

THE HIGH COURT

DUBLIN

RECORD NO. 2002/99 MCA.

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT, 1997

THE SOUTH WESTERN AREA HEALTH BOARD

APPLICANT

V

THE INFORMATION COMMISSIONER

RESPONDENT

APPROVED JUDGMENT DELIVERED BY

MR. JUSTICE T.C. SMYTH

ON TUESDAY, 31ST MAY 2005

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MR. JUSTICE T.C. SMYTH DELIVERED JUDGEMENT AS FOLLOWS

This is an appeal on a point of law pursuant to Section 42(1) of the Freedom of Information Act, 1997 (the Act of 1997) against a decision of the Information Commissioner (the Commissioner) made under Section 34(2) of the Act of 1997 on 24th October 2002 for: -

1. An order reversing the decision of the Commissioner for the release in whole or part of the records numbered 2, 19, 20 and 21 of the Social Welfare File maintained by Appellant pertaining to the adoption of the requester.
2. An order reversing the decision of the Commissioner for the release of the whole of record no. 28 of the Adoption File maintained by the Appellant (the Health Board) pertaining to the adoption of the requester.

The history behind the litigation can be briefly stated. About 40 years ago the birth mother of the requester gave birth out of wedlock to the requester. The requester became an adopted child, both mother and child have made new and more structured lives for each other since. The requester has spent much time



1 and effort in seeking to establish who her birth
2 mother is, the latter who is long since married with
3 a family of her own has a husband and family and does
4 not wish the structured trust and security built up
5 over the years to be shattered by a disclosure that
6 might be brought about by the requester contacting
7 the birth mother.

8
9 The Health Board, years ago had given the birth
10 mother an assurance of confidentiality and feels
11 itself honour bound to keep faith with the birth
12 mother, to adhere to the basis of the Board's
13 contract with the mother. The grounds of appeal are
14 stated in paragraph 4 of the contract with the
15 mother. The terms of the decision of the
16 Commissioner are set out in a letter of 24th October
17 2002 addressed to the requester and other than
18 identifying the name of the same the letter is set
19 out as an appendix to this judgment.

20
21 The grounds of appeal are stated in paragraph 4 of
22 the principal affidavit of Lorraine McGrattan sworn
23 on 22nd November 2002 and filed on behalf of the
24 board and they are as follows: -

25 "(a) The Commissioner misdirected
26 himself and erred in law in finding
27 that all records created before the
28 commencement of the Act contained in
29 the said files relate to personal
information about the requester.
(b) The Commissioner misdirected
himself and erred in law in finding
that the requester had a potential
right under Section 6(5)(b) of the Act



1 to access to all such records, subject
2 to any exemptions which might apply.
3 (c) The Commissioner misdirected
4 himself and erred in law in holding
5 that non identifying information about
6 the birth mother of the requester
7 contained in the record created before
8 the commencement of the Act may be
9 released under the provisions of the
10 Act.
11 (d) The Commissioner misdirected
12 himself and erred in law in holding
13 that records created before the
14 commencement of the Act containing
15 medical information about the health of
16 the requester's birth mother should be
17 released to the requester under the
18 provisions of the Act.
19 (e) The Commissioner misdirected
20 himself and erred in law in holding
21 that the foregoing enumerated records
22 are records to which the provisions of
23 Section 28 of the Act apply.
24 (f) In the alternative, if the
25 provisions of the said Section 28 apply
26 to the above enumerated records, the
27 Commissioner misdirected himself and
28 erred in law in holding that the
29 exemption thereto contained in Section
30 28(5) of the Act that the said records
31 be released outweighs the public
32 interest to the right of privacy of the
33 requester's birth mother should be
34 upheld.
35 (g) In the further alternative, if the
36 said provisions of Section 28 of the
37 Act apply to the above enumerated
38 records and the exemption contained in
39 Section 28(5) of the Act falls to be
40 considered in relation thereto, the
41 Commissioner misdirected himself and
42 erred in law in failing to invoke and
43 apply the mandatory provisions of
44 Section 29 of the Act.
45 (h) The Commissioner misdirected
46 himself and erred in law in failing to
47 hold that the disclosure of the
48 information contained in the above
49 enumerated records should constitute a
50 breach of a duty of confidence owed by
51 the Appellant to the requester's birth
52 mother and is therefore prohibited from
53 release by the provisions of Section
54 26(1)(b) of the Act.
55 (i) The Commissioner misdirected
56 himself and erred in law in holding
57 that the information contained in the
58 above enumerated records is "non
59



1 identifying" information.

2 (j) The Commissioner misdirected
3 himself and erred in law in holding
4 that the release by the Appellant to
5 the requester of certain information in
6 relation to her birth mother meant or
7 indicated that the remaining
8 information, identifying or non
9 identifying, had lost the quality of
10 confidence about it which would be
11 necessary to sustain a claim that
12 section 26(1)(a) or section 26(1)(b)
13 applies thereto.

14 (k) The Commissioner misdirected
15 himself and erred in law by taking
16 matters into consideration in his
17 interpretation and construction of the
18 provision of the Act which are
19 irrelevant thereto, in particular
20 proposals by the Department and Health
21 and Children to give adopted persons
22 statutory rights to information about
23 their adoption as well as to provide
24 for the setting up of a voluntary
25 contact register for persons seeking
26 contact with their birth parents.

27 (l) The Commissioner misdirected
28 himself and erred in law in holding
29 that the absence of an indication by
30 the requester's birth mother of an
31 objection to the release of non
32 identifying, background information was
33 a consideration to be taken into
34 account when weighing the public
35 interest in the release of the
36 information against the right to
37 privacy of the requester's birth
38 mother".

39 The plea of the Board is for a variation of the order
40 of the Commissioner so as to provide for the release
41 of those parts of the enumerated records as do not
42 contain personal information or medical or health
43 history of the requester's birth mother or record
44 that encompass confidential exchanges between the
45 parties.

46 To enable the court to have an appreciation of the



1 full factual background, documents other than those
2 exhibited were made available to the court under the
3 headings -

- 4 (a) Social work file (in full).
5 (b) Adoption society file (in full).
6 (c) Disputed documents.
7 1. Document A - unredacted.
8 2. Document B - unredacted.
9 3. Document A - redacted.
10 4. Document B - redacted.

11
12 There was also before the court a "booklet of
13 records" which consisted of: -

- 14
15 "(A) Records subject to appeal
16 "Draft letter from GG to the requester
17 dated 23rd December 1995, together with
18 handwritten note dated 18th October
19 1996 (records 19 - 21) [I note that the
20 Commissioner did not direct the release
21 of all of record 20].
22 Certificate of fitness for adoption
23 (record 28).
24 (B) Records given to requester by
25 Health Board outside of the Act of
26 1997.
27 (3) Letter from team leader of adoption
28 society to requester, dated 23rd
29 October 1996 (records 23 - 24).
30 (4) Letter from birth mother to
31 requester dated 9th February 1997
32 (record 30).

33
34 It appears from undisputed documentation that when
35 the requester initiated her inquiries by letter of
36 26th January 1995 she specifically informed the
37 Health Board that she did not wish her parents (i.e.



1 her adopters) to know of her inquiry. In late May
2 1995 the requester wrote to the Health Board seeking:
3 "Information, such as place of birth, weight,
4 mother's Christian name etc., then the process of
5 tracing would begin."
6

7 When the Health Board attempted to contact the birth
8 mother they gave her an assurance on each attempted
9 contact that all correspondence would be treated in
10 the strictest confidence. Notwithstanding the
11 considerable amount of information of a personal
12 nature given to the requester in the letter of 23rd
13 October 1996 the requester insists on having further
14 information as is clear from the decision of the
15 Commissioner.
16

17 The contact sheet P38 of the Social Welfare file
18 indicates that in very early 1997 the requester
19 informed the Health Board official, as recorded
20 thus: -
21

22 "She (the requester) had been talking
23 to a private detective who told her
24 (the requester) he/she could trace for
25 her and that she (the requester) would
do so if her b/m (birth mother) did not
agree to some contact."
26

27 A letter from the birth mother to the requester dated
28 9th February 1997 received by the Health Board was
29 given to the requester by the Health Board outside
the Act of 1997. without disclosure of name or



1 address it very plaintively explains that the birth
2 mother had no choice when she was made pregnant and
3 adoption was the only choice (she came of a poor but
4 good family). The birth mother states why she is
5 unable to make contact with the requester and in
6 wishing the requester well, pleads that each be
7 permitted to get on with their own individual lives.
8

9 Notwithstanding the foregoing the requester applied
10 in November 1998 under the Act of 1997 for access to
11 certain material. The Health Board's decision was to
12 refuse access to all of the records covered by the
13 request. This position was subsequently maintained
14 by the Health Board in its decision following the
15 requester's application for internal review.
16 Eventually the decision of the Commissioner was made
17 as set out in the appendix to this judgment.
18

19 The submissions of the Commissioner were informed by
20 the approach taken by the courts in Deely v
21 Information Commissioner [2001] 3 IR 439 and the
22 Minister for Agriculture v Information Commissioner
23 [2000] 1 IR 309. The argument advanced on the basis
24 of those authorities was that the exemptions invoked
25 by the Appellant ought not to be construed and
26 applied restrictively so as to defeat the general
27 principles enshrined in the preamble to the Act and
28 its general intendment as interpreted by the courts.
29



1 It is clear that the argument or basis of the appeal
2 set out in the documentation before the court was not
3 exactly that put before the Commissioner, yet I am
4 satisfied that however unsatisfactory such a state of
5 things may be, Mr. Murray SC for the Commissioner was
6 well able to meet the challenge. In fact it was more
7 a case of a change of emphasis in the arguments
8 pursued, than in the introduction of new matter. I
9 am satisfied and find as a fact that the information
10 being sought through these proceedings is all
11 information that was in existence prior to the
12 passing and coming into effect of the Act of 1997.

13
14 On that basis the Appellant submitted that access
15 ought not to have been granted having regard to the
16 principle of non-retrospectivity and that on the
17 basis that same comprises personal information of the
18 requester's birth mother and are exempt from
19 disclosure pursuant to Section 28 of the Act of 1997.

20
21 The Appellant also submitted that the granting of
22 access to certain records would make traceable the
23 connection between the entry in the Adopted Persons
24 Register and the Register of Births. While objection
25 is taken to this in the affidavit of 21st July 2003
26 filed on behalf of the Commissioner - the issue was
27 taken into account in Mr. Murray's very extensive
28 submissions. In the light of the sensitivities of
29 the subject matter of the appeal I considered that it



1 was appropriate that the matter be canvassed on the
2 appeal notwithstanding the frailties by omission
3 before the Commissioner. I express no view on this
4 issue, because Section 42 is an appeal on a point of
5 law and it would be wholly unsatisfactory that a
6 decision on appeal should be made without the matter
7 having first been raised before the Commissioner.

8
9 In my judgment the Commissioner was correct in his
10 submission that it was undesirable that as a matter
11 of policy that a party in the position of the
12 Appellant would not advance all relevant arguments to
13 the Commissioner in the first instance.

14
15 The motivation of the requester of information is
16 irrelevant under the Act. Equally irrelevant in the
17 instant case is the very small number of documents
18 involved. It is common case that all the records in
19 issue in this case were created before the
20 commencement of the 1997 Act for Health Boards on
21 21st October 1998. It is accepted that in the normal
22 course such "pre-commencement" records are not
23 accessible under the Act. However, the Commissioner
24 relied on s6(5) of the Act of 1997 which provides:

25 "Notwithstanding subsections (1) and
26 (4) but subject to subsection (6)
27 where -
28 (a) Access to records created before
29 the commencement of this Act is
necessary or expedient in order to
understand records created after such
commencement; or
(b) records created before such



1 commencement relate to personal
2 information about the person seeking
3 access to them subsection (1) shall be
4 construed as conferring the right of
5 access in respect of these records".

6 Personal information is defined in S2 of the Act. In
7 the instant case the Commissioner concluded that the
8 disputed documents related to personal information
9 about the requester and that, subject to any
10 exemptions that apply, the requester had a potential
11 right of access to them under S6(5)(b) of the Act of
12 1997. I am satisfied that the documents fell within
13 the test laid down in EH v Information Commissioner
14 [2002] 3 IR 600 in that the records either refer
15 expressly to the requester or

16 "relate(d) to something in which the
17 requester has a substantial personal
18 interest as distinct from something in
19 which he has an interest as a member of
20 the general community or a large-scale
21 class of same".

22 In determining that the requester had a substantial
23 personal interest in the records the Commissioner
24 went on to note that having as much access as
25 possible to her background appeared to be of great
26 importance to the requester. The Appellant submitted
27 that this was a flawed approach to adjudication
28 because it in fact considers that which is irrelevant
29 - the motivation of the requester. In this regard I
30 accept the Appellant's submission. In doing so I can
31 well understand and appreciate the importance for



1 most people of the fullest comprehension of their
2 identity, the sense of roots and the security of the
3 knowledge from whence they come is: nonetheless,
4 motivation of the requester in the adjudication
5 process is an irrelevant consideration.
6

7 Furthermore, I am not at all satisfied in the instant
8 case that in order to understand records created
9 after the commencement of the Act it is necessary or
10 expedient to have access to records created before
11 the commencement of the Act.
12

13 The case put by the Commissioner was that a draft
14 letter prepared by a social worker was intended to
15 communicate information given to him by the
16 requester's birth mother. In fact the draft letter
17 was never sent and from this I deduce that it was not
18 intended to send to the requester the information as
19 expressed in the draft. The fact that it was
20 substantially rewritten at a later date and that
21 almost all information was released to the requester
22 in the form of two letters to the requester (one
23 being from the birth mother and the other from a
24 social worker, other than he who had drafted a letter
25 which was not issued). It was submitted that such
26 unissued draft letter was a record about the
27 requester within the meaning of the decision in EH v
28 Information Commissioner.
29



1 Insofar as the document, created by the religious
2 order which had the responsibility for running the
3 institution in which the requester was born and in
4 which she remained with her birth mother for some
5 time up to the time of her adoption, it contains
6 joint personal information. It was contended by the
7 Commissioner that s6(5)(b) does not require that the
8 pre-commencement record comprise personal information
9 about the requester but rather that the record
10 concerned relates to personal information about the
11 requester.

12
13 In my judgment the Commissioner was correct in these
14 submissions and understanding of the law. However,
15 in this regard I refer to paragraph (29) of the
16 affidavit of Elizabeth Dolan sworn on 31st March 2003
17 and filed on behalf of the Commissioner in which it
18 is averred: -

19
20 "I say and believe and I am legally
21 advised that it is appropriate to
22 direct the attention of the court to
23 s34(6) of the 1997 Act and to explain
24 the manner in which the Respondent
25 applied that section to the present
26 request for access to records. I say
27 and believe that s34(6) of the 1997 Act
28 empowers the Respondent before
29 commencing their review to notify any
"other person" who in the opinion of
the Respondent should be notified of a
request for access. In the present
case I say and believe that the
Respondent formed the opinion that it
would not be appropriate to notify or
consult with the requester's birth
mother.

The Appellant had not notified the
requester's birth mother under s29 of



1 the 1997 Act since it did not form the
2 view that the records in question
3 should be released in the public
4 interest. In forming the opinion that
5 it would not be appropriate to notify
6 or consult with the requester's birth
7 mother the Respondent considered that
8 the nature of the information forming
9 the subject matter of the request was
10 of key importance. So far as concerned
11 the records numbered 19 to 21 the
12 Respondent was influenced by the fact
13 that it appeared likely that the
14 requester was already aware of the
15 matters described in both records for
16 the reasons set out in paragraph (24)
17 above".

18 The reasons given in paragraph (24) are stated as
19 follows: -

20 "...in the light of the fact that the
21 requester has already been furnished
22 with the records numbered 23 to 24 and
23 the record numbered 30 the Respondent
24 took the view that much of the
25 information contained in the draft
26 letter at the records numbered 19 to 21
27 had already been furnished by the
28 Appellant to the requester. Therefore,
29 the Respondent formed the view that the
30 disclosure of the information in the
31 records numbered 19 to 21 would not be
32 likely to interfere with the
33 Appellant's current role in the
34 adoption process or related work.

35 Furthermore, the Respondent formed the
36 view that for the same reason the
37 degree of invasion of the birth
38 mother's privacy occasioned by the
39 release of the records was minimal and
40 justified in the public interest".

41 The provisions of S34(6) of the Act of 1997 state
42 that: -

43 "As soon as may be after the receipt by
44 the Commissioner of an application
45 under subsection (2), the Commissioner



1 shall cause a copy of the application
2 to be given to the head concerned, and,
3 as may be appropriate, to the relevant
4 person concerned and, if the
5 Commissioner proposes to review the
6 decision concerned, he or she shall
7 cause the head and the relevant person
8 and any other person who, in the
9 opinion of the Commissioner, should be
10 notified of the proposal to be so
11 notified and thereupon the head shall
12 give to the Commissioner particulars in
13 writing or in such other form as may be
14 determined of any persons who he or she
15 has, or, in the case of a refusal to
16 grant a request to which s29 applies,
17 would if he or she had intended to
18 grant the request under s7 concerned,
19 have notified of the request".

20 It is clear that the section contains both mandatory
21 and discretionary provisions. If in the instant case
22 the relevant person is the requester then the birth
23 mother is "any other person who, in the opinion of
24 the Commissioner should be notified" (of the proposal
25 to review). It is common case that the birth mother
26 was not notified for the reasons set out in the
27 affidavit. However, it is clear from the papers that
28 this was not a simple case of putting in the balance
29 the right to know of the requester and the right of
privacy of the birth mother.

what the papers clearly reveal is that the
persistence of the inquiries had angered the birth
mother's husband and caused her to seek medical
advice and treatment. The concerns of the birth
mother were not only for her good name and
reputation, but principally for the harmony of her



1 marriage and the stability, cohesion and protection
2 of her family.

3
4 To have formed a view or opinion that "the degree of
5 invasion of the birth mother's privacy occasioned by
6 the release of the records was minimal and justified
7 in the public interest" is to fail to consider
8 relevant issues and rights such as the constitutional
9 rights of the birth mother's family and the
10 protection of her marriage and to make a value
11 judgment as to the extent or degree of invasion of
12 rights without according the birth mother directly,
13 or indirectly through her legal advisors, to make
14 representations in support of the rights she sought
15 to protect.

16
17 In my judgment natural and constitutional justice and
18 fair procedures required that the birth mother be
19 given an opportunity to make representations prior to
20 the decision being taken by the Commissioner. His
21 failure to do so is procedurally unfair and the
22 decision made as a result cannot stand.

23
24 I accept the Commissioner's submission that the
25 public interest with which the Act of 1997 is
26 concerned is of prime importance, but when put into
27 the balance with the various other constitutional
28 rights to which I have referred the principle of
29 proportionality must be applied. However, as the



1 rights expressly referred to in this judgment do not
2 appear to have been considered and informed the
3 decision of the Commissioner, the purported
4 proportionality test applied between the public
5 interest and the right to privacy is less than
6 adequate to sustain the decision.
7

8 In the course of his letter of 24th October 2002 the
9 Commissioner at pp 1/2 under the heading "Background"
10 enumerates the matters to which he had regard in
11 carrying out his review which (inter alia) states: -
12

13 "In addition, I have considered
14 proposals by the Department of Health
15 and Children to give adopted parents
16 statutory rights to information about
17 their adoption as well as to provide
18 for the setting up of a voluntary
19 contact register for persons seeking
20 contact with their birth parents".
21

22 The Appellant submitted that "this initial mistake"
23 on the part of the Commissioner as to the appropriate
24 matters to be taken into account in part contributed
25 to the incorrect manner in which he interpreted his
26 obligations and duties under the Act. If, it was
27 argued, at some future stage there may be a change in
28 the law to provide rights or entitlements over and
29 above those in the Adoption Acts and Regulations made
thereunder such cannot inform the proper
interpretation of the Act of 1997 to which the
Commissioner must have regard.



1 A submission was made in the alternative, i.e. that
2 the adopted persons did not have express statutory
3 rights to information about their adoption and that
4 the Commissioner sought through a strained
5 interpretation of the Act of 1997 to anticipate what
6 a contemplated legislative framework might contain.
7

8 Mr. Allen for the Appellant expressed this quite
9 bluntly by saying - the Commissioner jumped the gun.
10 In my judgment, notwithstanding the painstaking
11 manner in which the Commissioner expressed himself in
12 the letter of 24th October 2002, I found Mr. Allen's
13 submissions persuasive. That is not to say that the
14 Commissioner ought not to keep himself fully
15 informed, but decisions must be based on the law as
16 it stood at the date of the decision.
17

18 While the Act of 1997 was undoubtedly a legislative
19 development of far reaching importance and intended
20 effect, designed to reverse a traditional refusal or
21 reluctance in government and public administration to
22 permit public scrutiny of its workings, it fell to be
23 operated in a manner not only as provided in the Act
24 but also in a manner consistent with the
25 Constitution.
26

27 In this case the birth mother was given an assurance
28 at her time of greatest vulnerability (in age and
29 emotional involvement) that whatever she confided and



1 disclosed to 'the health authority' would be treated
2 in confidence. If the constitutional aspiration that
3 the state (in its several emendations) guarantees to
4 cherish all the children of the state equally - it is
5 imperative that this has its maximum meaning for the
6 most vulnerable. If the innocent, frank and
7 frightened trust is to be sacrificed on the altar of
8 transparency and a contemporary passion for
9 accountability, the tragic circumstances of young
10 girls who through ignorance, a sense of shame, fear,
11 absence of family support and/or bewilderment giving
12 birth like beasts in a field or abandoning their
13 newborn babies in church porches, car parks or
14 garbage bins may continue into the future because
15 there is no one who they can completely trust or
16 confide in.

17
18 The records created by the health authority who
19 promised that the frantic concealment of a distraught
20 young mother - very often little more than a child
21 herself - would not be disclosed should be honoured
22 in the public interest.

23
24 The Commissioner urged the court to accept the
25 decision in Sheedy v Information Commissioner [2004]
26 2 I.R. 533 which (inter alia) considered the
27 provisions of s26(1) of the Act of 1997, which
28 provides that access to records may be refused where
29 the information is given in confidence. While



1 respecting the careful consideration given to the
2 facts and the law in that case, in my judgment it is
3 clearly distinguishable from the instant case save on
4 the information given on a confidential basis and
5 that is of a completely different order.
6

7 In my judgment the disclosures made to the Appellant
8 - if to be transmitted even in the redacted form the
9 subject of the Commissioner's decision, would as a
10 matter of probability prejudice the giving to the
11 Appellant or any other health authority of further
12 similar information. I accept the evidence and the
13 submissions to the court that it is of importance to
14 the Appellant that future similar information should
15 be given to it and other health authorities. It is,
16 in my judgment, not in the public interest that
17 persons such as the birth mother in the instant case
18 should have their distress compounded and maybe put
19 at risk the life of a baby because there is in fact
20 no health authority that they can completely trust.
21

22 In my judgment the information given to the Appellant
23 by the birth mother did possess the necessary quality
24 of confidence to comply with the formulation set out
25 in House of Spring Garden v Point Blank [1984] IR
26 611.
27

28 Notwithstanding many other issues raised at the
29 hearing upon which it is unnecessary in my opinion to



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decide, I am satisfied to determine the real issues arising between the parties in favour of the Appellant for the reasons given.

END OF JUDGMENT

