THE COURT OF APPEAL

[2019] IECA 19

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).
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> 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.
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> 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.
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> 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.
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> 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;
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> (b) by failing to have any or any due regard to the matters of public interest advanced and relied upon by the appellant;
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> (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* (Clarke 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 Clarke 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. 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". However, 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.