are, in the opinion of the head, most closely related to the subject matter of the record or records, or

(*b*) that, in the opinion of the head, is otherwise most appropriate,

and inform the requester concerned, by notice in writing or in such other form as may be determined, of his or her having done so and thereupon—

(i) the head to whom the copy aforesaid is furnished shall be deemed, for the purposes of this Act, to have received the request under this section and to have received it at the time of the receipt by him or her of the copy, and

(ii) the head shall be deemed, for the purposes of this Act, not to have received the request.

(4) Where a request under this section relating to more than one record is received by the head of a public body ("the first-mentioned body") and one or more than one (but not all) of the records concerned is or are held by the body, the head shall inform the requester concerned, by notice in writing or in such other form as may be determined, of the names of any other public body that, to his or her knowledge, holds any of the records.

(5) The Minister shall, after consultation with the Commissioner, draw up and publish to heads guidelines for the purposes of *subsection (3)* and *(4)* and heads shall have regard to any such guidelines.

(6) A person shall be deemed to have the knowledge referred to in *subsection (3)* and *(4)* if, by the taking of reasonable steps, he or she could obtain that knowledge.

(7) Where—

(*a*) a person makes a request for information, or a request for access to a record, to a public body or to a head or a director, or member of the staff, of a public body, other than under and in accordance with this Act, and

(*b*) it is not or may not be possible to give the information, or make available the record, other than pursuant to a request in relation to it under and in accordance with *section 7*,

the head shall, if appropriate, cause the person to be informed of the right of access and shall assist, or offer to assist, the person in the preparation of such a request.

F13**[**(8) A person who makes a request under subsection (1) may, at any time before the making of a decision under section 8(1) in relation to the request, by notice in writing or in such other form as may be determined, given to the head concerned, withdraw the request and the head concerned shall cause notice of the withdrawal to be given to any other person to whom, in the opinion of the head, it should be given.**]**

Annotations

Amendments:

F13 Inserted (11.4.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 5, commenced on enactment.

Modifications (not altering text):

C22 Application of section restricted (10.04.2002) by *Residential Institutions Redress Act 2002* (13/2002), ss. 13, 31(1), (2), commenced on enactment and establishment day 16.12.2002 (S.I. No. 520 of 2005).

Application of Freedom of Information Act, 1997 to certain records.

31.—(1) A head may refuse to grant a request (including a request made before the passing of this Act) under section 7 of the Freedom of Information Act, 1997 ("a request"), if access to the records concerned could, in the opinion of the head, reasonably be expected to prejudice the effectiveness of the performance of its functions by the Board or the Review Committee or the procedures or methods employed for such performance.

(2) *Subsection (1)* does not apply in relation to a case in which in the opinion of the head concerned the public interest would, on balance, be better served by granting than by refusing to grant the request concerned.

...

C23 Application of section restricted (26.04.2000) by *Commission To Inquire Into Child Abuse Act 2000* (7/2000), s. 34, commenced on enactment (S.I. No. 149 of 2000).

Application of Freedom of Information Act, 1997, to certain records.

34.—(1) A head may refuse to grant a request (including a request made before the passing of this Act) under section 7 of the Freedom of Information Act, 1997 ("a request"), if access to the record concerned could, in the opinion of the head, reasonably be expected to prejudice the effectiveness of the performance of its functions by the Commission or a Committee or the procedures or methods employed for such performance.

(2) *Subsection (1)* does not apply in relation to a case in which in the opinion of the head concerned the public interest would, on balance, be better served by granting than by refusing to grant the request concerned.

(3) Before forming the opinion referred to in *subsection (1)* or *(2)*, a head shall consult with the Chairperson.

(4) A head shall refuse to grant a request in relation to a record held by the Confidential Committee and transferred to a public body by the Commission upon the dissolution of the Commission.

(5) In this section "head", "public body" and "record" have the meanings assigned to them by section 2 of the Freedom of Information Act, 1997.

Editorial Notes:

E41 Provision for repayment of fees under section made (7.07.2003) by *Freedom of Information Act 1997 (Fees) Regulations 2003* (S.I. No. 264 of 2003), reg. 5.

Decisions on requests under *section 7* and notification of decisions.

8.—(1) Subject to the provisions of this Act, a head shall, as soon as may be, but not later than 4 weeks, after the receipt of a request under *section 7*—

(*a*) decide whether to grant or refuse to grant the request or to grant it in part,

(*b*) if he or she decides to grant the request, whether wholly or in part, determine the form and manner in which the right of access will be exercised, and

(*c*) cause notice, in writing or in such other form as may be determined, of the decision and determination to be given to the requester concerned.

(2) A notice under *subsection (1)* shall specify—

(*a*) the decision under that subsection concerned and the day on which it was made,

(*b*) unless the head concerned reasonably believes that their disclosure could prejudice the safety or well-being of the person concerned, the name and designation of the person in the public body concerned who is dealing with the request,

(*c*) if the request aforesaid is granted, whether wholly or in part—

(i) the day on which, and the form and manner in which, access to the record concerned will be offered to the requester concerned and the period during which the record will be kept available for the purpose of such access, and

(ii) the amount of any fee under *section 47* payable by the requester in respect of the grant of the request,

(*d*) if the request aforesaid is refused, whether wholly or in part—

(i) the reasons for the refusal, and

(ii) unless the refusal is pursuant to F14**[**section 19(5), 22(2), 23(2), 24(3), 26(4), 27(4) or 28(5A)**]**, any provision of this Act pursuant to which the request is refused and the findings on any material issues relevant to the decision and particulars of any matter relating to the public interest taken into consideration for the purposes of the decision,

(*e*) if the giving of access to the record is deferred under *section 11*, the reasons for the deferral and the period of the deferral, and

(*f*) particulars of rights of review and appeal under this Act in relation to the decision under *subsection (1)* and any other decision referred to in the notice, the procedure governing the exercise of those rights and the time limits governing such exercise.

(3) Subject to the provisions of this Act, where a request is granted under *subsection (1)*—

(*a*) if—

(i) a fee is not charged under *section 47* in respect of the matter,

(ii) a deposit under that section has been paid and a fee under that section is charged and the amount of the deposit equals or exceeds the amount of the fee, or

(iii) such a deposit has been paid but such a fee is not charged,

access to the record concerned shall be offered to the requester concerned forthwith and the record shall be kept available for the purpose of such access for a period of 4 weeks thereafter, and

(*b*) if a fee is so charged, access to the record concerned shall be offered to the requester concerned as soon as may be, but not more than one week, after the day on which the fee is received by the public body concerned, and the record shall be kept available for the purpose of such access until—

(i) the expiration of the period of 4 weeks from such receipt, or

(ii) the expiration of the period of 8 weeks from the receipt by the requester concerned of the notice under *subsection (1)* concerned,

whichever is the earlier.

(4) F14**[**Subject to the provisions of this Act, in deciding**]** whether to grant or refuse to grant a request under *section 7*—

(*a*) any reason that the requester gives for the request, and

(*b*) any belief or opinion of the head as to what are the reasons of the requester for the request,

shall be disregarded.

(5) This section shall not be construed as requiring the inclusion in a notice under *subsection (1)* of matter that, if it were included in a record, would cause the record to be an exempt record.

(6) References in this section to the grant of a request under *section 7* include references to such a grant pursuant to *section 13*.

Annotations

Amendments:

F14 Substituted (11.4.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 6, commenced on enactment.

Extension of time for consideration of requests under *section 7*.

9.—(1) The head may, as respects a request under *section 7* received by him or her ("the specified request"), extend the period specified in *section 8 (1)* for consideration of the request by such period as he or she considers necessary but not exceeding a period of 4 weeks if in the opinion of the head—

(*a*) the request relates to such number of records, or

(*b*) the number of other requests under *section 7* relating either to the record or records to which the specified request relates or to information corresponding to that to which the specified request relates or to both that have been made to the public body concerned before the specified request was made to it and in relation to which a decision under *section 8* has not been made is such,

that compliance with that subsection within the period specified therein is not reasonably possible.

(2) Where a period is extended under this section, the head concerned shall cause notice in writing or in such other form as may be determined, to be given to the requester concerned, before the expiration of the period, of the extension and the period thereof and reasons therefor.

(3) The reference in *section 8 (1)* to 4 weeks shall be construed in accordance with any extension under this section of that period.

Refusal on administrative grounds to grant requests under *section 7*.

10.—(1) A head to whom a request under *section 7* is made may refuse to grant the request if—

(*a*) the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken,

(*b*) the request does not comply with *section 7 (1) (b)*,

(*c*) in the opinion of the head, granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of F15**[**...**]** work of the public body concerned,

(*d*) publication of the record is required by law and is intended to be effected not later than 12 weeks after the receipt of the request by the head,

(*e*) the request is, in the opinion of the head, frivolous or vexatious F16**[**, or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert**]**, or

(*f*) a fee or deposit payable under *section 47* F16**[**in respect of the request concerned or in respect of a previous request by the same requester**]** has not been paid.

(2) A head shall not refuse, pursuant to *paragraph (b)* or *(c)* of *subsection (1)*, to grant a request under *section 7* unless he or she has assisted, or offered to assist, the requester concerned in an endeavour so to amend the request that it no longer falls within that paragraph.

Annotations

Amendments:

F15 Deleted (11.4.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 7, commenced on enactment.

F16 Inserted (11.4.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 7, commenced on enactment.

PART IV

The Information Commissioner

Establishment of office of Information Commissioner.

33.—(1) There is hereby established the office of Information Commissioner and the holder of the office shall be known as the Information Commissioner.

(2) The Commissioner shall be independent in the performance of his or her functions.

(3) The appointment of a person to be the Commissioner shall be made by the President on the advice of the Government following a resolution passed by Dáil Éireann and by Seanad Éireann recommending the appointment of the person.

(4) (*a*) Subject to *paragraph (b)*, the provisions of the *Second Schedule* shall have effect in relation to the Commissioner.

F58**[**(*b*) Paragraph 5 of the Second Schedule shall not have effect in relation to remuneration in a case where the person who holds the office of Commissioner also holds the office of Ombudsman.**]**

(5) Section 2 (6) of the Ombudsman Act, 1980 shall not apply to a person who holds the office of Ombudsman and also holds the office of Commissioner.

Annotations

Amendments:

F58 Substituted (11.04.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 25, commenced on enactment.

Review by Commissioner of decisions.

34.—(1) This section applies to—

(*a*) a decision under *section 14*, other than a decision referred to in *paragraph (c)*,

(*b*) a decision specified in *paragraph (a)*, *(b)*, *(c)*, *(d)*, *(e)* or *(f)* of *section 14 (1)*,

(*c*) a decision under *section 14*, or a decision under *section 47*, that a fee or deposit exceeding £10 or such other amount (if any) as may stand prescribed for the time being should be charged under *section 47*,

(*d*) a decision under *section 9* to extend the time for the consideration of a request under *section 7*,

F59**[**(*dd*) a decision to refuse to grant a request under section 7 on the ground that, by virtue of section 46, this Act does not apply to the record concerned,**]**

(*e*) a decision under *section 11* to defer the giving of access to a record falling within *paragraph (b)* or *(c)* of *subsection (1)* of that section, and

(*f*) a decision on a request to which *section 29* applies,

but excluding—

(i) a decision aforesaid made by the Commissioner in respect of a record held by the Commissioner or (in a case where the same person holds the office of Ombudsman and the office of Commissioner) made by the Ombudsman in respect of a record held by the Ombudsman, and

(ii) a decision referred to in *paragraph (b)*, and a decision under *section 47* referred to in *paragraph (c)*, made by a person to whom the function concerned stood delegated under *section 4* at the time of the making of the decision.

(2) Subject to the provisions of this Act, the Commissioner may, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person—

(*a*) review a decision to which this section applies, and

(*b*) following the review, may, as he or she considers appropriate—

(i) affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper,

in accordance with this Act.

F60**[**(3) A decision under subsection (2) shall be made as soon as may be and, in so far as practicable, not later than 4 months after the receipt by the Commissioner of the application for the review concerned.**]**

(4) An application under *subsection (2)* shall be made—

(*a*) if it relates to a decision specified in *paragraph (d)* or *(f)* of *subsection (1)*, not later than 2 weeks after the notification of the decision to the relevant person concerned F59**[**or, in a case in which the Commissioner is of opinion that there are reasonable grounds for extending that period, the expiration of an additional period of such length as he or she may determine**]**, and

(*b*) if it relates to any other decision specified in that subsection, not later than 6 months after the notification of the decision to the relevant person concerned or, in a case in which the Commissioner is of opinion that there are reasonable grounds for extending that period, the expiration of such longer period as he or she may determine.

(5) A person who makes an application under *subsection (2)* may, by notice in writing given to the Commissioner, at any time before a notice under *subsection (10)* in relation to the application is given to the person, withdraw the application, and the Commissioner shall cause a copy of any notice given to him or her under this subsection to be given to the relevant person, or the head, concerned, as may be appropriate, and any other person to whom, in the opinion of the Commissioner, it should be given.

(6) As soon as may be after the receipt by the Commissioner of an application under *subsection (2)*, the Commissioner shall cause a copy of the application to be given to the head concerned, and, as may be appropriate, to the relevant person concerned and, if the Commissioner proposes to review the decision concerned, he or she shall cause the head and the relevant person and any other person who, in the opinion of

the Commissioner, should be notified of the proposal to be so notified and, thereupon, the head shall give to the Commissioner particulars, in writing or in such other form as may be determined, of any persons whom he or she has or, in the case of a refusal to grant a request to which *section 29* applies, would, if he or she had intended to grant the request under *section 7* concerned, have notified of the request.

(7) Where an application under *subsection (2)* is made, the Commissioner may at any time endeavour to effect a settlement between the parties concerned of the matter concerned and may for that purpose, notwithstanding *subsection (3)*, suspend, for such period as may be agreed with the parties concerned and, if appropriate, discontinue, the review concerned.

(8) In relation to a proposed review under this section, the head, and the relevant person concerned and any other person who is notified under *subsection (6)* of the review may make submissions (as the Commissioner may determine, in writing or orally or in such other form as may be determined) to the Commissioner in relation to any matter relevant to the review and the Commissioner shall take any such submissions into account for the purposes of the review.

(9) (*a*) The Commissioner may refuse to grant an application under *subsection (2)* or discontinue a review under this section if he or she is or becomes of the opinion that—

(i) the application aforesaid or the application to which the review relates ("the application") is frivolous or vexatious,

(ii) the application does not relate to a decision specified in *subsection (1)*, or

(iii) the matter to which the application relates is, has been or will be, the subject of another review under this section.

(*b*) In determining whether to refuse to grant an application under *subsection (2)* or to discontinue a review under this section, the Commissioner shall, subject to the provisions of this Act, act in accordance with his or her own discretion.

(10) Notice, in writing or in such other form as may be determined, of a decision under *subsection (2) (b)*, or of a refusal or discontinuation under *subsection (9)*, and the reasons therefor, shall be given by the Commissioner to—

(*a*) the head concerned,

(*b*) the relevant person concerned, and

(*c*) any other person to whom, in the opinion of the Commissioner, such notice should be given.

(11) (*a*) The notice referred to in *subsection (10)* shall be given as soon as may be after the decision, refusal or discontinuation concerned and, if it relates to a decision under *subsection (2)*, in so far as practicable, within the period specified in *subsection (3)*.

(*b*) The report of the Commissioner for any year under *section 40* shall specify the number of cases (if any) in that year in which a notice referred to in *subsection (10)* in relation to a decision under *subsection (2) (b)* was not given to a person specified in *subsection (10)* within the appropriate period specified in *paragraph (a)*.

(12) In a review under this section—

(*a*) a decision to grant a request to which *section 29* applies shall be presumed to have been justified unless the person concerned to whom *subsection (2)*

of that section applies shows to the satisfaction of the Commissioner that the decision was not justified, and

(*b*) a decision to refuse to grant a request under *section 7* shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified.

(13) A decision of the Commissioner following a review under this section shall, where appropriate, specify the period within which effect shall be given to the decision and, in fixing such a period, the Commissioner shall have regard to the desirability, subject to *section 44*, of giving effect to such a decision as soon as may be after compliance in relation thereto with *subsection (11)*.

(14) Subject to the provisions of this Act, a decision under *subsection (2)* shall—

(*a*) in so far as it is inconsistent with the decision to which this section applies concerned have effect in lieu thereof, and

(*b*) be binding on the parties concerned.

(15) In this section "relevant person", in relation to a decision specified in *subsection (1)*, means—

(*a*) the requester concerned and, if the decision is in respect of a request to which *section 29* relates, a person to whom *subsection (2)* of that section applies, or

(*b*) if the decision is under *section 17* or *18*, the person who made the application concerned under that section.

Annotations

Amendments:

F59 Inserted (11.04.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 26(a) and (c), commenced on enactment.

F60 Substituted (11.04.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 26(b), commenced on enactment.

Editorial Notes:

E56 Power pursuant to subs. (1) (c), s. 3 and s. 47 exercised (7.07.2003) by *Freedom of Information Act 1997 (Fees) Regulations 2003* (S.I. No. 264 of 2003).

Requests for further information by Commissioner.

35.—(1) Where—

(*a*) an application for the review by the Commissioner of—

(i) a decision to refuse to grant a request under *section 7*, or

(ii) a decision under *section 14* in relation to a decision referred to in *subparagraph (i)*,

is made under *section 34*, and

(*b*) the Commissioner considers that the statement of the reasons for the decision referred to in *paragraph (a) (i)* in the notice under *subsection (1)* of *section 8* or of the findings or particulars referred to in *subsection (2) (d) (ii)* of that section in relation to the matter is not adequate,

the Commissioner shall direct the head concerned to furnish to the requester concerned and the Commissioner a statement, in writing or such other form as may be determined, containing any further information in relation to those matters that is in the power or control of the head.

(2) A head shall comply with a direction under this section as soon as may be, but not later than 3 weeks, after its receipt.

Appeal to High Court.

42.—(1) A party to a review under *section 34* or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision.

(2) The requester concerned or any other person affected by—

(*a*) the issue of a certificate under *section 25*,

(*b*) a decision, pursuant to *section 8*, to refuse to grant a request under *section 7* in relation to a record the subject of such a certificate, or

(*c*) a decision, pursuant to *section 14*, to refuse to grant, or to uphold a decision to refuse to grant, such a request,

may appeal to the High Court on a point of law against such issue or from such decision.

(3) A person may appeal to the High Court from—

(*a*) a decision under *section 14*, or

(*b*) a decision specified in *paragraph (a)*, *(b)*, *(c)*, *(d)*, *(e)*, *(f)* or *(g)* of *subsection (1)* of that section (other than such a decision made by a person to whom the function stood delegated under *section 4* at the time of the making of the decision),

made by the Commissioner in respect of a record held by the Office of the Commissioner or (in a case where the same person holds the office of Ombudsman and the office of Commissioner) made by the Ombudsman in respect of a record held by the Office of the Ombudsman.

F61**[**(4) An appeal under subsection (1), (2) or (3) shall be initiated not later than 8 weeks after notice of the decision concerned was given to the person bringing the appeal.**]**

(5) The Commissioner may refer any question of law arising in a review under *section 34* to the High Court for determination, and the Commissioner may postpone the making of a decision following the review until such time as he or she considers convenient after the determination of the High Court.

(6) (*a*) Where an appeal under this section by a person other than a head is dismissed by the High Court, that Court may, if it considers that the point of law concerned was of exceptional public importance, order that some or all of the costs of the person in relation to the appeal be paid by the public body concerned.

(*b*) The High Court may order that some or all of the costs of a person (other than a head) in relation to a reference under this section be paid by the public body concerned.

F62**[**(*c*) The Supreme Court may order that some or all of the costs of a person (other than a head) in relation to an appeal to that Court from a decision of the High Court under this section be paid by the public body concerned if it considers that a point of law of exceptional public importance was involved in the appeal and, but for this paragraph, that Court would not so order.**]**

(7) A decision of the High Court following an appeal under *subsection (1)*, *(2)* or *(3)* shall, where appropriate, specify the period within which effect shall be given to the decision.

(8) F63**[**...**]**

Annotations

Amendments:

F61 Substituted (11.04.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 27(a), commenced on enactment.

F62 Inserted (11.04.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 27(b), commenced on enactment.

F63 Deleted (11.04.2003) by *Freedom of Information (Amendment) Act 2003* (9/2003), s. 27(c), commenced on enactment.

Number 30 *of* 2014

FREEDOM OF INFORMATION ACT 2014

REVISED

Updated to 15 December 2021

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Number 30 *of* 2014

FREEDOM OF INFORMATION ACT 2014

REVISED

Updated to 15 December 2021

An Act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies, other bodies in receipt of funding from the State and certain other bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons to enable them to exercise it, to provide for the independent review both of decisions of such bodies relating to that right and of the operation of this Act generally (including the proceedings of such bodies pursuant to this Act) and, for those purposes, to provide for the continuance of the office of Information Commissioner and to define its functions, to provide for the publication by such bodies of certain information about them relevant to the purposes of this Act, to repeal the Freedom of Information Act 1997 and the Freedom of Information (Amendment) Act 2003, to amend the Central Bank Act 1942, to amend the Official Secrets Act 1963, to repeal certain other enactments, and to provide for related matters. [14*th October*, 2014]

Be it enacted by the Oireachtas as follows:

Chapter 2

FOI Requests

Access to records

11. (1) Subject to this Act, every person has a right to and shall, on request therefor, be offered access to any record held by an FOI body and the right so conferred is referred to in this Act as the right of access.

(2) An FOI body shall give reasonable assistance to a person who is seeking a record under this Act—

(a) in relation to the making of the FOI request for access to the record, and

(b) if the person has a disability, so as to facilitate the exercise by the person of his or her rights under this Act.

(3) An FOI body, in performing any function under this Act, shall have regard to—

(a) the need to achieve greater openness in the activities of FOI bodies and to promote adherence by them to the principle of transparency in government and public affairs,

(b) the need to strengthen the accountability and improve the quality of decision-making of FOI bodies, and

(c) the need to inform scrutiny, discussion, comment and review by the public of the activities of FOI bodies and facilitate more effective participation by the public in consultations relating to the role, responsibilities and performance of FOI bodies.

(4) The records referred to in *subsection (1)* are—

(a) records created on or after the effective date, and

(b) (i) records created during such period (if any), or after such time (if any), before that date, and

(ii) records created before such date and relating to such particular matters (if any), and

(iii) records created during such period (if any) and relating to such particular matters (if any),

as may be prescribed, after consultation with such Ministers of the Government as the Minister considers appropriate.

(5) Notwithstanding *subsections (1)* and *(4)* but subject to *subsection (6)*, where—

(a) access to records created before the effective date is necessary or expedient in order to understand records created after such date, or

(b) records created before the effective date relate to personal information about the person seeking access to them,

subsection (1) shall be construed as conferring the right of access in respect of those records.

(6) *Subsection (4)* shall not be construed as applying, in relation to an individual who is a member of the staff of an FOI body, the right of access to a record held by an FOI body that—

(a) is a personnel record, that is to say, a record relating wholly or mainly to one or more of the following, that is to say, the competence or ability of the individual in his or her capacity as a member of the staff of an FOI body or his or her employment or employment history or an evaluation of the performance of his or her functions generally or a particular such function as such member,

(b) was created more than 3 years before the effective date by the FOI body concerned, and

(c) is not being used or proposed to be used in a manner or for a purpose that affects, or will or may affect, adversely the interests of the person.

(7) Nothing in this section shall be construed as applying the right of access to an exempt record—

(a) where the exemption is mandatory, or

(b) where the exemption operates by virtue of the exercise of a discretion that requires the weighing of the public interest, if the factors in favour of refusal outweigh those in favour of release.

(8) Nothing in this Act shall be construed as prohibiting or restricting an FOI body from publishing or giving access to a record (including an exempt record) otherwise than under this Act where such publication or giving of access is not prohibited by law.

(9) A record in the possession of a service provider shall, if and in so far as it relates to the service, be deemed for the purposes of this Act to be held by the FOI body, and there shall be deemed to be included in the contract for the service a provision that the service provider shall, if so requested by the FOI body for the purposes of this Act, give the record to the FOI body for retention by it for such period as is reasonable in the particular circumstances.

(10) If a person who is or was providing a service for a public body under a contract for the service is a public body specified in Part 2 of Schedule 1, but immediately prior to the enactment of this Act was not a public body to which the Act of 1997 applied, *subsection (9)* shall not apply to records held by that public body in respect of the contract for service it provides for the other public body until 6 months after the date of such enactment.

(11) Where an FOI request would fall to be granted by virtue of *subsection (9)* but for the fact that it relates to a record that contains, with the matter relating to the service concerned, other matter, the head of the FOI body concerned shall, if it is practicable to do so, prepare a copy, in such form as he or she considers appropriate of so much of the record as does not consist of the other matter aforesaid and the request shall be granted by offering the requester access to the copy.

Requests for access to records

12. (1) A person who wishes to exercise the right of access shall make a request, in writing or in such other form as may be determined, addressed to the head of the FOI body concerned for access to the record concerned—

(a) stating that the request is made under this Act,

(b) containing sufficient particulars in relation to the information concerned to enable the record to be identified by the taking of reasonable steps, and

(c) if the person requires such access to be given in a particular form or manner (being a form or manner referred to in *section 17*), specifying the form or manner of access.

(2) The head shall cause the receipt by him or her of a request under *subsection (1)* to be notified, in writing or in such other form as may be determined, to the requester concerned as soon as may be but not later than 2 weeks after such receipt, and the notification shall include a summary of the provisions of *section 19* and particulars of the rights of review under this Act, the procedure governing the exercise of those rights, and the time limits governing such exercise, in a case to which that section applies.

(3) Where a request under this section is received by the head of an FOI body ("head") and the record or records concerned are not held by the body ("the first-mentioned body") but, to the knowledge of the head, are held by one or more other FOI bodies, the head shall, as soon as may be, but not more than 2 weeks, after the receipt of the request, cause a copy of the request to be given to the head of the other body or, as the case may be, to the head of that one of the other bodies—

(a) whose functions are, in the opinion of the head, most closely related to the subject matter of the records concerned, or

(b) that, in the opinion of the head, is otherwise most appropriate,

and inform the requester concerned, by notice in writing or in such other form as may be determined, of his or her having done so and thereupon—

(i) the head to whom the copy aforesaid is furnished shall be deemed, for the purposes of this Act, to have received the request under this section and to have received it at the time of the receipt by him or her of the copy, and

(ii) the head shall be deemed, for the purposes of this Act, not to have received the request.

(4) Where a request under this section relating to more than one record is received by the head of an FOI body ("the first-mentioned body") and one or more than one (but not all) of the records concerned is or are held by the body, the head shall inform the requester concerned, by notice in writing or in such other form as may be determined, of the names of any other FOI body that, to his or her knowledge, holds any of the records.

(5) A person shall be deemed to have the knowledge referred to in *subsections (3)* and *(4)* if, by the taking of reasonable steps, he or she could obtain that knowledge.

(6) Where—

(a) a person makes a request for information, or a request for access to a record, to an FOI body or to a head or a director, or member of the staff, of an FOI body, other than under and in accordance with this Act, and

(b) it is not or may not be possible to give the information, or make available the record, other than pursuant to an FOI request in relation to it under and in accordance with this section,

the head shall, if appropriate, cause the person to be informed of the right of access and shall assist, or offer to assist, the person in the preparation of such a request.

(7) Where a person makes a request under this section, the FOI body may, having examined the request, advise the requester in writing or such other form as may be determined whether the records concerned may be accessed under—

(a) the European Communities (Re-use of Public Sector Information) Regulations 2005 (S.I. No. 279 of 2005), or

(b) the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007),

instead of under this Act.

(8) A person who makes a request under *subsection (1)* may, at any time before the making of a decision under *section 13(1)* in relation to the request, by notice in writing or in such other form as may be determined, given to the head concerned, withdraw the request and the head concerned shall cause notice of the withdrawal to be given to any other person to whom, in the opinion of the head, it should be given.

Annotations:

Modifications (not altering text):

C5 Reference in para. 7(a) construed (22.07.2021) by *European Union (Open Data and Re-use of Public Sector Information) Regulations 2021* (S.I. No. 376 of 2021), regs. 22, 23, in effect as per reg. 1(2).

Interpretation

2. (1) In these Regulations— ...

"Regulations of 2005" means the European Communities (Re-Use of Public Sector Information) Regulations 2005 (S.I. No. 279 of 2005);

...

Revocation

22. The Regulations of 2005 are revoked.

Construction of references and savings provisions

23. (1) A reference in any other enactment to the Regulations of 2005 shall be construed as a reference to these Regulations.

...

Decisions on FOI requests and notification of decisions

13. (1) Subject to this Act, a head shall, as soon as may be, but not later than 4 weeks, after the receipt of an FOI request—

(a) decide whether to grant or refuse to grant the request or to grant it in part,

(b) if he or she decides to grant the request, whether wholly or in part, determine the form and manner in which the right of access will be exercised, and

(c) cause notice, in writing or in such other form as may be determined, of the decision and determination to be given to the requester concerned.

(2) A notice under *subsection (1)* shall specify—

(a) the decision under that subsection and the day on which it was made,

(b) unless the head concerned reasonably believes that their disclosure could prejudice the safety or well-being of the person concerned, the name and designation of the person in the FOI body concerned who is dealing with the request,

(c) if the request aforesaid is granted, whether wholly or in part—

(i) the day on which, and the form and manner in which, access to the record concerned will be offered to the requester concerned and the period during which the record will be kept available for the purpose of such access, and

(ii) the amount of any fee under *section 27* payable by the requester in respect of the grant of the request,

(d) if the request aforesaid is refused, whether wholly or in part—

(i) the reasons for the refusal, and

(ii) unless the refusal is pursuant to *section 28(5)*, *31(4)*, *32(2)*, *33(4)*, *35(4)*, *36(4)* or *37(6)*, any provision of this Act pursuant to which the request is refused and the findings on any material issues relevant to the decision and particulars of any matter relating to the public interest taken into consideration for the purposes of the decision,

(e) if the giving of access to the record is deferred und er *section 16*, the reasons for the deferral and the period of the deferral, and

(f) particulars of rights of review and appeal under this Act in relation to the decision under *subsection (1)* and any other decision referred to in the notice, the procedure governing the exercise of those rights and the time limits governing such exercise.

(3) Subject to this Act, where a request is granted under *subsection (1)* —

(a) if—

(i) a fee is not charged under *section 27* in respect of the matter,

(ii) a deposit under that section has been paid and a fee under that section is charged and the amount of the deposit equals or exceeds the amount of the fee, or

(iii) such a deposit has been paid but such a fee is not charged,

access to the record concerned shall be offered to the requester concerned forthwith and the record shall be kept available for the purpose of such access for a period of 4 weeks thereafter, and

(b) if a fee is so charged, access to the record concerned shall be offered to the requester concerned as soon as may be, but not more than one week, after the day on which the fee is received by the FOI body concerned, and the record shall be kept available for the purpose of such access until—

(i) the expiration of the period of 4 weeks from such receipt, or

(ii) the expiration of the period of 8 weeks from the receipt by the requester concerned of the notice under *subsection (1)* concerned,

whichever is the earlier.

(4) Subject to this Act, in deciding whether to grant or refuse to grant an FOI request—

(a) any reason that the requester gives for the request, and

(b) any belief or opinion of the head as to what are the reasons of the requester for the request,

shall be disregarded.

(5) This section shall not be construed as requiring the inclusion in a notice under *subsection (1)* of matter that, if it were included in a record, would cause the record to be an exempt record.

(6) References in this section to the grant of an FOI request include references to such a grant pursuant to *section 18*.

Extension of time for consideration of FOI requests

14. (1) The head may, as respects an FOI request received by him or he r (the "specified request"), extend the period specified in *section 13(1)* for consideration of the request by such period as he or she considers necessary but not exceeding a period of 4 weeks if, in the opinion of the head—

(a) the request relates to such number of records, or

(b) the number of other FOI requests relating either to the record or records to which the specified request relates or to information corresponding to that to which the specified request relates or to both that have been made to the FOI body concerned before the specified request was made to it and in relation to which a decision under *section 13* has not been made is such,

that compliance with that subsection within the period specified therein is not reasonably possible.

(2) Where a period is extended under this section, the head concerned shall cause notice in writing or in such other form as may be determined, to be given to the requester concerned, before the expiration of the period, of the extension and the period thereof and reasons therefor.

(3) The reference in *section 13(1)* to 4 weeks shall be construed in accordance with any extension under this section of that period.

Refusal on administrative grounds to grant FOI requests

15. (1) A head to whom an FOI request is made may refuse to grant the request where—

(a) the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken,

(b) the FOI request does not comply with *section 12(1)(b)*,

(c) in the opinion of the head, granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of work (including disruption of work in a particular functional area) of the FOI body concerned,

(d) the information is already in the public domain,

(e) publication of the record is required by law and is intended to be effected not later than 12 weeks after the receipt of the request by the head,

(f) the FOI body intends to publish the record and such publication is intended to be effected not later than 6 weeks after the receipt of the request by the head,

(g) the request is, in the opinion of the head, frivolous or vexatious or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert,

(h) a fee or deposit payable under *section 27* in respect of the request concerned or in respect of a previous request by the same requester has not been paid, or

(i) the request relates to records already released, either to the same or a previous requester where—

(i) the records are available to the requester concerned, or

(ii) it appears to the head concerned that that requester is acting in concert with a previous requester.

(2) Subject to *subsection (3)*, a head may refuse to grant—

(a) a record that is available for inspection by members of the public whether upon payment or free of charge, or

(b) a record a copy of which is available for purchase or removal free of charge by members of the public,

whether by virtue of an enactment (other than this Act) or otherwise.

F2[(3) A record shall not be within *subsection (2)* by reason only of the fact that it contains information constituting—

(a) personal data within the meaning of the Data Protection Act 1988 to which that Act applies,

(b) personal data within the meaning of the Data Protection Regulation to which that Regulation and the Act of 2018 apply, or

(c) personal data within the meaning of Part 5 of the Act of 2018 to which that Act applies.]

(4) A head shall not refuse, pursuant to *paragraph (b)* or *(c)* of *subsection (1)*, to grant an FOI request unless he or she has assisted, or offered to assist, the requester concerned in an endeavour so as to amend the request for re-submission such that it no longer falls within those paragraphs.

F3[(5) In this section—

'Act of 2018' means the Data Protection Act 2018;

'Data Protection Regulation' means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016[49] on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).]

Annotations

Amendments:

F2 Inserted (25.05.2018) by *Data Protection Act 2018* (7/2018), s. 226(a), S.I. No. 174 of 2018.

F3 Inserted (25.05.2018) by *Data Protection Act 2018* (7/2018), s. 226(b), S.I. No. 174 of 2018.

Chapter 4

Review by Information Commissioner

Review by Commissioner of decisions

22. (1) This section applies to—

(a) a decision to refuse to grant an FOI request on the ground that, by virtue of *section 42*, this Act does not apply to the record concerned,

(b) a decision under *section 21*, other than a decision referred to in *paragraph (d)*,

(c) a decision specified in any of *paragraph (a)*to *(f)* of *section 21(1)*,

(d) a decision under *section 21*, or a decision under *section 27*, that a fee or deposit exceeding €10 or such other amount (if any) as may stand prescribed for the time being should be charged under *section 27*,

(e) a decision under *section 14* to extend the time for the consideration of an FOI request,

(f) a decision under *section 16* to defer the giving of access to a record falling within *paragraph (b)* or *(c)* of *subsection (1)* of that section,

(g) a decision on a request to which *section 38* applies,

but excluding—

(i) a decision aforesaid made by the Commissioner in respect of a record held by the Commissioner or (in a case where the same person holds the office of Ombudsman and the office of Commissioner) made by the Ombudsman in respect of a record held by the Ombudsman, and

(ii) a decision referred to in *paragraph (c)*, and a decision under *section 27* referred to in *paragraph (d)*, made by a person to whom the function concerned stood delegated under *section 20* at the time of the making of the decision.

(2) Subject to this Act, the Commissioner may, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person—

(a) review a decision to which this section applies, and

(b) following the review, may, as he or she considers appropriate—

(i) affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper,

in accordance with this Act.

(3) A decision under *subsection (2)* shall be made as soon as may be and, insofar as practicable, not later than 4 months after the receipt by the Commissioner of the application for the review concerned.

(4) An application under *subsection (2)* shall be made—

(a) if it relates to a decision specified in *paragraph (e)* or *(g)* of *subsection (1)*, not later than 2 weeks after the notification of the decision to the relevant person concerned or, in a case in which the Commissioner is of the opinion that there are reasonable grounds for extending that period, the expiration of an additional period of such length as he or she may determine, and

(b) if it relates to any other decision specified in that subsection, not later than 6 months after the notification of the decision to the relevant person concerned or, in a case in which the Commissioner is of the opinion that there are reasonable grounds for extending that period, the expiration of such longer period as he or she may determine.

(5) A person who makes an application under *subsection (2)* may, by notice given in writing, orally or by electronic means, to the Commissioner, at any time before a notice under *subsection (10)* in relation to the application is given to the person, withdraw the application, and the Commissioner shall cause a copy of any notice given to him or her under this subsection to be given to the relevant person, or the head, concerned, as may be appropriate, and any other person to whom, in the opinion of the Commissioner, it should be given, or (in the case of an oral withdrawal) cause such appropriate persons to be notified of the withdrawal.

(6) (a) As soon as may be after the receipt by the Commissioner of an application under *subsection (2)*, the Commissioner shall cause a copy of the application to be given to the head concerned, and, as may be appropriate, to the relevant person concerned and, if the Commissioner proposes to review the decision concerned, he or she shall cause the head and the relevant person and any

other person who, in the opinion of the Commissioner, should be notified of the proposal to be so notified and, thereupon, the head shall give to the Commissioner particulars, in writing or in such other form as may be determined, of any persons whom he or she has or, in the case of a refusal to grant a request to which *section 38* applies, would, if he or she had intended to grant the FOI request concerned, have notified of the request.

(b) The Commissioner may, at his or her discretion, remove any personal or confidential information which was not intended for circulation to the FOI body concerned from the application under this section when causing a copy of the application to be forwarded to the FOI body.

(7) (a) Where an application under *subsection (2)* is made, the Commissioner may at any time endeavour to effect a settlement between the parties concerned of the matter concerned and may for that purpose, notwithstanding *subsection (3)*, suspend, for such period as may be agreed with the parties concerned and, if appropriate, discontinue, the review concerned.

(b) In determining whether to suspend a review under this section, the Commissioner shall act in accordance with his or her own discretion.

(8) In relation to a proposed review under this section, the head, and the relevant person concerned and any other person who is notified under *subsection (6)* of the review may make submissions (as the Commissioner may determine, in writing or orally or in such other form as may be determined) to the Commissioner in relation to any matter relevant to the review and the Commissioner shall take any such submissions into account for the purposes of the review.

(9) (a) The Commissioner may refuse to accept an application under *subsection (2)* or may discontinue a review under this section if he or she is or becomes of the opinion that—

(i) the application aforesaid or the application to which the review relates (the "application") is frivolous or vexatious,

(ii) the application does not relate to a decision specified in *subsection (1)*,

(iii) the matter to which the application relates is, has been or will be, the subject of another review under this section,

(iv) the applicant has failed to provide the Commissioner with sufficient information or particulars, or otherwise has failed to co-operate with the Commissioner in the conduct of a review,

(v) there is no longer any issue requiring adjudication, as access to the records in question has been granted by the FOI body in the course of the review,

(vi) the application forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the Commissioner, appear to have made the requests acting in concert, or

(vii) accepting the application would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of work of his or her Office.

(b) In determining whether to refuse to accept an application under *subsection (2)* or to discontinue a review under this section, the Commissioner shall, subject to this Act, act in accordance with his or her own discretion.

(10) Notice, in writing or in such other form as may be determined, of a decision under *subsection (2)(b)*, or of a refusal or discontinuation under *subsection (9)*, and the reasons therefor, shall be given by the Commissioner to—

(a) the head concerned,

(b) the relevant person concerned, and

(c) any other person to whom, in the opinion of the Commissioner, such notice should be given.

(11) (a) The notice referred to in *subsection (10)* shall be given as soon as may be after the decision, refusal or discontinuation concerned and, if it relates to a decision under *subsection (2)*, in so far as practicable, within the period specified in *subsection (3)*.

(b) The report of the Commissioner for any year under *section 47* shall specify the number of cases (if any) in that year in which a notice referred to in *subsection (10)* in relation to a decision under *subsection (2)(b)* was not given to a person specified in *subsection (10)* within the appropriate period specified in *paragraph (a)*.

(12) In a review under this section—

(a) a decision to grant a request to which *section 38* applies shall be presumed to have been justified unless the person concerned to whom *subsection (2)* of that section applies shows to the satisfaction of the Commissioner that the decision was not justified, and

(b) a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified.

(13) A decision of the Commissioner following a review under this section shall, where appropriate, specify the period within which effect shall be given to the decision and, in fixing such a period, the Commissioner shall have regard to the desirability, subject to *section 26*, of giving effect to such a decision as soon as may be after compliance in relation thereto with *subsection (11)*.

(14) Subject to this Act, a decision under *subsection (2)* shall—

(a) insofar as it is inconsistent with the decision to which this section applies, have effect in lieu thereof, and

(b) be binding on the parties concerned.

(15) Nothing in this Act shall prevent the Commissioner in a review under this section from taking into account that the record concerned—

(a) has lost its confidentiality,

(b) is no longer commercially sensitive, or

(c) is personal information relating to an individual other than the requester.

(16) In this section "relevant person", in relation to a decision specified in *subsection (1)*, means—

(a) the requester concerned and, if the decision is in respect of a request to which *section 38* relates, a person to whom *subsection (2)* of that section applies, or

(b) if the decision is under *section 9* or *10*, the person who made the application concerned under that section.

Requests for further information by Commissioner

23. (1) Where—

(a) an application for the review by the Commissioner of—

(i) a decision to refuse to grant an FOI request, or

(ii) a decision under *section 21* in relation to a decision referred to in sub*paragraph (i)*,

is made under *section 22*, and

(b) the Commissioner considers that the statement of the reasons for the decision referred to in *paragraph (a)(i)* in the notice under *subsection (1)* of *section 13* or of the findings or particulars referred to in *subsection (2)(d)(ii)* of that section in relation to the matter is not adequate,

the Commissioner shall direct the head concerned to furnish to the requester concerned and the Commissioner a statement, in writing or such other form as may be determined, containing any further information in relation to those matters that is in the power or control of the head.

(2) A head shall comply with a direction under this section as soon as may be, but not later than 3 weeks, after its receipt.

Chapter 5

Appeal to High Court

Appeal to High Court, etc.

24. (1) A party to an application under *section 22* or any other person affected by the decision of the Commissioner following a review under that section may appeal to the High Court—

(a) on a point of law from the decision, or

(b) where the party or person concerned contends that the release of a record concerned would contravene a requirement imposed by European Union law, on a finding of fact set out or inherent in the decision.

(2) The requester concerned or any other person affected by—

(a) the issue of a certificate under *section 34*,

(b) a decision, pursuant to *section 13*, to refuse to grant an FOI request in relation to a record the subject of such a certificate, or

(c) a decision, pursuant to *section 21*, to refuse to grant, or to uphold a decision to refuse to grant, such a request,

may appeal to the High Court on a point of law against such issue or from such decision.

(3) A person may appeal to the High Court from—

(a) a decision under *section 21*, or

(b) a decision specified in any of *paragraphs (a)* to *(g)*of *subsection (1)* of that section (other than such a decision made by a person to whom the function stood delegated under *section 20* at the time of the making of the decision),

made by the Commissioner in respect of a record held by the Office of the Commissioner or (in a case where the same person holds the office of Ombudsman and the office of Commissioner) made by the Ombudsman in respect of a record held by the Office of the Ombudsman.

(4) (a) Subject to *paragraph (b)*, an appeal under *subsection (1)*, *(2)* or *(3)* shall be initiated not later than 4 weeks after notice of the decision concerned was given to the person bringing the appeal.

(b) Where the Commissioner has decided that access should be granted to some records (including parts of records) but not all records requested—

(i) the requester shall have 8 weeks after the date of the notification of the decision concerned to initiate an appeal to the High Court under this section, and

(ii) the public body concerned shall grant access to those records that it intends to release after expiration of 4 weeks from the decision of the Commissioner.

(5) A decision of the High Court following an appeal under *subsection (1)*, *(2)* or *(3)* shall, where appropriate, specify the period within which effect shall be given to the decision.

(6) The Commissioner may refer any question of law arising in a review under *section 22* to the High Court for determination, and the Commissioner may postpone the making of a decision following the review until such time as he or she considers convenient after the determination of the High Court.

(7) (a) Where an appeal under *subsection (1)*, *(2)* or *(3)* by a person (other than a head) is dismissed by the High Court, that Court may, if it considers that the point of law concerned was of exceptional public importance, order that some or all of the costs of the person in relation to the appeal be paid by the FOI body concerned.

(b) Where a reference under *subsection (6)* is heard by the High Court, that Court may order that some or all of the costs of a person (other than a head) in relation to such reference be paid by the FOI body concerned.

(8) Where an appeal to the Supreme Court is taken from a decision of the High Court under this section, that Court may order that some or all of the costs of a person (other than a head) in relation to an appeal to that Court be paid by the FOI body concerned, if it considers that a point of law of exceptional public importance was involved in the appeal and, but for this subsection, that Court would not so order.

Powers of Commissioner

45. (1) The Commissioner may, for the purposes of a review under *section 22* or an investigation under *section 44*—

(a) require any person who, in the opinion of the Commissioner, is in possession of information, or has a record in his or her power or control, that, in the opinion of the Commissioner, is relevant to the purposes aforesaid to furnish to the Commissioner any such information or record that is in his or her possession or, as the case may be, power or control and, where appropriate, require the person to attend before him or her for that purpose, and

(b) examine and take copies in any form of, or of extracts from any record that, in the opinion of the Commissioner, is relevant to the review or investigation and for those purposes take possession of any such record, remove it from the premises and retain it in his or her possession for a reasonable period.

(2) The Commissioner may for the purposes of such a review or investigation as aforesaid enter any premises occupied by an FOI body and there—

(a) require any person found on the premises to furnish him or her with such information in the possession of the person as he or she may reasonably require for the purposes aforesaid and to make available to him or her any record in his or her power or control that, in the opinion of the Commissioner, is relevant to those purposes, and

(b) examine and take copies of, or of extracts from, any record made available to him or her as aforesaid or found on the premises.

(3) Subject to *subsection (4)*, no enactment or rule of law prohibiting or restricting the disclosure or communication of information shall preclude a person from furnishing to the Commissioner any such information or record, as aforesaid.

(4) A person to whom a requirement is addressed under this section shall be entitled to the same immunities and privileges as a witness in a court.

(5) The Commissioner may, if he or she thinks fit, pay to any person who, for the purposes of a review under *section 22*, or an investigation under *section 44*, attends before the Commissioner or furnishes information or a record or other thing to him or her—

(a) sums in respect of travelling and subsistence expenses properly incurred by the person, and

(b) allowances by way of compensation for loss of his or her time,

of such amount as may be determined by the Minister.

(6) Subject to this Act, the procedure for conducting a review under *section 22* or an investigation under *section 44* shall be such as the Commissioner considers

appropriate in all the circumstances of the case and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Commissioner.

(7) A person who fails or refuses to comply with a requirement under this section or who hinders or obstructs the Commissioner in the performance of his or her functions under this section shall be guilty of an offence and be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 6 months or both.

(8) Where an FOI body fails to comply with a binding decision of the Commissioner under this Act, the Information Commissioner may apply to the court for an order to oblige the FOI body to comply with the decision.

(9) This section does not apply to a record in respect of which a certificate under *section 34* is in force.

(10) *Subsection (2)* shall not apply to—

(a) information, documents or things designated by regulations made under section 126(1)(a) of the Garda Síochána Act 2005, or

(b) Garda Síochána stations designated by regulations made under section 126(1)(b) of the Garda Síochána Act 2005,

except to the extent specified in a direction of the Minister for Justice and Equality.

(11) In deciding where to issue a direction under *subsection (10)* the Minister shall take into account the public interest.

(12) The Commissioner shall comply with the provisions on professional secrecy in—

(a) the Rome Treaty,

(b) the ESCB Statute, or

(c) any of the Supervisory Directives,

(within the meaning of the Central Bank Act 1942) in holding and dealing with information contained in records provided to him or her by the Bank under this Act.

In the matter of the **Freedom of Information Act, 1997**. **John Deely,** Appellant v. **The Information Commissioner,** Respondent and **The Director of Public Prosecutions,** Notice Party [2000 No. 95 M.C.A.]

High Court 11th May, 2001

Administrative law – Information Commissioner – Review – Exempt record – Statement of reasons – Decision not to state reasons – Notice of decision not to state reasons – Content and form of notice – Director of Public Prosecutions – Decision to prosecute – Whether documents relating to decision exempt – Freedom of Information Act, 1997 (Section 18) Regulations, 1998 (S.I. No. 519), reg. 6 – Freedom of Information Act, 1997 (No. 13), ss. 18, 26, 34 and 46.

Section 18 (2) of the Freedom of Information Act, 1997 provides:-

"Nothing in this section shall be construed as requiring -

(a) the giving to a person of information contained in an exempt record, or

the disclosure of the existence or non-existence of a record if the non-disclosure of its existence or non-existence is required by this Act."

Section 46(1) (b) provides that:-

"(1) This Act does not apply to:

(b) a record held or created by the Attorney General or the Director of Public Prosecutions or the Office of the Attorney General or the Director of Public Prosecutions (other than a record concerning the general administration of either of those Offices)."

The appellant sought to invoke the provisions of the Freedom of Information Act, 1997, to obtain details of a decision of the notice party to prosecute him. The notice party declined to provide the information and the appellant sought a review of this decision by the respondent. The respondent refused the appellant's application for information. The appellant appealed on a point of law to the High Court.

Held by the High Court (McKechnie J.), in dismissing the appeal, 1, that s. 18(2) of the Freedom of Information Act, 1997, permitted the refusal of a request for information contained in a record which was an exempt record under s. 46.

2. That the onus of proving that a decision of the respondent was erroneous in law rested on the appellant.

3. That there were statutory restrictions which prevented the notice party from disclosing the information requested.

4. That s. 6 of the Act of 1997 did not create a right of access to an exempt record.

5. That s. 46 meant that provisions of the Act of 1997, including s. 6, did not apply to documents listed therein, including records of the notice party *i.e.* the Act had no application to documents relating to a decision to prosecute.

6. That s. 46 operated in conjunction with s. 2, meant that the information requested was an "exempt record" and access to same could be refused under s. 46.

7. That a person accessing information under the Act of 1997 does so as of right, rather than by grace or favour of the public body in question. A requester must show that his request is made pursuant to a right of access founded on and contained within the Act.

8. That no record or information which was exempt under s. 46 could be obtained under the provisions of the Act.

9. That a notice as specified in s.8 need not contain information and could only be relevant if there were public interest considerations.

10. That the Information Commissioner has extensive discretion as to the procedures to be adopted in conducting a review or an investigation under the Act.

Obiter dictum: That a person was not entitled to demand and get from the Director of Public Prosecutions the reasons why he or she decided to embark upon a prosecution.

The State (McCormack) v. Curran [1987] I.L.R.M. 225; *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589 followed.

Cases mentioned in this report:-

Cowzer v. Kirby [1992] I.C.L.J. 114.

Director of Public Prosecutions v. Doyle [1994] 2 I. R. 286; [1994] 1 I.L.R.M. 525.

H. v. Director of Public Prosecutions [1994] 2 I.R. 589; [1994] 2 I.L.R.M. 285.

Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34.

Howard v. Commissioners of Public Works [1994] 1 I.R. 101; [1993] I.L.R.M. 665.

Mara v. Hummingbird Ltd. [1982] 1 I.L.R.M. 421.

Minister for Agriculture v. Information Commissioner [2000] 1 I.R. 309.

The People (Director of Public Prosecutions) v. Quilligan [1986] I.R. 495; [1987] I.L.R.M. 606.

Premier Periclase v. Commissioner of Valuation (Unreported, High Court, Kelly J., 24th June, 1999).

The State (McCormack) v. Curran [1987] I.L.R.M 225.

Motion on notice.

The facts have been summarised in the headnote and are fully set out in the judgment of McKechnie J., *infra.*

By motion on notice dated the 4th October, 2000, the appellant appealed against the decision of the respondent made on the 5th September, 2000, whereby the respondent refused the appellant access to the information sought.

The matter was heard by the High Court (McKechnie J.) on the 4th May, 2001.

The appellant appeared in person.

Brian Murray for the respondent.

Maurice G. Collins for the notice party.

Cur. adv. vult.

McKechnie J. 11th May, 2001

On the 1st April, 1999, at approximately 2 p.m., there was a road traffic accident at Caherulla, Ballyheigue, County Kerry. On the occasion in question the appellant was driving his motor vehicle, in the direction of Ballyheigue when a collision occurred between an oncoming vehicle and one immediately behind him. Though not involved either by reason of personal injury or by way of impact damage, the appellant on the instructions of the Director of Public Prosecutions was subsequently charged, by way of summons, with an offence under s. 52(1) of the Road Traffic Act, 1961, as amended. Being aggrieved at being so prosecuted and being further aggrieved at being the only driver to face any criminal charge, the appellant sought to invoke the provisions of the Freedom of Information Act, 1997, in order to obtain from the notice party the reason or reasons why this prosecution was brought against him. It is arising out of this request that the within judgment is given.

The Act of 1997, apart from minor exceptions not here relevant, came into force on the 21st April, 1998. Its passing, it is no exaggeration to say, affected in a most profound way, access by members of the public to records held by public bodies and to information regarding certain acts of such bodies which touch or concern such persons. The purpose of its enactment was to create accountability and transparency and this to an extent not heretofore contemplated let alone available to the general public. Many would say that it creates an openness which inspires a belief and trust which can only further public confidence in the constitutional organs of the State.

In its long title, the intention of the Act is said to enable members of the public (a) to obtain access, to the greatest extent possible, consistent with the public interest and the right of privacy, to information in the possession of public bodies, (b) to have personal information in the possession of such bodies corrected if the need arises and accordingly, (c) to have a right of access to records held by such bodies subject to necessary exceptions to that right.

To ensure that such rights can be availed of, in an informal, impartial and expeditious manner, the title goes on to refer to the availability of

assistance for persons who may wish to exercise these rights, to provide for the independent review both of the decision of such bodies and the operation of the Act and most importantly, of course, for the establishment of the office of the Information Commissioner. Other related matters are also recited.

As can thus be seen the clear intention is that, subject to certain specific and defined exceptions, the rights so conferred on members of the public and their exercise should be as extensive as possible, this viewed, in the context of and in a way to positively further the aims, principles and policies underpinning this statute, subject and subject only to necessary restrictions.

It is on any view, a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy.

The structure of the Act is evident from the manner in which it is set out. Part II, which deals with "Access to Records", *inter alia,* establishes the right of access, specifies the mechanism by which that right may be availed of, provides for notification of the resulting decision and gives an entitlement to have such a decision internally reviewed. In addition s. 18 deals with the right to information regarding acts of public bodies which affect the person concerned.

Part III, headed "Exempt Records", sets out, amongst other things, to what extent and in what way, the bodies therein referred to, should deal with a request for records and in particular it specifies the grounds upon which a refusal to grant may be justified.

Part IV establishes the Office of the Information Commissioner and provides for a review by that Commissioner of a decision given by a public body in a variety of circumstances. It obliged the Commissioner to keep the operation of the Act under review as well as directing the Commissioner, not later than three years after the commencement of the Act, to carry out an investigation into public bodies generally, in order to assess their compliance with the provisions of the Act. He or she, in addition, must publish an annual report and cause copies thereof to be laid before each House of the Oireachtas.

Part V, though headed "Miscellaneous", contains important provisions such as s. 42 which permits an appeal to the High Court on a point of law from the Commissioner's review under s. 34 and s. 46, which declares that the Act shall not apply to certain records, a section of some importance in this case.

There then follows three schedules. Schedule no. 1 sets out what bodies shall be public bodies for the purposes of the Act and also empowers the appropriate Minister to prescribe other bodies, organisations and groups to stand for the time being as being included within that schedule. The

second schedule deals with the Information Commissioner and the third with what enactments are excluded from the application of s. 32.

For the purposes of the issues presently at hand the following would appear to be the relevant provisions of the Act:-

Section 2(i) defines "exempt record" as meaning -

> "(a) a record in relation to which the grant of a request under section 7 would be refused pursuant to Part III or by virtue of section 46, or (b) …"

Section 4 permits a head of a public body to delegate in writing to a member of his or her staff, any of the functions of that head under the Act save for a limited number of exceptions not material to this case.

Section 6, which is headed "Right of access to records", at subss. (1) and (7) states:-

> "(1) Subject to the provisions of this Act, every person has a right to and shall, on request therefor, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access.
>
> (7) Nothing in this section shall be construed as applying the right of access to an exempt record."

Section 7 entitled "Request for access to records", at subsection (1) reads:-

> "(1) A person who wishes to exercise the right of access shall make a request, in writing or in such other form as may be determined, addressed to the head of the public body concerned for access to the record concerned
>
> (a) stating that the request is made under this Act,
>
> (b) containing sufficient particulars in relation to the information concerned to enable the record to be identified by the taking of reasonable steps, and
>
> (c) if the person requires such access to be given in a particular form or manner …"

Section 8, which deals with decisions on requests under s. 7 and notification of such decisions, is as follows:-

> "(1) Subject to the provisions of this Act, a head shall, as soon as may be, but not later than 4 weeks, after the receipt of a request under section 7
>
> (a) decide whether to grant or refuse to grant the request or to grant it in part,
>
> (b) …
>
> (c) cause notice, in writing … of the decision and determination to be given to the requester concerned.
>
> (2) A notice under subsection (1) shall specify -

(d) if the request aforesaid is refused, whether wholly or in part
  (i) the reasons for the refusal, and
  (ii) unless the refusal is pursuant to … any provision of this Act pursuant to which the request is refused and the findings on any material issues relevant to the decision and particulars of any matter relating to the public interest taken into consideration for the purposes of the decision,

(4) In deciding whether to grant or refuse to grant a request under section 7
  (a) any reason that the requester gives for the request, and
  (b) any belief or opinion of the head as to what are the reasons of the requester for the request,
shall be disregarded."

Section 14 provides for an internal review, *inter alia,* of a decision to refuse to grant access under s. 7, which review, if not carried out by the head of the public body, must by way of delegation, be carried out by a person whose rank is higher than that of the person who made the original decision under s. 7. Following the decision made on review, notice under subs. (4) must be sent to the relevant person and others if considered appropriate which notice is subject to subs. (6) which states:-

"This section shall not be construed as requiring the inclusion in a notice under *subsection* (4) of matter that, if it were included in a record, would cause the record to be an exempt record."

Section 18, because of its importance to this case should be cited a little more extensively than the other provisions mentioned above. Headed, "Right of person to information regarding acts of public bodies affecting the person", it reads as follows:-

"(1) The head of a public body shall, on application to him or her in that behalf, in writing or in such other form as may be determined, by a person who is affected by an act of the body and has a material interest in a matter affected by the act or to which it relates, not later than 4 weeks after the receipt of the application, cause a statement, in writing or in such other form as may be determined, to be given to the person -
  (a) of the reasons for the act, and
  (b) of any findings on any material issues of fact made for the purposes of the act.

(2) Nothing in this section shall be construed as requiring –
  (a) the giving to a person of information contained in an exempt record, or

…

(4) If, pursuant to subsection (2) or (3) the head of a public body decides not to cause a statement to be given under subsection (1) to a person, the head shall not later than 4 weeks after the receipt of the application concerned under subsection (1), cause notice, in writing or in such other form as may be determined, of the decision to be given to the person.

…

(6) In this section – 'act' in relation to a public body, includes a decision (other than a decision under this Act) of the body."

Under s. 34, a decision given under s. 14 can be reviewed by the Commissioner. As with the decision under review, the Commissioner, under subs. (2)(b) can

"following the review, may as he or she considers appropriate

(i) affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper, …"

On a point of law, the party to a review under s. 34 or any other affected person, may appeal to the High Court from the decision of the Commissioner. Under subs. 8, the determination of the High Court on appeal shall be final and conclusive.

And finally s. 46. It is headed "Restriction of Act". It reads:-

"(1) This Act does not apply to -

(a) a record held by -

(i) the courts,

…

(b) a record held or created by the Attorney General or the Director of Public Prosecutions or the Office of the Attorney General or the Office of the Director of Public Prosecutions (other than a record concerning the general administration of either of those Offices)."

In addition to these said provisions of the Act of 1997, there is one statutory instrument which, in the manner hereinafter set forth, is relevant to this case and so to complete the legislative framework it should be referred to. It is the Freedom of Information Act, 1997 (Section 18) Regulations, 1998. Under reg. 6 thereof it is stated that, in the case of a decision to refuse to grant an application under s. 18 of the Act, the notice under subs. (4) thereof, in relation to the decision, "shall comply with section 8 (2)(d)", again of course of the said Act.

Following the issue and service of the summons referred to above, but prior to its determination in the District Court, the appellant, by letter dated the 26th November, 1999, wrote to the office of the Director of Public

Prosecutions and, having referred to the decision to prosecute him under s. 52 of the Act of 1961, he sought "the most detailed information on the reasons for this decision, in accordance with s. 18 of the Freedom of Information Act, 1997."

The decision on this request, made by Ms. Maureen Stokes, the Freedom of Information Officer with the notice party, is contained in two letters, the first dated the 23rd December, 1999, and the second the 13th January, 2000. There is no material difference between the content of either letter. The decision was to refuse the request as made, on the grounds that the information sought was contained in records to which the Act of 1997 did not apply, this by virtue of s. 46 (1)(b) thereof. Accordingly, the appellant was informed, that given the nature of such records, s. 18 did not require the giving of information as contained therein. Being dissatisfied with this response, the appellant, as was his right, sought what is termed, an internal review under s. 14 of the Act. That review was carried out by the Deputy Director, Mr. Barry Donohue, who in the resulting notice addressed to the appellant and dated the 10th February, 2000, affirmed the decision of Ms. Stokes. Both the said Ms. Stokes and Mr. Donohue were duly and properly delegated to carry out these respective functions, with the Deputy Director holding a rank higher than that of Ms. Stokes within the office of the notice party.

On the 23rd February, 2000, the appellant, by way of an appeal, sought a review of that decision from the Information Commissioner under s. 34 of the Act. In a discursive letter dated the 3rd August, 2000, Mr. Fintan Butler, a senior investigator with the Commissioner, expressed an opinion, by way of a preliminary view, that the decision as given by the office of the notice party was correct. Accordingly, he invited a withdrawal of the application for review. In response the appellant, disagreeing with this preliminary view, expressed a concern that "to discuss it with the Director of Public Prosecution's office" did not constitute a review within the meaning of the Act of 1997 and accordingly, requested a decision from the Commissioner himself. That decision issued on the 5th September, 2000, wherein the Commissioner affirmed the decision of the notice party's office. Hence the appeal to this court pursuant to s. 42 of the Act of 1997.

In the Commissioner's notice he sets out what findings were made by him as well as concluding with his decision. Such findings he describes as follows:-

"*Findings*

> Section 18 of the Freedom of Information Act, 1997, provides for a right, in the case of a person affected by an act of a public body, to be

given reasons for that act. However, this is not an absolute right as s. 18(2)(a) qualifies it to the extent that reasons need not be given where to do so would involve the giving of information contained in an exempt record. Whatever the wording of its initial response, I am satisfied that the decision of the Director of Public Prosecution's office rests on its view that the giving of reasons in your case would inevitably require the giving to you of information which is contained in an exempt record.

The term "exempt record" is defined in s. 2 of the Freedom of Information Act, 1997 to include "a record in relation to which the grant of a request under s. 7 would be refused pursuant to Part III or by virtue of s. 46". Accordingly, s. 18 does not require the giving of reasons where to do so would involve revealing information contained in a record which is exempt under s. 46.

Under s. 46 (1)(b), the Freedom of Information Act, 1997, "does not apply" to a record held or created by the Director of Public Prosecution's office other than a record concerning the "general administration" of that office. In your case, the information required to provide the reasons requested by you is contained on a specific file created in connection with the decision on whether or not to prosecute. No case has been made by you that the records on this file are records concerning the general administration of the Director of Public Prosecution's office and I am satisfied that the records are exempt records by virtue of s. 46. Accordingly, I am satisfied that the Director of Public Prosecution's office could only have granted your request by the release of information contained in an exempt record.

Having considered the matter carefully, I find as follows:-

- that your request for reasons for the decision to prosecute you can only be met by the giving to you of information contained in an exempt record;
- that the Freedom of Information Act, 1997 does not require the giving of reasons where to do so involves the giving of information contained in an exempt record;
- that the Director of Public Prosecution's office was within its rights in deciding not to grant your application under s. 18 of the Freedom of Information Act, 1997."

Having thus set out his findings he then records his decision:-

"*Decision*

Having completed my review under s. 34 of the Freedom of Information Act, 1997, I affirm the decision of the Director of Public

> Prosecution's office to refuse to give the reasons for its decision to proceed with a prosecution in your case arising from a road traffic accident on the 1st April, 1999."

Before outlining the submissions made by the respective parties it should be observed that the evidential base upon which the notice party's response was founded and indeed, that on which the respondent's decision was based, is not in dispute. By a combination of the matters set forth in the letters referred to above it is clear that the notice party was alleging that the information sought was contained in, and could only be obtained and supplied from, records which, by reason of s. 46(1)(b) of the Act of 1997, were exempt records and furthermore were records to which the Act itself, did not apply. Though it is not so stated in as many words, it must follow from this assertion that such records are held or created by the notice party or his office and are records other than those concerning the general administration of such office. That this is the correct view, espoused by the notice party is confirmed by the Commissioner's decision wherein he says:-

> "I am satisfied that the decision of the Director of Public Prosecution's office rests on its view that the giving of reasons in your case would inevitably require the giving to you of information which is contained in an exempt record."

In addition and necessarily of importance, the said Commissioner in his review document, independently finds that in this case "the information required to provide the reasons requested by you is contained on a specific file created in connection with the decision on whether or not to prosecute. No case has been made by you that the records on this file are records concerning the general administration of the Director of Public Prosecution's office and I am satisfied that the records are exempt records by virtue of s. 46. Accordingly, I am satisfied that the Director of Public Prosecution's office could only have granted your request by the release of information contained in an exempt record."

As is evident from this extract, the appellant has not suggested that the information is contained in records dealing with general administration and otherwise has not, in the passing documentation or by way of submission, in any way, challenged the accuracy of this part of the notice party's response or the justifiable basis upon which the Commissioner so concluded.

The appellant's appeal to this court is presented on the basis of the relevant documentation exchanged between him the notice party and the respondent, respectively, and also on the affidavits sworn to ground this

application. Submissions were made in support thereof. Therefrom he asserts as follows:-

(a) that the request made by him under s. 18(1) cannot be refused on the grounds set forth at s. 18(2)(a): it being his view that the subsection last mentioned, merely preserves the integrity of the exemptions afforded to records covered by Part III and s.46 of the Act and then only on a request made under s. 7, which of course, his request is not;

(b) that if however, s.18(2)(a) can be relied upon as a legitimate basis for refusal, the notice in writing containing that decision must comply with the provisions of the Freedom of Information Act, 1997 (Section 18) Regulations, 1998. This instrument has the effect of compelling such a notice, which issues under s. 18(4), to comply with the requirements of s. 8 (2)(d) of the Act. As the notice which issued in this case, being in the form of the letters dated the 23rd December, 1999 and the 13th January, 2000, did not so comply with s. 8(2)(d), the preceding decision to refuse and communicated therein, was null and void and of no effect;

(c) that s. 46(1)(b) of the Act cannot be invoked as a means of lawfully refusing the request as made. This he claims follows on from the said s. 8(2)(d) of the Act, and furthermore is supported, in a cogent way, by para. 6.2 of a Guide to the Act published by the notice party under ss. 15 and 16 thereof. In addition he submits that s. 46(1)(b) can only be used where there are compelling reasons for so doing, as for example where sensitive information may damage key interests of the state or third parties, and finally;

(d) he claims that, in any event, he is entitled, as a matter of case law, following the decision of *Cowzer v. Kirby* [1992] C.L.J. 114, to have the information sought supplied to him.

By way of response both under s. 7 and on internal review under s. 14, the notice party, whom I shall firstly address only because of the event sequence in this case, alleges:-

(a) that the information as requested is and is only contained in an exempt record and, therefore, by virtue of s. 46(1)(b), the Act has no application to the request so made; and

(b) that by reason of this non-application it must follow that s. 18 cannot be relied upon as compelling the supply of the information as sought.

These said reasons, as so advanced, were elaborated upon and indeed added to by way of later correspondence between the said notice party and

the respondent as well as by affidavit evidence and through the submissions made. The additional points as canvassed were:-

(c) that s. 46(1)(b) is absolute in its terms and if any given circumstances come within this subsection, then, it automatically follows that the Act had no application;

(d) that in any event s. 18(2)(a) offers a valid basis for refusal with the resulting notice, in the form of the aforesaid letters, being a sufficient compliance with s. 8(2)(d), there being no matters relating to the public interest which were required to be, or were in fact taken into account in issuing the refusal as aforesaid;

(e) that the interpretation suggested by the appellant, of the guide document issued by the notice party's office was incorrect and, finally;

(f) a new point, namely that the decision of the notice party to prosecute or not to prosecute as the case may be, was not "an act" within the meaning of s. 18(1), and accordingly, in any event on that ground alone, the request was misguided.

The respondent in his submission, supports the factual and legal basis upon which the decision of the 5th September, 2000, was both arrived at and made. He says that the Commissioner is given power under s. 34(2), on review, to affirm or vary the decision or to annul the decision and if appropriate make such decision in relation to the matter concerned as he or she considers appropriate. It is said that he was justified in the conclusions of law arrived at and in his findings of primary fact, which findings should not be interfered with by this court. In addition, it is claimed that the respondent is given a broad discretion as to the procedures to be followed when conducting such a review. Furthermore he asserts that the finding made by him as to compliance by the notice party with s. 8 (2)(d) of the Act is such a finding, that, as with any finding of primary fact, it ought not to be interfered with by this court, but that in any event, even if separately considered, this conclusion as to compliance is fully justified. Finally, the respondent has reservations, if not a contrary view, as to the correctness of the submission advanced on behalf of the notice party in relation to the point referred to above. In conclusion, it is pointed out that the appeal to this court is on a point of law only and that, in all of the circumstances, the appellant has failed to present any case which would justify any variation or annulment of the decision reached by the respondent.

Prior to identifying what I think are the core issues in this case there are a number of matters, all of which are of at least some importance, which it might be helpful and convenient to deal with at this point. In no particular order of priority these are as follows:-

(a) Being a creature of the Oireachtas, of a type without direct or parallel precedent, it is not possible to cite Acts, *pari passu*, upon which the courts have expressed a view as to the correct method of statutory interpretation. The primacy of the test of any statute, is of course, an approach which pervades the commencement of any interpretative process, which is, to ascertain the will of parliament and to identify the intention of the legislature; this from the wording of the provision or provisions in question. *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, and in particular the judgment of Blayney J., is a decision on point.

(b) However, that approach may not in all cases be a complete answer to the exercise demanded. Different statutes may require additional methods to be adopted. Certainly, one is entitled to look at the Act as a whole and if there is any doubt or ambiguity, the purpose, intention and objects of the Act, may also be considered. As may the title, see *The People (Director of Public Prosecutions v. Quilligan* [1986] I.R. 495 and in particular p. 523 thereof. An interpretation, which if otherwise is consistent with accepted cannons of construction, and is one which recognises the different roles of the legislature and the judiciary, can, nevertheless, be positively and actively adopted for the purposes of furthering the declared aims and intention of parliament as expressed or found in the Act in question.

(c) I am not therefore certain that, given the vision of the Act of 1997, it is altogether a complete statement to suggest, that, the provisions thereof in their entirety can adequately be interpreted, for the purpose of implementation, simply by a straightforward application of *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101.

(d) In *Minister for Agriculture v. Information Commissioner* [2000] 1 I.R. 309, the High Court (O'Donovan J.) at p. 319 of the report, having quoted a passage from the judgment of Denham J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, immediately goes on to refer to the preamble of the Act and the intention of the legislature, and does so, very much in a way which embraces both as being of considerable importance in indicating how one should construe, not only the section with which the learned trial judge was then specifically dealing, but also the entirety of the Act. Furthermore, at p. 312 he impresses the importance of this preamble

and in addition having referred to s. 34(12)(b) and s. 8(4) emphasises the status of the rights conferred by this Act and so,

(e) I would simply caution as to how in a complete way this Act might be interpreted.

It was submitted on behalf of both the respondent and notice party that findings made by the respondent on questions of primary fact should not be reviewed by this court as part of the appeal process under s. 42 of the Act. There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or *via* a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-

(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;

(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;

(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision: see for example *Mara v. Hummingbird Ltd.* [1982] 2 I.L.R.M. 421, *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Premier Periclase v. Commissioner of Valuation* (Unreported, High Court, Kelly J., 24th June, 1999). However, an Income Tax Appeals Commissioner is quite a different statutory creature than is the Commissioner under the Act of 1997 and his conception likewise. So also is the Chief Appeals Officer in the social welfare case as, of course, is the Valuation Tribunal. These are but examples of bodies, tribunals and statutory *persona* from whom the superior courts have addressed references purely on points of law. There are of course many others. In this case however, it is unnecessary to express any view as to whether or not a court under s. 42 is so circumscribed. This because there is no challenge and never has been to any of the material facts as alleged by the notice party, or and obviously of more immediate importance, to the findings made by and upon which the appeal Commissioner arrived at his decision. Therefore I would prefer to express no concluded view on this point.

Under s. 34(12)(b) of the Act of 1997, a decision to refuse access to records "shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified". That presumption does not appear to apply when a person exercises his right to request information under s. 18. This omission however, may not altogether mean that, on a request to the respondent, the public body concerned, can passively await the discharge by an applicant of some sort of onus and only then react. A fuller engagement, as happened in this case, would indeed be much more desirable and certainly much more in keeping with the spirit of the legislation. In any event, the instant appeal to this court was conducted with the appellant assuming the onus and obligation of proving that the impugned decision of the Commissioner was erroneous on a point of law. This would appear correct and necessarily to follow from the relevant provisions.

As appears from the correspondence referred to, Mr. Butler wrote to the appellant on the 3rd August, 2000, wherein, amongst other things he indicated that he had discussed the appellant's request with the notice party's office. The response, by letter of the 14th August, 2000, may be construed as expressing displeasure at the contact, or in fairness, the author may simply have been mistaken in his belief that this contact amounted to and was in fact the review as sought. If the latter, he was of course mistaken. If the former he had no grounds for complaint. It seems to me that under s. 37(6) of the Act, the respondent, in conducting a review under s. 34 or an investigation under s. 36, has an extensive discretion as to the procedures which he may adopt or follow. Certainly, when dealing with a refusal the respondent can only be encouraged to pursue a solution to the joint satisfaction of the public body and the requester, and in so doing he must be free, in accordance with the underlying intention of the Act, to perform the preparatory work to his decision in whatever way he wishes, informally if that be his choice. It need hardly be said, however, that in so doing he must not compromise the due and proper performance of his function.

There is no doubt and it has not been challenged that the appellant is within the meaning of s. 18(1) of the Act, being a person who is affected by the decision of the notice party to prosecute and being a person who has the required material interest as therein specified.

Section 18(2) commences with the following words "nothing in this Section shall be construed *as requiring* …" (emphasis added). The words emphasised, namely "as requiring", do not in the appellant's view, amount to a prohibition on the giving of the information sought. Such words cannot, I feel, be treated in isolation from the rest of this subsection and in any event should, more properly be looked at and considered, in the

context of the more fundamental submission which is hereinafter dealt with.

As appears from the submission above outlined, the appellant strongly relies upon a certain entry contained in the notice party's "Guide to the Functions of and Records held by his Office". Compilation and publication of this document is a statutory requirement under ss. 15 and 16 of the Act. The relevant entry is to be found at p. 9, para. 6:-

"6.1 Access to Information within the Office

6.1. Applications under the Freedom of Information Act

Under the Freedom of Information Act, anyone is entitled to apply for access to information held in this office relating to the general administration of the office which is not otherwise publicly available. Each person had a right to:

> access records held by this office;
> correction of personal information relating to oneself held by this office which is inaccurate, incomplete or misleading;
> access to reasons for decisions made by this office directly affecting oneself."

It is the last which the appellant relies upon.

On its own and without reference to any other part of the document, one can understand how a person, in particular a lay person like the appellant, could come to the conclusion which he asserts. However, such isolation gives a distorted feel for the overall text.

At p. 2 it is stated:-

> "Most importantly access to information is also subject to the restriction provided for under s. 46 of the Act.
>
> Records created or held by the Office of the Director of Public Prosecutions are exempt, other than records concerning the general administration of the office."

At p. 3 it is recorded:-

> "It should be borne in mind that only those records concerning the general administration of the office come within the scope of the Act, and in that context the office of the Director of Public Prosecutions undertakes to hold any information provided to it by individuals or others, not relating to the general administration of the office, on a confidential basis"

And finally, at p. 4 it is stated:-

> "Records not within the range of general office administration are excluded from the scope of the Act.
>
> It must be emphasised that the office is precluded, both as a matter of natural justice and because of legal constraints, from giving reasons for decisions not to initiate a prosecution"

There are other entries also to like effect. When therefore, the document is read as a whole, one can readily see that, on access to information as well as access to records, these are statutory restrictions which in the notice party's view prevent the giving of certain information or the making available of certain records.

Consequently I do not believe that support, as such, is in fact found in these passages for the proposition as advocated by the appellant, though the contrary view as expressed by him is indeed understandable.

However, even if the appellant was correct, that in itself, could not in any way be conclusive as to the proper interpretation of the relevant statutory provision, this being a matter ultimately for this court.

There are two further related matters which, though strictly not germane should, in deference to the appellant be dealt with. The first is a claim that by virtue of the common law a person prosecuted is entitled to demand and get from the notice party the reasons why the latter decided to embark upon such a prosecution. Logically it might be argued that an aggrieved victim, where no prosecution follows might also be entitled to insist upon a similar entitlement. In my view, from several decided cases in both of the superior courts, it is beyond doubt that this is not so. In *The State (McCormack) v. Curran* [1987] I.L.R.M. 225 at p. 237 Finlay C.J. said:-

> "In regard to the Director of Public Prosecutions I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision *mala fides* or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not of a matter of public policy ever reviewable by a court.
>
> In the instant case, however, I am satisfied that no *prima facie* case of *mala fides* has been made out against either of the respondents with regard to this matter. Secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the Director of Public Prosecutions not to prosecute the appellant within this jurisdiction and that that being so he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based."

In *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589, this matter was also dealt with in the judgment of O'Flaherty J. where at p. 603 the learned judge stated:-

> "Thus, Blayney J. starts from the premise that the decision of the Minister is open to full judicial review. However, it is clear from the decision in *The State (McCormack) v. Curran* [1987] I.L.R.M 225 that the discretion of the Director of Public Prosecutions is reviewable only in certain circumstances as set out by Finlay C.J. at p. 237 of the report … It would seem then that as the duty to give reasons stems from a need to facilitate full judicial review, the limited intervention available in the context of the decisions of the Director obviates the necessity to disclose reasons."

Therefore there can be no question of the appellant, in this case or a like person in a similar case, being in a position, at common law to compel the notice party to give reasons as to why in any given set of circumstances he did or did not decide to prosecute.

The second related matter arises as a result of and following upon an application to the learned District Judge dealing with the road traffic prosecution. That judge, having heard both parties acceded to a request that prior to the hearing, the appellant should receive copies of the statements made by intended witnesses at his then forthcoming trial. By way of extension and analogy it is claimed that on this principle of law the appellant is also entitled to reasons. In *Director of Public Prosecutions v. Doyle* [1994] 2 I.R. 286 the Supreme Court, having considered a number of authorities, including *Cowzer v. Kirby* [1992] I.C.L.J. 114 decided through the judgment of Denham J. at p. 302:-

> "… that where an indictable charge is being disposed of by way of summary trial in the District Court, there is no general obligation on the prosecution to furnish, on request, the statements of the proposed witnesses for the prosecution. The trial is summary, it is not a halfway house between an indictable and summary trial. Thus, the answer to the first question is in the negative. However, the applicant retains at all times his constitutional rights to fair procedures and if he requires, and it is in the interests of justice, that he be furnished with statements, or indeed other documents held by the prosecution, which will be evidence in his trial, then he is so entitled. It is a matter for the trial judge to determine in each case."

From the context in which this issue arises and from the foregoing passage itself, it is abundantly clear that this principle of law is totally distinguishable from and is quite separate to any claim pursued or pursuable under the Act of 1997. The exercise of the District Judge's discretion,

therefore in having available the aforesaid statements is, in my view quite extraneous to the live issue in this case.

The core issues in this case centre on the correct interpretation of and the interplay between certain sections of the Act. Section 6(1) which creates the statutory basis for the right of access to records, commences with these words "Subject to the provisions of this Act". Therefore, the application of the right so created is subject not only to the remainder of s. 6 but also to the other provisions contained in the Act. Section 7 indicates the manner in which this right may be exercised. Section 8 deals with the decision made on such requests and the notification of such decision. Section 12 concerns itself with the manner of exercising the right of access if granted and s. 14 deals with internal reviews.

It should be noted that the provisions referred to at s. 7 onwards are all dependant upon the existence of the right of access created by s. 6 and are designed to facilitate the implementation of that right. So, unless in the first instance the right itself exists, any further reference to or consideration of the other sections would not appear to be relevant.

Section 2, which is the definitive section, at subs. (1) defines "exempt record" as meaning:-

> "(a) a record in relation to which the grant of a request under section 7 would be refused pursuant to Part III or by virtue of Section 46, or …"

Section 6(1), it will be recalled, created the right but as I have previously indicated that is subject to the other provisions of the Act which quite obviously include the remainder of s.6. Subsection (7) of this section reads:-

> "Nothing in this section shall be construed as applying the right of access to an exempt record."

Consequently in relation to an "exempt record", s. 6(1) cannot be relied upon as conferring a right of access to such records. So once it can be established what an "exempt record" is, it would appear to follow that, subject only to the manner in which it becomes an exempt record, such a document cannot form the subject matter of a request for a right of access.

For present purposes Part III of the Act is not in point given the accepted nature of the documents in issue in this case. But s. 46 is. As appears above, subs. (1) of that section reads:-

> "(1) This Act does not apply to
>
> (b) a record held or created by the Attorney General or the Director of Public Prosecutions or the Office of the Attorney General or the Office of the Director of Public Prosecutions (other than a record concerning the general administration of either of those Offices)."

What then is the effect of the aforesaid recited parts of ss. 2, 6 and 46 respectively?

The essence of the Act is that when a person comes within s. 6(1) he may exercise that right, not out of grace and favour of the public body in question, but rather pursuant to the force of law. It is a legal right which he is exercising; indeed under s. 8(4) of the Act the reasons why he wishes to exercise that right are entirely immaterial. So what is crucial is that a requester must show that his request for access is made pursuant to a right of access, this right being one founded on, and contained within, the provisions of the Act of 1997 itself.

Section 46(1)(b) in my view, has both a stand alone independent existence as well as having a direct relationship with s. 2(1). Under the former heading, the introductory words of the section are in my opinion clear beyond any doubt, uncertainty or ambiguity. "The Act does not apply to …". This can only mean that the provisions of the Act of 1997, obviously to include s. 6(1), have no application to the documents listed therein save only as to the qualification contained within such listing. In my view those words can have no other meaning. Subsection (1)(b) expressly includes a record, held or created by the notice party or his office, unless that record relates to the only qualification mentioned, namely the general administration of that office. If this be correct it must follow that the Act, by virtue of this section alone can have no application to the relevant record in this case, it not being one covered by general administration.

It must also follow therefore that since the Act does not apply, the head of the public body concerned, in this case the notice party, cannot be compelled to abide by any section thereof and that accordingly he can refuse a request for such documents made to him under s. 7.

In addition to the relevance of s. 46(1)(b) in this way, it also has a relevance by virtue of the definitive section, namely s. 2(1). It will be recalled this section defines an "exempt record"; as meaning *inter alia*, a record, the access to which can be refused under s. 46. So once a request for access to a record can be refused under the section last mentioned, it would seem to me that such record, by virtue of this right to refuse becomes, under s. 2(1), an exempt record . Having been thus so classified subs. (7) of s. 6 negates any application of s. 6(1). Accordingly, in this way s.46 operates on and in conjunction with s. 2(1). Hence both the independent and interactive role of s. 46.

So being records within s. 46(1)(b), the Act does not apply and being exempt records by virtue of that section and s. 2(1) the right created by s. 6(1) if such right otherwise exists is specifically excluded from applying to such documents by virtue of s. 6(7). Whilst the above deals with access to

records, nonetheless it is highly relevant to the appellant's request under s. 18.

Subsection (2) of s. 18 reads:-

> "Nothing in this section shall be construed as requiring -
> (a) The giving to a person of information contained in an exempt record or …"

Given that the appellant is attempting to establish a right which compels the notice party to furnish the information sought, he must in my view also establish that such a right is enforceable by or under the provisions of this Act. It is quite insufficient to say that the notice party is not prohibited by s. 18(2) from giving the information requested. That may be the case and indeed, though I express no view on it, the notice party may not by law be injuncted from supplying such information. But once he decides against the request the appellant must be able to demonstrate a compulsion arising from law which removes any discretion which the notice party might otherwise have. Very definitely in my opinion, he cannot do so in this case. Subsection (2) qualifies the section itself. It commences with the words quoted above. These can only mean that whatever rights are otherwise contained in s. 18, such rights do not and cannot extend to a requirement to give information which is contained in an exempt record as above defined. This I believe is the correct interpretation of this section and not that as suggested by the appellant for if it was that as submitted, it would render the entire section futile.

As, without debate it is accepted that the requested information is contained within an exempt record, it must follow that also under s. 18(2) the request can be refused.

It seems to me that when one looks at the relevant provisions a clear policy view emerges which is, in the context of this case, that no record or information contained in a record which is exempt pursuant to s. 46 can be obtained under the provisions of this Act.

As an alternative to his primary submission, the appellant asserts that if his request can be refused under s. 18(2) the resulting notice, containing such a decision under subs. (4), must comply, by virtue of the statutory instrument above mentioned, with s. 8(2)(d). So it is claimed, the notice must give the reasons for the refusal, must set out the findings on any material issues relevant to the decision and must particularise any matters relating to the public interest which were taken into consideration for the purposes of this decision. Whilst he may accept that the relevant letters contained the reasons for the decision, he claims that there is no mention of public interest considerations as is necessary and accordingly, there has been a breach of s. 8(2)(d) of the Act.

In my view this submission is not well founded. Firstly, as previously stated, s. 18(2) qualifies this section in the manner indicated. The section, of course includes subs. (4), which is the basis for the notice requirement which must issue following upon a decision to refuse. This notice requirement does not arise by virtue of s. 8(2)(d) or by virtue of the Regulations of 1998. What the instrument does is simply to import into subs. (4) the notice requirement specified in s. 8(2)(d). This method of applying s. 8(2)(d) cannot in my view have greater effect than if the original subs. (4) specified, in precise detail, what the notice should contain. As the entirety of the section, which obviously must include subs. (4), whether as originally drafted or as amended, is qualified by displacing any obligation to give information contained in an exempt record. It must follow in my view that this notice does not have to contain such information.

Secondly, I have grave reservations whether s. 8(2)(d)(ii) can have any application to a record, which becomes an exempt record in the manner applicable to this case. It may very well have an important role to play if the exemption arises from Part III but, that of course is not the situation here.

Thirdly, if however, the requirement did apply to an exempt record as established by s. 46(1)(d) of the Act, it can only have relevance if in fact there were matters of public interest considered by the public body in making its decision. In this case the evidence shows that there were no such matters. Accordingly, one cannot say that there was any breach of the relevant subsection, particularly where there is no compulsory provision making it necessary to take such matters into account.

Fourthly, again even if the requirement did apply and there was a breach thereof, there is no subsequent provision in the Act dealing with the effect of non-compliance.

Fifthly, this appeal is from the decision of the respondent who has reviewed the decision of the notice party and whose own decision procedurally is unchallenged and finally it may very well be that as the respondent has found the notice did effectively comply with s. 8(2)(d).

In conclusion therefore for the reasons as outlined above, I do not believe that any of the submissions advanced by and on behalf of the appellant are such as would entitle the appellant to any relief as claimed. Given this view it is, I think, unnecessary to consider whether or not a new point like that set forth above which was not raised by the public body or on review at the s. 34 stage can for the first time be raised on an appeal to this court. Because of this, quite obviously, I should not express any view on the point itself.

Solicitors for the respondent: *Mason Hayes & Curran.*

Solicitor for the notice party: *The Chief State Solicitor.*

Patricia O'Sullivan Lacy, Barrister

_____

THE HIGH COURT

2002 No. 18 M.C.A.

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 1997

AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42 (1) 0F THAT ACT

BETWEEN

MATTHEW RYAN AND KATHLEEN RYAN

APPELLANTS

AND

THE INFORMATION COMMISSIONER

RESPONDENT

JUDGMENT of Quirke J. delivered the 20th day of May 2003.

This an appeal by the appellants Matthew Ryan and Kathleen Ryan pursuant to the provisions of s. 42 (1) of the Freedom of Information Act 1997 ("the Act of 1997") from the decision of the respondent made by letter dated the 8th January, 2002 whereby the respondent, having carried out a review pursuant to the provisions of s. 34 (2) of the Act of 1997 affirmed the decision of the Department of Education and Science ("the Department") to refuse access to any further records in relation to a request made by the appellants by letter dated the 15th August, 2000.

FACTS

1. Arising out of the re-assignment of the second named appellant from remedial teacher to regular class teacher at St. Patrick's National School, Mountmellick, Co. Laois in 1997 the appellants, between June of 1999 and October of 2000 made a large number of requests to the Department for access to records relating to the appellants and to the re-assignment.

2. In respect of six of those requests (for convenience referred to hereafter by their various reference numbers) the appellants applied to the respondent for a review of the decisions made (or deemed to have been made) by the Department.

3. In August, 2001 the respondent, in pursuance of the powers conferred upon him by s. 34 (9) of the Act of 1997 exercised his discretion to discontinue his review of the Department's decision relative to the appellants request No 99354) and, pursuant to the same powers, refused a further four of the appellants' applications (No's 00084,000213,000323 and 000392), on the grounds that the appellant's then most recent request, (No 000459), included the material which was the subject matter of the requests for all of the records previously sought by the appellants in the five earlier applications.

   The appellants, in evidence, accepted that the approach adopted by the respondent in this respect was the correct one.

   Accordingly in August, 2001, the respondent was concerned only with one of the appellants' requests No. 000459). That request was received by the respondent on the 6th October, 2000.

4. On the 30th August, 2001 the respondent wrote to the appellants notifying them of the decision of the respondent to discontinue and refuse the earlier requests and to accept for review the latest request (No. 000459).

The letter also raised additional issues in respect of the review. In particular it:

(a) summarised the position in relation to earlier requests up to July of 2000,

(b) confirmed that the appellants were not interested in records relating to salary or leave of absence,

(c) enclosed a copy of the search guidelines used by the respondent's office, making certain observations as to their relevance to the review which the respondent was undertaking,

(d) gave the appellants certain assurances as to the integrity of the process which the respondent had undertaken,

(e) and advised how that process would be completed.

The letter was sent by ordinary pre-paid post to the appellants' address but the letter was not received by the appellants and so no response was forthcoming from them.

5. The search guidelines which were referred to and attached to the letter dated the 30th August, 2001 sent by the respondent to (but not received by) the appellants was a document published by the respondent describing the searches which were carried out in relation to cases where access is refused on the basis that records do not exist or cannot be found after all reasonable steps to ascertain their whereabouts have been taken. A copy of those guidelines was sent to the appellants by letter dated the 4th December, 2001. That letter was issued in the course of another unrelated review which was then being conducted by the respondent on foot of an application by the appellants which arose out of a decision made by another public body) with which the appellants were dissatisfied.

6. In arriving at his decision of the 8th January, 2002 the respondent noted that the Department had not responded to the appellants request (No. 000459) but had responded to previous requests indicating that it held no more records concerning the second appellant,(it had provided her with more than 144

records). He therefore treated the Department's response as a refusal pursuant to the provisions of s. 10 (1) (a) of the Act of 1997 on the grounds that:

"The record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts has been taken."

7. The respondent, through his officials, carried out a comprehensive review of the decision of the Department and in the process reviewed all copies of correspondence between the Department and the appellants concluding that a number of searches had been made in different sections of the Department and that various records had been provided to the appellants (including 144 records from the Primary Inspectorate and documentation which had been found in the Primary Payment Administration Sections).

8. Manual and electronic searches had disclosed no additional records either in the Legal Services section or in any other section and the appellants had indicated that they were not interested in records relating to the second named appellant's salary or leave of absence.

   A variety of different officials of the Department in different sections of the Department were contacted by way of correspondence, e-mail and telephone conversation. No further records were discovered.

   In the circumstances, and having taken into consideration documentation already released to the appellants and the fact that further searches had been made in all appropriate Sections of the Department where such records as sought by the appellants would be likely to exist, the respondent concluded that the Department was justified in deciding that no further records existed or could be found after all reasonable steps had been taken.

9. Earlier, in relation to a request by the appellants on the 16th July, 1999 the respondent had drawn the attention of the appellants to the provisions of s. 10 (1) (a) of the Act of 1997 and had invited the appellants to make submissions thereon. By letter dated the 13th October, 1999 the appellants made detailed submissions in that regard.

10. During telephone conversations on the 11th December, 2001, and the 4th January, 2002 Ms. Elizabeth Dolan of the respondent's office discussed with the second named appellant the review which was then being undertaken by the respondent and which was nearing completion. The second named appellant did not indicate that there was anything further which she wished to raise before the decision was made and did not indicate a desire to make any additional submissions on any aspect of the review at that time.

11. The respondent, in making his decision, took into account correspondence between the appellants and the respondent, including a nine page submission made by the appellants by letter dated the 13th October, 1999 in response to a letter from the respondent's Mr. Fee dated the 27th September, 1999.

12. Request No. 000459 was commenced by letter dated the 5th October, 2000 whereby the appellants wrote to the respondent referring to their request to the Department dated the 15th August, 2000 and to their subsequent request on the 13th September, 2000 to the Department for an internal review pursuant to s. 14 of the 1997 Act. The letter pointed out that no response had been received from the Department in respect of those requests and, pursuant to the provisions of s. 34 (2) (a) of the Act, applied for a review by the respondent of the Department's *"decision"*.

    The letter concluded by requesting that:

"As this appeal is related to others already submitted to your office could this appeal be dealt with when reference number 99354 is being dealt with please?".

GROUNDS OF APPEAL

Section 42 (1) of the Act of 1997 provides as follows;

> *"A party to a review under s. 34 or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision."*

It has been fairly and properly acknowledged on behalf of the appellants that it was appropriate and correct for the respondent to discontinue the previous review under reference number 99354, to refuse the applications under reference numbers 00084, 000213, 000823 and 000392 since all of those applications and reviews could properly be dealt with as one composite application. That procedure complied appropriately with the requisite statutory requirement. The respondent was empowered by the provisions of s. 34 (9) (a) (iii) of the Act of 1997 to do so since he was of the opinion (and indeed it is not disputed) that the matter which was to be the subject of the composite request included all of the material which had formed the subjects of the earlier applications and reviews.

The appellants, as parties to a review by the respondent of a *"decision"* of the Department now wish to exercise the right conferred upon them by s. 42 (1) of the Act of 1997 to appeal to this Court from the decision of the respondent arising out of his review.

As is evident from the terms of s. 42 of the Act of 1997 the appeal of the appellants must be confined to an appeal *"on a point of law"*.

The *"point of law"* which forms the basis has been identified in the following terms:

> *"(1)That the Information Commissioner failed to afford us as applicants/appellants sufficient or any opportunity to respond to his "preliminary views", purportedly contained in a letter to the said appellant/Applicants dated the 30th August, 2001.*
>
> *(2) That the Information Commissioner failed to have regard to the purpose of the Act as enabling the applicants to obtain access to the greatest extent possible to information in the possession of the Department of Education and Science and in the circumstances of the case applied too restrictive an interpretation to s. 10 (1) (a) of the Freedom of Information Act 1997."*

A further ground alleging that the respondent was influenced by the contents of records which he had examined was not relied upon at the trial of these proceedings.

In summary the appellants contend:

1. That the respondent: by allegedly failing to afford the appellants an opportunity to reply to his letter to them dated the 30th August, 2001 failed to adopt fair procedures and appropriate principles of natural and constitutional law and justice to the decision which he was required to make and
2. That the respondent incorrectly interpreted the provisions of s. 10 (1) (a) of the 1997 Act and, by applying that incorrect and restrictive interpretation of the Section, acted to the disadvantage of the appellants.

CONCLUSIONS

Ground 1

Section 34 of the Act of 1997 provides for a review by the respondent of decisions to which the s. applies including decisions of the kind which is the subject of this appeal.

Section 37 of the Act deals with the powers of the respondent for the purposes of a review under s. 34 of the Act. Subsection (6) thereof provides:

> *"Subject to the provisions of this Act, the procedure for conducting a review under s. 34 or an investigation under s. 36 shall be such as the Commissioner considers appropriate in all the circumstances of the case and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Commissioner."*

In *Deely v. The Information Commissioner* [2001] 3 I.R. 439 McKechnie J., observed that:

> *"It seems to me that under s. 37 (6) of the Act, the respondent, in conducting a review under s. 34 or an investigation under s. 36 has an extensive discretion as to the procedures which he may adopt or follow. Certainly, when dealing with a refusal the respondent can only be encouraged to pursue a solution to the joint satisfaction of the public body and the requester, and in so doing he must be free, in accordance with the underlying intention of the Act, to perform the preparatory work to his decision in whatever way he wishes, informally if that be his choice. It need hardly be said, however, that in so doing he must not compromise the due and proper performance of his function."*

It would be difficult to disagree with that analysis and I have no hesitation in respectfully adopting it.

Section 34 (6) of the Act provides for the notification by the respondent of various persons of his intention to review the decision concerned including a *"relevant person"* and *"any other person who, in the opinion of the Commissioner, should be notified of the proposal ..."*

Section 34 (8) provides that

"In relation to a proposed review under this s., the head, and the relevant person concerned and any other person who is notified under subsection (6) of the review may make submissions (as the Commissioner may determine, in writing or orally or in such other form as may be determined) to the Commissioner in relation to any matter relevant to the review and the Commissioner shall take any such submissions into account for the purposes of the review."

Subsections (6) and (8) of s.34, when read together empowered the respondent to notify certain persons of his intention to review a decision. Such persons thereafter became entitled to... *"make submissions (as the Commissioner may determine, in writing or orally or in such other form as may be determined) to the Commissioner."* .

In the instant case I am satisfied on the evidence that Ms. Eileen Dolan wrote a letter to the appellants on the 30th August, 2001 and placed that letter in the Department's collection tray for franking and posting by the post room staff. That was the practice within the Department. I am satisfied that it is probable that this letter was posted but that by reason of some misunderstanding it was not received by the appellants.

I am further satisfied that the second named appellant was notified during telephone conversations on the 11th December, 2001 and on the 4th January, 2002 that

the review which she had sought was well under way and was in fact almost completed. I am further satisfied that notwithstanding this conversation the second named appellant did not indicate that she wished to make any submissions further to the many detailed submissions which she had made in the past (including a very detailed submission by letter dated the 13th October, 1999 and numerous other letters and requests all of which were brought to the attention of the respondent).

I am satisfied that it has become the practice of the respondent, when notifying *"relevant"* persons such as the appellants of his intention to comply with a request for a review to deliver to such *"relevant persons"* a copy of the guidelines on the adequacy of search records together with other relevant information as to how the review is to be conducted.

I am satisfied that this procedure was followed by the respondent in the instant case but that by reason of postal difficulties written notification was not fully effected and accordingly the appellants were not advised as to the nature and extent of the guidelines and were not provided with the other information which was contained within the letter which was posted to them on the 30th August, 2001.

Whilst the final paragraph of that letter indicated that the appellants were *"welcome to make a submission to the Commissioner on any of the points raised above"* it is not without significance that the appellants were unable to identify any additional submission which they might have wished to make arising out of that letter or otherwise during telephone conversations with Ms. Dolan on the 11th December, 2001 and on the 4th January, 2002. Indeed up to and including the trial of these proceedings no additional submission of any relevance to the appellants contention could be identified which the appellant might usefully have, between the 30th August,

2001 and the date of the decision in January of 2002 , made which would have advanced the case which the appellants wished to make to the respondent.

Ms. Dolan took all the steps which were reasonably necessary in order to notify the appellants of the respondent's intention. All of the very many contacts made between the appellants and the respondent had been made by way of pre-paid post. The appellants had refused to make their telephone numbers available to the respondent and accordingly the only mode of communication open to the respondent was the mode chosen. Having taking the steps indicated to notify the appellants, I am satisfied that there was no additional obligation upon the respondent to confirm that the appellants had received the notification.

However, before the decision was actually made there is no doubt that the appellants did in fact become aware that the respondent was conducting a review because the second named appellant telephoned Ms. Dolan on the 11th December, 2001 and on the 4th January, 2002 and Ms. Dolan advised her that the review was nearing completion. On those occasions the second named appellant showed no interest in making further submissions to the respondent in relation to the review which she then knew he was undertaking.

Subsection (8) of s.34 of the Act of 1997 provides that a person who has been notified under subs. (6) of a review may in turn make submissions to the respondent and if such submissions have been duly made then the respondents is obliged to take such submissions into account for the purposes of the review.

If, in consequence of a failure on the part of the respondent to comply with an obligation under s. 34 of the Act, a *"relevant person"* is deprived of the opportunity to make submissions under subs.(8) of s.34 and, if such person suffers prejudice as a result, then the failure to notify may be fatal to the review.

I am satisfied that this is not such a case. In this instance, the respondent took all reasonable and appropriate steps to notify the appellants under the provisions of subsection (6) of s. 34 within a short time after the respondent had decided to conduct the review.

Although that notification was not effective I am satisfied on the evidence that, before the review was completed the appellants became aware that it was being conducted. I am further satisfied on the evidence that notwithstanding the late notification to the appellants they were nonetheless aware that they were entitled to make submissions to the respondent even within the short time which was then available to them. I am satisfied however that during their many earlier requests they had exhausted the submissions which were available to them and the respondent was fully conversant with all of the submissions which they had made during those earlier requests.

In *McCormack v. Garda Siochána Complaints Board* [1997] 2 I.R. 489 Costello J., discussed: *"...the constitutional presumption that a statute enacted by the Oireachtas intended that proceedings, procedures, discretions and adjudications permitted, provided for, or prescribed by Acts of the Oireachtas are to be conducted in accordance with the principles of constitutional justice ..."*

Dealing with a claimed duty upon a decision maker to give reasons for its decisions he stated:

> *"It is not the law of this country that procedural fairness requires that in every case an administrative decision-making authority must give reasons for its decisions. Where a claim is made that a breach of a constitutional duty to apply fair procedures has occurred by a failure to state reasons for an administrative decision the court will be required to consider (a) the nature of*

the statutory function which the decision-maker is carrying out, (b) the statutory framework in which it is to be found and (c) the possible detriment the complainant may suffer arising from the failure to state reasons."

He concluded:- *"It seems to me that the issue can largely be determined by considering whether some detriment is suffered by the applicant by the failure of the Board to give reasons for the opinion which it reached because if no detriment is suffered then no unfairness can be said to exist."*

Although that case related to the failure of a tribunal to give reasons for an opinion I believe that the underlying principle identified can be applied to the facts found in these proceedings.

In the instant case, having considered the nature of the statutory function which the respondent was carrying out within the statutory framework where it was found I am satisfied that the appellants have suffered no possible detriment by reason of the fact that they did not receive from the respondent the letter dated the 30th August, 2001 and that accordingly the appellants were not deprived of any meaningful opportunity to make such submissions as they might have wished to make having regard to the procedures adopted by the respondent and prescribed by statute. Accordingly there has been no breach by the respondent of the principles of natural or constitutional justice and no failure by the respondent to apply fair procedures such as would warrant relief of the kind which is sought by the appellants.

Accordingly this ground of appeal fails.

Ground 2

Section 10 (1) (a) of the Act of 1997 provides as follows:

"1. A head to whom a request under s.7 is made may refuse to grant the request it:-

(a) the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken."

Section 41 of the Act provides:

"(1) Where notice of a decision under s. 8 or 17 is not given to the requester concerned or to the person who made the application concerned under s. 17 before the expiration of the period specified for that purpose in s. 8 or 17, as the case may be, a decision refusing to grant the request under s. 7 of the application under s. 17 shall be deemed for the purposes of this Act to have been made upon such expiration and to have been made by a person to whom the relevant functions stood delegated under s. 4.

(2) Where notice of a decision under s. 14 is not given to the person who made the application concerned under that section before the expiration of the period specified in subsection (4) thereof, a decision affirming the decision to which the application relates shall be deemed for the purposes of this Act to have been made upon such expiration."

Since the appellants did not receive notice of a decision under s. 8 in relation to their request dated the 15th August, 2000 it follows that a decision refusing to grant their request under s. 7 of the Act was then deemed for the purposes of the Act to have been made upon the expiration of the time limited by the Act.

That refusal was deemed to be confirmed when the appellants received no notice of the making of a decision in relation to their application for a review pursuant to the provisions of s.14 of the Act.

In conducting the review requested by the appellants, the respondent treated *"the decision"* of the Department as a decision made on the grounds that *"the record*

concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken."

The appellants claim that this treatment demonstrated an incorrect interpretation of the section and of s. 41 of the Act which deems *"a decision"* to have been made when the requester has not been given due "notice of a decision within the time limited by the Act.

Section 34 (2) of the Act empowers the respondent to review *"a decision"* to which the section applies.

It was pointed out by McKechnie J. in *Deely v. The Information Commissioner (supra)* that *"under s. 37 (6) of the Act, the Respondent, in conducting a review under s. 34 or an investigation under s. 36, has an extensive discretion as to the procedures which he may adopt or follow ... in so doing he must be free, in accordance with the underlying intention of the Act, to perform the preparatory work to his decision in whatever way he wishes, informally if that be his choice. It need hardly be said, however, that in so doing he must not compromise the due and proper performance of his function."*

The respondent, in complying with the appellants' request, undertook an investigation of a large amount of documentation and concluded that *"the decision"* deemed to have been made pursuant to the provisions of s. 41 of the Act could be treated as *"a decision"* made pursuant to and for the reasons outlined in s. 10 (1) (a) of the Act.

I am satisfied that he was entitled to do so.

In *Deely v. The Information Commissioner* (*supra*) McKechnie J. considered submissions to the effect that findings made by the respondent on questions of

primary fact should not be reviewed by this Court as part of the appeal process under s. 42 of the Act. He observed that:

> *"There is no doubt that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-*
>
> *(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;*
>
> *(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision-making body could draw;*
>
> *(c) it can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;*
>
> *(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the la,w then that is also a ground for setting aside the resulting decision ..."*

I am satisfied that in this case there was a very substantial amount of material before the respondent upon which he could reasonably find the facts which he found. I am quite satisfied that there was before him sufficient evidence to enable him to reasonably conclude that he could treat *"the decision"* deemed to have been made pursuant to the provisions of s. 41 of the Act as a decision made pursuant to and for the reasons outlined in s. 10 (1) (a) of the Act.

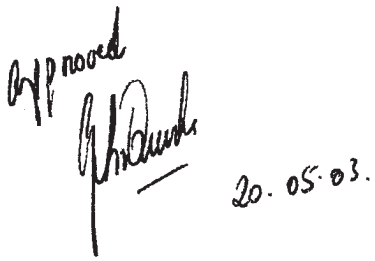
I am satisfied that he was empowered by the provisions of the Act to conduct the review as he did.

I am satisfied that the guidelines which he adopted and which were adduced in evidence were appropriate and adequate and that they were applied appropriately and adequately.

I am satisfied also that the respondent's understanding of his role, as outlined in evidence, was correct in that he was not required to search for records but was required rather to review the decision of the Department and in doing so to have regard to the evidence which was available to the decision-maker and to the reasoning used by the decision-maker in arriving or failing to arrive at a decision.

The role of this Court is expressly confined to the hearing of appeals from the respondent on points of law. Whilst it is true that, if the respondent had taken an erroneous view of the law in making his decision, then the appellants might have been entitled to relief, no evidence has been adduced in these proceedings which would justify such a conclusion. Furthermore there was a very large volume of evidence and material before the respondent which, upon consideration could reasonably have given rise to the decision which was made.

It follows that this ground of appeal also fails.



In the matter of the **Freedom of Information Act 1997. Barney Sheedy**, Appellant v. **The Information Commissioner**, Respondent and **the Minister for Education and Science** and **The Irish Times Ltd**., Notice parties [2005] IESC 35, [S.C. No. 329 of 2004]

Supreme Court 30th May, 2005

Administrative law – Freedom of information – Information Commissioner – Appeal – School reports – Whether release of school reports compiled by Department of Education would enable compilation of information in respect of comparative performance of schools – Extent to which interpretation of Education Act informed by provisions of Freedom of Information Act – Freedom of Information Act 1997 (No. 13), ss. 21(1)(a), 26, 28, 32(1), 34(2) and 42(1) – Education Act 1998 (No. 51), s. 53.

Section 53 of the Education Act 1998 provides, *inter alia*, that:-

"Notwithstanding any other enactment, the Minister may … refuse access to any information which would enable the compilation of information … in relation to the comparative performance of schools in respect of the academic achievements of students enrolled therein …"

Section 21(1)(a) of the Freedom of Information Act 1997 provides that a request for access to a record may be refused if access could reasonably be expected to prejudice:-

"… the effectiveness of tests, examinations … conducted by or on behalf of the public body concerned or the procedures or methods employed for the conduct thereof …"

However, s. 21(2) of the Act of 1997 provides that:-

"Subsection (1) shall not apply in relation to a case in which in the opinion of the head concerned, the public interest would … be better served by granting than by refusing to grant the request …"

Section 26(1) of the Act of 1997 provides that access to the records may be refused where the information was given in confidence.

Section 32(1) of the Act of 1997 provides that a request for disclosure of information shall be refused where:-

"(a) the disclosure of the information concerned is prohibited by any enactment … or

(b) the non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record."

The first notice party, on a request to it by the second notice party, refused to grant access to the tuairiscí scoile relating to various schools on the basis that s. 53 of the Education Act 1998 and ss. 21(1)(a), 26(1) and 28 of the Freedom of Information Act 1997 applied thereto. The respondent, on an appeal to it by the second notice party, set

aside the decision of the first notice party and directed that access be given to redacted versions of the tuairiscí scoile for five schools, including Scoil Choilm.

The appellant, who was the principal of Scoil Choilm, appealed the decision of the respondent to grant access to the tuairisc scoile in respect of Scoil Choilm to the High Court on the basis that the exceptions provided for in ss. 21(1)(a) and 26(1) of the Act of 1997 and s. 53 of the Act of 1998 applied to the information contained therein. The High Court (Gilligan J.) found in favour of the respondent on the grounds relied upon by the respondent but stayed the publication of the school report pending the final determination of an appeal to the Supreme Court. The appellant appealed to the Supreme Court.

Held by the Supreme Court (Denham and Kearns JJ., Fennelly J. dissenting), in allowing the appeal, 1, that the trial judge erred in bringing an approach to the appeal as regards the respondent's interpretation of s. 53 of the Act of 1998 which reflected the principles applicable to judicial review and the attitude expressed in the Act of 1997 that it was only in exceptional cases where members of the public should be deprived of access to information in the possession of public bodies.

2. That the Acts of 1997 and 1998 were not *in pari materia* as they did not have a collective title nor did they address the same or a single subject matter and a construction on s. 53 of the Act of 1998 which would yield an interpretation which fitted the aims and policies of the Act of 1997 could be not forced when there was no ambiguity in the opening phrase of s. 53.

3. That, because of the use of the phrase "notwithstanding any other enactment" in the opening phrase of s. 53 of the Act of 1998, it was impossible to construe the Acts of 1997 and 1998 together or as forming part of a *continuum* and s. 53 took precedence over any provision of the Act of 1997 as such a clause could nullify or override other provisions of the same piece of legislation or inconsistent provisions contained in previous legislation.

4. That the general words of s. 53 of the Act of 1998 went further than examination results and the reference to "comparative performance of schools in respect of academic achievements" included a range of other considerations in respect of which comparisons between schools could still be made and, accordingly, the school reports in question came within the protection afforded by s. 53.

5. That an exhaustive analysis conducted by reference to detailed evidence was unnecessary before the respondent could decide to apply the public interest provision of s. 21(2) of the Act of 1997 to direct release of the school reports. Once there was some evidence before him as to the circumstances in which the reports were compiled, his decision was not to be interfered with.

O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 applied.

(*Per* Fennelly J. dissenting) That the appeal came before the court through the mechanisms and procedures of the Act of 1997 and that an appeal pursuant to the Act of 1997 had to be considered in the context of that Act. The appellant's contention that the Act of 1997 was dis-applied by s. 53 of the Act of 1998 was unsupportable in light of the fact that he did not apply to the High Court by way of judicial review of the decision of the respondent and the machinery of appeal to the Superior Courts could not be used to challenge the jurisdiction of the respondent and the applicability of the Act of 1997.

Cases mentioned in this report:-

Coco v. A. N. Clark (Engineers) Ltd. [1968] F.S.R. 415; [1969] R.P.C. 41.

Deely v. Information Commissioner [2001] 3 I.R. 439.

D.P.P. v. Grey [1986] I.R. 317; [1987] I.L.R.M. 4.

Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34.

House of Spring Gardens Ltd. v. Point Blank Ltd. [1984] I.R. 611.

Mara v. Hummingbird Ltd. [1982] I.L.R.M. 421.

McLoughlin v. Minister for Public Service [1985] I.R. 631; [1986] I.L.R.M. 28.

Minster for Agriculture v. Information Commissioner [2000] 1 I.R. 309; [2001] 1 I.L.R.M. 40.

O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39; [1992] I.L.R.M. 237.

Premier Periclase v. Commissioner of Valuation (Unreported, High Court, Kelly J., 24th June, 1999).

R. v. Loxdale (1758) 1 Burr 445; 97 English Reports, 394.

Seward v. The Vera Cruz: The Vera Cruz (1884) 10 App. Cas. 59; 54 L.J.P. 9; 52 L.T. 474; 1 T.L.R. 111; 5 Asp. M.L.C. 386.

Sheedy v. Information Commissioner [2004] IEHC 192, [2004] 2 I.R. 533.

The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642; [1987] I.L.R.M. 202.

Appeal from the High Court

The facts of the case have been summarised in the headnote and are more fully set out in the judgment of Kearns J., *infra*.

By motion on notice dated the 1st April, 2003, the appellant appealed the decision of the respondent to release certain documents relating to the school. The High Court (Gilligan J.) refused the reliefs sought (see [2004] IEHC 192, [2004] 2 I.R. 533). The appellant appealed to the Supreme Court by notice of appeal dated the 16th July, 2004. The appeal was heard by the Supreme Court (Denham, Fennelly and Kearns JJ.) on the 9th March, 2005.

Gerard Hogan S.C. (with him *Peter Ward*) for the appellant.

Brian Murray S.C. (with him *Emily Egan*) for the respondent.

Donal McGuinness for the first notice party.

The second notice party was not represented before the Supreme Court.

Cur. adv. vult.

Denham J. 30th May, 2005

1 I have read the judgment about to be delivered by Kearns J. and I agree with it.

Fennelly J.

2 I gratefully adopt the summary of the facts and procedural history of this appeal set out in the judgment of Kearns J. I would add that I fully agree with his proposal that the grounds of appeal based on ss. 21 and 26 of the Freedom of Information Act 1997 should be dismissed. I differ only in respect of the treatment of s. 32 of that Act, read with s. 53 of the Education Act 1998.

3 The passing of the Freedom of Information Act 1997 constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers. The principle of free access to publicly held information is part of a world-wide trend. The general assumption is that it originates in the Scandinavian countries. The Treaty of Amsterdam adopted a new Article 255 of the EC Treaty providing that every citizen of the European Union should have access to the documents of the European Parliament, Council and Commission.

4 The long title to the Act of 1997 did something which has regrettably become uncommon. It proclaimed its purposes in a long title. This is deserving of full citation. The Act of 1997 is stated to be:-

> "An Act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions

to that right and for assistance to persons to enable them to exercise it, to provide for the independent review both of decisions of such bodies relating to that right and of the operation of this Act generally (including the proceedings of such bodies pursuant to this Act) and, for those purposes, to provide for the establishment of the office of information commissioner and to define its functions, to provide for the publication by such bodies of certain information about them relevant to the purposes of this act, to amend the Official Secrets Act 1963, and to provide for related matters."

5 Section 6(1) of the Act of 1997 gives effect to the general principle, thus proclaimed, of public access to documents "to the greatest extent possible consistent with the public interest and the right to privacy" as follows:-

"(1) Subject to the provisions of this Act, every person has a right to and shall, on request therefor, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access.

(2) It shall be the duty of a public body to give reasonable assistance to a person who is seeking a record under this Act –

(a) in relation to the making of the request under *section 7* for access to the record, and

(b) if the person has a disability, so as to facilitate the exercise by the person of his or her rights under this Act."

6 This is the first appeal under the Act of 1997 to come before this court, the Oireachtas having repealed the bar on such appeals contained in s. 42(8) of the Act of 1997 by s. 27 of the Freedom of Information (Amendment) Act 2003. Prior to now, therefore, all judgments on the operation of the Act have been given in the High Court. McKechnie J. made a number of statements of general importance, with which I fully agree, in *Deely v. Information Commissioner* [2001] 3 I.R. 439 at p. 442:-

"As can thus be seen the clear intention is that, subject to certain specific and defined exceptions, the rights so conferred on members of the public and their exercise should be as extensive as possible, this viewed, in the context of and in a way to positively further the aims, principles and policies underpinning this statute, subject and subject only to necessary restrictions.

It is on any view, a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy."

7 In addition, McKechnie J. made the following observations about the scope and limitations of an appeal taken to the High Court pursuant to s. 42(1) of the Act. He said at p. 452:-

"It was submitted … that findings made by the respondent [the Commissioner] on questions of primary fact should not be reviewed by this court as part of the appeal process under s. 42 of the Act. There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or *via* a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-

(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;

(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;

(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision …"

8 The judge was correct to say that these propositions were based on established principles. He cited well-known authority in support of them: *Mara v. Hummingbird Ltd.* [1982] I.L.R.M. 421; *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Premier Periclase v. Commissioner of Valuation* (Unreported, High Court, Kelly J., 24th June, 1999). I believe that these principles are applicable to this appeal. It is important to bear in mind, firstly, that the appeal comes before this court through the mechanism and procedures of the Act of 1997 and not otherwise and, secondly, that the court is concerned with an appeal on a point of law.

9 In the present case, the initial request made by the second notice party for access to all school reports of primary school inspectors went through all the statutory stages. There was, presumably, a two-stage refusal of access by the first notice party under ss. 7 and 14 of the Act of 1997, although the relevant decisions are not before the court. One of a number of grounds of the refusal advanced by the first notice party was based on s. 53 of the Education Act 1998. I am not concerned with any of the other grounds, since I am in agreement with Kearns J. that the appeal should be dismissed insofar as it relates to any matter other than s. 53.

10 As is clear from the judgment of Kearns J., the respondent, having been asked to review the first notice party's refusal of access to the relevant records pursuant to s. 34 of the Act of 1997, rejected that ground of refusal. It is interesting to note that another ground originally advanced was, pursuant to s. 10(1)(c) of the Act of 1997, "that the examination and

retrieval of the records sought would cause a substantial and unreasonable interference with or disruption of the other work of the public body concerned". It does not appear, therefore, that the first notice party contested the jurisdiction of the respondent or the propriety of the making of the request by invoking the procedures under the Act of 1997. He advanced a number of grounds of refusal recognised by the Act of 1997. He accepted the request made by the second notice party and dealt with it under ss. 7 and 14 of that Act. He then asked the respondent to review the decision in accordance with his powers and using the procedure provided by s. 34 of the Act.

11 Section 42(1) of the Act of 1997 provides:-

> "A party to a review under *section 34* or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision."

12 It is no longer contested that the appellant is a "person affected". The first notice party has not, however, appealed.

13 A principal submission made by counsel on behalf of the appellant was that, by s. 53 of the Act of 1998, the Oireachtas had decided to disapply the Act of 1997, that s. 53 was a "stand-alone" section and should not be interpreted by reference to the Act of 1997. Counsel argued that the Act of 1997 was an ordinary piece of legislation and that its legislative character or value was no different from any other Act of the Oireachtas. It had no constitutional or quasi-constitutional status. For the purposes of statutory interpretation and, in particular for the purposes of being affected by subsequent legislation, it should be treated like any other Act of the Oireachtas. Thus, it was a particularly important part, perhaps even the essence of counsel's submission that the court should not interpret s. 53 of the Act of 1998 by reference to or by importing into it the general principles underlying the Act of 1997. He criticised the respondent for failing to give effect to the "fundamental principle" of s. 53 of the Act of 1998.

14 The written submissions of the respondent say, on the other hand, that the relevant question, in the context of an application for a review before her or on appeal before the High Court in a freedom of information context is whether a particular statutory non-disclosure provision applies *by reference to s. 32.* It is submitted that there is a harmonious co-existence between statutory non-disclosure provisions in other legislation and those contained in the Act of 1997.

15 On this issue, I am satisfied that the respondent is plainly correct. The dispute as to disclosure of the inspectors' reports comes before this court exclusively as an appeal pursuant to, and employing the machinery of the Act of 1997. If the first notice party had exercised his right to appeal and claimed, as the appellant effectively does, that the Act of 1997 does not

apply, I believe he would have been met with the effective answer that he could not employ the machinery of the Act to argue that the respondent had no jurisdiction under the Act to grant access to documents covered by s. 53 of the Act of 1998. The appellant is clearly in the same position. I cannot understand how the respondent can be criticised for considering the application of s. 53 of the Act of 1998 in the light of the principles underlying the Act of 1997. Such criticism is misconceived. It is the Act of 1997 which gives jurisdiction to the respondent. By the same token, this court, in entertaining an appeal pursuant to the Act of 1997, must consider it in that context.

16 It is true that the respondent appears to have addressed the matter as if disclosure of the records mentioned in s. 53 of the Act of 1998 was "prohibited" by that section. It may be that this is a simple error of transposition, though the respondent, in his decision, expressly attributes this submission to the first notice party. Whatever its source, the approach is clearly erroneous. The applicable provision is s. 32(1)(b) of the Act of 1997, which I cite below. Under that provision, refusal to disclose is discretionary. Equally, s. 53 of the Act of 1998 is expressed in permissive terms: "Notwithstanding any other enactment the Minister … may refuse access to any information which would enable …" Counsel appeared to accept that s. 53 of the Act of 1998 is the sort of enactment which is *capable* of coming within s. 32 of the Act of 1997. Nonetheless, he argued, based on the introductory phrase ("notwithstanding any other enactment") that the Act of 1997 was, in effect "disapplied" by s. 53 of the Act of 1998.

17 The appropriate course for the appellant or the first notice party to have taken to support that contention would have been to apply to the High Court by way of judicial review of the decision of the respondent. I do not believe that the machinery of appeal to the High Court, and by extension to this court, can validly be used to challenge the very basis of the jurisdiction of the respondent and the applicability of the Act of 1997. For that reason alone, therefore, I believe that this argument of the appellant is misconceived. This is an appeal pursuant to the Freedom of Information Act 1997. I would dismiss the appeal.

18 However, in deference to the extensive arguments that have been heard by the court, and to remove any doubt, I will express my opinion on the argument that s. 53 of the Act of 1998 in some manner disapplied the Act of 1997. I do not believe that the Oireachtas can have intended such a result. Furthermore, it is neither sensible nor necessary, in order to give effect to the intent of s. 53, to attribute any such intention to the Oireachtas.

19 For all the reasons already given, the Act of 1997 was a piece of legislation of major significance. It was also intended, except for those restrictions and limitations contained within it, to have universal applica-

tion, meaning that it extends to every class of record held by any public body listed in the first schedule to the Act. Nonetheless, within its own terms, it recognised that there could be legislative provision (past or future) either prohibiting disclosure or permitting non-disclosure on a discretionary basis. It included a specific statutory mechanism to accommodate such legislation. Section 32 of the Act of 1997 reads:-

> "(1) A head shall refuse to grant a request under *section 7* if –
>
> (a) the disclosure of the record concerned is prohibited by any enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule), or
>
> (b) the non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record."

Section 2 of the Act of 1997 defines an enactment as meaning a statute or an instrument made under a power conferred by a statute. Clearly, the term is wide enough to include both past and future enactments. Thus, to the extent that s. 53 of the Act of 1998 permits non-disclosure, it is perfectly compatible with the Act of 1997.

20 Having enacted in such clear terms legislation of purportedly universal application providing for public access to all State documents, the Oireachtas is, according to the appellant, to be deemed, within a year and without any express reference to the Act of 1997, to have intended to remove a poorly defined category of information contained in publicly held records entirely from the purview of the Act and to submit its disclosure exclusively to the unfettered discretion of the first notice party. One consequence of that approach would inevitably be that any discretionary decision of the first notice party would be reviewable, if at all, only on grounds of irrationality (see *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642). Effectively, that would involve a move from the presumption in favour of disclosure written into the Act of 1997 to an even stronger contrary presumption. It is stronger, firstly, because a person seeking disclosure of records possibly within the scope of s. 53 of the Act of 1998 does not have any *prima facie* right of access to them. Outside the framework of the Freedom of Information Act 1997, it is difficult to see how any citizen (or any member of the media in the capacity of citizen) would have the standing to require the first notice party to justify refusal of access. Secondly, it is stronger because any decision by the first notice party not to disclose would be virtually beyond review.

21 But the problems created by this approach do not end there. As is disclosed by the argument in the present case, there is wide room for legitimate debate as to whether any particular documents do or do not

come within the scope of s. 53 of the Act of 1998. The appellant accepts that the inspectors' reports do not come within paras. (i) or (ii) of s. 53. He says that they come, and then only in part, within the general description:- "information which would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievement of students enrolled therein." Clearly, any judgment on this issue is highly subjective.

22 What if the respondent considers that certain documents do not come within the scope of s. 53 of the Act of 1998? That would give him jurisdiction under the Act of 1997. But the first notice party might consider that the same records are covered by the section. As already stated, his opinion on that issue would be virtually unreviewable. At least the Act of 1997 provides a considered and detailed machinery for determining such an issue. The first notice party would be in a position to challenge any decision of the respondent by appealing on a point of law to the High Court. However, if the first notice party simply refuses access, there is no available machinery for resolution of the conflict.

23 I believe that the result postulated is redolent of conflict and cannot have been intended. I believe that the more reasonable intention to attribute to the Oireachtas is that requests for access to information of the kind mentioned in s. 53 of the Act of 1998 could be made, but that the applicable machinery is that provided in the Act of 1997. Section 53 lays down no procedure or criteria at all.

24 In answer to an invitation from the court to address it on the principles applicable to situations of conflict between legislative provisions, counsel for the appellant cited the judgment of Henchy J., on behalf of this court, in *McLoughlin v. Minister for Public Service* [1985] I.R. 631. There was a conflict between two provisions of the Garda Síochána compensation legislation, one requiring a pension or allowance to be taken "into consideration" and the other stating that it should not be "taken into account". Henchy J. at p. 655 noted "a want of congruity between the two provisions" in which event he thought that the provision representing "the later thinking of the Oireachtas should prevail." The point to note is that the "incongruity" seemed unavoidable. By implication, I believe he would have preferred a solution which made the provisions compatible, as is possible here. Counsel also drew attention to the maxim *generalia specialibus non derogant*, referring to a passage from the Earl of Selborne quoted by Henchy J. in *D.P.P. v. Grey* [1986] I.R. 317 at p. 327. The passage is from *Seward v. The Vera Cruz: The Vera Cruz* (1884) 10 App. Cas. 59 at p. 68 and reads as follows:-

> "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application

> without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

Henchy J. was alone in considering this maxim relevant to resolution of the issue before the court. Nonetheless, the principle offers useful guidance and, if applicable to the relationship between s. 53 of the Act of 1998 and the Act of 1997, it suggests that the court should not regard the later Act of 1998 as affecting the earlier one of 1997. Such rules are, in any event, intended as useful guides to ascertaining the intention of the Oireachtas. The matter is discussed as follows in Bennion on *Statutory Interpretation* 4th ed.) at p. 256:-

> "It may be that, while a state of facts falls within the literal meaning of a wide provision, there is in an earlier Act a specific provision obviously intended to cover that state of facts in greater detail. Where the effect of the two enactments is not precisely the same, and the earlier one is not expressly repealed, it is presumed that Parliament intended it to continue to apply."

25 Clearly, the problem is to identify what is general and what is specific. Is the subject matter here the class of documents or is it the provision regarding disclosure? The class of information mentioned in s. 53 of the Act of 1998 is necessarily narrower than the universality of records covered by the Act of 1997. On the other hand, s. 53 lays down only the most general rule regarding the first notice party's power to refuse disclosure, but providing no machinery for requests or who can make them. The Act of 1997, on the other hand, contains detailed and specific provision regarding that subject. Thus considered, s. 53 is the general provision and the Act of 1997 is more specific. This view tends to resolution of the jurisdictional conflicts I have postulated, by reconciling the two provisions rather than placing them in conflict.

26 It is plain that s. 53 of the Act of 1998 deals with the same subject-matter as the Act of 1997, namely the disclosure of information. To that extent, the two enactments are in *pari materia.* There are strong intuitive reasons favouring a harmonious interpretation of the two provisions. The introductory words, "notwithstanding any other enactment," are general, not specific. The Oireachtas must be presumed to be aware of the existing state of the law at the time it enacts legislation. If it had intended to remove the documents mentioned in s. 53 of the Act of 1998 from the purview of the Act of 1997, as distinct from enacting a provision of the type specially provided for in s. 32 of the latter, I believe it would have clearly said so. I also believe that the maxim *generalia specialibus non derogant* provides

support for the continued effectiveness and applicability of the Act of 1997.

27 Accordingly, I am of the opinion that, even if the matter were procedurally regularly before this court, for example by way of judicial review, it would be correct to hold that the Oireachtas did not intend, in enacting s. 53 of the Act of 1998, to amend the Act of 1997. A more commonsense and realistic interpretation is that it intended to adopt legislation which, subject to operation of the procedures of the Act of 1997, would enable the first notice party to refuse disclosure of records.

28 Finally, it is necessary to consider the effect of s. 53 of the Act of 1998 in the light of the conclusion I have reached, namely that it is a provision of the type provided for in s. 32(1) of the Act of 1997 allowing for discretionary refusal. The reasons for the decision of the respondent are fully set out in the judgment of Kearns J. and I do not wish unnecessarily to repeat them. The crucial passage in the decision is as follows:-

> "I acknowledge that an analysis of the reports in question could give rise to comparisons being drawn between overall views of the schools. However, such comparisons would be highly subjective and I do not believe that any empirical league table of schools, even one based on overall impressions, could be compiled. In any event, I do not believe that such information would breach the provisions of s. 53 of the Education Act 1998. Having examined the contents of the reports and having regard to the provisions of s. 34(12) of the Freedom of Information Act 1997, I am not satisfied that access to the reports would breach the provisions of s. 53 of the Education Act 1998. Therefore I find that access to the reports is not exempt under s. 32(1)(a) of the Act of 1997."

29 It is important to observe, in the first instance, that this is a conclusion of fact. The respondent expressed his view that the information contained in the reports, to adapt the relevant words of s. 53 of the Act of 1998, "would [not] enable the compilation of information … in relation to the comparative performance of schools in respect of the academic achievement of students enrolled therein".

30 Counsel conceded that the tuairisc scoile does not enable compilation of information of the type mentioned in sub-paras. (i) or (ii) of s. 53 of the Act of 1998. He argues that the "academic achievement of students" has broader scope or meaning. He refers to some laudatory comments on one page of the report: regarding English, that "pupils' written work is of a very high standard in terms of the range of topics covered, presentation and standard of spelling"; regarding mathematics, that "written work is of an impressive standard, inclusive of the range of assignments and neatness and accuracy of presentation".

31 The respondent nonetheless concluded that he did "not believe that any empirical league table of schools, even one based on overall impressions, could be compiled". He also remarked on the subjective quality of the observations. Bearing in mind the statutory presumption in favour of disclosure, to which the respondent drew attention, and the fact that his conclusion is one of fact, I do not believe that the appellant has established any mistake of law. Bearing in mind that this court is considering an appeal on a point of law, I believe that para. (b) of the principles summarised by McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439 is applicable, namely that the court "ought not to set aside inferences drawn from … facts unless such inferences were ones which no reasonable decision making body could draw". The vehicle of appeal on a point of law cannot have been intended to involve the High Court or, *a fortiori*, this court in detailed review of the respondent's conclusions of fact. I do not think the conclusion of the respondent that the inspectors' reports did not come within s. 53 of the Act of 1998 was unreasonable at all and it certainly was not unreasonable to the standard required to enable this court to disagree with him in the context of an appeal on a point of law.

32 I would dismiss the appeal.

Kearns J.

33 The appellant is the principal of Scoil Choilm, a primary school at Armagh Road, Crumlin, Dublin 12. It is one of five inner city schools where an inspection of the school was carried out in March, 2001 by an inspector appointed by the Department of Education. The reports were prepared in accordance with department circulars nos. 31/82 and 12/83, the latter of which provides:-

> "A school report containing an assessment of the organisation and work of the school as a whole is to be furnished to the Department at regular intervals of approximately four years … and will be drawn up after discussion with the principal and staff of the school. Because the school report deals with the work of the school as a whole, reports on the work of individual teachers will not be issued in connection with it."

The circular also provides that the report "should be based on the knowledge the inspectors have gained of the school as a result of periodic visits".

34 The report (tuairisc scoile) in this case was completed on the 30th July, 2001. The report presented a favourable view of Scoil Choilm and contained a considerable amount of information about the school, including factual background material about the history and location of the school,

school accommodation, management arrangements within the school, links with parents and the wider community, organisation of classes, preparation and planning of educational programmes, languages and mathematics, social, personal and health education, creative and aesthetic activities, pupils with special needs, a post inspection meeting and a conclusion.

35 The second notice party applied to the Department of Education under the Freedom of Information Act 1997 for access to a number of tuairiscí scoile, including the report written in respect of the appellant's school. The Department refused to grant such access, having regard, *inter alia*, to s. 53 of the Education Act 1998 and ss. 21, 26 and 28 of the Act of 1997. Any difficulties arising under s. 28 of the Act of 1998 (which relates to personal information) were later resolved by the deletion of any material containing personal information from the reports.

36 The second notice party sought a review of the first notice party's refusal from the respondent under s. 34(2) of the Act of 1997. The respondent, by decision dated the 5th March, 2003, set aside the decision of the first notice party and directed that access be given to redacted versions of the tuairiscí scoile for some five schools, including Scoil Choilm. All personal information (within the meaning of s. 28 of the Act of 1997) was excluded from the redacted version. The appellant appealed the respondent's decision to grant access to the redacted version of the tuairisc scoile in respect of Scoil Choilm to the High Court pursuant to the provisions of s. 42(1) of the Act of 1997.

37 In a reserved judgment, delivered on the 20th May, 2004 (*Sheedy v. Information Commissioner* [2004] IEHC 192, [2004] 2 I.R. 533), the High Court (Gilligan J.) found that the appellant had *locus standi* to bring the proceedings (a finding which has not been challenged in the appeal to this court) but nonetheless found in favour of the respondent on the same grounds as those relied upon by the respondent. He then stayed publication of the tuairisc scoile report dated the 30th July, 2001, pending the final determination of an appeal to this court. The grounds of the appeal to this court may be summarised as follows:-

(1) that the trial judge misdirected himself in law and in fact in his interpretation of and/or his application of s. 53 of the Education Act 1998;

(2) that the trial judge erred in law and in fact in his interpretation of and/or his application of s. 32(1) of the Freedom of Information Act 1997;

(3) that the trial judge erred in law and in fact in his interpretation of and/or his application of s. 21(1)(a) and (b), and s. 21(2) of the Freedom of Information Act 1997; and

(4) that the trial judge erred in law and in fact in his interpretation of and/or his application of s. 26 of the Freedom of Information Act 1997.

It is perhaps appropriate to note that the first notice party did not himself appeal the respondent's decision to the High Court.

Section 53 of the Act of 1998 and s. 32(1) of the Act of 1997

38 The first and second grounds of appeal relate to s. 53 of the Act of 1998 and s. 32(1) of the Act of 1997 and should be dealt with together.

Section 53 provides that:-

"Notwithstanding any other enactment the Minister may –

(a) refuse access to any information which would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievement of students enrolled therein, including, without prejudice to the generality of the foregoing –

(i) the overall results in any year of students in a particular school in an examination, or

(ii) the comparative overall results in any year of students in different schools in an examination, and

(b) refuse access to information relating to the identity of examiners."

It is accepted by both sides in this appeal that the inspector's report did not disclose any individual marks or performances in any examinations, so that the case does not come within either of the specific examples contained in s. 53(a)(i) or (ii) of the Act of 1998. The first question in this part of the case, therefore, is whether the release of such reports would "enable the compilation of information … in relation to the comparative performance of schools in respect of the academic achievement of students".

39 The second question, which of necessity will, however, be dealt with first, concerns the extent to which the interpretation of s. 53 of the Act of 1998 may be affected by the stated intent and policy of the Act of 1997 and by the provisions contained at s. 32(1) of the Act of 1997.

The long title to the Act of 1997 states, *inter alia*, that it is:-

"An Act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies and to … provide for a right of access to records held by such bodies."

Section 32(1) of the Act of 1997 provides:-

"A head shall refuse to grant a request under section 7 if –

(a) the disclosure of the record concerned is prohibited by any enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule), or

(b) the non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record."

The term "head" is defined in s. 2 of the Act of 1997 as "head of a public body" and "head of a public body" in relation to a Department of State means "the Minister of the Government having charge of it".

Section 7 of the Act of 1997 provides that a person who wishes to exercise the right of access to records may make a request in writing to the head of the public body concerned for access to a particular record.

40 Decisions to refuse a request under s. 7 of the Act of 1997 may be reviewed by the respondent under s. 34 of the Act of 1997 and, in the context of any such review, it is provided as follows at s. 34(12)(b):-

"A decision to refuse to grant a request under *section 7* shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified."

41 Before considering the manner in which the respondent approached his review in this case, it is perhaps appropriate to give a flavour of what was said concerning academic standards in the report under consideration here:-

"Very impressive standards are found through the school and across the spread of the curriculum…

Caitheann na muinteoirí an-dua le teagasc na Gaeilge … is léir go bhfuil greim an-mhaith ag formhór na ndaltaí ar dheilbhíocht agus comhréir na teanga.

The pupils' written work (in English) is of a very high standard in terms of the range of topics covered, presentation and standard of spelling.

The teachers are very effective in explaining and consolidating understanding of the basic concepts in mathematics … written work is of an impressive standard, inclusive of the range of assignments and neatness and accuracy of presentation."

42 In refusing to release the report in this case, the first notice party relied upon the provisions of s. 53 of the Act of 1998, arguing that the disclosure of the five reports sought (of which this was one) would enable school league tables to be produced. It argued that the purpose of s. 53 is to prevent the compilation of such tables. It submitted to the respondent that the compilation of any such tables would adversely impact on the school system and on the first notice party's ability to manage those schools.

In dealing with this issue, the respondent stated:-

"[I]t is clear that this section of the Act is concerned with academic achievement. I agree that if anything in these reports reveal matters directly related to s. 53(a) of the Education Act 1998 and the Minister had refused access to it then its release could be refused under s. 32(1)(a) of the Act of 1997. [Counsel for the appellant in the course of the appeal to this court suggested - without contradiction - that this reference should in fact be to s. 32(1)(b) of the Act of 1997.] I have carefully examined the contents of the school reports before me. I have no reason to believe that they are significantly different from other reports produced by the Department in accordance with circular no. 12/83. The reports do not contain any specific references to the academic achievements of students in each school. There are no rankings or scoring given either for the school or the students involved … the comments contained in the report are of such a general and subjective nature that any direct comparison of academic achievement between the schools could not be drawn … I acknowledge that an analysis of the reports in question could give rise to comparisons being drawn between overall views of the schools. However, such comparisons would be highly subjective and I do not believe that any empirical league table of schools, even one based on overall impressions, could be compiled. In any event, I do not believe that such information would breach the provisions of s. 53 of the Education Act 1998. Having examined the contents of the reports and having regard to the provisions of s. 34(12) of the Act of 1997, I am not satisfied that access to the reports would breach the provisions of s. 53 of the Education Act 1998. Therefore, I find that access to the reports is not exempt under s. 32(1)(a) of the Act of 1997."

As noted above, a head would appear to have no discretion and must refuse release where disclosure is prohibited under s. 32(1)(a), so that the respondent's statement that "release could be refused" seems more appropriate to a refusal under s. 32(1)(b) of the Act of 1997.

Section 21 of the Act of 1997

43 Section 21 of the Act of 1997 Act deals with the "functions and negotiations of public bodies" and provides as follows:-

"(1) A head may refuse to grant a request under *section 7* if access to the record concerned could, in the opinion of the head, reasonably be expected to –

(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of the pub-

lic body concerned or the procedures or methods employed for the conduct thereof,

(b) have a significant, adverse effect on the performance by the body of any of its functions relating to management (including industrial relations and management of its staff), or

(c) disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the Government or a public body.

(2) *Subsection (1)* shall not apply in relation to a case in which in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under *section 7* concerned."

44 In describing his approach to a claim for exemption under s. 21 of the Act of 1997, the respondent stated as follows:-

"In arriving at a decision to claim a s. 21 exemption, a decision-maker must, firstly, identify the potential harm to the functions covered by the exemption that might arise from disclosure and, having identified that harm, consider the reasonableness of any expectation that the harm will occur. The test of whether the expectation is reasonable is not concerned with the question of probabilities or possibilities. It is concerned simply with whether or not the decision-maker's expectation is reasonable. In the case of a claimant under s. 21(1)(b) the establishment of 'significant, adverse effect' requires stronger evidence of damage than the 'prejudice' standard of s. 21(1)(a). When invoking s. 21(1)(b), the public body must make an assessment of the degree of importance or significance attaching to the adverse effects claimed. Not only must the harm be reasonably expected but it must also be expected that the harm will be of a more significant nature than that required under s. 21(1)(a).

The Department claims that the effectiveness of future inspections of schools could be prejudiced as the release of the reports would lead directly to the compilation of league tables which is prohibited under the Education Act 1998. The Department has elaborated on this argument in its submissions to me. It also contends that the compilation of such league tables could have a significant adverse effect on one of its management functions, *i.e.*, its duty to report on schools in accordance with the provisions of circular no. 12/83. I accept that the compilation, from the contents of the reports, of such school league tables could have an adverse effect on the effectiveness of the reports in question. However, it will follow from my comments in relation to s. 53 of the

Education Act 1998 that I do not accept that disclosure of the contents of the reports could result in the compilation of any meaningful league tables as feared by the Department."

45 The respondent also pointed to the statutory nature of the mandate for the work of inspectors under s. 13 of the Act of 1998 as meeting any concerns that schools would not co-operate with the compilation of future inspection reports if disclosure were to be directed.

46 Section 13 of the Act of 1998 provides for the appointment by the first notice party of inspectors who:-

> "shall visit recognised schools and centres for education on the initiative of the Inspectorate, and, following consultation with the board, patron, parents of students and teachers, as appropriate, do any or all of the following: … evaluate the organisation and operation of those schools and centres and the quality and effectiveness of the education provided in those schools or centres … evaluate the education standards in such schools … assess the implementation and effectiveness of any programmes of education … and report to the Minister, or to the board, patron, parents of students and teachers, as appropriate, on these matters … [a]n Inspector shall have all such powers as are necessary or expedient for the purpose of performing his or her functions and shall be accorded every reasonable facility and co-operation by the board and the staff of a school."

Having noted these provisions, the respondent was satisfied that they provided the first notice party with the necessary authority effectively to require the co-operation of schools in the compilation of school reports so that any suggestion that schools would in future not co-operate was without substance.

47 He noted that the first notice party's second submission suggested that difficulties with "partners" could arise if information which could lead to the creation of league tables were to be released, thereby frustrating the aims of the Act of 1998. The respondent took "partners" in this context to mean the relevant trade unions and/or boards of management. He further took it as an alternatively based claim for exemption under s. 21(1)(a) or (b) of the Act of 1997. However, by an application of the same reasoning which informed his decision in relation to s. 53 of the Act of 1998, he concluded that he did not believe the information contained in the reports could give rise to the compilation of information envisaged in the Act of 1998 and therefore did not accept such argument. He invoked s. 34(12) of the Act of 1997 to conclude that the first notice party had not justified its decision to refuse access under s. 21(1)(a) or (b).

48 At a later point in his decision, the respondent found that, even if s. 21(1)(a) or (b) applied, s. 21(2) still permitted him to hold that release

would be justified given that in his view the public interest would, on balance, be better served by granting than by refusing to grant the request. He concluded:-

> "I consider that there is a significant public interest in information about schools being available to the public. Given the vast expenditure of public funds on the education system, it can hardly be argued that what goes on in a school is always the business only of the board of management, teachers, parents or pupils. The protection of the right to privacy may require access to some records or parts of records relating to schools to be withheld. However, I find it difficult to see why records of the kind at issue in this review need to be withheld from the public. I have already stated that I am satisfied that disclosure of the contents of these reports would not be in breach of the provisions of the Education Act 1998 or lead to any meaningful comparisons between schools. In the absence of any countervailing public interest and if I had to decide this case on whether the public interest would be better served by release, I would find in favour of release."

Section 26 of the Act of 1997

49 Section 26 of the Act of 1997 relates to information obtained in confidence and provides that a head shall refuse to grant a request under s. 7 of the Act if:-

> "(a) the record concerned contains information given to the public body concerned in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or
>
> (b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in *column (3)* of the *Third Schedule* of an enactment specified in that Schedule) or otherwise by law.
>
> (2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, a public body or a person who is providing a service for a public body under a contract for services) in the course of the per-

formance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than a public body or head or a director, or member of the staff of, a public body or a person who is providing or provided a service for a public body under a contract for services.

(3) Subject to *section 29*, *subsection (1)(a)* shall not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under *section 7* concerned."

50 In dealing with this issue, the respondent noted that s. 26 of the Act of 1997 provided exemption for certain information given to a public body in confidence. However, he noted that s. 26(2) provided that such exemption would not apply to a record which was prepared by a head, director or member of staff in the course of the performance of his/her functions. The one exception to that rule was where the disclosure of the information concerned would constitute a breach of a duty of confidence owed to a person *other than* a public body or head or director, or member of staff of a public body. It followed therefore, the respondent stated, that the exemptions in s. 26(1) were capable of applying, but only if disclosure of the information in the reports would constitute breach of a duty of confidence owed by the first notice party to the staff, principal or board of management of the schools in question.

51 He noted that no argument had been made in relation to any specific agreement or enactment in relation to this matter, so he had thus considered whether an equitable duty of confidence existed in this case. He accepted as correct the test set out by Megarry J. in the case of *Coco v. A.N. Clark (Engineers) Ltd.* [1968] F.S.R. 415 at p. 419 and as adopted by Costello J. in *House of Spring Gardens v. Point Blank* [1984] I.R. 611:-

> "three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself … 'must have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances imposing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

52 The respondent was satisfied that no circumstances arose in the instant case such as would create a duty of confidence and stated:-

> "These school reports were prepared by inspectors who are members of staff of the Department. They were prepared in the course of the performance of their functions. They consist of the authors', *i.e.*, the inspectors', own opinions and observations formed during the

course of their visits to the schools. In my view, such matters cannot be the subject of a duty of confidence if, for no other reason, these opinions and observations were not 'imparted' to them by anyone."

53 While accepting there was information in the reports which may have been provided to the inspectors, such as details of a school's size, accommodation and resources, it was information which he felt was available to any member of the public and did not consist of "private or secret matters". While some opinions expressed by the inspectors were formed as a result of discussion with teachers and management in the schools concerned, it was highly unlikely – given the purpose of the reports and the circumstances of their creation – that these views or some of them were expressed in confidence. Having examined the reports, he was satisfied that they did not contain any information that could be said to have been imparted in circumstances imposing an obligation of confidence or have the necessary quality of confidence about it. He thus did not accept that release of any part of the reports would give rise to a breach of any duty of confidence and, in the circumstances, found that, by virtue of s. 26(2) of the Act of 1997, the exemptions in s. 26(1) could not apply.

Decision

54 Before addressing the three issues that arise for determination on this appeal, it is perhaps appropriate to consider the legal principles applicable where an appeal from a review of the respondent is made to the court.

55 As was emphasised by O'Donovan J. in *Minister for Agriculture v. Information Commissioner* [2000] 1 I.R. 309 at p. 319:-

> "[I]n the light of its preamble, it seems to me that there can be no doubt but that it was the intention of the legislature, when enacting the provisions of the Freedom of Information Act, 1997, that it was only in exceptional cases that members of the public at large should be deprived of access to information in the possession of public bodies and this intention is exemplified by the provision of s. 34(12)(b) of the Act which provides that a decision to refuse to grant access to information sought shall be presumed not to have been justified until the contrary is shown."

It is clear that the trial judge in this case brought an approach to the appeal before him which reflected this sentiment, not only as regards the decision-making power of the respondent under the Act of 1997, but also as regards the respondent's interpretation of s. 53 of the Act of 1998.

56 In his conclusion, the trial judge brought to all issues the principles which McKechnie J. suggested were appropriate in *Deely v. Information Commissioner* [2001] 3 I.R. 439, when he stated at p. 452:-

"(a) it (*i.e.*, the court) cannot set aside findings of primary fact unless there is no evidence to support such findings;
(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;
(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that is also a ground for setting aside the resulting decision."

This is a helpful résumé with which one would not disagree, but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect and the essence of this case is to determine whether the interpretation given first by the respondent and later by the High Court (Gilligan J.) to s. 53 of the Education Act 1998 was correct or otherwise.

Section 53 of the Act of 1998

57 The High Court adopted entirely the reasoning of the respondent to hold on this issue in *Sheedy v. Information Commissioner* [2004] IEHC 192, [2004] 2 I.R. 533 as follows at para. 53:-

"The respondent acknowledged that an analysis of the reports in question could give rise to comparisons being drawn between overall views of the schools. He takes the view, however, that such comparisons would be highly subjective and he does not believe that any empirical league table of schools, even one based on overall impressions, could be compiled. In any event, he states that he does not believe that such information would breach the provisions of s. 53 of the Act of 1998 and it was on this ground that he found that access to the reports before him were not exempt under s. 32 (1)(a) of the Freedom of Information Act 1997.

I also have had the benefit of reading the redacted version of the inspector's report relating to Scoil Choilm and I take the view that the appellant has failed to demonstrate that granting access to the school report from Scoil Choilm would enable the compilation of information in relation to the comparative performance of schools in respect of academic achievements of students. In my view, the appellant has failed to discharge the onus of proof that rests with him to demonstrate that the respondent erred in law in coming to the conclusion arrived at that the

that the report was not exempt pursuant to s. 32(1)(a) of the Act of 1997."

58 What this conclusion does not address is the meaning and appropriate construction to be given to s. 53 of the Act of 1998, which was clearly evaluated both by the respondent and the trial judge exclusively through the prism of s. 34(12)(b) and s. 32(1)(a) of the Act of 1997.

59 One might again pause at this point to observe that s. 32(1)(a) provides that a head "shall refuse" a request to disclose where disclosure is "prohibited by any enactment". There is no discretion of any sort where this subsection applies. It does not appear to have been considered that the non-disclosure in this case might more properly have been seen to have been one falling within s. 32(1)(b) of the Act of 1997 where non-disclosure is authorised (as distinct from prohibited) by an enactment and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record. Section 53 of the Act of 1998 is clearly discretionary in nature.

60 The question however, regardless of which part of s. 32(1) of the Act of 1997 is invoked, is whether or not this section can, or should, as has been urged upon this court, inform the interpretation of s. 53 of the Act of 1997, the critical portion of which in this context is the following:-

> "Notwithstanding any other enactment the Minister may … refuse access to any information which would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievements of students."

61 The use of a "notwithstanding" clause is a convenient form of drafting which skirts or avoids textual amendments to existing legislation but nonetheless operates by implication to bring about amendments or repeals of such legislation. A recent example is to be found in the constitutional amendment effected pursuant to the 27th Amendment of the Constitution Act 2004, whereby Article 2 of the Constitution (which provided that every person born in the island of Ireland enjoyed a constitutional right to citizenship) was effectively amended by the addition of Article 9.2.1º which now provides:-

> "*Notwithstanding any other provision of this Constitution*, a person born in the island of Ireland … who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen … is not entitled to Irish citizenship or nationality, unless provided by law" (emphasis added).

Such a clause can operate to nullify or override other provisions of the same piece of legislation or inconsistent provisions contained in previous legislation.

62 Because of the "notwithstanding" clause in s. 53 of the Act of 1998, it seems impossible to construe the Acts of 1997 and 1998 together, or as forming part of a *continuum*. The word "notwithstanding" is in this instance a prepositional sentence-starter which unequivocally means, and can only mean, "despite" or "in spite of" *any* other enactment. It underlines in the clearest possible manner the free-standing nature of the provision thereafter set out in s. 53. As Bennion, *Statutory Interpretation* (3rd ed.) points out at p. 214:-

> "Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them."

63 To the extent that the later enactment may be seen as an implied partial repeal of a former enactment, Bennion also states at p. 225:-

> "Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim *leges posteriores priores contrarias abrogant* (later laws abrogate earlier contrary laws)."

64 If these were two Acts *in pari materia* a case might be made that they should be construed together and as interpreting and enforcing each other. Thus Lord Mansfield in *R. v. Loxdale* (1758) 1 Burr. 445 was able to state at p. 447:-

> "[w]here there are different statutes *in pari materia* though made at different times, or even expired and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other."

65 These are not however two Acts *in pari materia* – they do not have a collective title nor do they address the same or a single subject matter. They are as far removed from a "code" - such as, for example, the Road Traffic Acts – as one could imagine. There is no way in which s. 32 of the Act of 1997 can be seen as explanatory of s. 53 of the Act of 1998 or *vice-versa*. The court cannot force a construction on s. 53 of the Act of 1998 in some way so as to yield up an interpretation which fits the aims and policy of the Act of 1997 when there is no ambiguity whatsoever in the opening words of s. 53.

66 On the contrary, it seems quite possible, having regard to the temporal proximity of its enactment in 1998 to the Act of 1997, that s. 53 may well have been inserted in the Act of 1998 with the unspoken intention of "batting off' the application of the Freedom of Information Act 1997, to what historically has been a highly contentious issue, namely, that of

making public certain findings in relation to the comparative performance of schools.

67 Section 53 of the Act of 1998 overrides or "trumps" any provision of the Act of 1997, unless it can be shown that the school reports in question do not come within the protection offered by s. 53.

68 In this regard, it is common case that the information gathered does not contain examination results. However, the general words of s. 53 go further than examination results and I think it obvious that the reference to "comparative performance of schools in respect of academic achievement of students" may include a whole range of other considerations in respect of which comparisons between different schools could still nevertheless be drawn up. Academic achievements include examinations. Academic achievement can, however, be taken as meaning something more and the parties to this appeal have not argued that a purely mechanistic and functional meaning should be given to the words "academic achievement" so as to limit the meaning of those words to examination results alone. A range of other considerations must be included, some of which will show one school to differ from another and perhaps be performing better than another across a range of subjects or activities. These might include considerations of how pupils appear to be doing in particular subjects, such as Irish or English, or in activities such as sport or drama. Even without the criteria of examination results being brought to bear, significant performance related differences may be evident from a description of the activities carried out in any school or group of schools. These are precisely the kind of matters addressed by the school report. Given that primary schools, with which we are here concerned, no longer have examinations, so that s. 53 (a)(i) and (ii) of the Act of 1998 can never apply to them in any event, it is not difficult to see that the general words of s. 53 have a particular relevance to their situation and it is equally clear that the release of the information in the reports could lead to comparisons being drawn between different schools. Indeed, there is a recognition and acknowledgement of that fact in the respondent's review. That recognition having been given, it does not seem to me to be open to the respondent to then dis-apply the section's general words by introducing the concept of subjectivity to downplay any comparison that might be drawn. The section itself does not distinguish between any subjective or objective test for comparisons which might be drawn, and the importation of this concept may be seen as effectively re-writing the section to a particular end.

69 I am fortified in the view I have taken by reference to s. 13(3)(a)(i) of the Act of 1998. It provides that inspectors shall:-

"evaluate the organisation and operation of those schools and centres and the quality and effectiveness of the education provided in those schools or centres."

70 Reports which comply with these requirements must, it seems to me, provide a basis for a real comparison between the various schools where such reports are compiled.

71 Whatever the desirability of making such information available to the public, it must also be said that this is not information "otherwise available to the general public". If it was, the application by the second notice party would be completely superfluous and unnecessary. Such information may be available to the first notice party or to the board, patron, parents of students and/or teachers in an individual school, but that is a group or category which falls well short of the "general public". I am satisfied that the information contained in the report meets this further requirement of the section also.

72 For these various reasons I would allow the appeal in relation to the point on s. 53 of the Act of 1998.

Section 21 of the Act of 1997

73 On this issue, the trial judge found that the appellant had not discharged the onus of showing that a significant adverse effect could result in the granting of access to the records and that no satisfactory evidence had been adduced in this regard.

74 He also found that, having regard to the provisions of s. 13 of the Act of 1998, on foot of which teaching staff are required to co-operate in the provision of information leading to the compilation of school reports, that the respondent was entitled to take the view that no prejudice or adverse effect could follow a direction to release the reports, because co-operation would still have to be forthcoming from teachers and staff in schools because of their statutory obligations in that regard.

75 I believe he was correct in so holding.

76 On the hearing of this appeal, counsel for the appellant argued that the finding of the respondent on this point was unsupported by any evidence and, secondly, the mere fact that s. 13 of the Act of 1998 compelled compliance did not of itself mean that s. 21(1)(a) of the Act of 1997 could never apply. He submitted that the overall effectiveness of the inspection regime might well be hampered if information which would otherwise be volunteered by teachers would not be forthcoming for the very good reason that it is likely to wind up in the particular tuairisc scoile of that school and, in turn, if it were to be published more widely following a successful

Freedom of Information Act request in respect of the particular school report.

77 It was further suggested that the respondent, having failed to carry out an analysis on proper evidence under s. 21(a) or (b) of the Act of 1997 could not then proceed to apply the public interest consideration contained at s. 21(2).

78 The onus to produce evidence of prejudice fell on the first notice party and in the absence of same the respondent was entitled, under s. 34 of the Act of 1997, to hold against the first notice party. A mere assertion of an expectation of non-co-operation from teaching staff could never constitute sufficient evidence in this regard, particularly in the circumstances shown to apply, namely, that as a consequence of both circular no. 12/83 and s. 13 of the Act of 1998, there was no choice left to schools or their staff as to whether or not to co-operate with the first notice party's inspectors in terms of furnishing the information sought.

79 Nor do I believe that any exhaustive analysis conducted by reference to detailed evidence was necessary before the respondent could decide to apply the public interest provision of s. 21(2) of the Act of 1997 to direct release of the reports. Once there was some evidence before him as to the circumstances in which these reports are compiled, as undoubtedly was the case here, the well established principles of *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 make it clear that his decision is not to be interfered with. This assessment, which involved a balancing exercise between various competing interests, was one uniquely within his particular remit.

I would dismiss this ground of appeal

Section 26 of the Act of 1997

80 The trial judge also upheld the respondent on the "confidentiality" arguments and, again, I am in complete agreement with the trial judge on this issue.

81 Section 26(1)(a) of the Act of 1997 is triggered where information is given or imparted in confidence, so that the respondent's first task was to inquire and assess whether or not the material or information going into the tuairiscí scoile had that quality or not. It is agreed by both parties to the appeal that he applied correct legal principles, as set out by Megarry J. in *Coco v. A. N. Clark (Engineers) Ltd.* [1968] F.S.R. 415, in performing this function.

82 He took the position that while some of the views *might* have been imparted to the inspectors in confidence, he thought it unlikely given the purpose of the reports and the circumstances of their creation. However, he went further and based his decision on his own reading of the reports.

Having examined the contents of the reports, he was thus in a position to state that he was satisfied that they did not contain any information that could be said to have been imparted in circumstances imposing an obligation of confidence or having the necessary quality of confidence about it. He thus felt that by virtue of s. 26(2) of the Act of 1997 the exemption in s. 26(1) could not apply. He had earlier found that there was no agreement or enactment in relation to the matter which would bring s. 26(1)(a) into consideration.

83 In reaching his decision the respondent had careful regard to the fact that the reports were prepared by inspectors in the course of their statutory functions and that they represented the fruits of the inspectors' own opinions and observations formed during the course of their visits to the schools. He concluded, as he was entitled to do, that these opinions and observations were not imparted to them by anyone. He further noted that much of the information would, in any event, already have been in the possession of the first notice party and that it did not consist of private or secret matters.

I would also dismiss this ground of appeal.

Solicitors for the appellant: *Fawsitt*.

Solicitors for the respondent: *Mason Hayes and Curran*.

Solicitor for the first notice party: *The Chief State Solicitor*.

Solicitors for the second notice party: *Hayes*.

Paul Christopher, Barrister

In the matter of the **Freedom of Information Acts 1997 to 2003: Harold J. Gannon**, Appellant v. **The Information Commissioner**, Respondent [2006] IEHC 17, [2005 No. 12 MCA]

High Court 31st January, 2006

Administrative law – Freedom of information – Information Commissioner – Appeal on point of law – Review by Commissioner of refusal by Legal Aid Board to disclose records – Confidential information – Public interest in refusing request – Jurisdiction of court on appeal on point of law – Whether decision of Commissioner irrational or unreasonable – Whether inferences drawn by Commissioner from interpretation of documents incorrect – Whether appellant afforded fair procedures – Civil Legal Aid Regulations 1996 (S.I. No. 273) – Civil Legal Aid Act 1995 (No. 32) – Freedom of Information Act 1997 (No. 13) s. 26 – Freedom of Information (Amendment) Act 2003 (No. 9).

Section 26(1)(a) of the Freedom of Information Act 1997, as amended, provides as follows:-

> "Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if –
>
> (a) the record concerned contains information given to a public body in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body."

Section 26(3) of the Act of 1997 further provides that subs. (1)(a) shall not apply in a case where, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than refusing to grant the request concerned.

The appellant requested records from the Legal Aid Board concerning a third party's application to the Board for legal aid. The Board refused the request pursuant to ss. 22, 23, 26 and 32 of the Act of 1997. The reasons given to the appellant were, *inter alia*, that the records requested contained information which had been given to the Board in confidence and that the disclosure of the information was likely to prejudice the giving to the Board of further similar information by the same or other persons and that it was of importance to the Board that such further similar information should continue to be given to it.

The appellant sought a review of that decision by the respondent pursuant to s. 34 of the Act of 1997. The respondent, having had regard, *inter alia*, to the correspondence between the appellant and the Board and the appellant's submissions to the Board, affirmed the Board's decision to refuse to grant the request. The respondent reached

this decision having had regard to s. 26(1)(a) and having concluded that the records requested contained information that had been given to the Board in confidence. The respondent further had regard to s. 26(3) and concluded that the public interest in maintaining the confidentiality of the information outweighed the public interest in granting the request. The appellant appealed that decision pursuant to s. 42(1), claiming, *inter alia*, that the decision was erroneous in point of law in finding that s. 26(1)(a) applied to the records, that the decision was irrational and unreasonable in finding that the information contained in the records had been submitted in confidence and that the appellant had not been afforded fair procedures by the respondent.

Held by the High Court (Quirke J.), in dismissing the appeal, 1, that the jurisdiction of the High Court in considering an appeal against a decision of the Information Commissioner on a point of law was limited in the following manner; (a) the court could not set aside findings of primary fact unless there was no evidence to support such findings; (b) the court ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could have drawn; (c) the court could reverse such inferences, if the same were based on the interpretation of documents and the court should do so if such inferences were incorrect; and (d) the court could set aside a decision of a body, if the conclusion reached by the body showed that it had taken an erroneous view of the law.

Deely v. Information Commissioner [2001] 3 I.R. 349 followed.

2. That a decision of an administrative body would not be impugned as irrational or unreasonable unless a court was satisfied that either (a) there was no relevant material before the decision maker which could reasonably have given rise to the impugned decision or, (b) that the decision maker wholly failed to take into account relevant material or, (c) that the impugned decision flew in the face of fundamental reason and common sense.

O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 and *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 applied.

3. That s. 26(1)(a) and s. 26(3) of the Act of 1997, as amended, required the Information Commissioner to engage in a balancing exercise between competing interests in deciding whether the public interest would be better served by granting, than by refusing to grant, access to records and that such balancing exercise was wholly within the jurisdiction of the Commissioner.

Sheedy v. Information Commissioner [2004] IEHC 192, [2004] 2 I.R. 533 applied.

4. That the procedures provided for under the Act of 1997, as amended, amounted to fair procedures and were in accordance with the provisions of natural and constitutional justice.

5. That, in the context of s. 26(1)(a) of the Act of 1997, the word "confidence" meant a situation where one party ("a confider") imparted private or secret matters to another party ("a confidant") on the expressed or implied understanding that the communication was for a restricted purpose.

Re B. and Brisbane North Regional Health Authority (1994) 1 Q.A.R. 279 followed.

Cases mentioned in this report:-

Re B. and Brisbane North Regional Health Authority (1994) 1 Q.A.R. 279; (1994) 33 A.L.D. 295.

Deely v. Information Commissioner [2001] 3 I.R. 439.
O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39; [1992] I.L.R.M. 237.
Ryder v. Booth [1985] V.R. 869.
Sheedy v. Information Commissioner [2004] IEHC 192 [2004] 2 I.R. 533; [2005] 2 I.L.R.M. 374.
The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642; [1987] I.L.R.M. 202.

Motion on notice

The facts of the case have been summarised in the headnote and are more fully set out in the judgment of Quirke J., *infra*.

By originating notice of motion dated the 28th February, 2005, the appellant, pursuant to s. 42 of the Freedom of Information Act 1997, appealed the decision of the respondent communicated to the appellant by letter of the 23rd December, 2004, whereby the respondent refused to grant the appellant access to the information sought. The appeal was heard by the High Court (Quirke J.) on the 19th January, 2006.

The appellant appeared in person.

Niall Michel, Solicitor, for the respondent.

Cur. adv. vult.

Quirke J. 31st January 2006

1 This is an appeal by the appellant on a point of law, pursuant to s. 42(1) of the Freedom of Information Act 1997. His appeal is against a decision of the respondent to affirm an earlier decision of the Legal Aid Board ("the Board") to refuse him access to certain written records within the possession of the Board. The records relate to an application made on behalf of an applicant ("the third party") for free legal aid. Notice of the respondent's decision was delivered to the appellant by letter dated the 23rd December, 2004.

Background

2 By letter to the Board dated the 14th May, 2004, the appellant made a request to the Board pursuant to the Act of 1997 for access to:- "any and all documents (records) submitted by the … (third party) … and/or his legal or personal representative(s) to the … (Board)."

In his letter of request the appellant explained that a decision of the Board to grant legal aid to the third party had:- "adverse consequences on my pending legal action." He said that he was unclear how the decision had been reached.

3 By letter dated the 24th May, 2004, Mr. Bernard O'Shea, the appointed deciding officer under the Act of 1997 responded to the appellant's request. He advised that:- "I have decided to refuse you access to all of the records covered by your request. I am refusing your request under ss. 22, 23, 26 and 32 of the … (Act of 1997)."

The letter of response provided, *inter alia*, as follows:-

> "Section 26 information obtained in confidence.
>
> Section 26(1) provides amongst other things that the Board shall refuse to grant a request if the record concerned contains information given to the public body concerned in confidence and on the understanding that it would be treated by it as confidential and, in the opinion of the Board if disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body or disclosure of the information concerned would constitute a breach of duty of confidence provided by a provision of an agreement or enactment or otherwise by law. It is my opinion that the records which you seek are exempt under this section."

4 The appellant sought a review of the decision of the deciding officer. He delivered extensive written submissions to the Board's freedom of information unit.

5 By letter dated the 13th August, 2004, Mr. Pat Fitzsimons, the Board's director of human resources, wrote to the appellant advising that:-

> "In accordance with s. 14 of the Freedom of Information Act 1997, I have reviewed all of the records relating to your request and the decision notified to you by letter of the 24th May, 2004. I wish to advise you that following my review of the documentation, I can affirm the decision notified to you by letter of the 24th May, 2004."

6 By letter dated the 13th August, 2004, the appellant requested a review by the respondent of that decision. By letter dated the 1st September, 2004, the appellant was advised that the respondent had agreed to conduct a review.

7 By letter dated the 17th November, 2004, Ms. Ciara Burns, who is an investigator for the respondent, wrote to the appellant. She indicated that she had examined all of the correspondence between the appellant and the Board and the appellant's submissions to the Board. She noted that the

appellant had been invited to make a submission to the respondent but had chosen not to do so.

8 Ms. Burns advised that:-

> "It is my preliminary view that s. 26(1)(a) applies to the records. As you are probably aware, s. 26(1)(a) provides for the refusal of requests if the record concerned contains information given to the public body in confidence."

She continued:-

> "The records in this case are records provided by (third party) to the … (Board). The Commissioner interprets the term 'confidence' for the purposes of s. 26(1)(a) … by reference to the following definition which is derived from the law relating to a breach of duty of confidence: 'A confidence is formed whenever one party ("the confider") imparts to another ("the confidant") private or secret matters on the express or implied understanding that the communication is for a restricted purpose' (*Re B and Brisbane North Regional Health Authority* (1994) 1 Q.A.R. 279) … the Commissioner considers that, first, information given in confidence is concerned with private or secret matters rather than information which is trite or which is already in the public domain *i.e.* that it is necessary to establish that the information has the necessary quality of confidence. Second, the communication must be for a restricted or limited purpose. Third, there must be an understanding that the information is being communicated for a restricted purpose."

Referring to s. 26(3) of the Act of 1997, Ms. Burns stated that:-

> "it is my preliminary view that the public interest in release does not outweigh the public interest in the right to privacy of individuals and their right to correspond in confidence, with their legal advisors."

She concluded that:-

> "all of the records in the scope of this review are exempt and … there is no public interest in their release."

9 By letter dated the 7th December, 2004, the Board wrote to Ms. Burns advising, *inter alia*, that:-

> "the records furnished by … (the third party) to the Board were clearly furnished in confidence and that was self-evidently both … (the third party's) … and the Board's understanding generally."

The Board indicated in its letter that the relationship between the Board's solicitors and its clients was acknowledged to be a solicitor/client relationship which attracted "the 'badge of confidentiality' so that the imparting of information by a client such as …(the third party)… to the Board and its solicitors will, unless the contrary were capable of being shown, be considered to have been effected in confidence."

10 In her decision delivered by letter dated the 23rd December, 2004, the respondent adopted the earlier view of Ms. Burns and her interpretation of the term "confidence" for the purposes of s. 26(1)(a) of the Act of 1997. The respondent continued:-

> "I consider that disclosure would prejudice the giving to the body of further similar information from other persons in the future and it is important to the … (Board) that such further similar information should be continue to be given to it. I find that s. 26(1)(a) applies to the records."

Finally the respondent declared:-

> "I am aware of no public interest in this case which would justify the loss of privacy of the individual in question, and the consequent erosion of the expectation that recipients of legal aid would be treated in the same way as those who were in a position to pay for legal services."

11 By notice of motion dated the 28th February, 2005, the appellant appealed to this court against the respondent's decision.

Relevant legislative provisions

12 It is acknowledged by the parties that the decision of the respondent resulted from the exercise by her of her jurisdiction to conduct a review of the decision of the Board to refuse the appellant access to the documents sought. That jurisdiction was conferred upon her by the provisions of s. 34 of the Act of 1997.

13 For the purposes of the review the appellant enjoyed the presumption that the decision of the Board was not justified.

14 Section 43(3) of the Act of 1997, as amended, provides as follows:-

> "In the performance of his or her functions under this Act, the Commissioner shall take all reasonable precautions (including conducting the whole or part of a review under section 34 … otherwise than in public) to prevent the disclosure to the public or, in the case of such a review, to a party (other than a head) to the proceedings concerned of information specified in paragraph (a) or (b) of subsection (1) or matter that, if it were included in a record, would cause the record to be an exempt record."

Section 42(1) of the Act of 1997 (as amended) provides, *inter alia*, that:-

> "A party to a review under *section 34* or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision."

Section 6(1) of the Act of 1997 (as amended) provides as follows:-

"Subject to the provisions of this Act, every person has a right to and shall, on request therefor, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access."

Section 8(4) of the Act of 1997 provides that:-

"Subject to the provisions of this Act, in deciding whether to grant or refuse to grant a request under section 7 –

(a) any reason that the requester gives for the request, and

(b) any belief or opinion of the head as to what are the reasons of the requester for the request,

shall be disregarded."

Section 26(1)(a) of the Act of 1997 provides as follows:-

"Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if –

(a) the record concerned contains information given to a public body in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body."

Section 26(3) of the Act of 1997, provides that the exemption referred to in s. 26(1)(a) of the Act:-

"shall not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under *section 7* concerned."

The appellant's case

15 During the course of these proceedings the appellant stated that he wished to confine his claim for access to documents which he described as "financial documents". These documents comprise preliminary documentation provided by the third party to the Board in support of his application for legal aid. He argues that the documents to which he now seeks access were not provided to the Board by the third party in confidence. Accordingly, he says, the Board's decision to deny him access is irrational and unreasonable.

16 The appellant contends that nothing on the face of the documents provided by the Board to applicants for legal aid suggests that the Board will deal with the information provided to the Board on a confidential basis. He says that there is no duty upon the State to treat information received from applicants for such State assistance in confidence. He says that the documents which he seeks, do not, accordingly, enjoy the exemption provided by s. 26(1)(a) of the Act of 1997, as amended.

17 He says that there is no reason for the court to believe that the disclosure of the information contained within the documentation would be likely to prejudice the provision of similar information from future legal aid applicants.

18 He argues further that the provisions of s. 32(2) of the Civil Legal Aid Act 1995 supports his contention that the information contained in the documents which he seeks was not provided to the Board in confidence. He says that the respondent failed to apply any appropriate standard to the review which she undertook and erred in finding that the documents attracted solicitor/client privilege.

19 Finally, the appellant argues that he was denied fair procedures contrary to the provisions of natural and constitutional justice.

Decision

20 The principles applicable to appeals pursuant to the provisions of s. 42(1) of the Act of 1997 are those identified by the High Court (McKechnie J.) in *Deely v. Information Commissioner* [2001] 3 I.R. 439 in the following terms at p. 452:-

> "There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or *via* a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-
>
> (a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;
>
> (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
>
> (c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;
>
> (d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision."

Irrationality

21 In this case the appellant has argued that the decision of the respondent was unreasonable or "irrational" in the sense identified by the courts within this jurisdiction in cases such as *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642. I do not accept that contention.

22 There was adequate material before the respondent to enable her to make the determination which she made. That determination cannot be described as a decision which "flies in the face of fundamental reason and common sense" (see the judgment of Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 at p. 658).

23 The respondent found that s. 26(1)(a) applies to the documents concerned.

She adopted the preliminary view of her investigator Ms. Burns. She was:-

> "satisfied that the records in this case have the necessary quality of confidence in that they were provided in circumstances imposing a duty of confidence."

24 In making that determination she had before her the evidence of the Board that the documents were furnished in confidence and that this was:-

> "self evidently both the … (third party's) … and the Board's understanding generally, as a result of the provisions of the of the Civil Legal Aid Act 1995, and the examination of the records themselves."

25 This court has also had the opportunity to examine the documents.

26 It is well settled that the courts will not intervene with the decisions of administrative bodies on grounds of unreasonableness or irrationality unless satisfied either; (a) that there was no relevant material before the decision maker which could reasonably have given rise to the impugned decision, or (b) that the decision maker wholly failed to take into account relevant material or (c) that the impugned decision "flies in the face of fundamental reason and common sense".

27 None of those considerations apply in the instant case. Accordingly I am quite satisfied that the decision sought to be impugned was not "irrational" or unreasonable in the sense which would render it unlawful or invalid for the purposes of this appeal.

Section 26(1)(a) of the Act of 1997

28 The respondent correctly applied a presumption of non-justification to the decision of the Board not to grant access to the documents sought.

29 Her decision to refuse access was based upon her finding that s. 26(1)(a) applied to the documents.

30 The appellant contends that her finding was erroneous in law.

31 Section 26(1)(a) requires refusal to grant access where information is contained in documents given to a public body:-

(1) in confidence,
(2) on the understanding that the information will be treated as confidential,
(3) where disclosure will be likely to prejudice the giving of further similar information by the same or other persons and
(4) where it is of importance that such further or similar information should continue to be given to the public body in question.

Confidentiality ((1) and (2))

32 The respondent adopted the preliminary view of her investigator Ms. Burns. She concluded that the documents in question had been provided to the Board by the third party in confidence. She concluded also that the information within the documents had been provided on the understanding that it would be treated as confidential by the Board.

33 In arriving at that decision the respondent interpreted the term "confidence" for the purposes of s. 26(1)(a) by referring to a decision of the Information Commissioner in Queensland, Australia in "*Re B and Brisbane North Regional Health Authority* (1994) 1 Q.A.R. 279.

34 That case was concerned with the terms of s. 46(1)(b) of the Freedom of Information Act 1992 in Queensland which provided, *inter alia*, that documentary information (described as "matter") is exempt from disclosure in Queensland if:-

"(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could be reasonably expected to prejudice the future supply of such information, unless its disclosure would, on balance be in the public interest."

The Commissioner in that case adopted the following definition of the word "confidence" for the purposes of that section:-

> "A confidence is formed whenever one party ("the confider") imparts to another ("the confidant") private or secret matters on the expressed or implied understanding that the communication is for a restricted purpose."

That definition itself derived from an essay "*Breach Of Confidence*" by F. Gurry in a work entitled "*Essays in Equity*" published by the Law Book Company in 1985 in Australia. The definition was described as the "existing law" within Australia at the time of publication.

35 The respondent adopted that definition of the word "confidence" for the purposes of 26(1)(a) of the Act of 1997. I am satisfied that she was correct to do so.

36 Whether information is "given to the public body concerned in confidence and on the understanding that it would be treated by it as confidential" (see s. 26(1)(a) of the Act of 1997, as amended) is a question of fact. Undisputed evidence that the information was regarded and treated as confidential by and between supplier and recipient public body could certainly ground a lawful decision that the information was communicated in confidence - (see *Ryder v. Booth* [1985] V.R. 869.

37 The respondent found as a fact that the documents were provided to the Board in confidence and on the understanding that it would be treated by the Board as confidential.

38 When making that finding of fact the respondent had before her a number of documents including the Board's letter dated the 7th December, 2004, which advised that the records in issue had been furnished in confidence and on the understanding that it would be treated as confidential.

39 The respondent did not base her decision upon the solicitor/client relationship which existed between the third party and solicitor provided to him by the Board. She took that relationship into account in making her finding of fact.

40 She also had the opportunity to consider all of the other relevant documents and their contents. She was entitled to reach the conclusion which she reached. This court may not interfere with her finding.

Disclosure likely to prejudice the provision of similar information in the future ((3) and (4))

41 The review conducted by the respondent pursuant to the provisions of s. 34 of the Act of 1997 correctly comprised a *de novo* review of the appellant's request for access.

42 The provisions of s. 26(1)(a) of the Act of 1997, as amended, require the formation of an opinion as to whether access to documents:-

> "would be likely to prejudice the giving to the body of further similar information from the same person or other persons" and whether " it is of importance to the body that such further similar information … should continue to be given to the body."

The respondent in her letter dated the 27th December, 2004, indicated that she had formed the opinion that disclosure would prejudice the provision of further information and that it was important that such further similar information should continue to be given to the Board.

43 The formation of that opinion was entirely within the jurisdiction of the respondent. The courts will not interfere with the exercise of that jurisdiction in the absence of irrationality in the sense outlined earlier. There was adequate relevant material before the respondent to enable her to form that opinion.

44 The Board is a body corporate with perpetual succession established by the Oireachtas pursuant to the provisions of s. 3 of the Civil Legal Aid Act 1995. The Act is described (in its preamble), as "an Act to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases."

45 The provisions of the Act (including ss. 24, 26 and 29) and the provisions of the Civil Legal Aid Regulations 1996 have the combined effect of empowering the Board to carry out assessments of the financial eligibility of applicants for legal aid by reference to their disposable income, disposable capital and general means.

46 It was open to the respondent to form the opinion that it was of importance to the Board that such information should be given, on an ongoing basis, to the Board from applicants for legal aid.

47 It was also open to the respondent to form the opinion that the provision of public access to such personal, private and sensitive information would be likely to inhibit and discourage applicants for legal aid from providing that information to the Board in the future.

48 It follows that the respondent lawfully formed the requisite opinion pursuant to the provisions of s. 26(1)(a) of the Act of 1997, as amended.

49 It follows further that she correctly found that the documents sought were documents to which s. 26(1)(a) of the Act of 1997, as amended, applied.

50 The appellant, relying upon the provisions of s. 26(3) of the Act of 1997, contends that the public interest is better served by granting him access to the documents then by refusing to grant that access.

51 The "public interest" identified by him is the right of the public to know how public funds are being disbursed. I do not accept his contention. The documents concerned have been lawfully found to have been provided in confidence on the understanding that they would be treated by the Board as confidential.

52 Although there is a valid public interest in ensuring the proper distribution of public funds there was and is also a right vested in the third party to have his privacy and the confidential character of his private personal information respected and protected.

53 The appropriate exercise by the respondent of the jurisdiction conferred upon her by s. 26(1)(a) and s. 26(3) of the Act of 1997 required a balancing exercise between competing interests. That exercise was entirely

within the jurisdiction of the respondent (see the judgment of the Supreme Court (Kearns J.) in *Sheedy v. Information Commissioner* [2004] IEHC 192, [2004] 2 I.R. 533). There was adequate material before her to enable her to decide as she did.

54 The court will not interfere with her conclusion that:- "I am aware of no public interest in this case which would justify the loss of privacy of the individual in question and the consequent erosion of the expectation that recipients of legal aid would be treated in the same way as those who were in a position to pay for legal services."

Fair procedures

55 The appellant contends that in arriving at her decision the respondent denied him fair procedures contrary to the provisions of natural and constitutional justice.

56 That argument cannot be sustained. The procedures provided for the benefit of applicants for access to records under the Act of 1997 are those contained within the Act itself. They were applied and followed scrupulously by the Board and by the respondent throughout all phases of the appellant's requests and inquiries. At each stage of each process the appellant was acquainted with the remedies available to him under the Act. He was provided with ample opportunity to be heard and to make submissions. He was provided with the decisions of the appropriate persons together with reasons for those decisions within the time limits provided by the Act.

57 The Act has not been challenged by the appellant on grounds of constitutional infirmity. It enjoys the presumption of constitutionality.

58 It follows that I am satisfied that the appellant was not denied fair procedures and that the decision of the respondent was made in accordance with the provisions of natural and constitutional justice.

59 It follows further that the appellant's appeal is dismissed.

Solicitors for the respondent: *Mason Hayes & Curran.*

Peter O'Brien, Barrister

Westwood Club, Appellant v. **The Information Commissioner**, Respondent and **Bray Town Council**, Notice Party [2014] IEHC 375, [2013 No. 176 MCA]

High Court 15th July, 2014

Freedom of Information – Access to records – Control – Commercially sensitive information – Financial records of private company – Presumption in favour of disclosure – Statutory appeal – Jurisdiction of court – Whether records of company under control of public body – Whether release of information prejudicial to competitive position of company – Whether burden of proof upon applicant to show why records should be released – Whether release of information justified by public interest – Freedom of Information Act 1997 (No. 13), ss. 2 and 27.

Section 2(5)(a) of the Freedom of Information Act 1997 provides that:-

> "a reference to records held by a public body includes a reference to records under the control of the body."

Section 27(1)(b) of the Act of 1997 provides that the head of a public body may refuse to grant a request for a record under s. 7 of the Act if the record contains:-

> "financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation."

Section 27(1)(b) is subject to s. 27(3) of the Act of 1997 which provides, *inter alia*, that:-

> "… *subsection (1)* does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under *section 7* concerned."

A company was set up by a resolution of the notice party in 2007 to build a pool and leisure centre on the notice party's lands with a loan from the notice party of approximately €10.5 million. The 2010 accounts of the company stated that the notice party would not be seeking repayment of the loan in the foreseeable future. The leisure centre was originally occupied by the company without any lease and subsequently under a lease from the notice party for uneconomic rent. The notice party owned the entire share capital of the company and two current employees and one former employee of the notice party were directors of the company. Representatives elected to the notice party constituted half of the company's advisory committee.

In order to establish the funding relationship between the notice party and the company, the appellant requested from Wicklow County Council the financial records of the company for 2008 and 2009 and all records held by the notice party in relation to it. This request was refused and the appellant appealed to the respondent.

The investigator for the respondent advised the appellant by letter of her preliminary view that the request for access be refused. The investigator considered that the company was not under the notice party's control and therefore that records held by the company were not subject to the Act of 1997. In relation to records held by the notice party in its capacity as shareholder, the investigator considered the request should be refused pursuant to s. 27(1)(b) of the Act of 1997 as release of the records could prejudice the company's competitive position. The investigator also considered s. 27(3) and concluded that release of the details at issue would in no way serve the public interest. The investigator's letter invited the appellant to make any submission it wished but stated, *inter alia*, that the onus lay on the appellant to demonstrate that the records requested did not contain information that if released could prejudice the company's competitive position, or alternatively that the public interest warranted the release of the requested information. The appellant did not accept the preliminary view of the investigator and made submissions to the respondent. The respondent's final decision rested on the preliminary view of the investigator and upheld the refusal of the request.

The appellant appealed to the High Court, pursuant to s. 42 of the Act of 1997.

Held by the High Court (Cross J.), in allowing the appeal, 1, that while there was a presumption in favour of disclosure in the Act of 1997 there was no absolute right to disclosure. The burden of proof lay in favour of disclosure and the public body at all times carried the burden of demonstrating why the documents should not be released.

Rotunda Hospital v. Information Commissioner [2011] IESC 26, [2013] 1 I.R. 1 applied.

2. That the remit of the court in considering an appeal on a point of law was as follows:- (a) it could not set aside findings of primary fact unless there was no evidence to support such findings; (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones that no reasonable decision making body could draw; (c) it could, however, reverse such inferences if they were based on the interpretation of documents and should do so if incorrect; and (d) if the conclusion reached by such bodies showed that they had taken an erroneous view of the law, then that was also a ground for setting aside the resulting decision.

Sheedy v. Information Commissioner [2005] IESC 35, [2005] 2 I.R. 272 applied.

Deely v. Information Commissioner [2001] 3 I.R. 439 followed.

3. That a mistake or error of law in the decision would not itself result in that decision being quashed. It was only when the mistakes were material that such a decision could be made.

4. That the reliance by the respondent on the reasoning of the investigator in its final decision without repudiation of the legally erroneous statement contained in her preliminary view, namely that it was incumbent upon the appellant to show why the documents should be released, was fatal to the legality of the decision to refuse the request.

5. That "control" included the real strategic control of one entity by the other and the financial nexus between them. Directors of a "controlled" company were always obliged to act pursuant to the interest of that company in accordance with company law and accordingly the fact that one company was a separate legal entity from the other could not be the definitive test of the matter; neither could the level of day to day interference be definitive.

6. That the court in a statutory appeal, no more than in a judicial review, should not lightly interfere with any findings of fact. The law allowed a wide margin of discretion to decision makers. The respondent was the person who had been charged at law with the decision making of the relevant matters and had expertise in so deciding. It was not for the court to impose its standards of excellence or otherwise upon what decision makers should decide or how they should decide it.

Cases mentioned in this report:-

Deely v. Information Commissioner [2001] 3 I.R. 439.
Fyffes plc v. DCC plc [2005] IEHC 477, [2009] 2 I.R. 417.
Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34; [1998] E.L.R. 36.
Mara v. Hummingbird Ltd. [1982] I.L.R.M. 421.
Minister for Enterprise v. Information Commissioner [2006] IEHC 39, [2006] 4 I.R. 248.
O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39; [1992] I.L.R.M.237.
Premier Periclase Ltd. v. Commissioner of Valuation (Unreported, High Court, Kelly J., 24th June, 1999).
Rotunda Hospital v. Information Commissioner [2011] IESC 26, [2013] 1 I.R. 1; [2012] 1 I.L.R.M. 301.
Sheedy v. Information Commissioner [2005] IESC 35, [2005] 2 I.R. 272; [2005] 2 I.L.R.M. 374.

Originating notice of motion

The facts have been summarised in the headnote and are more fully set out in the judgment of Cross J., *infra*.

By originating notice of motion dated the 19th June, 2013, the appellant sought an order discharging the decision of the respondent, various declaratory reliefs and an order remitting the appellant's request for further consideration by the respondent in accordance with law.

The appeal was heard by the High Court (Cross J.) on the 29th and 30th April, and the 1st and 2nd May, 2014.

David Conlan Smyth S.C. (with him *John Kenny*) for the appellant.

Catherine Donnelly for the respondent.

Damien Keaney for the notice party.

Cur. adv. vult.

Cross J. 15th July, 2014

[1] In these proceedings, Westwood Club ("the appellant"), is challenging a decision of the respondent ("the Commissioner") which affirmed the refusal of the notice party, Bray Town Council ("the Council"), to grant access to the appellant to any records held by the Council concerning Bray Swimming Pool and Sports Leisure Centre Limited ("Shoreline").

[2] Shoreline was set up by the notice party by a resolution dated the 17th April, 2007. The company was at that stage in the process of being formed for the purposes of operating a swimming pool. A contract for construction was signed on the 12th April, 2007, endorsed by the Cathaoirleach of the notice party. The minutes of the notice party state that the reason that Shoreline was being set up was to operate leisure facilities:-

> "… so as not to become a drain on Council resources. To be in a position to engage staff without the restrictions on employee numbers that are applicable to local authorities and as it is financially advantageous from a taxation perspective."

[3] The minutes went on to state that during the construction of the leisure centre, the number of directors of Shoreline would be limited to facilitate speedy decision making and thereafter it was stated that a board would be formed consisting of directors of nominating bodies and that such "nominating bodies would be approved by the Town Council. It is also envisaged that the board will include a number of members of Bray Town Council". Part of the funding was awarded by the Department of Arts, Sport and Tourism for the project with the balance being funded from the Council and there was a decision of the notice party "to guarantee its wholly owned subsidiary". Over €10 million was, in fact, provided to Shoreline by way of a loan from the notice party. The leisure centre was built on the notice party's land and occupied by Shoreline originally without any lease and subsequently a lease was granted to Shoreline by the notice party at what I accept to be uneconomic rent.

[4] In order to establish the funding relationship between Shoreline and the notice party, Mr. Paul Begley, on behalf of the appellant, requested access to the financial records of Shoreline for 2008 and 2009 by letter dated the 21st April, 2011. The request was sent to the secretary of Shoreline at the notice party's civic offices. The request sought a detailed breakdown of income and expenditure for 2008 and 2009.

[5] This late request was replied to by the Freedom of Information Officer for Wicklow County Council by letter dated the 10th May, 2011, who informed the appellant that as Shoreline was a private company, it was not

subject to the provisions of the Freedom of Information Act 1997 ("the Act").

[6] By letter dated the 31st May, 2011, the appellant advised the Freedom of Information Officer that it was amending its request to all records held by the notice party in relation to Shoreline. The letter referred to the fact that the notice party owned 100% of the share capital of Shoreline and that the three directors were all local authority employees.

[7] By letter dated the 29th June, 2011, the Freedom of Information Officer for Wicklow County Council responded to the appellant stating:-

> "The reason for my refusal is that any records held by Bray Town Council relating to the finances of Bray Swimming Pool, Sports and Leisure Centre (t/a Shoreline) are held by staff members of Bray Town Council who are officers of the company and not held by Bray Town Council *per se*. Accordingly, this information is held by a private company which is not subject to the provisions of the Freedom of Information Acts."

[8] The appellant then exercised its right of appeal by letter of the 1st July, 2011, to the County Manager of Wicklow County Council which appeal noted, *inter alia*, that the appellant failed to see how Bray Town Council as 100% shareholder and owner held no financial records of the company.

[9] In response to this appeal, Ms. Lorraine Gallagher, Acting Director of Services for the Council responded by letter dated the 26th July, 2011, which summarised correspondence to the then date and gave reasons for affirmation of the original decision which may be summarised as:-

(a) Shoreline is a private limited company which operates as a commercial company, it is not employed by or delivering services to the notice party, it delivers service to its members. A private company is a separate legal entity and therefore not subject to the provisions of the Act.

(b) Under the Act a company which carries out services under contract to public bodies, for example, a cleaning company, comes within the ambit of the Freedom of Information regime but only to the extent that those records of that company relate to services actually provided to the public body.

(c) The Acts also stipulates that a company which is funded directly or indirectly by a government minister comes within the Freedom of Information regime. While the construction of the pool was part funded by the Department of Arts, Sports and Tourism it noted "no funds were paid to this company by the Department. There-

fore this company is not funded directly or indirectly by a government body and is not subject to the provisions of the Freedom of Information Acts".

(d) Shoreline has entered into a lease agreement with the notice party to operate the facility, it acts as a private company and engages in all normal day to day operational issues of such a facility.

(e) The record specifically requested and not held by the notice party, the published accounts of Shoreline, are publicly available on the company's website. Any records held by officials of the notice party relating to the finances of Shoreline are held by them in their capacity as officers of the company and not of the notice party; "information is held by a private company and is not subject to the provisions of the Freedom of Information Acts".

[10] This refusal was appealed to the office of the Information Commissioner (the respondent) by the appellant by letter dated 10th August, 2011. The appeal noted that the directors of Shoreline were obliged to prepare financial statements and to keep proper books of accounts and noted that the company is directly "owned, controlled and funded by Bray Town Council". The appeal noted that public money funded the company and built the facilities, which are on Council land. So the "Council must hold detailed financial information on its subsidiary".

[11] The respondent accepted the appeal for consideration and invited submissions and the appellant submitted that the information requested was information held by the notice party about Shoreline rather than information held by Shoreline itself. The appellant further noted that the facility operated by Shoreline was built by the notice party at a cost of approximately €10.5 million and that the completed pool was then transferred to Shoreline. The appellant noted the 2010 accounts of Shoreline which stated:-

> "There is a loan due to Bray Town Council of €10,777,384 … Council will not be seeking repayment of this loan in the foreseeable future."

[12] The appellant further noted that the notice party owned 100% of the share capital of Shoreline and that Shoreline was set up by the notice party to allow the Council to operate a swimming pool and ancillary facility. Furthermore, it noted the fact that three of the directors of Shoreline were employees of the Council and added that it was implausible for the Council to assert that it did not have records of Shoreline just because Shoreline had legal independence.

[13] By letter dated the 28th February, 2013, the investigator on behalf of the respondent advised that it had come to a preliminary view that the request for access would be refused and this letter noted that the companies were separate legal entities to those who owned and managed them and that ownership of the company does not entail any legal assumption of control by the Council over the company. The preliminary view set out in detail the basis on which the respondent's investigator, Ms. Lyons, came to her view and invited any comments to be made in response by three weeks' time.

[14] The reason the investigator, Ms. Lyons, came to her preliminary view was in the main incorporated in the terms of the final decision of the respondent, the subject of this appeal. It is important to make certain references to the main points of this letter. The investigator on behalf of the respondent divided the potential records being sought by the appellant into (a) the records of Shoreline; and (b) any records held by the Council in its capacity as a shareholder. That division of the appellant's request was a useful one and is followed in this judgment.

[15] In relation to the records of Shoreline itself, the investigator held that the Council did not control "the day to day operations of the company" and came to the view that the company was "in business on its own account" and that any records held by the company other than those it was required to submit to the Council as *per* s. 159 of the Companies Act 1963 were not under the Council's control and it followed that the records could not be deemed to be subject to the Act.

[16] In relation to those records held by the Council in its capacity as shareholder, the investigator considered whether these records should be refused pursuant to s. 27(1)(b) of the Act and whether they might contain financial, commercial, scientific or technical or other information "whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation".

[17] In this regard, the investigator concluded that the standard of proof to show that the information "could" prejudice the competitive position of the company was "very low".

[18] The investigator noted that the Council held records in its capacity as shareholder pursuant to the requirements of s. 159(1) of the Companies Act 1963, and considered that those records were in principle subject to the Act as they are "held" by the Council. The investigator concluded that there are some differences between the draft unabridged documents sent to

the Council (which contain a breakdown in Shoreline's profits and losses accounts and tangible and fixed assets for the year 2008 and 2009 as well as the details of employee numbers and costs for 2009) and that Shoreline contended that the release of this information, though it dates from 2008 and 2009, could enable competitors to understand how its business was run and accordingly, the investigator accepted this submission from the Council and the company and accepted that the release could prejudice the company's competitive position.

[19] The investigator then considered the provisions of s. 27(3) which provides that information might be still released if the public interest in its release outweighed the public interest in withholding it and referred to the comments of the Supreme Court in *Rotunda Hospital v. Information Commissioner* [2011] IESC 26, [2013] 1 I.R. 1 and accepted what undoubtedly were the *obiter* comments of that court in relation to the consideration of public interest. The investigator concluded "the release of details at issue will not in way serve the public interest in ensuring the openness and accountability of same". The fact that the company was set up and is owned by the Council is, she concluded, irrelevant in this regard.

[20] The investigator then stated that if the appellant accepted her views the application fee of €150 would be refunded but if they did not accept that view that:-

> "It is open to you to make submissions to the Commissioner as to why this is the case. Any submission you wish to make will be taken into account by the Commissioner in arriving at her decision. It is important to note, however, that the onus lies on you as requestor of the records at issue to demonstrate that further records of relevance to your request are controlled by the Town Council or relate to a contract for service. In respect of those records held by the Town Council in its capacity as shareholder of the company, the onus lies on you to demonstrate that they do not contain information that if released could prejudice the company's competitive position, or alternatively that the public interest warrants the release of the company's commercially sensitive information. I would anticipate receipt of those comments by the 21st March, 2013."

[21] The appellant did not accept the preliminary view as outlined above and made submissions through its financial controller, Mr. Begley in this matter and in a related similar decision of the respondent in relation to another swimming pool operated by Kildare County Council. It is fair to say that the submissions of the appellant in response to the preliminary view did not really engage with the preliminary view of the respondent.

[22] On the 29th April, 2013, the respondent made its decision, the subject matter of this appeal, and found in favour of the Council's refusal on the basis that "certain records of relevance to the request as held by the Council contained commercially sensitive information that was not required to be released in the public interest, and on the basis that any further records of relevance to the request as held by the company were not under the Council's control as such as they could be deemed to be held by the Council further to s. 2(5)(a) of the Act".

[23] The decision maker firstly dealt with the issue of records held by the Council in its capacity as shareholder and secondly the other records in relation to the question of the Council's control.

[24] I will deal with the decision in reverse order to conform with the order of the consideration of the documents in the preliminary decision.

[25] Dealing with the issue of the Council's control of the company, the respondent referred to the preliminary views referred to above and indicated that the company was a separate legal personality and referred to the issue as being the extent to which the alleged controller "takes an active role in that company's day to day operation". The respondent found that the payment of grant monies in respect of the construction of the pool on council land and the advertisement of the pool on the Council's website do not of themselves prove that the Council controlled the company's day to day operations.

[26] Reference was made to the judgment of the High Court in *Minister for Enterprise v. Information Commissioner* [2006] IEHC 39, [2006] 4 I.R. 248 which found, at p. 264, that the Department did not control the City Enterprise Boards as the board was "in business on its own account subject to limited and defined reporting requirements that do not include the information requested". However, the respondent then added:-

> "Thus it seems to me that the relevant former and current local authority staff make (such) decisions in their capacity as officers of the company rather than the local authority officials. Thus I do not accept that the Council can be said to control those board decisions (in which regard I also note that strategic rather than the operational nature thereof). Further, neither does it seem that the Town Manager or Town Council's elected members have any role in approving the board's decisions, other than deciding on matters that are required to be taken at a general meeting."

[27] The respondent then specifically referred to the preliminary decision made by the investigator to the effect that the company was "in business on its own account". The respondent accepted the arguments that

the Council did not control the company or have any role in its day to day operation and that any records held by the company could not be deemed to be held by the Council further to s. 2(5)(a) of the Act.

[28] In relation to those records held by the Council in its capacity as a shareholder, the respondent refused this request on the same basis as the preliminary decision, namely that in the first place she found that they contained financial information whose disclosure "could reasonably be expected to result in a material or financial loss or gain to the person to whom the information relates or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation" (this is, in effect, a repetition of the provisions of the Act). Again, the respondent accepted the view in the preliminary letter that the standard of proof was very low and otherwise accepted the argument set out in this preliminary view letter.

[29] The respondent then considered the issue of public interest as she is required to do so under s. 27(3) of the Act. In relation to the other category of documents, those held directly by the Council and, *prima facie*, subject to the Act, the relevant issue was the question of the public interest.

[30] When dealing with the issue of public interest, reference again was made to the reasoning in the preliminary view letter and the previously referred to comments in the Supreme Court, in *Rotunda Hospital v. Information Commissioner* [2011] IESC 26, [2013] 1 I.R. 1, at p. 76, that the public interest was described as "a true public interest recognised by means of well known and established policy, adopted by the Oireachtas or by law" which must be distinguished from a private interest for the purpose of s. 27(3) of the Act.

[31] The respondent added:-

> "The [Freedom of Information] Act itself recognises the public interests in ensuring the openness and accountability of public bodies as to how they conduct a business, and in ensuring that people can exercise their rights under the Freedom of Information Act. However, s. 27 of the Act also recognises a public interest in safeguarding an operation's ability to carry on its business without inappropriate interference from competition, which could arise by disclosing its commercially sensitive information to the world at large."

[32] The respondent again adopting the reason in the preliminary view concluded on this point:-

> "Insofar as there is a public interest in the release of commercially sensitive information regarding a limited company that is not subject to the [Freedom of Information] Act, I am satisfied that this has been ad-

equately met by the various requirements of company legislation. On the other hand, in my view, the low standard of proof that is required to be met in order for s. 27(1)(b) to apply, recognises that the public interest in ensuring that the release of material under [Freedom of Information] does not impact inappropriately on commercial interests. On balance, therefore, I accept and find that the public interest weighs in favour of withholding the details in issue."

The statutory appeal

[33] This is a statutory appeal by the applicant. The relevant statutory provisions in relation to this appeal would seem to be as follows. Section 2(5)(a) of the Act of 1997 provides that:-

"(a) a reference to records *held* by a public body includes a reference to records *under the control of the body*" (emphasis added).

[34] Section 6 provides that:-

"(1) Subject to the provisions of this Act, every person has a right to and shall, on request therefor, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access.

[…]

(7) Nothing in this section shall be construed as applying the right of access to an exempt record."

[35] Section 7(1) provides that a person who wishes to exercise a right of access is required to make a request in writing.

[36] Section 27(1)(b) states that a public body may refuse to grant a request under s. 7 if the record contains:-

"financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or *could prejudice the competitive position of that person in the conduct of his or her profession or business* or otherwise in his or her occupation" (emphasis added).

[37] Section 27(1)(b) is subject to s. 27(3) which provides:-

"Subject to *section 29*, *subsection (1)* does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under *section 7* concerned."

[38] Pursuant to ss. 34(1)(a), 34(2) and 14 of the Act, the respondent may review a public body's decision to refuse to grant a request.

[39] Following the review, the respondent may affirm or vary the decision or annul the decision or make such other decision as they consider proper.

[40] Under s. 42 of the Act, a party to a review before the respondent or any other person affected by the decision may appeal to the High Court on a point of law from that decision.

[41] It is accepted by both the appellant and respondent that there is a presumption in favour of disclosure and that the default position is one of disclosure. In *Sheedy v. Information Commissioner* [2005] IESC 35, [2005] 2 I.R. 272 Fennelly J. stated at p. 275:-

> "[3] The passing of the Freedom of Information Act 1997 constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers."

[42] In a number of cases including *Sheedy v. Information Commissioner* [2005] IESC 35, [2005] 2 I.R. 272, judges have referred to the long title of the Act being "an act to enable members of the public to obtain access, to the greatest extent possible, consistent with the public interest and the right of privacy, to information in possession of public bodies".

[43] The appellant submits that at no point did the respondent "show any awareness of the presumption in favour of disclosure in its decision".

[44] I do not find that that submission is valid. On a number of occasions, the respondent, without specifying or restating the presumption of disclosure in her analysis of the provision of s. 27 in relation to public interest and otherwise, did indeed recognise the public interest in ensuring the openness and accountability of public bodies. I do not find the respondent erred in this regard.

[45] Furthermore, it is clear, rightly or wrongly, that the respondent did analyse the relationship between Shoreline and the Council in relation to the issue of control.

[46] The respondent relies upon the decision of Macken J. in *Rotunda Hospital v. Information Commissioner* [2011] IESC 26, [2013] 1 I.R. 1 to the effect that the Act does not create an absolute right to disclosure. I accept that proposition that while there is a presumption in favour of disclosure there is no absolute right to disclosure.

[47] The appellant argued that the burden of proof to justify the non-release of documents always rests on the body which is refusing the request. The respondent in her submissions does not dispute this. I find that throughout the various deliberations of the respondent, it is reasonably clear that at no stage, save for one important exception which will be discussed below, was there any issue of the burden of proof shifting to the appellant.

The applicable law

[48] In *Deely v. Information Commissioner* [2001] 3 I.R. 439, McKechnie J. in the High Court held that in an appeal such as this, the onus of proving that the decision of the respondent was erroneous in law rests on the appellant and he outlined, at p. 452, the remit of a court in considering an appeal such as this on a point of law, as follows:-

> "(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;
> (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
> (c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;
> (d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision: see, for example, *Mara v. Hummingbird Ltd*. [1982] I.L.R.M. 421, *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Premier Periclase Ltd. v. Commissioner of Valuation* (Unreported, High Court, Kelly J., 24th June, 1999). However, an Income Tax Appeals Commissioner is quite a different statutory creature than is the Commissioner under the Act of 1997 and his conception likewise. So also is the Chief Appeals Officer in the social welfare case as, of course, is the Valuation Tribunal. These are but examples of bodies, tribunals and statutory *persona* from whom the superior courts have addressed references purely on points of law. There are of course many others. In this case however, it is unnecessary to express any view as to whether or not a court under s. 42 is so circumscribed. This because there is no challenge and never has been to any of the material facts as alleged by the notice party,

> or and obviously of more immediate importance, to the findings made by and upon which the appeal Commissioner arrived at his decision. Therefore I would prefer to express no concluded view on this point."

[49] The principles were endorsed by Fennelly J. in the Supreme Court in *Sheedy v. Information Commissioner* [2005] IESC 35, [2005] 2 I.R. 272. In *Sheedy v. Information Commissioner* [2005] IESC 35, Kearns J., at p. 294, stated in relation to McKechnie J.'s summary in *Deely v. Information Commissioner* [2001] 3 I.R. 439:-

> "[56] … This is a helpful résumé with which one would not disagree, but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect and the essence of this case is to determine whether the interpretation given first by the respondent and later by the High Court (Gilligan J.) to s. 53 of the Education Act 1998 was correct or otherwise."

I accept the law as stated above in *Deely v. Information Commissioner* and as clarified in *Sheedy v. Information Commissioner* [2005] IESC 35 as being a proper description of my jurisdiction in this appeal.

The documents

[50] As indicated above, the respondent approached various documents being sought by the appellant under two distinct headings, namely:-

(a) Those documents which Shoreline sent to the notice party over and above the documents which a company is ordinarily obliged to supply to the Companies Registration Office ("CRO") which documents were held to come within the scope of the appellant's request but the records were refused for release because of the issue of confidentiality.
(b) Secondly, documents created by Shoreline were refused because of the lack of control by the Council over Shoreline as found by the respondent.

1. Documents directly held by the notice party

A. The issue of confidentiality

[51] It is accepted that certain documents are held by the notice party directly being certain financial statements which Shoreline sent to the notice party.

[52] In relation to these documents, the respondent found against the appellant under two separate tests in relation to this category and, as the appellant has stated, if the respondent had found in the appellant's favour in either test, the records would have been released. The first test is whether the release of the documents "could" prejudice the commercial interest of Shoreline. In this regard, the appellant complains of the categorisation by the respondent of the standard of proof as being "very low". I cannot agree with the appellant that this categorisation of itself would be grounds for appeal. "Very low" may be a term of art about which one could argue but I do not find that the use of this term to be an error of law and indeed in layman terms it fairly describes the nature of what must be proved.

[53] The respondent, in *Dr. X. v. Midland Health Board* (Case no. 030759, 30th August, 2004), had previously decided that the phrase "could prejudice" required evidence of potential harm:-

> "… in invoking the phrase 'prejudice' the damage likely to occur as a result of disclosure of the information sought must be specified with a reasonable degree of clarity."

[54] Similarly in the respondent's decision in *Eircom plc v. The Department of Agriculture and Food* (Case nos. 98114, 98132, 98164 and 98183, 13th January, 2000), the respondent noted:-

> "The essence of the test in s. 27(1)(b) is not the nature of the information but *the nature of the harm* which might be occasioned by its release" (emphasis added).

[55] The appellant contends that no proper exercise in this regard was carried out by the respondent and that the finding should be set aside on this ground alone. The respondent submits that the above quotations from these decisions misstates what was decided or were taken out of context, but having reviewed the respondent's submissions in this regard, I do not accept that point.

[56] In order to ascertain the nature of the inquiry that was undertaken by the respondent, it is necessary to examine in a little detail the various emails and correspondence between the respondent and the notice party on this issue.

[57] By email dated the 21st January, 2013, the notice party confirmed that it, as shareholder, was in possession of the accounts of the company and said that they contained commercially sensitive information.

[58] This was responded to on the same day by an email from the investigating officer of the respondent requesting copies of the records to enable a decision to be made as to whether they required to be released and to know how they differed from the records put into the public domain by

their filing in the CRO and why the details held by the Council were commercially sensitive.

[59] By email dated the 18th February, 2013, the notice party gave their first answer to the request from the respondent as follows:-

> "The information that is deemed to be commercially sensitive under s. 27(1)(b) of the Act *i.e.* the records contained financial, commercial or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, as detailed below:-
>
> (i) all information in the profit and loss account – the record contains financial, commercial or other information whose disclosure could reasonably be expected to prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation;
>
> (ii) In the notes to the accounts:-
>
> details of the operating loss
> information on numbers and remuneration of employees
> the breakdown of tangible fixed assets.
>
> The records contain financial, commercial or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupations.
>
> In summary, the Council feels that it would negatively impact on the company to have such details released to a competitor."

[60] What the notice party was doing here was merely repeating the terms of the Act and merely stating that they objected to furnishing the information and this email drew an understandable response from the respondent, *inter alia*:-

> "One very important thing that is missing is the Council's explanation of *why* the details in the accounts – presumably the details that are in the unabridged accounts that are not in the abridged ones although this is not made explicitly clear – are commercially sensitive.
>
> I am not being pedantic here – you will note my email of the 21st February [2013] I stated that I needed to know why the details in the records held by the Council are commercially sensitive.

I need to know why *each of the particular details at issue* are deemed by the Council to be commercially sensitive before I can form any opinion on the matter. Please send me the details by close of business today. I don't think this deadline to be unreasonable given that I have said it in both email and our last telephone conversation on the matter that I needed an explanation of why the details are deemed commercially sensitive in addition to knowing how the abridged and unabridged accounts differ. You might also wish to note that s. 34(1)(ii) of the [Freedom of Information] Act places the onus on the Council to satisfy the Commission that details should be exempt from release. Given the fact that if no argument/explanation is given, it is open to the Commission to direct the release of the details you'll appreciate that I have actually been trying to protect the Council's interest by giving as many chances possible for the relevant arguments to be made. However, I can't keep doing this indefinitely" (emphasis added).

[61] On the next day, a further email was sent by the investigator on behalf of the respondent to the notice party stating, *inter alia*:-

"You'll note that my email of the 18th asked for the Council's explanation as to *why* the details in the accounts … are commercially sensitive. However, other than pointing me to the precise details that the Council considers to be commercially sensitive, which is useful, no actual explanation was given as to why these details are deemed to be sensitive at this point in time.

Therefore, once again I must ask you to give me an explanation of why the figures for the company's profit and loss, and tangible fixed assets for 2008 and 2009, and details of employee costs and remuneration for 2009 (the 2008 CRO accounts having contained such details by the way), might be of use to a competitor now. For instance, would it enable a competitor to build up a picture of the company's current cost base, *etc*. and if so, how, and why might this be of use to competition?

Jackie, I really cannot give another opportunity for the Town Council to makes it case. This office has no idea of what makes these four to five year old details commercially sensitive and it would be inappropriate for us to make an argument on behalf of the Council given the requirements of s. 34. I don't need a complicated answer, as the threshold of proof in s. 27 is quite low, but at the same time I need some kind of argument from the Council" (emphasis added).

[62] The appellant contends that this correspondence indicates a bias in favour of the notice party by the respondent. That would indeed be a

possible reading of the correspondence but I think a fairer reading is that the respondent in this case, through its investigating officer was trying to cajole the notice party into giving the reasonable explanations which the respondent at that stage required.

[63] The last email was answered by email of the 27th February, 2013, from the notice party, as follows:-

> "Having discussed the commercial sensitivity of certain elements of the accounts with Shoreline's auditor, he is of the view that:-
>
> (a) releasing details of turnover profit margin and details of overheads contained in the profit and loss account in the unabridged accounts would disclose to a competitor how the business is run.
>
> (b) releasing percent of wages breakdown contained in the notes to the unabridged accounts would disclose to a competitor how the business is run.
>
> and is therefore considered to be commercially sensitive.
>
> I trust this clarifies the situation."

[64] On the very next day, the detailed preliminary view referred to above dated the 28th February, 2013, which upheld the refusal, was furnished.

[65] Dealing with the issue of confidentiality the preliminary view, which was then incorporated in the final decision, the subject matter of this appeal, then states:-

> "The company contends that release of the above details to the world at large will, notwithstanding that they date from 2008 and 2009, enable competitors to understand how its business is run. It seems reasonable to me to accept that any insight into the company's finances could be used by its competitors to the company's detriment, particularly when the company would not be privy to corresponding details regarding the operation of its competition. It is my view, therefore, that s. 27(1)(b) applies to the details referred to in the preceding paragraph in that I would accept that the release could prejudice the company's competitive position in the conduct of its business."

[66] Counsel for the appellant makes the point that the detailed preliminary view dated the 28th February, 2013, in all probability must have been substantially drafted before the receipt of the explanation which is of a window dressing nature only.

[67] I will not decide the matter on that point but I do hold that the explanation as finally given on the 27th February, 2013, by the notice party does little more than repeat the requirements of s. 27(1)(b) and refers to the

nature of the documents held. It does not in any sense engage with the proper question of the investigator on behalf of the respondent as to *why* these particular documents, if disclosed, could prejudice the financial position of the notice party. In particular, the point properly made by the investigator on behalf of the respondent as to the antiquity of the documents was not dealt with at all by the email of 27th February from the notice party.

[68] I believe that the query as to the antiquity of the documents raised a reasonable question to be answered by the notice party in circumstances where the investigator indicated plainly to the notice party that without some explanation as to why these documents of some antiquity could be prejudicial to the company's competitive position there would be a failure by the notice party to deal with the proper request. The notice party entirely failed to engage with the issue of the antiquity of the documents. By merely furnishing to the investigator Shoreline's auditor's view that the release of the documents "could prejudice" the competitive position of the company and by not in any sense answering the proper queries of the investigator, I believe that the investigator should have ruled against the notice party.

[69] I hold that the acceptance by the respondent first in its preliminary decision and secondly in the final decision of the approach of the notice party is clearly a failure to follow its previous practice as outlined in the decisions of the respondent referred to above, *e.g. Dr. X. v. Midland Health Board* (Case no. 030759, 30th August, 2004). I do not accept the respondent's submission in this regard.

[70] I find that the information as furnished by the notice party to the respondent and ultimately accepted by the respondent amounts to little more than a restating of the Act and listing of the documents in saying that these documents were commercially sensitive *etc*.

[71] In *X. v. The Department of Communications, Marine and Natural Resources* (Case no. 020644, 30th April, 2003), the respondent held:-

> "It is arguable that the release of pricing information contained in the invoice could result in a material loss to the company by making such information available to its competitors. However, given the information is now historic, being almost five years old, I find that its release could not give an advantage to competitors of such magnitude as 'could reasonably be expected' to result in loss to the company or prejudice its position."

In this case the respondent raised the antiquity issue with the notice party, but proceeded to rule in its favour without having received any real reply.

[72] I accept the submission on behalf of the appellant that the respondent was under an obligation to consider whether the release of the historic commercial information could result in the detriment as stated.

[73] All that is done by the respondent is to note the contention by Shoreline that detriment will accrue from its release "notwithstanding that they date from 2008 and 2009". This is not a reason and I believe that the respondent has fallen into an error of law in this regard.

[74] It is contended by the respondent and I accept that a mistake or error of law in the decision will not itself result in that decision being quashed. It is only whether the mistakes are or are not material that such a decision can be made and I will consider that aspect of the matter later in my judgment.

B. Public interest

[75] Having found that the respondent erred in relation to the release of these documents on the issue of confidentiality, it might not be necessary for me to consider the public interest test, however, I will do so for completeness sake. The respondent having decided that the issue of confidentiality applies under s. 27(1)(b) then very properly considered the provisions of s. 27(3) on the issue of the public interest.

[76] Section 27(3) stipulates:-

> "Subject to *section 29* [not relevant in this case], *subsection (1)* does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under *section 7* concerned."

[77] Counsel on behalf of the appellant criticised the respondent for relying upon the *obiter* remarks of the Supreme Court in *Rotunda Hospital v. Information Commissioner* [2011] IESC 26, [2013] 1 I.R. 1, at p. 76. This case was used as authority for the proposition that a release under s. 27(3) may only be ordered if there is:-

> "a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law."

[78] The fact that the above definition of public interest was contained in *obiter* remarks at p. 76 in *Rotunda Hospital v. Information Commissioner* [2011] IESC 26, [2013] 1 I.R. 1 and was adopted by the respondent is not, I find, grounds of itself to condemn the respondent. It is only if such

definition of the public interest were wrong that I should condemn it. It is clear that the public interest test as referred to in *Rotunda Hospital v. Information Commissioner* [2011] IESC 26 refers to the public interest as identified by an established policy adopted by the Oireachtas or by law and accordingly, in my view, it is a reasonable definition of public interest and I accept the arguments of the respondent in this regard.

[79] The appellant also criticises the reasoning of the respondent in relation to public interest that the appellant must demonstrate "that their interest in the records being sought is public before the public interest is engaged by the Act".

[80] I accept the arguments of the respondent that the respondent did not exclude the possibility that a private interest in making the request could be accompanied by a public interest in disclosure and I do not find as is contended by the appellant that the respondent held that a private interest "of itself" disposed of the "public interest test".

[81] What the respondent held in its regard is "[in]sofar as there is a public interest in the release of commercially sensitive information regarding a limited company that is not subject to the [Freedom of Information] Act, I am satisfied that this has been adequately met by the various requirements of company legislation".

[82] I fail to find any error in the reasoning of the respondent in relation to the public interest test.

2. Documents held by Shoreline and whether the notice party controlled Shoreline?

[83] In her decision, the respondent made the realistic point that it had no power to conduct "exhaustive investigation" into how a private company, which is being set up in accordance with company law, is operated in practice. I accept that point.

[84] The respondent then concluded:-

> "I accept that the arguments made to date indicate that the Council does not control the company or have any role in its day to day operations. Furthermore, as already noted, company law requires company directors to act in the interest of that company, and to abstain from any matters that represent a conflict of interest. Company law also requires the Council and the company to be treated as two separate identities. Accordingly, I am also satisfied that the Council has no legal entitlement to any records that come into the possession of current or local authority staff as a result of their roles as company directors. It follows that I do not consider the applicant's contentions to be an appropriate

basis for me to find that the Council controls or has a legal entitlement to, further records as held by the company that might be relevant to the request."

[85] Earlier in its consideration of the issue of control, the respondent referred to the appellant's contention:-

> "The applicant contends that the Council controls the company and its records, and that such records are potentially releasable under the [Freedom of Information] Act. As set out in the preliminary views letter, companies have separate legal personalities to those who own and/or manage them. Although the applicant contends otherwise, the company must be legally seen as a separate entity to the Council. Company case law indicates that it is not the majority or 100% ownership of a company that determines if an owner controls the company, but rather the extent to which he or she takes an active role in that company's day to day operations. Having regard to this point in particular, I would accept that the payment of grant monies in respect of the construction of the pool, the construction of the pool on Council land, or the advertisement of the pool on the Council's website, do not, of themselves, prove that the Council controls the company's day to day operations."

[86] The respondent has in her submissions eloquently raised the issue of curial deference and the fact that the court in a statutory appeal no more than a judicial review should lightly interfere with any findings of fact including, the respondent submits, the definitions of what is or is not "control". I fully accept the respondent's submissions. The law allows a wide margin of discretion to decision makers. It is not for the court to impose its standards of excellence or otherwise upon what decision makers should decide or how they should decide it. Anxious scrutiny, or as it works in practice officious scrutiny, forms no part of our law and represents an attempted blurring of the separation of power by those who advocate it. Whereas the respondent is not an expert with expertise in, for example, planning or engineering, and a distinction is rightly made in that regard by the appellant, the respondent is the person who has been charged at law with the decision making of these matters and has an expertise in so deciding.

[87] I accept that a margin of appreciation has to be shown as to what the respondent did or did not consider on the issue of control and, as I have stated earlier in this judgment, the applicable law as to the limits of my jurisdiction is as set out in *Deely v. Information Commissioner* [2001] 3

I.R. 439 and *Sheedy v. Information Commissioner* [2005] IESC 35, [2005] 2 I.R. 272.

[88] The issue that the appellant will have to satisfy me is as to whether the respondent has erred in law or failed the long established tests in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

[89] The respondent relies upon *Minister for Enterprise v. Information Commissioner* [2006] IEHC 39, [2006] 4 I.R. 248, in which the court held that records consisting of internal documentation in relation to a grant application to a City Enterprise Board were not under the control of the Department and in the above case, the court held that the Boards were established as a company limited by guarantee and that the focus of the Minister's powers in relation to the Boards was as to their overall financial capacity rather than individual grants and that the company was "in business in its own account subject to limited and defined reporting requirements".

[90] The appellant relies upon the decision of Laffoy J. in *Fyffes plc v. DCC plc* [2005] IEHC 477, [2009] 2 I.R. 417, in which she referred to the test and control in the following terms at p. 496:-

> "[170] … As a matter of law, Lotus Green may be regarded as having acted as the agent of DCC in relation to the holding and disposal of the shares in Fyffes, if to do otherwise would lead to an injustice. Whether it should be, depends on whether the inference is factually justified. This is to be determined having regard to all of the facts, including the nature of its interest in the shares, and the relationship between Lotus Green and DCC. The views of the human agents of the companies are not in any way determinative of the question."

[91] I do not see any inconsistency between the judgments in *Fyffes plc v. DCC plc* [2005] IEHC 477, [2009] 2 I.R. 417 and *Minister for Enterprise v. Information Commissioner* [2006] IEHC 39, [2006] 4 I.R. 248.

[92] The day to day workings of the company and whether the notice party interferes with the day to day operations is of course an important matter. It is not, however, to be taken as definitive. In this case, I am of the view that the respondent did, in effect, take the day to day workings of the company as definitive. In referring to the fact that the company is a separate legal entity and the obligations of its directors under company law, the respondent was embarking upon a reasoning process that would mean no separate legal company could be said to be controlled by another company absent perhaps evidence of extreme daily interference.

[93] The directors of a "controlled" company will always be obliged to act pursuant to the interest of that company in accordance with company law and accordingly the fact that one company is a separate legal entity from the other cannot be the definitive test of the matter, neither can the level of day to day interference be definitive. "Control" must include the real strategic control of one entity by the other and the financial nexus between them.

[94] The respondent did give some consideration to the fact that the notice party was 100% shareholder of Shoreline, that the notice party had two current and one former local authority staff members on the board and I am prepared to accept also she considered the issue that the initial caretaker board of the company was comprised of the notice party's engineer, town clerk and manager and that representatives elected to the notice party constituted half of the advisory committee. The respondent also clearly considered that the pool was constructed on Council lands.

[95] I do not find, however, that all relevant matters were adequately considered by the respondent in relation to the issue of control and indeed that some matters were not considered at all and some matters were given erroneous consideration.

[96] What was not considered was that the notice party provided a loan to Shoreline in a sum in excess of €10 million. This was referred to erroneously by the respondent as a "payment of grant monies". The accounts of the company clearly referred to the fact that it has this debt to the notice party and clearly a company that is dependent upon the goodwill of the notice party might well be deemed to be controlled by that notice party. Clearly, this is an issue that ought to have been considered. The respondent gave no consideration at all to this issue and in fact, seems to have misconstrued this vast loan and debt which remains on Shoreline's books as being the payment of "grant money".

[97] Whatever about the day to day activities of Shoreline, as long as they proceed to conduct the swimming pool and leisure facilities, I have no doubt that if the directors of Shoreline in their independent capacity deemed it appropriate to change the swimming pool to a casino that the notice party would not be likely to approve of such a change and would be in a position, due to the loan, to prevent it if they so wished. I find that the notice party must be said to control Shoreline and indeed the conclusion to the contrary is irrational within the meaning of the principles enunciated in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and the subsequent decisions on judicial review and the failure to even consider the issue is an

error of law which must and did affect the final conclusion of the respondent.

[98] In addition, the respondent did not comment or take into account the fact that Shoreline was in possession of the property under a lease (which only came into existence a considerable length of time after the construction of the pool) which is not a commercially viable one. In other words, if the commercial relationship of two arm's length corporations were to apply and an economic rent were to be charged, I am satisfied that Shoreline would in all probability not be able to meet such rent and would be insolvent.

[99] Accordingly, I find that the respondent erred in law in its consideration of the matters of control by concentrating entirely on what it defined as the day to day control of the operations of the swimming pool and leisure facility rather than the obvious, clear and, in my view, undoubted real control that the notice party exercises over Shoreline and thus its records.

Burden of proof

[100] It is accepted by all the parties that the burden of proof lies in favour of disclosure and the notice party at all times carries the burden of demonstrating why the documents should not be released.

[101] The respondent at all times in its decision, save in one significant matter, clearly accepted that that is the case.

[102] The respondent, however, in my view has fallen into an error of law in relation to the burden of proof in the preliminary decision of its investigator dated the 28th February, 2013. The investigator having made its decision proceeded properly to advise the appellant that it might accept the preliminary decision in writing and in which case their application fee of €150 would be refunded – this was very properly stated as not being in any way an attempt to persuade an application for review, or if the preliminary view was not accepted:-

> "It is open to you to make submissions to the Commissioner as to why this is the case. Any submissions you wish to make will be taken into account by the Commissioner in arriving at her decision. It is important to note, however, that the onus lies on you as requestor of the records at issue to demonstrate the further records of relevance to your request or control by the Town Council orally to a contract for service. In respect of those records held by the Town Council in its capacity as shareholder of the company, the onus lies on you to demonstrate that

> they do not contain information that if released could prejudice the company's competitive position or alternatively that the public interest warrants the release of the company's commercially sensitive information".

[103] It is fair to say that the response by the appellant dated the 6th March, 2013, which dealt in the main with a parallel application in respect of a Kildare County Council leisure facility did not really engage anymore with the preliminary view and in particular it is correct the submission did not make any reference to the view of the preliminary decision that it was now incumbent upon the appellant to demonstrate why the record should be released.

[104] The decision of the respondent did not refer to this shift in the onus of proof to the appellant and, whereas the language of the decision of the respondent might well lead one who is reading that decision on its own to conclude that the respondent at all times accepted that it was incumbent upon the notice party to demonstrate why the documents should not be released, I have, however, formed the view that the failure of the respondent to repudiate the legally erroneous statement in the preliminary view (that it was now incumbent upon the appellant to show why the documents should be released, *etc.*) and indeed the incorporation of the reasoning of the preliminary decision maker into the final decision without such a repudiation, has fatally undermined the final decision itself. This error in the preliminary view is a significant error in the process of the decision making and the decision itself is tainted by that error.

[105] The final decision rests upon the preliminary view and this clearly and expressly requires the applicant to prove something that the applicant never is required to prove.

[106] Section 34(12)(b) of the Act is clear:-

> "decision to refuse to grant a request under *section 7 shall be presumed not to have been justified* unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified" (emphasis added).

[107] I have previously held that the general argument on behalf of the appellant in relation to the burden of proof is not valid. I must conclude, however, that a decision resting so clearly upon an erroneous statement of the law as contained in the preliminary decision must, of itself, be contaminated by that error and cannot stand.

Conclusion

[108] For the reasons as outlined above, I find that the respondent has erred as follows:-

(a) in its failure to properly analyse the issue of confidentiality;
(b) in its failure to properly analyse the issue of the control; and
(c) in its reliance upon its preliminary view that was clearly tainted by illegality.

[109] I have formed the view that each of the above errors was a material error and that I should allow this appeal to succeed. If the only error were that identified at para. 108(c) above, it may have resulted in a different final order, but I will hear counsel at a later date for submissions of the final order to be made.

[*Reporter's note:* By order of the High Court (Cross J.) dated the 23rd October, 2014, the decision of the respondent was discharged and the appellant's request was remitted to the respondent for further consideration in accordance with law within 10 weeks by a different decision maker. The appellant was also awarded its costs, to be taxed in default of agreement.

The decisions of the Information Commissioner referred to in the judgment of Cross J. are available on the Information Commissioner's website (http://www.oic.gov.ie/en/decisions/).]

Solicitors for the appellant: *Peter Duff & Co.*

Solicitors for the respondent: *Mason Hayes & Curran.*

Solicitor for the notice party: *David Sweetman*.

Paul Brady, Barrister

THE HIGH COURT

[2015 No. 4 MCA]

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS 1997-2003

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42 OF THE FREEDOM OF INFORMATION ACT 1997

BETWEEN

PATRICK MCKILLEN

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

THE MINISTER FOR FINANCE

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered the 19th day of January, 2016

Introduction

1. This matter is an appeal on a point of law pursuant to s. 42 of the Freedom of Information Act 1997, as amended, against the decision of the respondent dated the 14th of November, 2014. At all material times, the appellant was the largest shareholder in an entity known as the Maybourne Hotel Group in London which owned a number of well known hotels. The appellant says that a hostile takeover bid of the Maybourne Hotel Group was launched by Sir David Barclay and Sir Frederick

Barclay ("the Barclay brothers") which was vigorously opposed by the appellant. This led to litigation in the High Court of England and Wales in 2012. The appellant alleges that as part of the Barclay brothers' strategy in pursuing the takeover bid, they sought in 2011 to acquire certain personal and corporate loans of the appellant with Irish Bank Resolution Corporation and to that end lobbied various parties including the Minister for Finance and the National Asset Management Agency.

2. By letter of the 21st of August, 2012, the appellant requested from the notice party access to records concerning him or his personal or business loans held by the notice party. The appellant indicated that he wished to access any records concerning an approach concerning any individual or business seeking information about his loans or lobbying for the opportunity to acquire personal or business loans in which he had an interest.

Chronology of Relevant Events.

3. 21st of September, 2012 - the notice party responded to the appellant's request for information by letter enclosing a tabulated schedule of records which the notice party considered to be relevant to the appellant's request. Each "record" appears to comprise an item of correspondence or a chain of email communication. The schedule disclosed that there were 19 such records and in the case of each record, a variety of columns was used to describe the record and its date, to specify the decision on whether to grant, part grant or refuse access and the reason for the decision, *inter alia*. In the case of 13 of the records, the notice party refused access and in the case of the other 6 records, access was granted in part subject to redactions.

4. 3rd of January, 2013 - the appellant sought an internal appeal of the decision.

5. 23rd of January, 2013 - the result of the internal appeal was to confirm the original decision subject to variation in the case of records 8 and 11 by removing some of the redactions.

6. 5th of February, 2013 - the appellant applied to the respondent for a review of the notice party's decision.

7. 28th of March, 2013 - the respondent wrote to the appellant indicating that she had agreed to carry out a review and that the appellant could make submissions to be received by the 19th of April, 2013. This letter was accompanied by an information leaflet entitled "Important Information for Requesters" which included advice about making submissions. This stated that although submissions are not strictly necessary, it is recommended that the requester bring any relevant matters to the attention of the investigator assigned by the respondent.

8. 15th of April, 2013 - the appellant wrote a letter making submissions in relation to the matter.

9. 19th of February, 2014 - Ms. Brenda Lynch, an officer of the respondent, telephoned Ms. Breda Keena, the appellant's representative, to advise Ms. Keena that she had been assigned the review. She told Ms. Keena that the notice party had revised its position in relation to some of the documents, and these revised documents had now been received and would be examined by her the following week. Ms. Keena appears to have referred to litigation between the appellant and the notice party and the fact that a discovery order had been made in that litigation.

10. 7th of March, 2014 - Ms. Lynch emailed the notice party enquiring as to whether an order for discovery had been made against the notice party and if so, were the 19 records relevant to the review encompassed by the order for discovery. Subsequently Ms. Lynch telephoned Ms. Keena about this issue and Ms. Keena indicated that she would check if a discovery order had been made against the notice party and if records had been provided on foot of such order. Ms. Lynch further advised Ms. Keena that a release of such records under FOI could be contempt of court if amounting to a possible breach of the implied undertaking under discovery.

11. 10th of March, 2014 - Ms. Keena emailed Mr. Hugh Millar of Crowley Millar who appears to have represented the appellant in his litigation against the notice party. In this email, Ms. Keena informed Mr. Millar that she had received a telephone call from Ms. Lynch asking them to consider whether they had been supplied with FOI documents through discovery and to consider the legal implications of this under FOI legislation. She conveyed to Mr. Millar Ms. Lynch's view that if the FOI documents had been supplied through discovery, they cannot be supplied through FOI and they needed to consider the implications carefully and revert to Ms. Lynch.

12. 13th of March, 2004 – 11.10. Mr. Millar emailed Ms. Keena in the following terms:

> "I am not aware of any legal implications of progressing the FOI appeal. I discussed this at a meeting with senior and junior counsel today and they share my views. None of us understand the point the Commissioner's office is making.
>
> I suggest you seek clarification by email of the legal issue and then forward the reply to me. Absent clarification there seems to me to be no reason why the appeal should not progress. If and when discovery is necessary in any future proceedings that will be addressed in the normal course of events."

13. 15.06 – the notice party emailed Ms. Lynch to advise her that a discovery order had been made against the notice party which captured a significant number of the FOI documents.

14. 15.58 – Ms. Keena forwarded Mr. Millar's email to Ms. Lynch asking for clarification.

15. 16.57 – Ms. Lynch emailed Ms. Keena explaining the potential difficulty that arose from discovery and quoted a previous decision of the respondent in relation to the operation of s. 22 (1) (b) of the FOI Act. This decision explains that it is a rule of

law that a party obtaining the production of documents by discovery in an action gives an implicit undertaking to the court that he or she will not make any use of the documents or the information contained therein otherwise than for the purpose of the action. The decision goes on to refer to the judgment of the High Court in *EH v. The Information Commissioner* [2001] 2 I.R. 463 in which O'Neill J. stated that in such circumstances, disclosure must be refused. Ms. Lynch went on to explain her understanding that an order for discovery had been made against the notice party and most of the 19 records the subject of the FOI request were provided in response to the discovery order. Ms. Lynch said she was awaiting details of the records provided. Ms. Lynch concluded by saying that access to any records provided under discovery must be refused under FOI on the basis of s. 22 (1) (b).

16. 17.17 – Ms. Keena replied saying she would forward Ms. Lynch's email to the legal team.

17. 14th of March, 2014 – 9.28. The notice party emailed Ms. Lynch indicating which of the FOI documents had been the subject of the discovery order. According to this email, record 5 had not been discovered but records 6 to 16 inclusive had been discovered. (Records 5 to 16 are the subject matter of this appeal).

18. 14.48 – Ms. Lynch emailed Ms. Keena advising her that she had today been advised by the notice party that records 6 to 16 inclusive had been provided under the order for discovery and so the position set out in her email of the previous afternoon relates to these records. She said she would be examining the notice party's position on records 1 – 5.

19. 17.10 – Ms. Keena emailed Ms. Lynch saying that the appellant's lawyer had recommended that they proceed with the appeal and they would leave it to Ms. Lynch to make a decision on the remaining records.

20. 20th of March, 2014 - Ms. Lynch emailed the notice party saying she had reviewed the documents and since records 6 - 16 inclusive were provided pursuant to an order for discovery, they are exempt from release. With regard to record 5, she agreed that s. 27 (1) (b) applied to some of the information therein and asked for clarification of the basis on which the notice party claimed that it was exempt.

21. Following receipt of this email, it would appear that an official of the notice party telephoned Ms. Lynch to say that they would change their position and release revised records shortly.

22. 25th of March, 2014 - The notice party emailed Ms. Lynch enclosing revisions to, *inter alia*, record 5.

23. 28th of March, 2014 - Ms. Lynch emailed Ms. Keena setting out her view on all the records and stating that records 6 – 16 inclusive were provided to the appellant pursuant to an order for discovery and s. 22 (1) (b) applies to these records and they are exempt from release under FOI. In respect of record 5, Ms. Lynch said that she agreed that s. 27 (1) (b) applies to the amounts and numbers in the emails and to the word(s) after "client/buyer from". She also agreed that the name and contact details of the person who sent the email are exempt under the same subsection. She did not consider the public interest is better served by the release of this information. She concluded by saying that her views were not binding on the respondent and any response the appellant wished to make would be taken into account before the final decision was made. If there were any comments on her views, these were to be provided by the 11th of April, 2014. If Ms. Lynch had not heard from Ms. Keena by that date, she would assume that her views were accepted and she would recommend to the respondent to issue a decision accordingly.

24. 10th of April, 2014 - Ms. Keena responded to Ms. Lynch by email stating that they did not agree that the public interest is best served by not releasing the information under FOI. She explained this as follows:

> "We believe it is in the public interest to see how public servants and state agencies have interacted with the Barclays and facilitated their hostile takeover attempt of significant Irish owned assets and businesses. The Barclays could never have attempted such a plan under normal banking conditions considering that the loans were fully performing and generating a profit. Mr. McKillen continues to defend against the Barclay takeover attempt and the stark difference between the way state officials interacted with the Barclays and Mr. McKillen is considerable. Mr. McKillen contributes significantly to the Irish economy through employment and businesses that generate millions of euros each year in revenue. Why state officials decided to work with the Barclays and against Mr. McKillen when it would result in the loss of hundreds of millions of euros for IBRC had their plan succeeded, is of public interest and surely a very good example of why the Freedom of Information Act is so important.
>
> We await the formal decision from the Information Commissioner."

25. Thus, the appellant's sole argument in support of the release of the disputed records was that same was in the public interest. It was not disputed that records 6-16 inclusive were the subject of an order of discovery obtained by the appellant nor was it disputed that s. 27 (1) (b) applied to record 5. As is apparent from the foregoing emails, the appellant had the benefit of legal advice throughout.

26. 16th of May, 2014 - Ms. Lynch emailed the notice party pointing out that s. 34 (12) (b) provides that a decision to refuse a request "shall be presumed not to have been justified unless the head concern shows to the satisfaction of the Commissioner

that the decision was justified." Accordingly, in relation to, *inter alia*, record 5, Ms. Lynch pointed out that as s. 27 is a harm based exemption, the notice party would have to identify the harm considered likely to arise.

27. 12th of June, 2014 - the notice party provided a lengthy response setting out details of why it was considered that record 5, *inter alia*, was commercially sensitive insofar as the redactions were concerned, and further that the redacted information was given in confidence to the notice party.

28. 6th of November, 2014 - The appellant's solicitor Mr. Paul Tweed of Johnsons Solicitors, emailed the respondent to complain of the delay in the respondent making a decision. It should be noted that whereas Messrs. Johnsons represent the appellant in the within proceedings, the solicitors previously referred to, Messrs. Crowley Millar, represented the appellant in his litigation against the notice party. Apart from complaining of the delay, Mr. Tweed's email raised no new arguments or submissions.

29. 7th of November, 2014 - Ms. Lynch replied to Mr. Tweed's email saying a decision would be made within two weeks. She continued:

> "As you may be aware, 19 records were identified as relevant to the review, some of which were released or part released during the course of the review. The position in relation to records 6 -16 and 17 – 19 remains as set out in my email to Ms. Keena of the 28th of March last. Records 6 – 16 (inclusive) were provided to the appellant pursuant to an order for discovery. Section 22 (1) (b) applies to these records and they are exempt from release under FOI. Records 17 – 19 are PQ's answered in the Dáil and as this information is publicly available, s. 46 (2) of the Act applies to these.
>
> In relation to records 1 – 5, these were all released by the Department so only the redacted parts are the subject of the review. This office's position is that

some additional information in some of these records should be released, and that other information is exempt under s. 27 or 28 of the FOI Act …"

30. Mr. Tweed did not respond further to this email before the respondent's decision was made on the 14th of November, 2014.

Record 5

31. Record 5 consists of three emails. The first was sent on the 17th of June, 2011, at 01.51 and the identity of the sender is redacted. It is addressed to an official of the notice party, Mr. John Moran, and the subject is "Maybourne Group – NAMA Debt Purchase Offer". The sender refers to an offer on behalf of a client/buyer from what is presumably a geographical region that is redacted. The sender states that because of the sensitivity and confidentiality of earlier discussions concerning the matter, the client/buyer's name was not being committed to the email. The sender offers to confirm the identity of the client/buyer via a follow up phone call. The offer then appears in the following terms:

"Option 1:

Buyer will assume debt of [redacted] and will then renegotiate the debt with the banks. The covenant of the buyer is such that we believe that the banks will be delighted to have their loans in safe hands. Buyer will pay [redacted] cash payment to the shareholders. This is for [redacted] of the company.

Option 2:

In the event that we have a shareholder who wants to remain as part of the group…then we will be happy to go ahead with this transaction as follows:

Buyer will assume debt of [redacted] and then renegotiate the debt with the banks. The covenant of the buyer is such that the banks will be delighted to have their loans in safe hands.

Buyer will pay [redacted] to the shareholders. This is for [redacted] of the company, leaving any die-hard shareholder with the remaining 15%."

32. The second email comprised in record 5 is dated the 19th of June, 2011, and is from Mr. Moran to another official of the notice party, Mr. Scott Rankin wherein Mr. Moran posed the following question:

"Do you have any sight on the underlying property and how and where NAMA are with it?"

33. The third and final email in record 5 is dated 20th June, 2011, and was sent by Mr. Aidan Carrigan, another official of the notice party, apparently on behalf of Mr. Rankin, who was copied in the email, to Mr. Moran in the following terms:

"The Maybourne Group loans are held by NAMA and involved some of the bigger developers (including McKillen but these loans are not caught up in the McKillen court proceedings). These loans are performing loans and in such circumstances the normal procedure would be for NAMA to refer any prospective investors to the debtors/shareholders of the group."

The Respondent's Decision.

34. The respondent's decision was given on the 14th of November, 2011. Insofar as relevant to these proceedings, the respondent decided that s. 22 (1) (b) applies to records 6-16 and s. 27 (1) (b) applies to the withheld information in record 5. In elaborating on the reasons for her decision, the respondent in dealing first with record 1, said:

"The information in record 1 to which access was refused on the basis of s. 27 (1) (b) and s. 27 (1) (c) refers to the borrowing position of a commercial entity, the identity, the commercial interests, current and potential ownership stakes, levels of borrowing and financing arrangements for a proposed financial arrangement which was not completed. The Department stated that release of

the information could prejudice the commercial entity's strategy, competitive position and commercial and legal standing in relation to the matters to which the letter refers. It further said that revealing information such as a party's level of indebtedness, willingness to pay, financing partners, among other factors could provide an insight into the party's level of interest in the proposed arrangement, as well as its strategic approach, financial position and flexibility. It contended that release of the information could provide a significant insight into the commercial interest of the organisation and that this could influence the entity's position in future similar situations. It argued that it could also be the case that revealing a particular party's interest in an asset and the nature of a proposal in relation to that asset could have a material impact on either the asset value or the financial return to the interested party in both current and future situations. The Department said that access to such information has the potential to alter the competitive landscape and strengthen or weaken a strategic or negotiating position at a cost to the party whose information has been revealed. While certain negotiating processes related to the contents of these records have concluded, according to the Department, it is not unreasonable to expect that further negotiations may be ongoing or take place in the future and release of the information in the records could prejudice any such negotiations."

35. The contention that s. 27 (1) (b) and (c) applied to record 1 was rejected by the respondent, not on the basis that it was not confidential or commercially sensitive for the reasons put forward by the notice party, but rather because the record had already been publicly disclosed in the course of litigation in the High Court of England and Wales. Accordingly since the information was publicly available, the harm envisaged by s. 27 could not arise.

36. With regard to record 5, the respondent said:

"This record comprises a series of external and internal emails regarding a potential interest in an asset. The Department claimed that s. 27 (1) (b) applies to the information redacted from this record, which includes details of amounts and percentages and would identify the source of the proposals. The issues which arise here are similar to those set out above in relation to records 1 and 2. However, unlike records 1 and 2, there is no information available to me to suggest that the identity of the sources or details of the proposal in this record are already in the public domain. I am satisfied that disclosure of the withheld information could reasonably be expected to result in material financial loss or gain or could prejudice the competitive position of that person in the conduct of his or her business and I find that s. 27 (1) (b) applies to the withheld information.

Having found that s. 27 (1) (b) applies, s. 27 (3) of the FOI Act requires me to consider whether, on balance, the public interest would be better served by granting than by refusing the request. The FOI Act itself recognises the public interest in ensuring the openness and accountability of public bodies as to how they conduct their business. However, s. 27 of the Act also recognises a public interest in safeguarding an operation's ability to carry on its business without inappropriate interference from competition, which could arise by disclosing its commercially sensitive information to the world at large. There is a public interest in the ability of private companies to submit commercially sensitive information to public bodies in the knowledge that it would be treated as such. There is also a public interest in supporting an environment that is conducive to the conduct of business.

The Department stated that it is accepted practice to maintain the confidentiality of both the identity of interested parties and the details of proposals. In so doing, consideration is given to both the particular circumstances at a point in time and potential future opportunities. The Department also identified the importance of Irish officials being able to communicate with the market the steps being taken towards economic recovery and that such communications include both broad communications and bilateral communications. It also mentioned the role of the Department in fostering investor interest in Ireland and the importance of connecting interested parties with the relevant state authorities. The Department put forward the view that the advantages in terms of openness and transparency are not sufficient to outweigh the possible harm that might arise from the release of the information. It also stated its opinion that the release of the redacted details would not meaningfully advance the public interest considerations of openness and transparency.

The applicant argued that there is a public interest in seeing how public servants and state agencies interacted with particular individuals and/or businesses. He also stated that he contributes significantly to the Irish economy through employment and business.

Having considered the submissions on this point from both the applicant and the Department, I am satisfied that the public interest is served to some extent by the release of the record in redacted form. In my view, this satisfied the public interest in openness and accountability on the part of the Department. I conclude that, on balance, the public interest would not be better served by the release of the redacted information to which s. 27 (1) (b)

applies to the extent that overriding the commercial sensitivity of that information, as set out above, would be justified and I find accordingly."

37. Dealing with records 6-16, the respondent noted that the notice party had informed her that these records had been provided by it to the appellant pursuant to an order for discovery. The respondent noted that s. 22 (1) (b) is a mandatory exemption and referred to the dicta of O'Neill J. in *EH and EPH v. The Information Commissioner* [2001] 2 I.R. 463 to the effect that in such circumstances, disclosure must be refused.

The Legislation.

38. The relevant sections of the Freedom of Information Act 1997, as amended, which arise for consideration in these proceedings are as follows:

"22 (1) A head shall refuse to grant a request under section 7 if the record concerned—...

(b) Is such that its disclosure would constitute contempt of court."

39. Section 27 provides as follows:

"(1) Subject to subsection (2), a head shall refuse to grant a request under section 7 if the record concerned contains:...

b) Financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or...

(3) Subject to section 29 , subsection (1) does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on

balance, be better served by granting than by refusing to grant the request under section 7 concerned."

The Arguments.

40. Mr. O'Callaghan S.C. on behalf of the appellant in dealing with the scope of a s. 42 appeal submitted that to apply pure judicial review grounds to errors arising from a mistake of fact was too narrow an approach. He referred to some English authorities on this point including *R. (Alconbury Ltd) v. Secretary of State for the Environment* [2003] 2 A.C. 295 and *E v. Secretary of State for the Home Department* [2004] QB 1044. He contended that there was Irish authority for the proposition that manifest error of fact is a ground to be considered in an appeal on a point of law and cited *State (Davidson) v. Farrell* [1960] I.R. 438 on *State (Lynch) v. Cooney* [1982] 1 I.R. 137. He distinguished *Ryanair v. Flynn* [2000] 3 I.R. 240 and said that the Supreme Court considered in *NUI Cork v. Aherne* [2005] 2 I.R. 57 that an error of fact could also amount to an error of law. *Mara (Inspector of Taxes) v. Hummingbird* [1982] 2 ILRM 421 is to the same effect.

41. In dealing with record 5, counsel contended that the notice party had no interest in engaging in negotiations regarding the sale of an asset when that was the function of an independent statutory agency and accordingly there was no proper public interest served by preserving the confidentiality of what were described as inappropriate approaches to Government regarding a potential disposal of an asset by an independent State agency. He said that the public interest required that parties lobbying Government inappropriately be identified, particularly where the notice party's own officials considered that the appropriate course was to refer the bid to the shareholders. Furthermore he said that the non disclosure of the identity of the party making the bid tacitly recognised the non confidential nature of the communication. Finally, it was said that the antiquity of the offer meant that the respondent had failed

to properly assess its commercial sensitivity. The appellant in this respect relied on *Sheedy v. Information Commissioner* [2005] I.R. 272, *Minister for Agriculture v. Information Commissioner* [2000] 1 I.R. 309 and *Westwood Club v. The Information Commissioner* [2014] IEHC 375.

42. Dealing with records 6 – 16, counsel submitted that the evidence of Ms. Watson, the appellant's solicitor, showed that contrary to the information supplied by the notice party, records 6 – 9 inclusive had not been subject to any order for discovery in the proceedings between the appellant and the notice party, and such discovery order in fact related only to records 10 – 16 inclusive. Accordingly there was a manifest error made by the respondent with regard to the applicability of s. 22 (1) (b) to records 6 – 9.

43. With regard to records 10 – 16, counsel sought to distinguish *EH* on the basis that the FOI application here had pre-dated the making of the discovery order in the later proceedings. In further support of the distinction between the instant case and *EH*, counsel said that the rationale underlying the implicit undertaking is explained in cases such as *Ambiorix Ltd v. Minister for the Environment (No. 1)* [1992] 1 I.R. 277 and *Greencore Group Plc v. Murphy* [1995] 3 I.R. 520.

44. As an alternative to distinguishing *EH*, the appellant submitted that it was wrongly decided and should not be followed. In this respect, a number of authorities was referenced including *Irish Trust Bank v. Central Bank of Ireland* [1976] ILRM 50, in *Re Worldport* [2005] IEHC 189, *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 and *Wicklow County Council v. An Bord Pleanála* [2015] IEHC 229. It would be quite unjust in the circumstances of this case if the appellant were precluded from accessing documents which were readily available, for example, to the press and media and this would be entirely contrary to the spirit of the FOI legislation generally.

It would be unjust that the appellant should be denied access to documents on the basis of a mistake made by a State entity.

45. Mr. Foley B.L. on behalf of the respondent submitted that the appellant's case was characterised by the, possibly unique, feature that none of the appellant's arguments made in the course of this appeal had ever been addressed to the respondent. He submitted that the court could not consider grounds of appeal based on either submissions or material not before the respondent. He relied on *Minister for Education v. Information Commissioner* [2009] 1 I.R. 588, *Southwestern Health Board v. Information Commissioner* [2005] 2 I.R. 547 and the *Governors of the Hospital for the Relief of Poor Lying in Women v. Information Commissioner* [2013] 1 I.R. 1 (the *Rotunda* case) in that respect.

46. He contended that the onus of proof was on the appellant to prove error of law on the part of the respondent and the decision would not be interfered with unless it was demonstrated to be irrational or unreasonable. In that regard he relied on *Comhaltas Ceoltóirí Éireann v. Dun Laoghaire* (Unreported, High Court, 14th of December, 1977) and *Killilea v. Information Commissioner* [2003] 2 I.R. 402 respectively.

47. With regard to record 5, counsel said that the redacted information related solely to the terms of the bid put forward by the interested party and thus could not be more commercially sensitive. Further, notwithstanding the fact that the appellant was at all material times aware that the notice party was claiming that s. 27 (1) (b) applied to record 5 insofar as the redactions were concerned, the appellant never argued to the contrary or suggested that the record was not in fact commercially sensitive. Here again, all the appellant's arguments on appeal with regard to s. 27 (1) (b) were new and not previously raised. Unless the respondent's conclusions were unsupported by any evidence, they could not be reviewed by the court on appeal. There were many

authorities which demonstrated that the standard identified in *O'Keeffe v An Bord Pleanala* [1993] 1 I.R. 39 applied to an appeal on a point of law. The terms of record 5 itself made clear it was intended to be confidential. The arguments now made about the antiquity of the allegedly sensitive information had never previously been raised. In fact the only argument made by the appellant in relation to record 5 was with regard to the public interest issue under s. 27 (3).

48. Counsel submitted that the public interest was entirely satisfied by the release of the record in redacted format. Whereas the appellant argued that there was a public interest in exposing allegedly improper approaches to a Government Department in respect of matters solely within the province of an independent statutory agency, that interest was fully served by the release of the record with the redactions. If the appellant wished to make any complaint about the matter, he has everything he needs to do so from record 5 as it stands. That would not be added to in any way by disclosure of the bid details and thus the respondent was perfectly entitled to conclude that there was no public interest in the redacted parts of the record. The balance struck by the respondent between the competing interests at play in this regard was perfectly reasonable and the appellant would have to demonstrate that the respondent had got the balance so wrong as to fly in the face of reason and common sense.

49. With regard to records 6 – 16, the respondent contended that the appellant could not now complain of the fact that records 6 – 9 were not in fact the subject of a discovery order, even if that were the case. If a factual error arose in that regard, it was entirely the responsibility of the appellant. The appellant was at all times aware that the respondent was dealing with the matter on the basis of the uncontested information from the notice party that records 6 – 16 were covered by the discovery order. The appellant was in a position to determine if that information was incorrect by simply comparing the schedule of allegedly discovered documents with the

documents in respect of which he obtained discovery from the notice party. The English authorities relied upon by the appellant on the issue of reviewable error of fact made clear that such review could only arise in circumstances where the appellant was not himself responsible for the error.

50. With regard to s. 22 (1) (b), counsel said that here again, the arguments now made by the appellant had never been raised before the respondent. This was despite the fact that the appellant and his lawyers were made aware by the respondent of the fact that the respondent considered that s. 22 (1) (b) applied as explained in *EH* and when this was pointed out to the appellant, he never demurred from it. There was no basis for distinguishing *EH* from the facts of the present case, the relevant dicta of O'Neill J. not being case specific but intended to give general guidance to public bodies considering FOI requests. The appellant's complaint of unfairness in the fact that the documents could be obtained by the media but not by him was the price of obtaining discovery and if such unfairness were alleged to arise, the appellant could apply to the court to be released from his undertaking as in *Roussel v. Farchepro Ltd* [1999] 3 I.R. 567.

51. Any alleged unfairness could not be a basis for the court to decline to apply *EH*, which the court was obliged to follow unless satisfied that it was overwhelmingly wrong. This was clear from a number of authorities including *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, in *Re Worldport Ireland Ltd (In Liquidation)* [2005] IEHC 189 and *Wicklow County Council v. Kinsella* [2015] IEHC 229.

Discussion.

52. In *Deely v The Information Commissioner* [2001] 3 I.R. 439, in the course of his judgment, McKechnie J. said (at p. 452):

> "There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my

view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-

(a) It cannot set aside findings of primary fact unless there is no evidence to support such findings;

(b) It ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;

(c) It can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

(d) If the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision.

See for example *Mara -v- Hummingbird Limited* [1982] 2 I.R.L.M. 421, *Henry Denny and Sons (Ireland) Limited -v- Minister for Social Welfare* [1998] 1 I.R. 34 and *Premier Periclase -v- Commissioner of Valuation* (Unreported, High Court, Kelly J., 24th June, 1999)."

53. In *Killilea v. The Information Commissioner* [2003] 2 I.R. 402, which like *Deely* was a s. 42 appeal, Murphy J. said (at p. 426):

"If a decision of the respondent to discontinue a review, taken in the exercise of the discretion vested in him by the Oireachtas by means of s. 34 (9) of the Act is, properly speaking, within the scope of s. 42 (1) the court ought only to upset the respondent's exercise of such discretion if the same were found to have fallen foul of the judicial review standard of reasonableness. In other words, the Court ought not to interfere with the respondent's decision to discontinue his review of the decision made by the Department in this case unless it considers his decision to fly in the face of fundamental reason or

common sense, or to be so irrational or unreasonable that no reasonable Commissioner could have come to it."

54. In *Sheedy v. Information Commissioner* [2005] 2 I.R. 272, Kearns J. (as he then was) in the course of delivering the majority judgment of the Supreme Court expressed a similar view (at p. 299):

> "Nor do I believe that any exhaustive analysis conducted by reference to detailed evidence was necessary before the respondent could decide to apply the public interest provision of s. 21(2) of the Act of 1997 to direct release of the reports. Once there was some evidence before him as to the circumstances in which these reports are compiled, as undoubtedly was the case here, the well established principles of *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 makes it clear that his decision is not to be interfered with. This assessment, which involved a balancing exercise between various competing interests, was one uniquely within his particular remit."

55. In *Gannon v. The Information Commissioner* [2006] 1 I.R. 270, another s. 42 appeal, Quirke J. also applied the criteria set out in both *Deely* and *O'Keeffe*. More recently, in *Westwood Club v. Information Commissioner* [2014] IEHC 375, Cross J. followed *Deely* in determining that the onus of proof in a s. 42 appeal rests on the appellant who had to satisfy the test in *O'Keeffe*.

56. It seems to me therefore that at this juncture, it is beyond argument that the standard to be met by an appellant in a s. 42 appeal is virtually indistinguishable from that applied by the court in judicial review matters. Accordingly, a decision of the respondent will not be interfered with unless it is either based on no evidence or flies in the face of fundamental reason and common sense. It is thus immaterial if the court would have arrived at a different decision based on the same evidence. Inferences

will not be set aside unless they are such that no reasonable decision maker could have drawn them.

57. The scope of a s. 42 appeal is further limited by reference to the materials that were before the Commissioner and the submissions made to her. In the *Rotunda* case, the appellant sought in the High Court, to canvass a point of law not raised before the respondent. On this issue, Fennelly J. in the Supreme Court said (at p. 29):

> "[90] I do not accept that the new point should have been considered either because many other cases raised the same issue or because it was a matter of importance. The Act is clear: an appeal to the High Court lies only in respect of a point of law. It must be a point of law involved in the decision under appeal. Thus, I do not think that the High Court should have entertained the point." (My emphasis).

58. In *Minister for Education v. Information Commissioner* [2009] 1 I.R. 588, McGovern J. observed (at p. 591):

> "[6] The Commissioner complains that the appellant made no argument to her, based on s. 19 (1) (c), but confined his argument to s. 19 (1) (a). This, indeed, appears to be the case. Accordingly, the Commissioner argues that the appellant should not be permitted to make submissions in his appeal against her decision based on s. 19 (1) (c).
>
> [7] The court should be slow to admit a new argument not advanced before the Commissioner. In the area of criminal law, the Court of Criminal Appeal has repeatedly stated that it will be reluctant to entertain arguments on appeal which were not made at the original trial. In *Murray v. Trustees of Irish Airlines* [2007] IEHC 27, [2007] 2 ILRM 196, Kelly J. refused to allow additional evidence where the parties seeking to adduce the evidence made submissions to the Pensions Ombudsman on two occasions and never sought

to introduce that evidence which was available. Although the case concerns evidence and not legal arguments or submissions, it is of some general relevance to the Commissioner's argument. In *South Western Area Health Board .v. Information Commissioner* [2005] IEHC 177, [2005] 2 I.R. 547, the issue of whether or not the High Court could entertain a point on appeal that was not raised before the Commissioner during the course of review was the subject of comment. Smyth J. said at paras. 17 and 18 at p. 553:-

> '... it would be wholly unsatisfactory that a decision on appeal should be made without the matter having first been raised before the Commissioner.
>
> In my judgment the Commissioner was correct in his submission that it was undesirable that as a matter of policy that a party in the position of the appellant would not advance all relevant arguments him in the first instance.' "

59. I find myself in agreement with these views. A s. 42 appeal is not a *de novo* hearing where the appellant is at large to advance new arguments or evidence not put before the respondent. It is an appeal on a point of law which was considered and dealt with by the respondent. It is not here suggested that there are new arguments or evidence not available to the appellant at the time the respondent decided the matter or that the appellant was disadvantaged in any way, for example, by the lack of legal advice. As Smyth J. remarked, it would be entirely unsatisfactory if appeals on pure points of law could be run on the basis of matters never raised before, let alone considered and decided by, the respondent. That would transform the appeal into something quite different from that envisaged by the Act.

60. With regard to record 5, the appellant claims that the s. 27 (1) (b) exemption did not apply because the respondent had failed to properly assess the commercial

sensitivity of this record. As can be seen from the above chronology, despite the fact that the appellant was aware at the latest from the 28th of March, 2014, that the respondent considered that s. 27 (1) (b) applied, and made further submissions on the 10th of April, 2014, he never suggested any disagreement with that proposition. It seems to me therefore that the appellant cannot now advance this argument. In any event, there is no basis for suggesting that the respondent's assessment that the redacted information was commercially sensitive is based on no evidence or flies in the face of fundamental reason and common sense. It certainly could not be said that no reasonable decision maker could have arrived at these conclusions.

61. The sole argument that was raised by the appellant in relation to record 5 before the respondent related to s. 27 (3) and the contention that it was in the public interest that the redacted information be disclosed. The appellant's core complaint here is that there could be no public interest in preserving the confidentiality of improper approaches to a Government Department to influence the decision of an independent statutory agency regarding the disposal of an asset. This argument however applies, if it applies at all, to record 5 in its entirety and the appellant's complaint in the email of the 10th of April, 2014, was that he was being treated unfairly by the State in its dealings with him as against its dealings with the Barclay brothers. This of course assumes that record 5 relates to the Barclay brothers but there is no evidence of that.

62. The appellant was making the case that there was a public interest in exposing the fact that the notice party appeared to favour the Barclay brothers over him and this would give rise to a potential loss to the Exchequer whereas the appellant was a significant contributor to the Irish economy. Thus the appellant was saying that the public interest lay in exposing what he claimed was unfair dealing by the third party which could be harmful to the State's interest. In that context, any improper conduct

by the third party complained of, if there was such, is disclosed by the release of record 5. The redacted information adds nothing to the alleged impropriety of the conduct in issue. It is difficult to understand therefore the basis on which the appellant alleges that there is a public interest in this redacted information, as distinct from his own private interest in accessing it.

63. In the *Rotunda* case, a person sought the disclosure of information relating to his natural mother in circumstances where the hospital said that it had been given in confidence. The respondent rejected that contention and considered that there was a public interest in "persons generally having the fullest possible information on their origins". This was found by the Supreme Court to amount to an error of law. In the course of her judgment, Macken J. said (at p. 76):

> "It seems not at all clear to me that there is anything in the Act which supports or suggests that there is, in law, an overriding public interest of the type invoked by the respondent. On the contrary, such an approach in considering only a so called public interest in a requester having information relating to the circumstances of birth, suggests an interpretation of the Act coming close to establishing a right of access to exempt information, which can only be denied by some exceptional circumstance. That is not a correct application of s. 26 (3) of the Act [*similar in its terms to s. 27 (3)*] and ignores the provisions of s. 6 (7) of the Act as they apply to part III. Rather, as mentioned above, in circumstances where a tension exists between a right of access under s. 6 (1) rights of access and other rights recognised as being important, and therefore exempt from disclosure under part III of the Act, the Act mandates a refusal of information. The right generating the exemption under s. 26 (1) (a) is a private interest right vesting primarily in the appellant, on the facts of this case, and the information sought must be refused, provided the appellant is in

a position to meet the tests set out there. In such circumstances, any "public interest" would, in my view, require to be a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law. In the present case, the respondent made a statement of alleged policy as constituting the "public interest". There is no evidence that the Oireachtas has adopted such a policy."

64. In the course of his judgment in the same case, Fennelly J. said (at p. 46):

"I do not believe that s. 26(3) applies in a case where the reason for seeking access to the record is exclusively private. The respondent's jurisdiction pursuant to s. 26 (3) is to decide whether provision of access for a particular record is in the public interest. Whether a person in the position of the requesters in this case should be granted such access concerns their private interests."

65. Section 27 (1) (b) is a harm based exemption. This is demonstrated in the fact that the respondent upheld disclosure of records 1 and 2 on the basis that although they might be viewed as containing commercially sensitive information, such information was already in the public domain by the virtue of the UK litigation and thus no harm could arise from its disclosure. If there is a public interest in disclosure of the redacted information, and in my view it remains very much to be seen whether such a public interest recognised by means of a well known established policy adopted by the Oireachtas or by law has been established in this case, the respondent was required to balance that interest against the potential harm that might result from the disclosure of the information. There is nothing to my mind that suggests that the respondent in carrying out this balancing exercise did so other than correctly, and less still that the balance struck could be said to fly in the face of reason and common

sense. It is not the function of the court to reassess that balance unless manifestly arrived at in error, and no such error has been demonstrated here.

66. With regard to records 6 – 9, the appellant says that the failure to direct disclosure of these records on the basis that they were the subject of an order for discovery is a manifest error of fact amounting to an error of law. Not only was this argument never addressed to the respondent, but contrary to what is now alleged, if it was an error of fact at all, it was an error for which the appellant himself is directly responsible. As the chronology above demonstrates, on the 7th of March, 2014, Ms. Keena on behalf of the appellant advised the respondent that she would check if a discovery order had been made and if records had been provided on foot of such order.

67. Whatever about the various teams of lawyer involved in the different pieces of litigation, the appellant himself was in the position to ascertain if records 6 – 16 had been discovered. On the 14th of March, 2014, the respondent notified the appellant that the respondent had been advised by notice party that records 6 – 16 had been provided pursuant to an order for discovery. The appellant was again told on the 28th March, 2014, and the 7th November, 2014, that the respondent was proceeding on the basis that records 6-16 were the subject of a discovery order. At no time did the appellant suggest that this information was incorrect and in my view, the respondent was perfectly entitled to assume that it was correct and that the appellant was so satisfied. For the appellant to now suggest that this was a manifest error on the part of the respondent, when the only parties in a position to verify that were the appellant and the notice party, seems to me to be unfounded.

68. Indeed, this is confirmed by one of the principle authorities relied upon by the appellant in this respect, *Criminal Injuries Compensation Tribunal* [1999] 2 A.C. 330

where Carnwath L.J. in setting out the criteria to ground an appeal on error of material fact said:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning." (My emphasis).

69. Here, the appellant was responsible for the mistake of which complaint is now made and therefore cannot rely on this as a ground of appeal.

70. In *EH,* O'Neill J. considered the effect of s. 22 (1) (b) as follows (at pages 484 -486):

> "The issue which arises on this appeal in relation to the undertaking given by the applicant to obtain discovery is whether or not the Commissioner was right in concluding as a matter of law that the disclosure of the documents sought would be a breach of the undertaking given and hence a contempt of court.
>
> Similarly an issue arises as to whether or not the disclosure of the information sought by the applicant under the Act of 1997 would be a breach of the order of Barr J. and thus also a contempt of court.
>
> As is clear from the decision of the Commissioner, he based his decision in regard to the undertaking on the basis that it was an express undertaking given to the court for the purposes of protecting the third parties. He formed the view that the disclosure of the documents would breach that express undertaking and because of that he arrived at the conclusion that a contempt of court would arise. For the guidance of public bodies he additionally expressed the view,

that on the basis that the usual implied undertaking given in relation to discovered documents was for the benefit only of the party giving the discovery, that in his view a contempt of court in this situation would not arise.

In my view the purpose of s. 22 (1) (b) is to prevent the Act of 1997 operating in such a way as to permit interference in the administration of justice, a function which is reserved by the Constitution solely to the courts established by or under the Constitution. If it were the case that one could under the provisions of the Act of 1997 obtain documents disclosure of which was prohibited by the ruling of a court or by a undertaking given to a court, I have no doubt that this would amount to a gross and constitutionally impermissible interference in the administration of justice…

I have come to the conclusion that notwithstanding the entirely laudable and separate philosophy of disclosure which underpins the Act of 1997, that the Act construed in a manner consistent with the Constitution could not be used, so that access to documents under the Act would have the result of robbing an order of a court or an undertaking given to a court of the force and effect which the court in question intended these to have.

In my view s. 22 (1) (b) is there to ensure that this does not happen, and it must operate accordingly…

The Commissioner was, in my view wrong, in his conclusion that the usual undertaking given in relation to discovery would not give rise to a contempt of court. Breach of the implied undertaking given in respect of discovered documents is a contempt of court. Notwithstanding that the undertaking benefits solely the party making discovery, the undertaking is given to the court and like all undertakings given to a court, breach of it is a contempt of

the court. Indeed this is abundantly clear from *Home Office v. Harman* [1983] 1 A.C. 280, a case which was cited to the court by counsel for the applicant and relied upon by counsel.

True, in the case of the usual implied undertaking the party for whose benefit it is given i.e. the party making disclosure can waive the undertaking but in the absence of such waiver as in the present case the undertaking continues as an undertaking to the court with all of the attending consequences of a breach of an undertaking to the court…

I have come to the conclusion that where a head of a public body or the Commissioner is aware that there is in existence an undertaking to a court be it expressed or implied, that disclosure must be refused on the basis of s. 22(1)(b)."

71. The respondent's investigator made it clear in communications with the appellant throughout, as did the respondent herself in the decision under appeal, that she considered that the above referred to dicta of O'Neill J. in *EH* applied to records 6 – 16 and accordingly disclosure must be refused. The respondent's position in this regard was conveyed not only to the appellant but also the appellant's lawyers. Yet at no time was this position challenged or disputed by the appellant. Despite that fact, the appellant argued before the court that *EH* was to be distinguished on the facts and if found not to be distinguishable, ought not to be followed on the basis that it was wrongly decided.

72. The instant case was said to be distinguishable on the basis that the request here was made prior to the making of the order for discovery, unlike in *EH*. To my mind however that makes no material difference. The views expressed by O'Neill J. could not be clearer. Disclosure of documents the subject of an order for discovery,

whenever made, is a contempt of court. Section 22 (1) (b) is mandatory and in such circumstances, disclosure must be refused.

73. The appellant's alternative submission that *EH* ought not to be followed is not based upon any conflicting authority, but rather on the proposition that to follow *EH* would work an injustice to the appellant in circumstances where the records are freely available to anyone other than the appellant because of his undertaking. It is submitted that there may be many reasons why a party may have an independent entitlement to a document and the mere fact that it is covered by a discovery order could not operate as a matter of principle to frustrate that entitlement. This is said to be contrary to the intent and purpose of the Act.

74. The circumstances in which a court may decline to follow the decision of a court of equal jurisdiction have been considered on a number of occasions. In *Worldport,* Clarke J. said (at p. 7):

> "Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered at a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J. (in *The Industrial Services Company* [2001] 2 I.R. 118, s.218 application), based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were

free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in *Industrial Services* and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided."

75. The same judge, this time speaking in the Supreme Court, more recently reiterated his view in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 when he said (at p. 2) :

"**2. The Binding Nature of Consistent High Court Case Law**

2.1 The jurisprudence of the High Court regarding the proper approach of a judge of that Court when faced with a previous decision of another judge of that Court is consistent. The authorities go back to the decision of Parke J. in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] I.L.R.M. 50. Similar views have been expressed in my own judgment in *In Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, by Kearns P. in *Brady v. D.P.P.* [2010] IEHC 231, and most recently by Cross J. in *B.N.J.L. v. Minister for Justice, Equality & Law Reform* [2012] IEHC 74 where *Worldport* was expressly followed.

2.2 It seems to me that that jurisprudence correctly states the proper approach of a High Court judge in such circumstances. A court should not lightly depart

from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing.

2.3 In his judgment Fennelly J. referred to the series of judgments of the High Court on the point in issue in this case. The trial judge considered himself bound by that line of authority. In the light of the case law to which I have earlier referred it seems to me that the trial judge was correct in that approach unless he viewed that line of authority as obviously wrong or having been arrived at without proper consideration of relevant case law or the like. In my view the trial judge was correct in the approach he took."

76. Accordingly, I am satisfied that I am bound to follow the judgment of O'Neill J. in *EH* unless it contains a clear error or fails to take into account any relevant authority which ought to have been considered. None of that appears to me to arise here. Rather the appellant simply seeks to argue that, on principle, it was wrongly decided. That does not in my view amount to a sufficient basis to justify me in departing from the well settled principles of judicial comity and *stare decisis* and I decline to do so in this instance.

Conclusion.

77. In the light of the foregoing, I am satisfied that no error of law has been demonstrated by the appellant in the respondent's approach to record 5 which I uphold. In relation to the remaining records 6 – 16, the respondent was bound to apply the decision of this court in *EH* and I am satisfied did so correctly.

78. For these reasons therefore, I must dismiss this appeal.

Approved

Seamus Woulfe 19/1/16

THE COURT OF APPEAL

Record Number: 2017/71

Peart J.
McGovern J.
McCarthy J.

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS 1997 AND 2003

BETWEEN:

F.P.

APPELLANT

- AND -

THE INFORMATION COMMISSIONER

RESPONDENT

- AND –

THE CHILD AND FAMILY AGENCY, OUR LADY'S CHILDREN'S HOSPITAL, CRUMLIN, SP AND SF

NOTICE PARTIES

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 30TH DAY OF JANUARY 2019

1. This is an appeal from the order of the High Court (McDermott J.) made on the 20th December 2016 refusing the appellant's appeal on a point of law pursuant to s. 42 of the Freedom of Information Acts 1997-2003 ("the Act") for the reasons stated in a written judgment delivered on that date ([2016] IEHC 771).

2. The appellant had sought certain records from the Eastern Health Board ("the Board") which related to himself and S whom he had always believed to be his biological daughter until he later found out that this was not so. The records he sought emanate from certain complaints of sexual abuse made by his wife which were alleged to have been committed by him in 1997 against S when she was aged about four years. The details of

the allegations have never been disclosed to him other than that the child had stated that "he had touched her back bottom and her front bottom".

3. The appellant was notified of the allegations by the Board and was invited to a meeting as part of the Board's investigation. He declined to participate. He was also invited by the second named notice party ("the hospital") to attend the hospital for interview in relation to an assessment of S by the hospital. He declined that invitation also, because assurances which he had sought as to fair procedures were not forthcoming.

4. In December 1998 further allegations of sexual abuse were made against the appellant by his wife in respect of S. The hospital commenced an investigation. The appellant again refused to submit to interview as he was still not satisfied that appropriate procedures and facilities would be in place.

5. Further correspondence ensued whereby the appellant sought certain information in relation to the process, including as to who had been notified in relation to the conclusions, including his superior at the school where he worked as a teacher. Some information was forthcoming in that regard, as noted by the trial judge in his judgment, but this was insufficient to satisfy the appellant's concerns.

6. On the 25th February 1999 the appellant made a request under s. 7 of the Act to both the Board and to the hospital. He sought from both all records held relating to himself, and to S, and in relation to himself and S jointly. On the 28th June 1999 some records which related to him were released but, on the basis of s. 28 of the Act, those which related to S either individually or jointly were refused.

7. On the 6th October 1999 the appellant was notified by the Board of the outcome of its investigation into the allegations. That letter stated:

"Taking into account all information available to this department, including the information contained in the assessment in St. Louisa's Unit, the concerns or allegations are unconfirmed.

As the gardaí were notified of the allegation, they will be notified of the outcome."

[Emphasis provided]

8. In November 1999 the appellant sought further records created by the Board subsequent to his first request, to which the Board responded on the 25th November 1999 by providing him with one such record – any others comprising only correspondence between him and the Board. It appears that there were four records relating to S which had been created since his first request, and these too were withheld by the Board on the basis of s. 28 of the Act.

9. As noted by the trial judge, the appellant sought an internal review of the decisions of both the Board and the hospital dated 25th November 1999. Those reviews resulted in the original decisions being upheld.

10. On the 25th October 2000 the appellant sought a review of these decisions by the respondent Information Commissioner pursuant to s. 34 of the Act. Considerable, indeed inordinate, delay in the Commissioner's office ensued. However, in April and June 2003 the appellant was eventually informed by the Commissioner that her preliminary view was that the decisions of both the Board and the hospital should be upheld on the basis that the records contained joint personal information relating to him and S, and as such were exempt under s. 28 of the Act. However, the appellant was invited to demonstrate that on balance the public interest in granting access to the joint records outweighed the child's right to privacy within the meaning of s. 28(5) of the Act. He made submissions, but nevertheless on the 25th November 2005 the Commissioner affirmed the decisions of the

Board and of the hospital on the basis that the joint records in question were exempt under s. 28 of the Act.

11. The appellant then brought an appeal to the High Court on a point of law pursuant to s. 42(1) of the Act in respect of these decisions. That appeal was successful. In her judgment in *P. v. Information Commissioner* [2009] IEHC 574, Clark J. concluded that the Commissioner had misdirected herself as to the application of the public interest test set out in s. 28(5)(a) of the Act . The decisions were set aside, and the matter was remitted to the Commissioner for a further consideration and decision.

12. There was a good deal of correspondence back and forth between the appellant and personnel in the Commissioner's office before that fresh review was undertaken. It is unnecessary to describe that correspondence in any detail. In due course by letter dated 14th November 2013 the investigator, Ms. Campbell, wrote to the appellant enclosing a copy of her preliminary view. She considered various matters including the delay that had occurred. But ultimately she expressed the view that the right to privacy outweighed the public interest in granting access to any documents other than what were referred to as "form documents" to which, in her view, s. 26 of the Act (*i.e.* information obtained in confidence) did not apply. It was proposed that such form documents would be released but with appropriate redactions.

13. The appellant was given the opportunity to make submissions upon this preliminary view, and he did so extensively by letter dated 6th December 2013. In his affidavit in the High Court sworn on the 19th March 2014 he set out a lengthy summary of the submissions that he made in support of his view, *inter alia*, that the public interest should outweigh the right to privacy of S and other third parties to whom the information sought may relate, such as S's mother. He relied also on the many previous submissions that he had made over previous years.

14. The Information Commissioner (by this time, Mr Peter Tyndall) issued a decision on the 23rd January 2014 in respect of the requests made to the Board and the hospital. Once again the request for records was refused.

15. This decision is lengthy. Having given some background, and having described some of the legal issues arising, and referred to relevant case law dealing with those issues, the Commissioner set out in detail the applicant's submissions in relation to the public interest considerations identified by him in his written submissions. The Commissioner stated in that regard:

> "In essence, however, his public interest considerations amount to an argument that the public interest in openness and accountability is entitled to great weight in the circumstances of this case given the rights involved and the seriousness of the functions being performed by the HSE and the Hospital in investigating the allegations against him. He also argues that 'full details and the related documentation' should be provided to an 'accused person in early course' as a means of deterring false allegations of child sexual abuse, particularly in cases involving parental separation or divorce'."

16. The Commissioner referred to s. 8(4) of the Act which provides that when deciding whether to grant or refuse a request under s. 7 of the Act the reasons given for making the request and any belief or opinion of the 'head' as to what are those reasons "shall be disregarded".

17. Having considered further the balancing of private rights against the public interest, the Commissioner stated:

> "In any event, however, both section 8 (4) of the FOI Act and the Rotunda Hospital case stand for the principle that a requester's private interest in certain records cannot be construed into a public interest based on the requester's own motives for seeking

access to the records. Thus, I consider that an objective rather than subjective standard applies in determining the public interest in granting access to the records concerned".

18. The Commissioner went on to state that the public interest test did not give him any authority to investigate complaints against public bodies or to act as an alternative dispute mechanism in relation to actions taken by public body.

19. The Commissioner acknowledged that "there is a strong public interest in openness and accountability in relation to the manner in which public bodies carry out their functions in dealing with allegations of child sexual abuse", but he did not consider that it was within his remit to determine whether the appellant should have been provided with further personal information in the course of the assessment process or the investigation, whether as a matter of fair procedures, equality of arms, or simply good administrative practice. He stated that the question whether the appellant should have access to further information in order to pursue a remedy or some other form of redress is a matter for the courts, and that it would be in the context of relevant court proceedings, such as an action for judicial review or defamation, that the applicant's identity as the person against whom allegations of child sexual abuse were made and his personal reasons for seeking disclosure of sensitive personal information relating to others in addition to himself would be of relevance.

20. The Commissioner stated also that it was not intended by the Oireachtas that the Act should be used as a means of deterring false allegations of child sexual abuse in the manner suggested by the appellant.

21. Addressing the question of the right of access to a record comprising personal information, the Commissioner stated:

"As matters stand, there is no right of access to a record which is exempt under section 28 of the FOI Act. Personal information remains exempt information (notwithstanding section 28 (2) (a)) where section 28 (5B) applies. With certain limited exceptions not applicable in this case, the Oireachtas has determined that personal information should be given strong protection in response to an FOI request. Even where an overriding public interest in granting the request exists, there is a discretionary element to the application of section 28 (5) (a).

Moreover, the applicant's private interest in determining whether he may have a cause of action whether under the civil or criminal law does not establish a public interest in disclosure of the information concerned. As Mrs Justice Macken stated in relation to Thomas Walsh's request in the *Rotunda Hospital* case: 'I recognise, of course, the desire of persons to have as much information as possible about the circumstances of birth. A policy, however, giving rise to a public interest, is not easily adopted without legislative guidance, because of course, such a policy must be debated and its limits, if any, fixed by reference to any competing interests (the mother's, a new family's, privacy and such matters)'. It seems to me that a change in policy such as that proposed by the applicant with respect to access to personal information under section 28 would require consideration of the constitutional right to privacy, the principle of proportionality that is reflected in Article 8 of the European Convention of Human Rights, as well as the need to safeguard the flow of relevant information to public bodies regarding suspected cases of child abuse."

22. As to whether the present case gave rise to 'exceptional circumstances' such that the public interest required disclosure of sensitive personal information where serious questions arose about the performance by a public body of its functions, the Commissioner

did not believe that he could determine unilaterally that there are serious questions about the performance by a public body of its functions such as would warrant the disclosure of sensitive personal information without the consent of the third parties concerned. He went on to state, having regard to Article 8, and the Supreme Court's judgment in the *Rotunda Hospital* case, that in his view, even in exceptional circumstances, the amount of sensitive personal information about a third party individual that could properly be released under FOI without consent may be quite limited.

23. There followed a number of paragraphs in the decision under the heading "No overriding public interest in the records at issue". The relevant parts of those paragraphs are as follows:

> "In his submission dated 6 December 2013, the applicant concedes that the personal information of another party must be protected. He acknowledges that privacy rights are protected under both the Irish Constitution and Article 8 of the European Convention on Human Rights. His offer of a declaration to protect and uphold the privacy rights of the third party individuals concerned in this case would even appear to be an implicit admission that there is no *overriding public interest* in releasing the information at issue to any member of the public other than himself. The applicant clearly has a very strong private interest in the matter, but his private interest does not itself represent a public interest. Moreover, he seems to overlook the fact that the duty to protect and uphold the privacy rights of [S] and her mother … rests with the HSE and the Hospital, the bodies which hold the records at issue in this case.
>
> Nevertheless, the applicant has previously been granted access to a large number of records relevant to his requests. I recognise that the vast majority consists of his own correspondence with the public bodies. As the Investigator noted in her preliminary

view, [S's mother] would have necessarily ceded any rights to privacy viz. the applicant that she and [S] may have had in relation to the allegations insofar as disclosure would have been considered necessary by the competent authorities for the purposes of procedural fairness at the time of the investigation. Accordingly, the applicant was given a certain amount of information during the investigative process and at its conclusion, and copies of his correspondence and a small number of additional records have been released to him in response to his FOI requests. [*There then followed a list of 16 documents, for the most part being copy correspondence*]

I find that the released records have served the public interest in openness and accountability to some degree. They may not provide the level of detail that the applicant seeks, but they provide a good outline of how the HSE and the Hospital dealt with the allegations made against him. In other words, they shed some light on the "working of government and administration" in relation to the investigation of allegations of child sexual abuse at the time. The applicant has suggested that the outcome of "unconfirmed" as opposed to "unfounded" was itself prejudicial to him. However, it seems to me that, having been made aware of the outcome, he should have been in a position to challenge it through the appropriate channels without recourse to FOI if he believed that it was somehow erroneous. In any event, I do not accept that the applicant's dissatisfaction with the investigative process and its outcome provides a basis for undermining the privacy rights of the third party individuals concerned under section 28 of the FOI Act in relation to the remaining information at issue. I conclude that, on balance, the public interest in granting the applicant's requests for access to the remaining records at issue is not sufficiently

strong to outweigh the public interest in upholding the privacy rights of the third parties concerned."

24. Referring to the Investigator's preliminary view that certain 'form documents' should be released in redacted form, the Commissioner stated that he had had regard to that view, and he listed the form documents in question. He referred to the preliminary view that the release of these redacted documents "would involve only a minimal invasion of privacy while serving the public interest in openness and accountability". Having noted the objections of [S] and her mother to any further release on the basis that they do not want these matters opened up again after the passage of so much time, the Commissioner concluded that even though the invasion of privacy would be minimal, the public interest which would be served by the release of these documents would also be only minimal and that overall "any further invasion of her privacy or that of her mother's, through the release of further personal information was not warranted in the public interest".

25. The Commissioner concluded that the records that the appellant had sought to be released to him were all exempt under s. 28(1) of the Act, and that the granting of the requests made was not warranted under s. 28(5)(a) of the Act by virtue of any overriding public interest, and the Commissioner accordingly upheld the refusal decisions by the Board and the hospital.

Appeal on Point of Law – s. 42 of the FOI Act:

26. The appellant has a right of appeal to the High Court against a review decision. However, as provided for by s. 42 of the Act, it is a limited right of appeal, being confined to a point of law. Any such appeal must, in accordance with s. 42(4) of the Act, be initiated not later than 8 weeks from the date on which notice of the decision was given to the appellant.

27. The appellant initiated his appeal within time by originating notice of motion dated 20th March 2014. In his grounding affidavit at para. 35 thereof, he identified the point of law being relied upon as being that "[the Commissioner] misdirected himself in his interpretation and application of section 28 of the Act, and, more specifically, in his application of the public interest test set out in section 28(5)(a) of the Act". That point of law is expanded upon in para. 36 of that affidavit, where he stated:

> "36. In support of my appeal on the point of law set out in the preceding paragraphs, I rely on the following grounds of appeal:
>
> (i) The respondent misdirected himself as to the application of the public interest test set out in, and in the exercise of his discretion under, section 28 (5) (a) of the Act by wrongly adopting what is in effect a fixed or inflexible policy of refusal of access to documents in requests concerning allegations of child abuse;
>
> (ii) The respondent erred in his characterisation and/or treatment of the joint personal information at issue in the requests as being solely or primarily the personal information of the fourth named notice party and/or the third named notice party;
>
> (iii) The respondent failed to have any or any due regard to the fact that the joint personal information at issue in the requests also constitutes personal information of the appellant;
>
> (iv) The respondent erred in his interpretation of section 28 of the Act insofar as he concluded that any release of the records concerned to the appellant himself amounted to release of the records to the world at large;
>
> (v) The respondent failed to have any or any due regard to the considerations of the public interest identified and relied on by the appellant herein in

the context of the application of the public interest test set out in section 28 (5) (a) of the Act, including those considerations of the public interest relating to the vindication of rights of persons in the position of the appellant herein under the Constitution and the European Convention on Human Rights and, in particular, erroneously characterised his submissions as constituting a private rather than a public interest for the purposes of this test;

(vi) The respondent failed to have any or any due regard to the extremely prejudicial effects of persons in the position of the appellant not being able to access information held by public bodies relating to allegations of the most serious and criminal nature against such persons which may have grave and far-reaching consequences for their personal and family lives;

(vii) The respondent failed to have any or any due regard to the facts and circumstances of the case in his interpretation and application of section 28 (5) (a) of the Act;

(viii) The respondent failed to have any or any due regard to the judgment of the High Court (Clark J.) delivered on 13th July 2009, *P. v. Information Commissioner* [2009] IEHC 574, remitting the matter for fresh consideration, in his interpretation and application of section 28 (5) (a) of the Act;

(ix) The respondent gave undue weight to the right to privacy of the fourth named notice party and/or the third named notice party and/or failed to recognise, or have regard to, any limitations on the right of privacy as

protected under the Constitution and/or the European Convention of Human Rights;

(x) The respondent erred in his weighing of the public interest that the request should be granted and the public interest that the right to privacy of the individual(s) to whom the joint personal information also relates should be withheld;

(xi) The respondent wrongly and unfairly took account of the period of time which had passed since the commencement of the appellant's Freedom of Information requests in 1999 in assessing the public interest which would be served by the release of the records, in circumstances where very serious and lengthy delays in the consideration and conclusion of the appellant's requests were attributable to delays, largely unexplained, in the respondent's office;

(xii) In all circumstances, the respondent interpreted and applied section 28 of the Act in such a way as to render the public interest test set out in section 28 (5) (a) devoid of any practical meaning or effect.

28. In his judgment the trial judge set forth in great detail the submissions made on the appellant's behalf in support of his grounds of appeal. He referred to the fact that the appellant complains that the Commissioner, while acknowledging that the information sought constituted joint information, nevertheless proceeded thereafter to consider that information almost exclusively from the perspective of the notice parties to whom it also related. However, the trial judge concluded that he was not satisfied that there was any substance to that submission, and that "the reality of the case is that the records sought are exempt as personal information under s. 28 (1)".

29. In the High Court, and on this appeal, the appellant sought to characterise his interest in gaining access to the information he seeks as being a public interest, and not simply his own private interest. In that regard he submitted that an aspect of that public interest is the deterrent effect that access to the documents could have on other persons minded to make false allegations of sexual abuse. He submitted, as noted by the trial judge in his judgment, that it would also promote good administration, the holding of correct information, and the principle of equality of arms thereby ensuring that all parties to potential civil proceedings would have equal access to whatever material and information that was available.

30. He concluded that the appellant's interest in seeking the material referred to in relation to the sexual abuse allegations made against him is a purely private interest which was not a sufficient basis to mandate the exercise of the Commissioner's discretion under the section in the appellant's favour. The trial judge was satisfied that the Commissioner had not given undue weight to the mother's and child's privacy right, and had not failed to recognise the limitations on those rights as protected under the Constitution and/or the Convention.

31. In coming to that conclusion the trial judge referred to the judgment of O'Malley J. in *K v. the Information Commissioner and Health Service Executive* [2013] IEHC 373 in which the learned judge stated, albeit in a somewhat different context, namely the operation of the court system in connection with childcare proceedings, that "The Freedom of Information Act is not, as O'Neill J. makes clear (in *E. H. v. Information Commissioner* [2001] 2 I.R.463) intended to be used in a manner that bypasses the constitutionally established structures for the administration of justice".

32. The trial judge was satisfied that the "public interest" in granting access to the information sought "is not to be determined on the basis of the appellant's personal

circumstances or desire to explore or pursue civil proceedings or criminal complaints". Thereafter the trial judge considered the judgments of Fennelly J. and Macken J. in *The Governors and Guardians Rotunda Hospital v. Information Commissioner* [2013] 1 I.R.1, being a case relating to the disclosure of details of a deceased birth mother to her adult child, and which were considered to fall within the scope of confidential information under section 26 of the Act. In that case, as the trial judge noted, Fennelly J. was satisfied that the question to be determined was whether the provision of access to a particular record was in the public interest, and went to determine that "the issue of a child seeking information about his or her concerns intensely private matters which could give rise to a conflict with the profound wish for privacy on the part of the other party". Fennelly J. was satisfied that "the requester was seeking access to the record as a private individual for a private purpose". He went on to state that whether people should be granted access to such information concerning their origins was a matter of policy which could have been inserted in the legislation, and noted that this had not been done. In the circumstances, Fennelly J. was satisfied that it was not open to the Commissioner in that case to adopt a general policy in the public interest.

33. The trial judge also referred to the judgment of Macken J. in the same case. She also was not satisfied that there was an overriding public interest of the type found by the Commissioner to exist. In that regard she stated, as noted by the trial judge:

> "On the contrary, such an approach in considering a so-called public interest in a requester having information relating to the circumstances of birth, suggests an interpretation of the Act coming close to establishing a right of access to exempt information, which can only be denied by some exceptional circumstances. This is not a correct application of s. 26 (3) … and ignores the provisions of s. 6 (7)…".

34. Having so stated, Macken J. went on to state:

"In such circumstances,' public interest' would, in my view, require to be a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law. In the present case, the respondent made a statement of alleged policy as constituting the 'public interest'. There is no evidence that the Oireachtas has adopted such a policy. I am of the view that, at least on the materials mentioned, no established public interest has been properly identified."

35. Thereafter the trial judge expressed, *inter alia*, the following conclusions:

"67. The Court is satisfied that the 'public interest' elements asserted by the appellant are in reality matters of 'private interest'. It is also satisfied that, as already noted, there are extensive legal remedies and procedures available in civil and criminal proceedings to ensure that legally admissible, discoverable or disclosable materials are made available to the parties and to the court in the course of civil and criminal proceedings. In my view, it would require a legislative change to permit the right of access to records as a matter of course to persons claiming to be falsely accused of child sexual abuse or any other crime.

68. The Court is satisfied that the reviewer and the Commissioner (at pages 12 to 13 of the decision already quoted) carefully distinguished between the appellant's assertion of private rights and his claim, which was accepted, that there was a general public interest in openness and transparency in respect of information held by public bodies The respondent acknowledged the strong public interest in openness and accountability in relation to the manner in which public bodies carried out their functions when dealing with allegations of child sexual abuse. However, he determined that the records that were released to the appellant were sufficient to serve the public interest in openness and accountability. They shed light on the

working of government administration concerning the investigation of the abuse at the time. The court is satisfied that the respondent gave appropriate weight to the considerations of public interest relevant to his determination and in accordance with the legal principles applicable.

69. The respondent also considered the rights to privacy as asserted by the two notice parties, the mother and child. He took into account that the child was four years old when the allegations were originally made. At the time of the determination, the views of the child were taken into account concerning her right to privacy. She was then a young adult and a student and no longer had any familial contact with the appellant. She wished to move on with her life and the Commissioner took account of her submission and her mother's submission that a senior clinical psychologist had indicated that no further reference should be made to these events in her own best interest. The Commissioner concluded that since over 14 years had passed since the records were created their release was not warranted nor was any further invasion of her or her mother's right to privacy. The Court is satisfied that the appellant's private interests which constitute a significant element of his grounds for access to the records did not qualify as a 'private interest' and that the important public interest concerning good governance was taken into account in the decision to release a significant body of material to him. It was open to the Commissioner to consider that this important public interest was outweighed by the public interest in upholding the rights to privacy of mother and child for the reasons given."

36. The trial judge also went on to consider the appellant's submission that the release of the material to him ought not to be regarded as "being effectively, or at least potentially, to the world at large", as was found by the Commissioner, despite the appellant's willingness

to make a declaration that if the material was released to him he would protect and uphold the privacy rights of the third parties concerned. The Commissioner had found there to be little value in such a declaration where it would be impossible to enforce it. Equally it was submitted that certain conditions could be attached to any release granted. But the trial judge considered that the attaching of conditions would be going beyond the jurisdiction of the High Court hearing an appeal under s. 42 of the Act, particularly where such an appeal was not a *de novo* hearing, but one confined to an error of law on the part of the Commissioner.

Grounds of appeal

37. In his notice of appeal the appellant sets out eight grounds on which he contends that the trial judge erred in his judgment, as follows:

(a) by wrongly characterising the matters of public interest advanced and relied upon by the appellant as being matters of private interest alone;

(b) by failing to have any or any due regard to the matters of public interest advanced and relied upon by the appellant;

(c) by failing to find that the respondent gave undue weight to the right of privacy of the child and/or the mother, and failed to have any or any due regard to the judgement of Clark J. in *P v. Information Commissioner* [2009] IEHC 574 remitting the matter for fresh consideration;

(d) by upholding the respondent's determination that the records which had been furnished to the appellant (*i.e.* copies of his own correspondence) were sufficient to serve the public interest in openness and accountability, and to promote the principle of good administration in respect of the two public bodies concerned;

(e) by failing to find that the respondent had adopted a fixed or inflexible policy of refusal of access to the accused person in respect of any of the core or significant documents in requests concerning allegations of child abuse;

(f) by interpreting and applying section 28 of the FOI Acts in such a way as to render the public interest test set out in section 28 (5) (a) of the Act devoid of any practical meaning or effect;

(g) by upholding the respondent's overarching finding in his Decision that any release of the records concerned to the appellant himself, being the accused person, amounted to release of the records to the world at large;

(h) by its conclusions on the relevance and/or availability of alternative remedies and their effect on the appellant's request for access to the records sought.

38. The appellant has identified in his submissions a number of interests which he considers amount to a public interest. He submits that the Commissioner and the trial judge wrongly characterised these as purely private interests, and failed to have regard to them when carrying out the balancing exercise required to be carried out under s. 28 (5) (a) of the Act when considering whether the public interest in providing the records sought outweighed the public interest that the privacy rights of the child and the mother should be upheld. In this respect it is submitted that the Commissioner and the trial judge erred as to their interpretation and application of the test for the purpose of the section.

39. The appellant submits that the facts and circumstances of this particular case are important to bear in mind when considering the public interest, particularly the fact that in his previous challenge to a decision of the Commissioner in *P v. Information Commissioner* (Clark J.) the Court was of the opinion having examined the records in question that there was malice on the part of the mother in making the complaints of sexual abuse against the appellant. Emphasis is placed also on the fact that the allegations have

been categorised as being "unconfirmed", and on the fact that he has never been informed of the details of the allegations levelled against him. It is submitted that these factors are relevant factual facts and circumstances when considering the public interest in openness and transparency, and whether in this case the public interest in disclosing the materials outweighs the public interest in upholding the privacy rights of the child and mother in respect of the joint personal information sought by the appellant. Counsel has referred to the long title of the Act which states, *inter alia*, that it is an Act "TO ENABLE MEMBERS OF THE PUBLIC TO OBTAIN ACCESS, TO THE GREATEST EXTENT POSSIBLE CONSISTENT WITH THE PUBLIC INTEREST AND THE RIGHT TO PRIVACY, TO INFORMATION IN THE POSSESSION OF PUBLIC BODIES AND TO ENABLE PERSONS TO HAVE PERSONAL INFORMATION RELATING TO THEM IN THE POSSESSION OF SUCH BODIES CORRECTED ...". It is submitted accordingly that there is a public interest in ensuring that someone in the position of the appellant, against whom serious allegations have been maliciously made, and which have been found to be "unconfirmed", is provided with the personal information comprising the records he seeks, so that he can seek to have the records corrected. The appellant considers the allegations to be false and that he is entitled to have the record of the allegations corrected or amended to reflect what he considers to be the correct position, namely that the result of the investigation was that the allegations were "unfounded" as opposed to "unconfirmed". It is submitted that the power to have the record corrected under s. 17 of the Act supports his argument that the public interest in openness and transparency, and of deterrence which is behind the entitlement to his personal information that he seeks is entitled to great weight in the balancing exercise to be undertaken under s. 28(5) of the Act, and that the Commissioner erred by concluding that the public interest he identified was outweighed by the right to privacy enjoyed by the child and the mother.

40. The appellant has submitted that the Commissioner failed to have proper regard to the particular facts and circumstances of the present case when carrying out the balancing exercise under s. 28(5) of the Act, and that in effect he applied what amounts to a fixed and inflexible policy of refusing access to records in any case of an allegation of sexual abuse. In other words, the Commissioner has adopted a fixed policy whereby in every case where records are sought in relation to allegation of sexual abuse the public interest in upholding and protecting the right to privacy on the part of the complainant will always trump any public interest in making the information available to a person in the position of the appellant who requests such information under s. 7 of the Act.

41. The appellant submits that he has a constitutional right to be informed of the nature of the allegations made against him so that his right to defend himself against them is protected and vindicated, and that this is a matter that was not given proper weight by the Commissioner when balancing the public interest against the right to privacy.

42. It has been submitted also that while undoubtedly the appellant's interest in obtaining the joint personal information can be seen as being his own private interest as opposed to a public interest, that private interest does not of itself deprive it of the character also of a public interest, so that they can overlap and coexist when all the particular facts and circumstances of the case are taken into account. In the present case the appellant submits that the facts and circumstances are of a particularly egregious nature given the malicious nature of the allegations as found by Clark J. in *P v. Information Commissioner*, and the fact that the allegations have been found to be "unconfirmed". It is submitted that particular weight should have been attached to these features of the case by the Commissioner.

43. The appellant has submitted also that upholding the public interest in openness and transparency is important so as to deter persons from making malicious and false

allegations of sexual abuse, and that any wrongdoing in that regard can be dealt with appropriately, and that particular weight should have been attached to this public interest by the Commissioner when weighing the public interest in making disclosure against upholding the rights to privacy in relation to the information which are asserted by the child and mother in this case.

44. 44. It was submitted also that the Commissioner and the trial judge erred in discounting the fact that the appellant was willing to give a declaration or undertaking that if the records were released he would guarantee the privacy of the child/mother by not revealing the contents to any other party. He suggests that in such circumstances it was an error to conclude that a release of the information to the appellant would amount to a release of the information to the world at large. It is submitted that in so deciding the Commissioner did not have regard to the type of information in question, namely highly sensitive information which the appellant was himself most unlikely to want to disseminate, for obvious reasons. The appellant submits that the Commissioner was wrong to refuse to consider the value of such an undertaking on the basis that he would have no way of policing or enforcing the undertaking. Rather, it is submitted, the offer of such an undertaking ought to have been seen by the Commissioner as indicative of the appellant's *bona fides* in seeking the information.

45. In so far as s. 8(4) of the Act provides that the Commissioner shall disregard, inter alia, any reason that the requester gives for the request when he is deciding whether to grant or refuse a request under s. 7, the appellant suggests that this should not be construed as meaning that the reasons for the request may not be had regard to when considering whether the public interest in providing the information outweighs the privacy interests engaged for the purposes of s. 28(5) of the Act, since the context in which the request is made can be relevant to the exercise of his discretion.

46. Insofar as the respondent and the trial judge referred to the judgments of Fennelly J. and Macken J. in the *Rotunda* case already referred to, the appellant submits that it is to be distinguished since it was a case where s. 26 of the Act (confidential information) was under consideration, rather than s. 28 (personal information), and that the comments relied upon should be seen as being *obiter*.

47. The respondent opposes the appeal to this Court and has provided both written and oral submissions. Those submissions are supported by submissions both written and oral provided by the second named notice party, namely Our Lady's Children's Hospital, Crumlin. Counsel for the respondent in her submissions has emphasised the limited nature of an appeal from the Commissioner's decision on a point of law only. It is submitted that it is difficult to identify any issue raised on appeal to the High Court by the appellant as being a point of law, and that in effect what the appellant is seeking to do is to obtain a different decision from the High Court on appeal, because he disagrees with the way in which the Commissioner exercised his discretion and carried out the balancing exercise he was required to carry out before deciding to refuse the appellant's request. It is suggested that it amounts to a merits appeal which is impermissible.

48. The respondent emphasises that under the provisions of s. 28 (1) of the Act personal information is exempt from disclosure, unless it relates, *inter alia*, to the requester or where it relates to another party, that other party consents. The obligation to refuse is mandatory unless one or more of the exceptions in s. 28 (2) apply, or if the Commissioner exercises his discretion under s. 29 (5) (a) of the Act. The respondent emphasises the discretionary nature of the Commissioner's function under s. 28 (5), and the very limited circumstances in which an exempt record may be disclosed.

49. The respondent emphasises the importance which the provisions of the Act attach to the privacy of personal information and the need to protect that privacy - *e.g.* s. 43 of the

Act as to all reasonable precautions being taken by the High Court to prevent disclosure to the public of information contained in an exempt record, such as, *inter alia*, by conducting a hearing other than in public.

50. When emphasising the limited nature of an appeal under s. 42 to the High Court on a point of law, the respondent has referred to a number of judgments which set out certain principles as to the ambit of the appeal on a point of law, and which indicate the necessity for a certain deference to the expertise of the Commissioner in these matters, and to the wide margin of appreciation to be permitted to him as to the manner in which he exercises his discretion. Cases referred to include *Deely v. Information Commissioner* [2001] 3 I.R. 439, *Killilea v. Information Commissioner* [2003] 2 I.R. 402, *Sheedy v. Information Commissioner* [2005] 2 I.R. 272, *Westwood Club v. Information Commissioner* [2014] IEHC 375, and *McKillen v. Information Commissioner* [2016] IEHC 27. It is submitted that the principles that apply to an appeal such as the present one should be seen as akin to judicial review principles, so that a decision will be set aside on a s. 42 appeal only if a clear error of law on the part of the Commissioner can be established, and not simply because the High Court would on the same facts have made a different decision.

51. The respondent submits that it is clear from the decision itself that very detailed consideration was given by him to the competing interests which he was required to consider and weigh up before deciding to exercise his discretion to either grant or refuse the appellant's request. He submits that the trial judge was correct in his conclusions that no error of law was made by him. He refers to the fact that in his decision he stated that he agreed with the appellant that the public interest in openness and transparency was "a strong public interest". But he submits that under s. 28 (5) (a) the public interest referred to is not simply what the appellant refers to as the public interest in openness and transparency, or the public interest in deterring others from making false allegations but is

rather, as provided therein, "the public interest that the request be granted". It is submitted that such a public interest must be other than and beyond the essentially private interest that the requester has in obtaining access to the information for his own purposes, whatever those may be.

52. Counsel for the respondent has referred in some detail to the decision of the Commissioner. She has drawn attention to the 'public interest arguments' that the appellant had relied upon in his access request, as they are noted by the Commissioner as follows:

- Deterring false allegations of sexual abuse and, more generally, the right of an accused father/husband to information about allegations of child sexual abuse in cases of parental separation;
- Reducing the risk of an erroneous "validation" of child sexual abuse;
- Promoting the principle of good administration;
- The right to correct information held by a public body;
- Promoting the principle of "equality of arms", i.e. ensuring that all parties in civil proceedings have "equal access to whatever materials and resources are available".
- Discouraging the "deprivation of a right of action", which in this case would seem to mean, in the applicant's own words to the High Court, facilitating a "fishing expedition" by granting access to information that would allow him to determine whether he has a cause of action under section 5 of the Protections for Persons Reporting Child Abuse Act 1998.

53. Counsel has referred to the Commissioner's conclusion, to which I have referred already, that these matters were more in the nature of private interests, albeit that he expressed agreement with the appellant's view that "there is a strong public interest in

openness and accountability in relation to the manner in which public bodies carry out their functions in dealing with allegations of child sexual abuse". It is submitted that there was no error of law on the part of the Commissioner, and that the trial judge was correct to reject the appeal against same.

54. It is submitted by the respondent that it is clear from the very lengthy decision of the Commissioner that care was taken by the Commissioner to consider all the submissions and material put forward by the appellant, and to the particular facts of the case, and that it cannot be properly said that the Commissioner has evinced a fixed or inflexible policy that in all cases involving allegations of child sexual abuse he will always decide in favour of upholding the privacy of other parties and refuse access to the records sought in so far as they contain personal information of such other party

55. The respondent submits also that there is no error of law in the conclusion by the Commissioner that an undertaking by the appellant to ensure that the privacy of the child and mother was protected in the event that the materials were disclosed to him was insufficient either on the basis that the Commissioner had no jurisdiction under the Act to impose conditions, or accept such an undertaking, or on the basis that he could not police or enforce any such undertaking, and that the High Court was correct to so conclude also.

56. As for the appellant's criticisms of the High Court judge's references to the availability of alternative remedies for the appellant in relation to gaining access to the materials he seeks access to, such as by way of discovery/disclosure of documents in civil or criminal proceedings to which the appellant may be a party, the respondent submits that the appellant is mischaracterising the trial judge's comments. Undoubtedly, for example at paras. 34, 35, 68 and 75 of his judgment, the trial judge referred to the fact that there were legal remedies available in both civil and criminal proceedings to ensure that relevant documents were made available, such defamation or malicious prosecution proceedings,

and also in judicial review. However, while the appellant submitted that these alternative remedies and the procedures for discovery/disclosure exist are no answer to his request for access to documents sought under s. 7 of the Act, the respondent submits that the request was not refused on that basis, but rather on the basis that the public interest in providing the documents was outweighed by the public interest in refusing so as to protect the privacy of the child and the mother.

Conclusions

57. The core issue raised on this appeal is whether or not the trial judge was correct to uphold the trial judge's conclusion that the Commissioner had correctly interpreted s. 28 of the Act, and had applied the correct test and lawfully exercised his discretion. More specifically, that core issue is whether the trial judge was correct to determine that the Commissioner's decision that the public interest in providing access to the joint personal information sought by the appellant was outweighed by the public interest in upholding the privacy of the child and mother in this case. That core issue is encapsulated by grounds (a) to (c) and to an extent (f) of the grounds of appeal. Before I address that core issue, I prefer to express my conclusions on the other less central questions raised by the appellant at grounds (d), (e), (g) and (h) in the grounds of appeal.

Ground (d): Furnished records sufficient to serve the public interest in openness and transparency:

58. The question whether or not the provision of certain records to the appellant was sufficient to serve this public interest is somewhat incidental to the core issue in the appeal. Whether it is or is not sufficient for that purpose does not affect the question of whether the provision of the additional material sought is a public interest, and if so, whether that public interest is outweighed by the public interest in upholding the right of privacy of the

child and mother. Nonetheless, since it is raised as a ground in the s. 42 appeal it was addressed by the trial judged, and I have at para. 35 above set out the trial judge's conclusion on the question. He stated that the Commissioner had acknowledged that there was a general public interest in openness and transparency in respect of information held by public bodies; but went on to state that the Commissioner had concluded that this public interest had been sufficiently satisfied by the provision of such documents as had been provided. The trial judge was satisfied that the Commissioner had taken account of, and given appropriate weight to this particular public interest.

59. While I am satisfied that the trial judge did not err in this conclusion, I would add that in my view even if no such documents had already been provided, it would not mean that the public interest in openness and transparency, acknowledged to be a public interest, would inevitably have to triumph over the public right in upholding the privacy of the child and mother. It goes without saying perhaps that the Commissioner ought to at a minimum consider this particular general public interest in openness and transparency as part of his consideration under s. 28 (5) of the Act, but provided he does so, the fact that no materials may have been provided is not dispositive. I find no error of law on the part of the trial judge, or indeed the Commissioner, in this regard.

Ground (e) – application of a fixed or inflexible policy:

60. In my view the respondent is correct to draw attention to the detailed consideration of the facts and circumstances of this case that is evident from the Commissioner's decision itself. There is nothing to suggest that the Commissioner either has, or applied any sort of fixed and inflexible policy of not providing the access to personal information sought in any case involving allegations of child sexual abuse. It is quite clear that he considered the individual facts and background to this particular request, and dealt with it on its own merits and not by any such fixed or inflexible policy on his part. It may well be

that in many such instances, as submitted by the appellant in the High Court, the Commissioner has concluded under s. 28 (5)(a) that the right of privacy in such materials outweighs any asserted other public interest in providing the documents requested. It may well be that the Commissioner considers that very great weight indeed must attach to the privacy rights of third parties. That is clearly a view that would be open to him. That may well account for the fact, if it be so, that in the majority of cases privacy has been determined to outweigh the competing public interest in openness and transparency. But the fact that it may be so concluded even in the vast majority of cases does not lead to a conclusion that the Commissioner is adopting a fixed and inflexible policy in such reviews that he carries out in relation to such requests under s. 7 of the Act. It must be borne in mind that the statutory scheme provides that refusal is mandated in cases where access to the record requested would involve the disclosure of personal information. Therefore, the default position is that such records may not be given access to if requested. It is only if one of the exceptions to that embargo applies that access may be given, and even then there is discretion. It follows that it will be the exception rather than the rule that access to such personal information will be provided. Because it is exceptional to the general rule, it is understandable that few such requests will be granted. To find otherwise would in effect reverse the exception. In other words, it would be the exception rather than the rule that access would be granted, since the public interest in openness and transparency is a constant. It is present in all cases as a general principle amounting to a public interest to be had regard to in any request. In the present case, the decision itself makes clear in any event that in this particular case individual consideration was given to the competing factors to be taken account of in the balancing exercise, and in my view the trial judge was correct to reject this ground of appeal. There is no error of law on the part of the Commissioner in this regard, and I agree with the conclusions of the trial judge.

Ground (g) – release is "to the world at large":

61. It will be recalled that in his decision the Commissioner had referred to the fact that the appellant had informed him in submissions that he was willing to give a declaration of his willingness to protect and uphold the privacy rights of the third parties concerned in the event that his request was granted, and had gone on to state that the appellant had acknowledged that the FOIN Act does not make any provision for restrictions to be placed on the use of any personal information that may be provided on foot of a request. The Commissioner had concluded that he did not see the value of the offer of such a declaration by the applicant as his office would have no means of enforcing it. The trial judge at para. 71 of his judgment agreed with this conclusion.

62. I also agree with what was stated by the Commissioner in this regard, and find no error on the part of the trial judge. The point is not core to the overall question of whether or not the Commissioner has correctly interpreted and applied s. 28 of the Act. But the Commissioner had to address it since the offer of such a declaration was made by the appellant in submissions. Clearly, if the fact that the granting of access to personal information of another person, or joint information, as in this case, is considered as a release of that information to the world at large, was always to be regarded as a reason for not granting access to that information, then access to such information could never be granted. That would render the exception provided for in s. 28(5)(a) ineffective. But granting such access is, as O'Neill J. stated in *E.H.* a release potentially to the world at large, and it is right that this fact be borne in mind by the Commissioner when balancing the public interest in openness and transparency against the public interest in upholding the rights of privacy of third parties involved. It is a factor to be put in the balance, as is any proposed declaration by the appellant, or similar undertaking, in order to guarantee that such privacy will be protected. But at the end of the day, it is for the Commissioner to

weigh up the different relevant factors, and decide whether the public interest in disclosure outweighs the public interest in upholding privacy by refusing the request. I see no error of law in the manner in which the Commissioner considered the question of the release being one potentially to the world at large, and the declaration offered, and in the conclusion he reached.

Ground (h) - the relevance and/or availability of alternative remedies:

63. The Commissioner acknowledged that there was a strong public interest in openness and transparency in relation to information held by public bodies provided that it was consistent with the right of privacy. He stated also that his office had always recognised that there is "a public interest in promoting procedural fairness where a public body engages with a member of the public in a context which may carry adverse consequences for that individual". H owever, he went on to state that this "does not mean that it is within my remit as Information Commissioner to determine or make value judgments as to whether the applicant should have been provided with further personal information in the course of the assessment process or the investigation whether as a matter of fair procedures, "equality of arms" or simply good administrative practice". He stated also that this public interest did not permit him to review the question of whether the outcome of the investigation was correct or not.

64. These remarks were made in the context of the appellant's concerns about the fairness of procedures in the investigation and the conclusion reached that the allegations were found to be "unconfirmed", and the appellant's wish to seek to have the record corrected through the use of s. 17 of the Act. In that regard the Commissioner stated that "it is not open to me as Information Commissioner to determine that personal information should be provided to the applicant now, in the public interest under section 28(50(a) of the FOI Act, as a means of remedying any actual or suspected wrongdoing by the HSE, the

Hospital, or any third party individuals such as [the mother]. It was at that point that the Commissioner referred to the exclusive power of the Courts in relation to the administration of justice under the Constitution, and that it "would be in the context of relevant court proceedings, such as an action for judicial review or defamation, that the applicant's identity as the person against whom allegations of child sexual abuse were made and his personal reasons for seeking disclosure of sensitive personal information relating to others in addition to himself would be of relevance". He went on to state "the applicant's private interest in determining whether he may have a cause of action whether under civil or criminal law does not establish a public interest in disclosure of the information concerned".

65. Having referred to the appellant's submissions as to why he considered the Commissioner's reliance upon alternative remedies as a reason supporting the refusal of access to the records sought to be erroneous, the trial judge stated at para. 34 of his judgment:

> "34. These submissions focus on the process by which decisions were reached and the purpose for which an applicant might seek records under the Act. That purpose is irrelevant to an application under section 8 (4). Furthermore, this appeal is not concerned with the fairness of procedures in civil or criminal proceedings in the appellant's case which might arise from the behaviour of those making false allegations in this case or any cause of action that may be vested in the appellant arising therefrom. Civil and criminal proceedings are governed by rules of practice and procedure whereby discovery may be directed in civil proceedings or disclosure in criminal proceedings. These issues are determined in the course of those proceedings pursuant to rules of court case law calculated to ensure fair procedures. The question whether the Eastern Health Board or St Louise's Unit acted in

accordance with fair procedures in respect of their investigation of allegations made against the applicant may be the subject of judicial review if there was a failure to observe fair procedures in relation to any determination. If there was such a breach an application may be made to have a decision quashed: the rules of discovery applied to such proceedings. These processes are not in issue in these proceedings which relate to a discrete issue under s. 28(a) [*sic*] and s. 28(5B) of the Act. I am not satisfied that the appellant may use the process of this appeal to mount something akin to a collateral attack on the investigations and determinations made by the notice parties and in particular the finding that the allegations were "unconfirmed".

66. The trial judge made further references to alternative remedies as a means of the appellant seeking redress by way of the procedures of discovery/disclosure, at paras. 35, 68 and 75. The appellant submits to this Court that the availability of alternative remedies is not a relevant consideration under s. 28 of the Act, and that the appellant is not required to have exhausted such remedies before making a request under s. 7 of the Act. Accordingly, it is submitted that the trial judge fell into error in upholding the Commissioner's decision on this basis. I n this context also, the appellant has submitted that the excessive and unexplained delay on the part of the Commissioner's office in reaching a conclusion on his request has seriously prejudiced him in seeking to exhaust his alternative remedies referred to by the Commissioner, since if he attempted to do so he would inevitably be met by arguments that he is out of time and has himself delayed in commencing such other proceedings.

67. I agree with the Commissioner's submissions on this appeal that the appellant is mischaracterising the judgment of the trial judge as advancing the availability of alternative remedies as a reason for refusing his application. The trial judge referred to the procedures available under both civil and criminal proceedings for the disclosure of the

records sought as part of his consideration of whether the public interest in disclosure outweighed the privacy rights of the mother and child, and in the context of the appellant's complaints about the investigation, fair procedures, the "unconfirmed" conclusion reached, and his wish to have the record corrected. He was not in my view stating that the appellant ought to have pursued any of these alternative remedies, either instead of, or prior to, seeking information under the Act, and therefore that he had no entitlement to the information pursuant to his request.

68. I am satisfied that there is no error on the part of the trial judge under this ground of appeal.

Grounds (a),(b), (c) and (f) – private interest versus public interest – s. 28 (5)(a) of the Act:

69. As I have stated, the appellant's core submission on this appeal is that the trial judge misconstrued and misapplied the public interest test provided for in s. 28(5)(a) of the Act. I have already summarised the parties' submissions under this heading. The parties made extensive written submissions, which were supplemented by their oral submissions. Having considered same, I am not satisfied that there is any error on the part of the trial judge, or therefore the Commissioner in relation to the interpretation of the test and its application in this case under s. 28(5)(a) of the Act. Central to the appellant's case is that the Commissioner erred in concluding that the public interest factors identified by the appellant as being relevant to the balancing exercise under s. 28(5)(a) of the Act were to be seen as the private interest of the appellant, notwithstanding that it was acknowledged that there was a public interest generally in openness and transparency. I have already set out above the matters to which the appellant drew attention as public interests at para. 52 above.

70. The Commissioner, in my view correctly, stated at para. 38 of his decision that the requirement in s. 8(4) of the Act that the actual or perceived reasons for a request must be disregarded means, in the context of a consideration of whether a request should be granted or not "that the reasons given for the request may be considered only insofar as they reflect a true public interest, *i.e.* insofar as the concerns raised in relation to the request may also be matters of general concern to the wider public". The Commissioner went on to state:

> "For instance, a requester may seek access to information relating to payments made by a public body to another individual out of concern that his or her tax money is being misused or otherwise wasted. Such concerns, or reasons for the request, reflect the very strong public interest in ensuring maximum openness and accountability in relation to public expenditure. Notwithstanding this strong public interest, access is unlikely to be granted if the payment relates to an intrinsically private aspect of the recipient's life, such as family circumstances or inadequacy of means. Where, on the other hand, a potential invasion of privacy is regarded as minimal, the public interest in disclosure is likely to prevail ..... . In any event, however, both section 8 (4) of the FOI Act and the *Rotunda Hospital* case stand for the principle that a requester's private interest in certain records cannot be construed into a public interest based on the requester's own motives for seeking access to the records. Thus, I consider that an objective rather than subjective standard applies in determining the public interest in granting access to the records concerned."

71. In my view, the example given by the Commissioner above clarifies the distinction between a real public interest served by providing access to certain requested documents, and the purely private interest of the appellant in having access to the documents requested (*i.e.* so that he can, for example, ascertain further detail of the allegations, consider any remedies he might pursue, or seek to have the record corrected, as he sees it, to

"unfounded"). The fact that any access to the records would be consistent with openness and transparency (or indeed serve the other interests identified by the appellant as described at para. 35 of the Commissioner's decision) does not transform the appellant's private interest in obtaining access into a public interest.

72. The provision of documents that comprise joint personal information or the personal information of others alone will almost by definition never be in conflict with the principle of openness and transparency. But that is not to say that the interest sought to be satisfied or achieved by access to such records comprising personal information of others/joint personal information must be characterised as being in the public interest. The appellant wants access to the records for his own purposes. That is his own private interest, in contrast to the type of public interest in the example given by the Commissioner in para. 35 of the Commissioner's decision.

73. I find no error of law on the part of the trial judge in his conclusions in this regard, and therefore neither on the part of the Commissioner. This is a limited form of appeal under s. 42 of the Act, being confined to a point of law. The Court has been referred to the relevant authorities in relation to the circumstances in which the court hearing an appeal on a point of law may intervene. These authorities are set forth above, which I respectfully adopt. It is clear from these that considerable deference will be afforded to an expert decision-maker such as the Commissioner, that a wide margin of appreciation will be afforded to him, being the person who has, by the Act, been charged with the making of decisions in relation to requests under s. 7 of the Act. It is not sufficient, even were it to be the case, that in the exercise of the same discretion the court hearing an appeal might itself have reached a different decision. There must be a clear error of law established.

74. There is no error on the part of the trial judge in his judgment. The Commissioner in his decision has correctly drawn a distinction between the private interest of the appellant

and the type of public interest that he is bound to weigh in the balance against the public interest in upholding the rights of privacy of the child and mother in this case. Having correctly interpreted the section in this regard, I am satisfied that in the exercise of the wide discretion given to him by the Act, he was entitled to reach a conclusion that the public interest that the request should be granted was outweighed by the public interest in upholding the rights of privacy of the child and mother in this case. Such a conclusion was clearly open on the facts of the case. In my view the decision of the Commissioner is lawful, and I would dismiss this appeal.

McDonagh, Freedom of Information Law, 3rd Ed, 2015

Chapter 4 - Access

Section VI. - Administrative Grounds for Refusing Access

4-246

Section 15 of the 2014 Act sets out a list of 10 administrative grounds for refusing access to records. An appeal can be brought against a refusal of access to a record on any of the administrative grounds set out in s.15.[347]

Non-existence or failure to locate the record: s.15(1)(a)

4-247

Section 15(1)(a) allows for the rejection of an access request in the case of the non-existence of the requested record, or failure to locate it after all reasonable steps have been taken to ascertain its whereabouts. A claim for exemption under s.15(1)(a) can arise where the records sought never existed, where the records may have existed in the past but do not currently exist, or where records did exist but cannot now be found.[348]

Non-existence of records

4-248

In *Mr X and Children's University Hospital, Temple St*,[349] the applicant had requested access to statistical information concerning the activities of a unit of the hospital during a specified period. One element of the request concerned information of which the Commissioner found that no record existed in any form and to which s.10(1)(a) (now s.15(1)(a)) was therefore held to apply. The Commissioner also found that s.10(1)(a) (now s.15(1)(a)) applied to another element of the request, the satisfaction of which would require extraction of information from a number of files in order to create a new record. The application of s.15(1)(a) in these circumstances is questionable, since the material in question clearly existed within the hospital's database, though not in the form requested by the applicant. While other provisions of the Act might, depending on the circumstances, be used as a justification for refusing access to this material, in particular s.15(1)(c)—which allows for refusal where granting the request would cause a substantial and unreasonable interference with the work of the FOI body—reliance on s.15(1)(a) to justify a refusal of access to material which does, in fact, exist, though not in the form requested by the applicant, is inappropriate.

Failure to locate records

4-249

The role of the Commissioner in carrying out reviews of the reasonableness of steps taken to ascertain the whereabouts of a record was discussed by the Commissioner in detail in *Mr A.B.X. and Department of Social, Community and Family Affairs*.[350] The Commissioner took the view that his role was not to search for the requested records, but rather to review the decision of the FOI body and to decide whether that decision was justified. In so doing, he would have regard to the evidence available to the decision-maker and the reasoning used by him or her in arriving at the decision. According to the

Commissioner, the evidence in such cases consists of the steps actually taken to search for the records along with miscellaneous other evidence about the record management practices of the FOI body. The Commissioner took the view that because misfiling or misplacing of records is a common enough occurrence, where an FOI body accepts that the records sought exist but cannot be located, he would normally expect the search to extend to locations where the records might be, as opposed to should be. He also said that where a file is missing or has been destroyed, then it may be possible to reconstruct it, either wholly or partially, if its contents were generated within the FOI body. The approach taken by the Commissioner in *A.B.X.* to his role in reviewing the adequacy of searches was endorsed by the High Court (Quirke J.) in *Ryan v Information Commissioner*[351] in the following terms:

> "I am satisfied also that the respondent's understanding of his role, as outlined in evidence, was correct in that he was not required to search for records but was required rather to review the decision of the public body and in doing so to have regard to the evidence which was available to the decision-maker and to the reasoning used by the decision-maker in arriving or failing to arrive at a decision."

4-250

In *Mr A.A.T. and the Department of Social, Community and Family Affairs*,[352] a case concerning a request made by an applicant for "papers" relating to him, the FOI body ignored records in electronic form when carrying out its search. The Commissioner questioned whether, in light of the obligation placed on FOI bodies by s.6(2) (now s.11(2)) to give reasonable assistance in relation to the making of a request, such an approach was within the letter, let alone the spirit, of the FOI Act.

4-251

The Commissioner has made it clear that the Act does not provide for a right of access to a record that ought to exist,[353] even in a case where failure to keep records did not constitute good administrative practice.[354]