

**Murray, C.J.  
Denham, J.  
Hardiman, J.  
Fennelly, J.  
Macken, J.**

**IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS, 1997 AND 2003**

**BETWEEN**

**THE GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE RELIEF OF POOR LYING-IN WOMEN**

**APPELLANT**

**AND**

**THE INFORMATION COMMISSIONER**

**RESPONDENT**

**JUDGMENT of Mr. Justice Fennelly delivered the 19th day of July 2011.**

1. In 1922, a young woman gave birth to a male baby at the Rotunda Hospital. That child would now be eighty nine years of age, but sadly he died in December 2008 before he had obtained the information he had been pursuing regarding his mother.
2. This small matter has been the subject of two decisions by the Hospital, a decision on review by the Information Commissioner and a decision on appeal on a point of law by the High Court.
3. All of these procedures took place under the Freedom of Information Acts 1997 to 2003. It is difficult to resist the instinct that a practical solution could have been found and that it would all have been much simpler if the FOI had not invoked.

**The facts**

4. On 21st September 2004, Ms Dawn Walsh, who lives in Wales, wrote to the Hospital for information pursuant to the Freedom of Information Acts 1997 and 2003. Her father was Thomas Joseph Walsh, who was the child born in the Hospital on 10th May 1922. She made the request on his behalf. The information she sought was "an admission or discharge address of Bridie Welsh," the mother of Thomas Joseph Walsh. She said that Bridie was discharged on 18th May 1922. In a P.S., the letter mentioned "date of birth, age etc." Bridie was also called Bridget and Walsh was also spelled Welsh.

5. The request was part of a search by Ms Walsh and her father for information about the family history. They knew, apparently, that Thomas Walsh had been "boarded out" as a baby by his mother and that she had lived at College Road, Galway.

6. The Hospital replied on 21st October as follows:

"The only hospital record from 1922 which contains information regarding Bridie Welsh is the 1922 Labour Ward Book, which records Bridie Welsh being admitted to the Labour Ward on 10th May 1922 and giving birth to a liveborn male child on the 10th May 1922; the discharge date is recorded as the 18th May 1922.

"The Labour Ward Books record all births by date order and by the mother's name; they do not record the patient's home address nor the patient's date of birth. Therefore, we are unable to provide you with the specific information requested....."

7. A decision was, therefore, made refusing the request pursuant to section 10(1)(a) of the Act of 1997 on the ground that the record relating to the date of birth did not exist. The letter went on, however:

"Whilst the hospital's Labour Ward Book does not record an individual's date of birth, the age of the patient at time of delivery is recorded. However, when a patient presents to the hospital, they do so on the understanding that the personal information they provide is to be held in confidence and for the purpose of receiving medical care. It is important that this confidentiality is maintained in order to ensure that each patient feels confident that the information they are giving is protected and to protect the future collection of this information."

8. The Hospital informed Ms Walsh ("the requester") that "Bridie Welsh's age as recorded in the 1922 Labour Ward Book cannot be released to you."

9. A few days later the Hospital wrote to the requester enclosing a "Family Tracing—Points of Contact Sheet" and suggesting that she contact the Rotunda Girls' Aid Society.

10. The requester sought a review of the Hospital's decision to refuse access to the record. The Hospital on 13th April 2005 reaffirmed its decision not to release information about the age of Bridie Welsh on the ground that this was "personal information," and could not be released pursuant to section 28(1) of the Act of 1997.

11. The requester applied to the Information Commissioner ("the Commissioner") for a review of the decision of the Hospital pursuant to section 34 of the Act. In the intervening period, the Hospital discovered that a further record existed in the "Porter's Lodge Book." While this recorded the name as Bridie Walsh, the dates and other details corresponded and it was clear that it related to the same person.

12. The Commissioner, by her decision dated 14th December 2007, annulled the decision of the Hospital to refuse access to the records in question. She explained that the review was concerned solely with the two records containing an entry for the age of Bridie Welsh and directed the Hospital to grant access, in the form of provision of a copy, to those two records.

13. She ruled on the two grounds of exemption pursuant to sections 26 and 28 of the Act of 1997 which had been relied upon by the Hospital.

14. Firstly, she considered whether the information was "personal information," as defined in section 2(1) and exempted by section 28. She ruled that the age of an individual may come within section 2(1) but held that, in addition, it must also satisfy one or other of what she called the "overarching prior requirements" in the general definition of "personal information." She held, moreover, that the exemption conferred in respect of the disclosure of personal information by section 28(1) of the Act did not apply. Section 28(2)(c) provides that the foregoing provision does not apply where "information of the same kind as that contained in the record in respect of individuals generally, or a class of individuals that is, having regard to all the circumstances, of significant size, is available to the general public, . . ." The General Register Office maintains a system of registration of deaths, births and marriages, including information about the age of any individual. Thus, information about the ages of individuals is available to the general public and the exemption did not, in her view, apply.

15. The Commissioner also referred to section 28(6)(b) of the Act, which empowers the Minister to make regulations for the grant of requests in certain cases. S.I. No. 47 of 1999 in relation to access to the records of deceased persons. The Commissioner expressed the opinion, without finding it necessary to decide, that it was likely that the records would fall to be released under those provisions.

16. Finally, the Commissioner considered whether the information should be protected from release on the basis of confidentiality pursuant to section 26 and held the information at issue "must have the necessary quality of confidence," in order to benefit from that section. She accepted that information arising in a professional relationship would normally fall within the category of confidential relationships recognised by the law. She then referred to some Australian legal authority regarding the law on breach of a duty of confidence suggesting that only "private and secret matters" were covered and reached the conclusion that the information, being available to the general public through the General Register Office, could not be concerned with private or secret matters. Thus, it did not have the necessary quality of confidence and section 26(1) did not apply.

17. Furthermore, she expressed the view that, even if section 26(1)(a) were to apply, this exemption was subject to a "public-interest override" by virtue of section 26(3) and that the balance of the public interest would be served by releasing the information. She referred in particular to the fact that one of the requesters (meaning Mr Thomas Walsh) was the son of Bridie Welsh. If there had been no such personal tie, the public interest might have been otherwise. There was a strong public interest in "persons generally having the fullest possible information on their origins." She considered that section 26(1)(b), which deals with information whose disclosure would constitute a breach of an agreement or an enactment, did not apply.

#### **The High Court**

18. The Hospital appealed on points of law to the High Court pursuant to section 42 of the Act against the decision of the Commissioner to annul its decision. The High Court (McCarthy J), by its judgment delivered on the 2nd July 2009, dismissed the appeal.

19. The Hospital claimed that the decision of the Commissioner was erroneous in point of law in respects which may be summarised as follows:

1. in incorrectly treating the Freedom of Information Act as applying to records which were created in 1922, prior to the commencement of the Act;
2. in failing to hold the information in question to be personal information and exempt from disclosure pursuant to section 28 of the Act;
3. in a ruling that information regarding age must satisfy "one or other of the overarching prior requirements" in section 2 (1) of the Act;
4. in holding that the exception set out in section 28(2)(c) (the General register) applied;
5. in holding that the age of the patient does not have the necessary quality of confidence for the purposes of section 26(1) of the Act;
6. in incorrectly applying a balancing test pursuant to section 26(3) of the Act;
7. in applying the public-interest test;
8. in making the release of the records conditional upon proof of a relationship between the requester and Bridie Welsh;

20. The learned trial judge had to decide, in the first instance, whether he should entertain the first ground of appeal over the objection of the Commissioner. Having considered extensive authority, he decided to consider the issue for the following reasons: a determination by the Commissioner as to whether the Act was applicable to the information potentially raised an issue of jurisdiction; there were a number of other cases pending in respect of substantially the same issue; it was desirable as a matter of public policy that such a fundamental issue should be considered; more generally, a court should not refuse to entertain a good point of law merely because it had not been raised previously.

21. McCarthy J held that the records in question were not excluded from the scope of the act. Although section 6(4) referred to "records created after the commencement of this Act," subsection 5(b) made an exception for "records created before such commencement relate to personal information about the person seeking access to them." He held that the records, though created before the commencement of the Act, contained information which related to Mr Thomas Walsh.

22. Although it will not do justice to the lengthy and careful consideration given by the learned High Court judge to each of the legal issues, it will suffice for my purposes to summarise his conclusions which are as follows.

23. The Commissioner, he held, was in error in deciding that information, in order to fall within the definition of "personal information" must also satisfy one or other of what she called the "overarching prior requirements" in the general definition of "personal

information.” That was to ignore the words, “without prejudice to the generality of the foregoing” which introduced the list of items including number (vi) which explicitly covers the age of an individual. The Commissioner, nonetheless, was correct in her interpretation of section 28(2)(c). Information as to age was generally available in the public register. Consequently, the exemption did not apply.

24. With regard to section 26, the learned judge agreed with the Commissioner in her conclusion that the age of Bridie Walsh should be considered to be information in the public domain in, that he did not concern “private secret matters.” Even if the late Bridie Walsh had imparted information in anticipation of the fact that it would not be disclosed by the hospital, that subjective belief cannot apply where, objectively speaking, the information does not have the necessary quality of confidence. Finally, the learned judge considered the combined application of section 28(6)(b) of the Act and the regulations adopted by the Minister which provided that disclosure requests must be granted where they are made by the families or next of kin of the individual in question.

### **The Appeal**

25. The Court has before it a notice of appeal from the Hospital and a notice to vary from the Commissioner.

26. The Hospital submits that the High Court was in error in the following respects:

- in holding that the Act applies to records created before its commencement: although the learned trial judge was correct in holding that, once the information came within paragraph (vi) of the specified categories of personal information, it was unnecessary for it also to comply with what the Commissioner called one of the “overarching” requirements; the link between the age of Bridie Welsh and Thomas Walsh was not personal information concerning the latter, because the link between him and the age of his mother was at best tenuous;
- in holding that the personal information concerning Bridie Walsh was not exempt from disclosure pursuant to section 28(1): information relating to the age of an individual is defined as personal information; the Hospital fundamentally disagrees with the conclusion that the Hospital records contained information of the same kind as that available in the General register of Births Marriages and Deaths; that information was available only if a person searching the records had sufficient information to refine the search; the implication of the interpretation of section 28(2)(c) by the learned trial judge is that any member of the public can use the Act to obtain information about any other member of the public;
- the Hospital did not advance a claim that the information was confidential in the sense of section 26(1)(b); the learned trial judge was mistaken in considering whether it had the necessary quality of confidence;
- in failing to hold that the information had been given to the Hospital on the understanding that it would be treated as confidential and in holding that no right to privacy exists in deceased persons; this is at the heart of the Hospital’s objection to the release of the information; age is a factor of high clinical relevance in maternity care; it is essential that it must be able to give an assurance of absolute confidentiality that details of this kind will not be disclosed by it to a third party without the consent of the patient;
- in applying the provisions of the Freedom of Information Act, 1997 (section 28(6)) Regulations, 1999. (S.I. No. 47 of 1999) and section 28(6)(b) of the Act so as to hold that Bridie Walsh should be treated as a deceased person and that the requester had a right of access to the information; the Commissioner had, in fact, made no decision on this point; in any event, it is not established the Bridie Welsh is deceased and the requester has not established that he or she one of the categories of persons identified in the regulations;
- The High Court erred in its application of section 26(3) and the notion of public interest.

27. The Commissioner filed a notice to vary. She submits that the High Court was wrong in law in permitting a new issue of law to be considered, which had not been considered at the stage of review pursuant to section 34 of the Act and in failing to apply the correct burden of proof pursuant to section 34(12) of the Act. She also appeals against the decision of the learned trial judge to hold that it was not necessary for information to meet the requirements of section 2(1)(a) or (b) of the Act to fall within the definition of personal information.

### **Some comments**

28. This entire case concerns an apparently innocuous, and now, after a lapse of many years, even trivial piece of information about the age of a single woman who gave birth to a child in the hospital in 1922. Her son was looking for this information in the course of perfectly normal research into his family history. It is difficult to avoid the feeling that none of this great litigation would have taken place if it had not been for the Freedom Information Acts and that the information would have been released.

29. Nonetheless, once the machinery is set in motion, all concerned are constrained to apply it. The Hospital has been notably conscientious in doing so and in seeking to balance its duties to respect its obligations under the Act with what it rightly sees as its general duties to respect the confidence of its patients. The Commissioner conducted a careful examination of the legal and factual issues and received representations from the requester and from the Hospital. She was rightly conscious that difficult legal issues were involved.

30. The Court has not been asked to address any larger issues such as constitutional rights to privacy or the protection of access to personal data. The present appeal must be considered solely in the context of the Freedom of Information Acts. I propose to examine each of the questions in the sequence in which they arise.

31. Broadly speaking there are three groups of issues:

- i) whether the acts applies to old records;
- ii) whether the documents concern personal information (section 28);
- iii) whether they concern information imparted in confidence to the Hospital.

32. A preliminary objection was raised in the High Court regarding point number (i), which had not been raised before the Commissioner and on which she had not ruled.

### **Should the High Court have entertained a point not raised before the Commissioner?**

33. Section 42(1) of the Freedom of Information Act, 1997 provides:

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

34. It is important to bear in mind that the appeal to the High Court is taken from a review by the Commissioner pursuant to section 34 of the Act. Section 34(12) of the Act provides:

"In a review under this section—

(a) a decision to grant a request to which section 29 applies shall be presumed to have been justified unless the person concerned to whom subsection (2) of that section applies shows to the satisfaction of the Commissioner that the decision was not justified, and

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

35. The Commissioner relies, in particular, in paragraph (b), which places a burden on the body refusing a request to justify its decision. I agree that it is, thereby necessarily implied that the body will raise before the Commissioner any point of law which supports its position. Although section 42(1) does not expressly say so, I think it is an integral part of any appeal process, other than possibly an appeal by complete re-hearing, that any point of law advanced on appeal shall have been advanced, argued and determined at first instance.

36. Among the various reasons given by the learned trial judge for considering whether the Act covered the records in this case, though they were created prior to the commencement of the Act, the only one which, in my view, could possibly give rise to an exception is that it concerned the jurisdiction of the Commissioner. However, as will appear when the matter is considered, section 6(4) does not establish an absolute rule excluding prior records. Subsection 5 makes a number of exceptions, one of which is where "records created before such commencement relate to personal information about the person seeking access to them..." Whether a particular record relates to the person requesting it is a matter of fact to be determined, in the case of a review, by the Commissioner. That decision was a matter within her jurisdiction.

37. I do not accept that the new point should have been considered either because many other cases raised the same issue or because it was a matter of importance. The Act is clear: an appeal to the High Court lies only in respect of a point of law. It must be a point of law involved in the decision under appeal. Thus, I do not think the High Court should have entertained the point.

38. However, the High Court has, in fact, entertained the point and has decided it. If the decision of the High Court were to remain unreviewed, it would stand as a binding precedent, at least so far as the Commissioner is concerned. In these circumstances, it is both desirable and necessary that this Court, in the special circumstances of this case, consider it. A similar situation arose in the case of *C.C. v Ireland and others* [2005] IESC 48. There the High Court had entertained argument in advance of a criminal trial concerning the interpretation of the Act under which the applicants were charged and were to be tried. I took the view that:

"By pursuing the route of Judicial Review, the Appellant has sought to have rulings made in advance of his trial as to the interpretation of the applicable statutory provisions. This is not a procedure which the Court should approve. The forum for ruling on the law applicable in criminal cases is the court of trial."

39. Nonetheless, I believed, since the High Court had, in fact, determined the interpretation of the statute on a point of great importance, "that, exceptionally, in view of the course events have taken, this Court must consider the correctness of the substantive rulings which have, in fact, been made by the learned High Court judge." A similar view was expressed by Geoghegan J.

40. It is necessary to consider whether the record held in the Hospital concerning the age of Bridie Welsh, though created prior to the commencement of the Act, nonetheless comes within its ambit. Otherwise, the law would be left in a state of doubt and uncertainty.

## **The Act**

41. The general purpose of the Freedom of Information Acts appears from the introductory words in the long title to the Act of 1997, which is described as "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 into possession of public bodies..."

42. To that end, section 6(1) lays down the governing principle that:

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

43. While the act seeks to reconcile the principal objective of open access to the records held by public bodies with other interests and, in particular, the rights of individuals to privacy in respect of their personal affairs, it proceeds on a presumption of disclosure. This is best exemplified by section 34(12)(b) which provides that, where a decision by the public body to refuse access is being reviewed by the Commissioner, "a decision to refuse to grant a request under section 7 shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified."

44. The system and the procedure under the Act of 1997, which remains the principal Act, are, in the first instance, established and expressed in terms of "records," held by public bodies. Exceptions and exemptions are concerned with the contents of those records, for example, where they contain personal information.

45. Section 6, as already explained, confers a right of access to a "record." Under section 7, any person, (a "requester") who wishes to exercise that right of access, may make a request in writing "for access to the record concerned..." Section 12 provides for the methods by which a head may "give access..... to a record." Section 2 defines an "exempt record" as meaning, inter-alia, "a record in relation to which the grant of a request under section 7 would be refused pursuant to Part III..."

46. Part III provides for three separate and distinct situations, sections 26, 27 and 28, in which "a head shall refuse to grant a request under section 7..." Sections 26 and 28, but not section 27, have been raised in this case. If either section 26 or 28 applies, i.e. if the head is required, after consideration of any exceptions or qualifications within the respective sections, to refuse, that refusal prevails regardless of whether the other section applies. The sections are not made subject to each other. They are independent provisions for refusal. If one section provides for refusal, access is refused.

47. The provisions of the Act are complex. In this case, a number of sections need to be considered. I will try to express the issues in terms of questions.

**Are the Hospital records excluded from the Act because they were created before the commencement of the Act?**

48. Section 6(1) of the Act lays down the basic principle that, subject to the provisions of the Act, "every person has a right to.....be offered access to any record held by a public body...." The Act contains procedures for the making of requests, decisions by the public bodies receiving them and review, where necessary by the Commissioner. It is a central feature of the legislation that a person seeking information does not have to establish any particular or personal interest in the records being sought. Anyone can apply. The requesters, Thomas Walsh and his daughter had as much or as little right to apply as, for example, a journalist.

49. Generally speaking, the Freedom of Information Acts were intended to apply prospectively, i.e., only to records created after it entered into force. To that end, section 6(4) provides:

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

- (a) records created during such period (if any), or after such time (if any), before the commencement of this Act, and
- (b) records created before such commencement and relating to such particular matters (if any), and
- (c) records created during such period (if any) and relating to such particular matters (if any),

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

50. Subsection 5 creates exceptions:

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

- (a) access to records created before the commencement of this Act is necessary or expedient in order to understand records created after such commencement, or
- (b) records created before such commencement relate to personal information about the person seeking access to them,

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

51. Section 2(1) defines personal information as "information about an identifiable individual ---that would, in the ordinary course of events, be known only to the individual or members of his family, or friends, of the individual....."

52. Thus, in order to come within the definition of personal information, the information must be "about" an individual. The age of Bridie Welsh was clearly information about her. It would stretch the meaning of the word, "about" to say that her age was "about" her son. To that extent, I would accept the submission made on behalf of the Hospital that the link between the information concerning the age of Bridie Welsh is tenuous. However, section 6 is primarily concerned with access to records. If the record held by the relevant public body "relates to personal information about the person seeking access to" it, it is not excluded. It makes sense not to exclude a record containing information, even personal information, about the person seeking access to it.

53. The Labour Ward Book and the Porter's Lodge Book contained personal information relating to both Bridie Welsh and Thomas Walsh. In his case the information concerned his birth. Therefore, it related to his age, one of the matters mentioned in paragraph (vi) of the provision of section 2(1) defining personal information.

54. Therefore, I am satisfied that the relevant records come within the scope of section 6(1) of the Act and are not excluded by section 6(4). Thus the Act applies.

**Would access to the Hospital records involve the disclosure of personal information (including personal information relating to a deceased individual)?**

55. Section 28 (1) of the Act provides:

"Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if, in the opinion of the head, access to the record concerned would involve the disclosure of personal information (including personal information relating to a deceased individual)."

56. Thus section 28 provides that records are exempt from disclosure provided that access would "involve disclosure of personal information..." That exemption applies even in the case of personal information related to deceased persons. For the purpose of the definition, it does not matter, therefore, whether Bridie Welsh was still living at the date of the decision of the Hospital. In reality, it is highly likely that she is no longer living.

57. The Commissioner decided that the information contained in the Hospital records related to the "religion, age, sexual orientation or marital status" of Bridie Welsh and thus satisfied paragraph (vi). Clearly, the records, at the least disclosed her age. However, the Commissioner ruled that this was not enough. She relied on the general definition of personal information. Section 2(1) provides:

"(1) In this Act, save where the context otherwise requires—

"personal information" means information about an identifiable individual that—

- (a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or
- (b) is held by a public body on the understanding that it would be treated by it as confidential...."

58. It then proceeds to provide that "without prejudice to the generality of the foregoing, [personal information] includes..... There follows a list of twelve matters which are deemed to be included, including paragraph (vi). The Commissioner was of the view that it was also necessary for the information to come within one or other of what she described as the "overarching prior requirements in paragraphs (a) and (b)." Since, in her view, it did not pass either of these tests, it was not personal information and section 28 did not apply.

59. In reaching that conclusion the Commissioner failed to have regard to the expression "without prejudice to the generality of the foregoing..." That expression, which occurs routinely in statutes, means that what goes before is a general statement, but that, as in this case, in any event, it will suffice for whatever is the relevant statutory purpose to comply with what follows. It would be strange and would probably defeat the statutory purpose if information relating a person's entitlement under the Social Welfare Acts (paragraph viii) or for the purpose of a tax assessment (paragraph (ix)) was not to be treated as personal information unless the Commissioner were also to be satisfied that paragraph (a) or (b) applied.

60. Thus, the Commissioner erred in imposing any additional requirement. The record in the present case contained personal information if any of it, such as the age of the patient, came within the terms of paragraph (vi). Thus, for the purposes of section 28 of the Act, the records contain personal information. The provision of access would involve the disclosure of personal information relating to Bridie Welsh. Therefore, the records are prima facie exempt from disclosure, unless they come within one of the exceptions.

**Was the information relating to the age of Bridie Welsh of the same kind as that contained in the General Register of Births, Marriages and Deaths and was it available to the general public?**

61. Section 28(2)(c) of the Act makes an exception to the exemption from disclosure provided by section 28(1) where:

"...information of the same kind as that contained in the record in respect of individuals generally, or a class of individuals that is, having regard to all the circumstances, of significant size, is available to the general public, . . .

62. There seems to be no question but that information of "the same kind as" the age of Bridie Welsh is contained in the General Register. The Hospital has disputed the applicability of section 28(2)(c) essentially on the basis that the information is not generally available, i.e., it is not "available to the general public." The Commissioner dealt with that issue in her decision as follows:

"The General Register Office (GRO) operates the regime of registration of deaths, births and marriages in this country. From inquiries made by my staff with the GRO, it is clear that information on the age of any individual is available through that individual's birth certificate, and if that individual has died, through the death certificate. It is clear that the information contained in the GRO's certificates is part of a public record which is accessible to all. The .....date of birth, will vary depending on the level of information already held by the searcher; but where the searcher has a name, in principle it will be possible to trace the individual's date of birth through one or other of the GRO's registration certificates. Clearly where the searcher has information in addition to the name, such as county or region of birth or the probable age range of the individual, the search process will be easier."

63. She accepted that in many tracing cases, individuals who had names and some other details did not have enough information to identify the correct information. Nonetheless, she expressed the view that any difficulty in tracing did not take away from the fact that the ages of individuals whose births, marriages and deaths are registered are available to the general public.

64. The learned trial judge was of the view that whether a given piece of information is available to the general public must be determined according to an objective test. He distinguished between public availability and the capacity of a given individual to find the information.

65. The Hospital submitted, on the appeal, that, while the legislation establishing the register of births, marriages and deaths requires that anyone be allowed to inspect the index and obtain a copy of any entry in the register books, and the records as a whole are available to anyone, it did not follow that that information relating to any given individual is available to anyone. Information is only available if the searcher has enough information to refine his or her search. Thus, it is submitted, the reality is that the information is not available to the public as such, but rather only to those persons with sufficient prior information to carry out the search effectively.

66. Counsel on behalf of the Hospital has explored in detail the difficulties in tracing names and identifying the correct and relevant entry in the register. For example, the age of the patient in the Hospital would only enable a person to identify the year in which the person was born. Depending on the number of persons of that age, it would still not be possible to identify the correct person with any certainty.

67. The Hospital also submitted that the decision of the High Court had implications for the privacy and security of members of the public: the practical effect of the judgment is that any member of the public could rely upon section 28(2)(c) in order to obtain information about another member of the public so long as that information could be said to be "publicly available". By reference to the findings of the High Court, information such as the age, date of birth, address, marital status and occupation of any member of the public is "publicly available" as this information is all contained in various public registers.

68. As I have already stated, there can be no doubt that information "of the same kind as" as the age of Bridie Walsh, or indeed of any person is contained in the General Register of births, marriages and deaths.

69. The Hospital argues that this information is not available to the general public. It seeks to make a distinction between availability to the public as a whole and availability to an individual searcher, who may have difficulty in identifying the target of the search, because of the limited information at his disposal. That, in my view, is to miss the point. Section 28(2)(b) is concerned with "information of the same kind," not with information corresponding to the particular individual whose records are the subject of a request under section 7 of the Act. It is possible for members of the public to learn the ages of people whose vital information is registered. That is information of the same kind as is contained in any other body of information.

70. The object of the establishment of the General Register was to provide a general and publicly available record of all births, marriages and deaths. The Registration of Births (Ireland) Act, 1863 recited that it was "expedient that a complete System of Registration of Births and Deaths should be established in Ireland....." The registration of marriages had been made obligatory by the Marriages (Ireland) Act, 1844. Sections 50 and 51 of the Act of 1863 provided that "every person" should be entitled to search the indexes of the register between specified hours "and to have a certified Copy of any Entry in the said Indexes..." The purpose and effect of the statutory system of registration of births, marriages and deaths was to establish a complete, mandatory and public

system of registration. It is impossible, in the face of the statutory right to inspect and to take copies, to doubt that the information contained in the register is available to the general public.

71. It makes no difference that searches in individual cases may be difficult or time consuming. The fact is that the information is there and open to be inspected "by any person."

72. The Civil Registration Act, 2004 now governs the system of registration. It provides for its reorganisation and modernisation and repeals the acts of 1844 and 1863. Section 61 of that Act provides for searches, in effect for provision of certificates of registration on payment of a prescribed fee.

73. I have noted the submission of the Hospital to the effect that the exclusion of the exemption by reference to section 28(2)(c) has implications for privacy of persons such as patients. I do not believe that point can defeat the simple and objective test laid down by paragraph (c). If there is a danger of abuse by infringement of confidentiality, I believe the relevant provision is section 26.

74. I am satisfied, for these reasons, that the exemption provided by section 28(1) does not apply. For that reason, it is unnecessary to consider section 28(5) or Freedom of Information Act, 1997 (section 28(6)) Regulations, 1999. (S.I. No. 47 of 1999). I would add that, if it were necessary to do so, I would agree with the judgment of Denham J.

**Did the record contain information given to the Hospital in confidence on the understanding that it would be treated in confidence?**

75. Section 26 provides a ground of exemption from disclosure distinct from section 28. It stands on its own. It provides as follows:

(1) Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if—

(a) the record concerned contains information given to a public body in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or

(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule) or otherwise by law.

(2) [not applicable in this case]

(3) Subject to section 29, subsection (1) (a) shall not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under section 7 concerned.

76. At the outset it must be noted that section 26(1) contains two distinct provisions. I draw special attention to this fact, because it seems that both the High Court and the Commissioner treated them indistinctly. In effect, paragraph (b) has been treated as the governing provision to the exclusion of paragraph (a).

77. Paragraph (a) deals with information given to a public body in confidence where disclosure would be likely to prejudice the body in receiving similar information in the future. Paragraph (b) deals with information communicated in accordance with a contract or a statute which contains a provision imposing a duty of confidence.

78. The High Court judgment dealt with the issue of confidentiality in extenso.

79. Firstly, the learned trial judge drew attention to the duty of the Hospital to register the birth of the child (Thomas Walsh the son of Bridget Welsh) in 1922. He held that no question of confidentiality could arise in respect of material which fell to be disclosed as a matter of law. This conclusion was not related, at least not expressly, to either paragraph (a) or (b) of subsection (1). He pronounced as general proposition that information provided for registration by the public registry was no longer confidential. Hence, section 26 could not apply.

80. Secondly, the learned judge went on to deal in some detail with cases concerning the law of confidentiality. He discussed *Coco v AN Clarke (Engineers) Limited* [1968] F.S.R. 415; *Saltman Engineering Co. Ltd v Campbell Engineering Company Ltd* (1948) 65 RPC 203; and *House of Spring Gardens Ltd v Point Blank Ltd* [1984] I.R. 611. In seeking to adapt this case law to information confided by Bridie Welsh to the Hospital, the learned judge approved the decision of the Commissioner that, "as a matter of law, information in the public domain could not concern "private and secret matters" (being necessary elements in the test of confidentiality." He adverted to the possibility that Bridie Welsh could have imparted the information to the Hospital in anticipation of its not being disclosed, but held the view that her subjective belief could not prevail where, objectively speaking, the material was not of a confidential nature. Thus, the exemption from disclosure did not apply in the absence of the quality of confidentiality.

81. Having reached this conclusion, the learned judge did not need to consider whether the Commissioner had been correct in balancing the public interest in disclosure with the right to keep it confidential in accordance with section 26(3). Nonetheless, the learned judge expressed his opinions on this latter issue, though as obiter dicta. He examined a number of cases concerning the right, including the constitutional right, of an individual to be informed as to his or her parentage. He also considered whether the Hospital had constitutional rights but did not reach any conclusion on the point.

82. The Hospital, in its submissions, disputes the relevance and applicability of the case law relating to breach of confidence in relation to commercial secrets and points out that section 26(1)(b) deals with a duty of confidence provided for by an agreement or by a statute. The Hospital invokes the duty of confidence imposed by law and by the Ethical Conduct Guidelines of the Medical Council and says it could never be a defence for a doctor to an allegation of breach of his duty of confidence to his patient to say that the matter was in the public domain. It says that the learned trial judge did not appear to have given any consideration to provisions of section 26(1)(a) relating to "prejudice to the future supply of further similar information..."

83. The first question to consider is whether the learned trial judge was right when he held that there could be no question of

confidentiality in respect of material which fell to be disclosed by the Hospital in performing its duty to register the birth of the child. In so holding, he appears, without saying so, to have applied an exception to section 26(1) of the same kind as is contained in section 28(2)(c), although no such provision is contained in this section. The trial judge's reason for his refusal to apply section 26 was that the information was "in the public domain." Thus, it was not the communication of the information by the Hospital to the Registrar of Births that made the difference. It was the appearance of the information in the public register. Section 26 contains no exception corresponding to section 28(2)(c). The fact that the information is in the public register does not prevail over the obligation of the head to refuse in accordance with section 26(1). As I have already stated, sections 26 and 28 provide for independent grounds of refusal of access.

84. Accordingly, I am satisfied that the High Court was in error in excluding the application of section 26 on the ground that the Hospital had registered the birth of Thomas Walsh.

85. The learned trial judge also upheld the decision of the Commissioner in her application of the law of confidence. The Commissioner expressed some additional views concerning the application of section 26 to the facts.

86. It is fundamental to further consideration of this exemption, to note the distinction between paragraphs (a) and (b) of section 26(1).

87. Section 26(1)(b) has no relevance to the present case. It concerns, as is clear from its terms, only cases where the disclosure of information by the giving of access to a record by a head of a public body would, in the words of the section, "constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment... or otherwise by law." It is of interest to note that paragraph (b) does not apply where disclosure would, otherwise, be a breach of an obligation of confidence imposed by statute on members of boards or employees of various statutory bodies. That confirms that paragraph (b) concerns cases where an obligation of confidence is imposed on the body in question. Paragraph (b) applies only to information whose disclosure would involve the person or body disclosing it committing a breach of a contract or a statutory provision. Thus, only paragraph (a) could be relevant in this case.

88. Paragraph (a) has three components, namely that;

- i) the record contains information given to the body in confidence and on the understanding that it would be treated by it as confidential;
- ii) in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons;
- iii) it is of importance to the body that such further similar information should continue to be given to the body.

89. The Commissioner accepted that information arising in a professional relationship between a health professional and patient would normally fall within the category of confidential relationships traditionally recognised by the law. She thought, however, that the information relating to Bridie Welsh had most likely been given to a hospital employee rather than a treating physician.

90. The Commissioner's reason for excluding the application of section 26 was that the information contained in the record was not "concerned with private or secret matters." She took a definition of the term, "confidence," from the law relating to breach of a duty of confidence. She said that she could not "see how information that is available to the public through the GRO, as outlined above, can be concerned with private or secret matters." The matter "outlined above" was, of course, the application of section 28(2)(b). Thus she treated that provision as creating an exception to section 26 which, as I have said, it does not. She added, as a further reason, that, because Mr Thomas Walsh knew the name of his mother and some other details about his birth, the information about his mother's age could not be treated as having the necessary quality of confidence.

91. I cannot agree with the Commissioner that the availability of the information in the GRO was relevant to the application of section 26(1). The section, unlike section 28, contains no provision to that effect.

92. I also think she was mistaken in two further respects. Firstly, it cannot be correct to say that it is relevant to a whether a hospital is bound by an obligation of confidentiality whether patient information is given to a hospital employee rather than a treating physician. Clearly, the obligation to respect the confidence of patients rests on the Hospital generally regardless of the function of the Hospital employee who receives and records the information. The final point that the Commissioner made was based on the state of knowledge of the late Mr Thomas Walsh. The question of whether or not the head is bound to refuse access in accordance with the provisions of section 26(1) is to be determined objectively by reference to the three components of paragraph (a). The requester can be any member of the public. The state of knowledge of the requester is not relevant to that question.

93. Therefore, I am of opinion that the Commissioner and the High Court were respectively in error in their interpretation and application of section 26(1). This was due to the importation of a test based on a different area of the law. In the result, it has not been determined whether those conditions apply.

94. Nonetheless, it is clear, at least by implication, that the Commissioner accepted that Bridie Welsh had conveyed her personal information to the Hospital in confidence and on the understanding that it would be treated in confidence by the Hospital. It is also clear from the submissions made to the Commissioner by the Hospital regarded information about the age of a patient as clinically significant and that it was concerned that disclosure of that information would be likely to prejudice the giving to it of further similar information. It is obvious that the Hospital would wish to be able to offer such assurance of confidentiality that such further similar information would continue to be given to it in future.

95. The Commissioner refused to apply section 26(1) essentially for the single reason that she did not regard the information as having the necessary quality of confidence. It is clear that, but for this, the information would have had to be treated as covered by section 26(1).

**Even if the information had been imparted to the Hospital confidentially, did the public interest justify its release?**

96. Having come to the conclusion that section 26(1)(a) did not apply, the Commissioner did not, strictly speaking, need to consider section 26(3) providing for what she called "a public interest override." That provision reads as follows:

"Subject to section 29, subsection (1)(a) shall not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under section 7 concerned."



97. The Commissioner decided to consider the application of this provision, although her primary view was that section 26 did not apply at all, because she did not believe that the information in the Hospital records had the necessary "quality of confidence." She found that "on balance the public interest would be better served by releasing the records than by their being withheld." She gave the following reason:

"The fact that one of the requesters is in this case is the son of Ms Welsh is a circumstance in which it is legitimate to have regard in applying the public interest test. Were it the case that the requester had no close personal ties to the person whose information is at issue (Ms. Welsh), then the public interest conclusion might be otherwise. However, the public interest in persons generally having the fullest possible information on their origins is a very strong one. In the circumstances of this case, I take the view that the public interest, on balance, would favour disclosure of the information to your father and your self."

98. The issue of public interest, pursuant to section 26(3) of the Act, has been argued before this court in the somewhat unsatisfactory circumstance that neither the Commissioner nor the High Court technically made any decision on the issue. Nor was any consideration given to the application of the procedures set out in section 29 of the Act. The appeal was taken to the High Court on a point of law. That point cannot include a point such as this public-interest point which was not decided by the Commissioner. The Commissioner, nonetheless, expressed the opinion that section 26(3) would have entitled her to order the release of the information. In these circumstances, it seems to me unavoidable that the matter be addressed in this Court, even if the following views are necessarily obiter.

99. McCarthy J, having reached his own conclusion that the information was in the public domain once the birth had been registered and having, in addition, approved the Commissioner's view that the information did not have the necessary quality of confidence, nevertheless, proceeded, after expressing some hesitation, to consider the Commissioner's views on the public-interest issue. He found that the Commissioner had been in error because she had not considered all relevant factors. In particular, he said that she had failed to take account of the views of the Hospital. Having made extensive reference to authority, the judge does not appear to have arrived at any conclusion on the public-interest issue. He explained that he had sought to address certain principles which must be applied by the Commissioner.

100. The Hospital submits that, since the Commissioner failed to take all relevant facts into account, her decision cannot stand. The Commissioner submits that she is not under an obligation to recite the considerations she took into account. It is submitted that she balanced the factors in favour of release of the information against those militating in against, although she did not enumerate them in her decision. According to the written submissions of the Commissioner, "crucially what emerges is that the weighing of the public interest was carried out by the Commissioner, having regard to the definite link between the requester and the patient and, further, having regard to the information already within the Requester's knowledge and that which he could potentially have been accessed via the GRO."

101. It is clear, however, that, as the learned High Court judge pointed out, the Commissioner did not, in striking that balance, take account at all of the right or duty of the Hospital to respect the confidence of information confided to it by its patients, specifically by Bridie Welsh. The Commissioner responds to this finding of the learned trial judge by claiming that she had not failed in this respect, citing in support to the following passage from her decision:

"I accept that information arising in a professional relationship between a health professional and a patient would normally fall within the category of confidential relationships traditionally recognised by law."

102. That statement, however, was taken from the part of her decision which considered whether the information was confidential. At that point, she entirely discounted the Hospital's argument that the information was confidential because she could not see "how information that is available to the public through the GRO.....can be concerned with private or secret matters..." This conclusion, which was erroneous in any event, led her to the further conclusion that section 26 had no application. Once she had decided that the obligation of confidence had no value, it is impossible to see how she could claim to have weighed this consideration in the balance for the purpose of considering the public interest in releasing the information. Moreover, her decision contains no suggestion that she did.

103. The key point in the Commissioner's decision was her view that "the public interest in persons generally having the fullest possible information on their origins is a very strong one." The High Court judge implicitly accepted this proposition.

104. The learned trial judge cited the judgment of Hamilton C.J. in *I.O.T. v. B. and Others* [1998] 2 I.R. 321, at page 348, to the effect that "[t]he right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child.." On the other hand, the Chief Justice counterbalanced this right with the rights of the mother. At page 349, he remarked of children's rights:

"While they enjoy the constitutional right to know the identity of their respective natural mothers, the exercise of such right may be restricted by the constitutional right to privacy and confidentiality of the natural mother in respect of her dealings with the [adoption society]."

105. The case of *South Western Area Health Board v. Information Commissioner* [2005] 2 I.R. 547 also concerned the conflict between an adopted child wishing to trace her parentage and the parent's wish to maintain privacy and confidentiality, in the context of her later marital and family circumstances, concerning information regarding the birth of her adopted child. Smyth J allowed an appeal from the Information Commissioner. He remarked at page 556:

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

106. McCarthy J also referred to a number of decisions of the European Court of Human Rights. The learned judge found most assistance in the decision of that Court in *Odievre v. France* [2004] 38 E.H.R.R. 43. The case concerned a dispute in French law between a mother, who had surrendered her child for adoption and, in due course, the child. The former claimed an entitlement on her part to the maintenance of confidentiality. The latter applied to a French court for release of information about her birth and permission to obtain copies of any documents, birth, death and marriage certificates and civil status documents. The Court, in the course of its judgment made the following observation:

"The expression "everyone" in Article 8 of the Convention applies to both the child and the mother. On the one hand, people have the right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life. The child's vital interest in its personal development is also widely recognised in the general scheme of the Convention. On the other hand, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied... The two private interests with which the court is confronted in the present case are not easily reconciled: moreover, they do not concern an adult and child, but two adults, each endowed with her own free will." (emphasis added)

It will be noted that the Court spoke of the "two private interests concerned."

107. All of these cases concern intensely private matters. A child seeking information about his or her family may give rise to conflict with a profound wish for privacy on the part of the other party. The present case is different but only in degree. Thomas Walsh was seeking information about his mother, who, in all probability, is long since deceased. The Hospital, however, invokes section 26 of the Act to protect from disclosure information communicated to it in circumstances of confidentiality.

108. The Commissioner considers that section 26(3) provides a "public-interest override." That provision applies where "the public interest would, on balance, be better served by granting than by refusing to grant the request..." The request is made under section 7. It seeks access to a record and may be made by anybody. It was made, in this case, by a private individual for a private purpose. It was not made in the public interest.

109. The Commissioner based her decision on the "public interest in persons generally having the fullest possible information on their origins." Section 26 (3) is concerned with the public interest in granting access to the particular record sought. Whether people generally should be granted access to information concerning their origins is a matter of policy. It would have been possible to include in the legislation. It has not been included. It is not, in my view, open to the Commissioner to adopt a general policy in the public interest.

110. I have, for a number of reasons, decided that the Commissioner was in error in the factual reasons she gave for applying section 26(3). If those were the only reasons for setting aside the decision of the Commissioner, the appropriate procedure would be to remit the matter to her for further consideration.

111. More fundamentally, I do not believe that section 26(3) applies in a case where the reason for seeking access to the record is exclusively private. The Commissioner's jurisdiction pursuant to section 26(3) is to decide whether provision of access to a particular record is in the public interest. Whether a person in the position of the requesters in this case should be granted such access concerns their private interests.

112. I am satisfied that the Commissioner was in error in considering that the grant of access in this case was in the public interest.

113. I would, therefore, allow the appeal and set aside the decision of the Commissioner.