THE SUPREME COURT

Murray, C.J. [S.C. No. 356 & 357 of 2009]
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 Macken J. delivered on the 19th day of July, 2011

This is an appeal from the judgment of the High Court (McCarthy, J.) delivered on the 2nd July, 2009, and the Order made thereon, concerning a request for information made to the appellant, known to all and sundry as The Rotunda Hospital ("the hospital"), a well known maternity hospital in the City of Dublin. By that judgment the learned High Court judge found that the request for information about the age of a woman who had a child in the hospital in 1922, was a request which (i) came within the provisions of the Freedom of Information Acts, 1997 and 2003 ("the Act of 1997"), and (ii) the hospital was obliged to give the information sought. The High Court upheld the Commissioner's substantive decision on her earlier review of the hospital's refusal to furnish the information. For completeness sake, since the proceedings are between the hospital and the respondent ("the Commissioner"), I should mention that the request was made by a woman, [Miss Dawn Walsh], on behalf of her father, a man called Thomas Joseph Walsh, who was, in turn, the child born in 1922. He is now dead. She is therefore the grandchild of the woman who gave birth.

Background Facts
The request for information arose from the fact that the child born in 1922, the late Mr. Walsh, through his daughter, was seeking information from the hospital. The particular request the subject of this appeal, was made to the hospital in September, 2004, expressly under the provisions of the Act of 1997. It appears from the affidavit evidence filed that the woman and her father knew that he had been boarded out as a baby by his mother and that the mother had lived at College Road, Galway. Originally, in correspondence with the hospital, what was sought was a home address, the date of birth and the age of a woman, but eventually what was before the Commissioner and the High Court was information about her age at the time she gave birth to Mr. Walsh. Her name, corresponding to details in the request and as used by her or as recorded by the hospital, was variously Bridget Walsh, Bridie Walsh and/or Bridie Welsh. In this judgment I use the name Bridie Walsh.

On the 21st October, 2004 the hospital replied to the request. It is necessary to set this out because it shows the basis for its refusal to provide the information sought. It said:

> *"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 the 10th May, 1922, and giving birth to a live born 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.*
>
> *While 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.*
>
> *Bridie Welsh's age, as recorded in the 1922 Labour Ward Book cannot be released to you."*

The letter suggests two things: (a) that the hospital was unable to give the date of birth or a home address of Bridie Welsh, because it didn't have that information on record, and (b) insofar as her age was concerned, because this was claimed by the hospital to have been given on the basis set out above, that information could not be given. Subsequently, the hospital wrote enclosing some guidance information and suggesting that the requester contact the Rotunda Girls Aid Society. The result of the above exchanges is that the hospital did not grant the information sought pursuant to the terms of the Acts, insofar as the age of Bridie Walsh was concerned.

The requester then applied, as she was entitled to, for the hospital's decision to be reviewed, but on the 13th April, 2005 the reviewer affirmed the decision not to release the information about the age of Bridie Walsh. Subsequently again, the hospital apparently discovered that another record of Bridie Walsh existed in what was called the "Porters Lodge Book", whose dates and other details corresponded with the other records in the hospital, and which related to the person recorded as "*Bridie Welsh*" elsewhere in the hospital records.

In the meantime, however, the requester had applied to the Commissioner, under the provisions of the Acts, seeking a review of the decision of the hospital's refusal of the information sought. The Commissioner considered the matter, and issued her decision in December 2007. She points out that her review was concerned exclusively with the two records which contained the age of Bridie Walsh, the Labour Ward Book and the Porters Lodge Book.

The Commissioner's Decision
In her decision, the most important elements of which I set out, the Commissioner, first, considered whether or not the information sought was "*personal information*", as defined in the Acts, and found it capable of being so. She held, however, that, even if it is personal information within s.2(1) of the Act of 1997 as being one of the specific types of information which include "*age*" in s.2(1)(vi), it also had to comply with what she called the "*overarching prior requirements*" in the general definition of "*personal information*", in s.2(1). Next, she found that information "*of the same kind*" as was contained in the record, that is, age, fell within the provisions of s.28(2)(c) of the Act of 1997, namely, that such information was available to the general public. The basis for this finding was that the General Register Office, which maintains a system, *inter alia,* for the public registration of births, marriages and deaths, includes in the appropriate register "*information of the same kind*" as the "*age*" of an individual. In the context of this appeal, that is the date of birth information recorded in the Register of Births. In such circumstances, she found that the information loses its status as personal information exempt from disclosure, under s.28(1) of the Act of 1997, which status it would have retained, absent the application to age of the provisions of s.28(2)(c).

Next, and also of importance, in the context of this appeal, is the Commissioner's position on the meaning and application of s.26(1)(a) of the Act of 1997. For the purposes of relating the findings of the Commissioner at this stage, it is sufficient to say that she found that while information given in the course of a professional relationship would, in general, come within what she called "*confidential relationships*" recognised in law, she determined that the information which is referred to in that section must have "*the necessary quality of confidence*", before the exemption from disclosure provided for in that section can be properly invoked, and that in the case of "*age*" in the particular context of other facts, it did not have that status.

In that regard, in her decision she invoked, in support of her conclusions, an extract from *B v. Brisbane North Regional Health Authority* [1994] 1 QAR 279, mentioned in an Australian academic writing Essays in Equity, and to which I will return, from which she found that only "*private or secret matters*" were included in the definition of a "*confidence*". Relying on that citation, as cited in her earlier decision in Case No. 050305, and on the fact that the requester had other information, she found that since the information sought, namely, age, was also available to the general public in the form of "*information of the same kind*" through the General Register Office, age in this case could not be concerned with "*private and secret matters*", and did not have the necessary "*quality of confidence*". In consequence, she concluded the exemption from disclosure in s.26(1)(a) did not apply.

A lthough finding that the hospital was not entitled to rely on s.26(1)(a) for the above reasons, and that finding being sufficient to determine the issue, she nevertheless went on to consider what the position might be if she had come to a different view in relation to s.26(1)(a), that is to say, that the exemption there did apply. Section 26(3) of the Act provides for disclosure of the information where the "*public interest*" would best be served by providing for the release of the records, rather than by their refusal. One of the original requesters, Mr. Walsh, was the son of Bridie Walsh, and she found that since there was a strong public interest in persons "*generally having the fullest possible information on their origins*", it was appropriate that the information would be made available.

The Commissioner, pursuant to her findings, annulled the decision of the hospital, and directed it to disclose the requested information in the two records in question, from which decision the hospital, pursuant to s.42 of the Act of 1997, appealed to the High Court, on several points of law.

The High Court Proceedings and the Judgment
I now turn to the judgment of the High Court. First, it is necessary to say briefly what the hospital claimed. According to the High Court judgment, the relevant grounds of appeal before it were:

> (1) The Commissioner was in error in treating the Act as applicable when it had no such application since the records in question came into existence before the Act's commencement.
>
> (2) The Commissioner was in error in failing to hold that age was personal information, *inter alia*, because of an erroneous view that one or other of certain so called "*overarching requirements*" was or were not fulfilled.
>
> (3) The Commissioner had erroneously held that the exception to the prohibition on disclosure of the records in question as containing personal information applied (pursuant to s.28(1)(c) of the Act) on the basis that they were in the public domain.
>
> (4) That the Commissioner had applied an incorrect test to the exemption provided for by s.26(1)(a).
>
> (5) The Commissioner had incorrectly applied a certain balancing test permitting disclosure of the records in question as a matter of discretion under s.26(3).
>
> (6) The Commissioner erred in making release of the record in question "*conditional upon proof of the relationship of the requester to the patient*" (by which, according to the learned High Court judge, was meant that that requirement was an effective admission that the requester had failed to show that he was the son of Bridget Walsh, whereby any ground of disclosure based upon that fact ought to be rejected).

The High Court, in July, 2009, dismissed the hospital's appeal on several grounds, in particular on both s.28 and s.26(1)(a). In other respects, including on the definition of "*personal information*" in s.2(1), the learned High Court judge did not uphold the Commissioner's findings. On the application of s.26(3), he also reached a different view. In his judgment, the learned High Court judge found, in essence, as follows. On the applicability of the Act of 1997 to pre-Act records, in this case those created in 1922, the Commissioner had objected to this issue being heard, on the basis that this was not the subject of any debate before her, and was not part of her decision from which the appeal was being brought. The hospital argued it was an issue going to jurisdiction and, *inter alia*, for that reason, should be argued and determined by the High Court. The learned High Court judge decided to hear the matter,

based on the following: his view that it raised an issue of jurisdiction; the same issue apparently was a feature in other cases under the same Acts; it was proper that, as a matter of public policy, such an issue should be aired, being of such a fundamental nature; and that he should not refuse to hear argument on this serous point, merely because it had not been raised earlier. Having so decided, the learned High Court judge then found, on the merits, that records created in 1922 were not excluded from the ambit of the Act of 1997, based on a proper consideration and application of s.6(4) and s.6(5)(b). The latter subsection made specific provision for disclosure of records created before the Act came into effect, provided they related to personal information about the person seeking access to them. He found that, in this case, they related to personal information about Mr. Thomas Walsh.

On the second issue, the learned High Court judge found that the Commissioner was wrong to find that "*personal information*", besides coming within its specific definition in s.2(1)(vi), must also satisfy what she had called the "*overarching prior requirements*" in the general definition in s.2(1) of the Act, since this misunderstood or failed to have regard to the phrase "*without prejudice to the generality of the foregoing*" appearing in that section before each of the specific matters included in the definition. In consequence, what followed in the definition could only constitute examples of matters such as age, constituting personal information.

Dealing with the first important ground of appeal before this Court, namely, s.28, the learned High Court judge found that the Commissioner was correct to find that as to "*age*", information "*of the same kind*" is found in the Register of Births, in accordance with s.28(2)(c). The exemption from disclosure of personal information, being age, otherwise found in s.28(1) was, in consequence of s.28(2)(c), disapplied by that latter provision, with the result that age was no longer, in this case, exempt from disclosure, under s.28. He also held that the information in the record must be furnished where the request was made by the next of kin of the individual, pursuant to s.28(5) of the Act.

Dealing with the second important ground before this Court, the learned High Court judge also accepted the Commissioner's view and application of s.26(1)(a) of the Act, to the information sought, and found, as did she, that the exemption from disclosure in that subsection only applied to "*private or secret matters*", arising from certain case law from the field of intellectual property. He considered that, regardless of the belief of the original imparter of the information, that belief was merely subjective, and could not apply when, objectively, the information did not have the required "*quality of confidence*". He disagreed with the Commissioner's stated approach to s.26(3), in certain observations he made on that subsection, finding that she had not properly considered all the necessary elements in applying the public interest test, including the hospital's interest in patient confidentiality.

The Appeal
The hospital has appealed the decision of the learned High Court judge and the Commissioner has served a Notice to Vary. As to the hospital's appeal, it contends that the learned High Court judge was: (a) wrong in law to hold that the Act applied to records created before its commencement; (b) that information in the Register of Births, not being information "*of the same kind"* as that appearing in the records concerning Bridie Walsh; the information sought was not excepted under s.28(1)(c) he was wrong in law in so finding; (c) was wrong, in fact, in his determination that the hospital had claimed the information was confidential, as it had always been the hospital's contention only that the information had been imparted on the understanding that it would be treated as confidential; that age is a factor of high clinical relevance in maternity cases and that the hospital must be able to a give a guarantee of absolute confidentiality that details disclosed to the hospital will not be subsequently furnished to a third party without the consent of the patient; and he was therefore wrong in law to find that such information was required to have any "*quality of confidence*", (d) was wrong in law in applying the test under s.26(3) of the Act; and (e) was wrong in law to hold that Dawn Walsh was a person who was entitled to apply and receive information under the Regulations, in particular since the Commissioner had made no decision on this issue.

The Commissioner's Notice to Vary raised several issues, being: that the learned High Court judge was in error (a) in relation to the manner in which he awarded costs; (b) in permitting the hospital to raise a new issue and in dealing with the same, when it had not been canvassed before the Commissioner in her review procedure; and she made no decision on it; (c) in failing to have any proper regard to the burden of proof placed on a public body to show to the satisfaction of the Commissioner that a decision to refuse to grant a request for access is justified, s.34(12) of the Act; and (d) in holding that personal information coming within the non-exhaustive list set out at (i) to (xii) in the definition of "*personal information*" in s.2(1) of the Act was not also required to satisfy the requirements of (a) and (b) of s.2(1) so as properly to come within the statutory definition.

Detailed and very helpful written submissions were filed on behalf of each party and were supplemented by oral argument.

Legislative Scheme
Since a significant element in the Commissioner's decision and in the judgment of the High Court, centres on the proper meaning, scope and application of particular sections of the Act of 1997 (I do not consider the Act of 2003 to be relevant to the issues), it is appropriate to cite portions of this before considering the judgment. The Freedom of Information Act, 1997 ("the Act of 1997") came into force in that year, and sets out in the long form title the purposes and aims of the Act itself. It is helpful to set out the long title in part, because it seems to me that it may be of assistance in ascertaining the appropriate interpretation of key provisions of the Act which were under consideration by the Commissioner in reaching her decision, and which also formed key arguments before both the High Court and this Court.

> The long title to the Act commences as follows:
>
> *"AN ACT TO ENABLE MEMBERS OF THE PUBLIC TO OBTAIN ACCESS, TO THE GREATEST EXTENT POSSIBLE CONSISTENT WITH THE PUBLIC INTEREST AND THE RIGHT TO PRIVACY, TO INFORMATION IN THE POSSESSION OF PUBLIC BODIES AND TO ENABLE PERSONS TO HAVE PERSONAL INFORMATION RELATING TO THEM IN THE POSSESSION OF SUCH BODIES CORRECTED AND, ACCORDINGLY, TO PROVIDE FOR A RIGHT OF ACCESS TO RECORDS HELD BY SUCH BODIES, FOR NECESSARY EXCEPTIONS TO THAT RIGHT … TO PROVIDE FOR THE INDEPENDENT REVIEW BOTH OF DECISIONS OF SUCH BODIES RELATING TO THAT RIGHT … AND, FOR THOSE PURPOSES, TO PROVIDE FOR THE ESTABLISHMENT OF THE OFFICE OF INFORMATION COMMISSIONER …"*

As Fennelly, J., stated in *Sheedy v Information Commissioner* [2005] I.R., 272:

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

European Union should have access to the documents of the European Parliament, Council and Commission.

Section 6(1) of the Act gives effect to the general principle of public access to documents "to the greatest extent possible consistent with the public interest and the right to privacy …".

By the provisions of s.33 of the Act, the office of the Commissioner was established, and s.34 of the Act permits the Commissioner, in respect of certain decisions referred to in that section, to review any such decision, and having done so, to affirm or vary it, or annul the decision, and, if appropriate, to make such decision in relation to the matter concerned, as the Commission considers proper, in accordance with the Act.

The Commissioner, and the High Court, both draw attention to the provisions of s.34(12) of the Act, which states:

> *"…*
>
> *(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."*

"Personal information" is defined in s.2(1) of the Act as meaning 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."*
>
> (emphasis added)

Personal information, by the same section, is expressly deemed to include "*information relating to … medical history*" of the individual, and "*age*", in providing as follows:

> *"and without prejudice to the generality of the foregoing, includes-*
>
> *…*
>
> *(i) information relating to the …medical …history of an individual,*
>
> *…*
>
> *(vi) information relating to … age … of the individual,*
>
> *… ."*
>
> *An "exempt record" is also defined by s.2 as being:*
>
> *(a) a record in relation to which the grant of a request under section 7 would be refused pursuant to Part III or by virtue of section 46 , or*
>
> *…"*

Part III of the Act is described in its title as "*Exempt Records*" and runs from sections 19 to s.32. Sections 19 to s.25 cover matters such as: (i) records of meetings of the government, (ii) deliberations, functions and negotiations of public bodies, (iii) parliamentary court and certain other matters, (iv) law enforcement and public safety, and (v) security, defence and international negotiations. Section.31 covers financial and economic interests of the State and public bodies. Some of these provisions provide that the record shall not be disclosed at all, save in very limited circumstances, or only on consultation with others.

Among these sections covering exempt records, are included two sections of special relevance in this appeal, s.26 and 28. There are some sections analogous to these, such as s.27 and s.30, which I also consider.

Section.26, in its relevant parts, reads 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 the public body concerned* in confidence *and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or*
>
> *(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule) or otherwise by law.*
>
> *…*
>
> *(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."*
>
> (emphasis added)

Section 28 of the Act concerns "*personal information*", as defined in s.2(1) and in relation to a request for information, the following relevant sections provide:

> *"(1) 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).*
>
> *(2) Subsection (1) does not apply if –*
>
> *…*
>
> *(c) 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,*
>
> *… .*
>
> *(5) Where, as respects a request under section 7 the grant of which would, but for this subsection, fall to be refused under subsection (1), in the opinion of the head concerned, on balance –*
>
> *(a) the public interest that the request should be granted outweighs the public interest that the right to privacy of the individual to whom the information relates should be upheld, or*
>
> *(b) the grant of the request would benefit the individual aforesaid,*
>
> *the head may, subject to section 29, grant the request."*
>
> (emphasis added)

It will be seen from the foregoing that, at least in relation to the issues arising on this appeal, the Act of 1997 includes a protection for "*personal information*", and that such information is exempt from disclosure, and information which complies with s.26(1)(a) is also exempt from disclosure.

To understand the full tenor of Part III, however, I should also refer to similar or analogous rights to those in s.26(1), which are also exempt from disclosure, and are provided for specifically under s.27, 30, 31 and 32.

Section 27, in its relevant part, reads as follows:

> *"(1) Subject to subsection (2), a head shall refuse to grant a request under section 7 if the record concerned contains –*
>
> *(a) trade secrets of a person other than the requester concerned,*
>
> *(b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or*
>
> *(c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.*
>
> *(2) A head shall grant a request under section 7 to which subsection (1) relates if—*
>
> *…*
>
> *(b) information of the same kind as that contained in the record in respect of persons generally or a class of persons that is, having regard to all the circumstances, of significant size, is available to the general public,"*
>
> …
>
> (emphasis added)

Section 30, in its relevant part, reads as follows:

> *30(1) A head may refuse to grant a request under section 7 if, in the opinion of the head –*
>
> *(a) the record concerned contains information in relation to research being or to be carried out by or on behalf of a public body and disclosure of the information or its disclosure before the completion of the research would be likely to expose the body, any person who is or will be carrying out the research on behalf of the body or the subject matter of the research to serious disadvantage, or*
>
> *(b) disclosure of information contained in the record could reasonably be expected to prejudice the well -being of a cultural, heritage or natural resource or a species, or the habitat of a species, of flora or fauna.*

Section 31, in its relevant part, reads as follows:

> *31(1) A head may refuse to grant a request under section 7 in relation to a record (and, in particular, but without*

prejudice to the generality otherwise of this subsection, to a record to which subsection (2) applies) if, in the opinion of the head –

(a) access to the record could reasonably be expected to have a serious adverse effect on the financial interests of the State or on the ability of the Government to manage the national economy,

(b) premature disclosure of information contained in the record could reasonably be expected to result in undue disturbance of the ordinary course of business generally, or any particular class of business, in the State and access to the record would involve disclosure of the information that would, in all the circumstances, be premature, or

(c) access to the record could reasonably be expected to result in an unwarranted benefit or loss to a person or class of persons.

(2) This sub-section applies to a record relating to several classes of financial importance, including rates of exchange, taxes or other sources of income, etc."

(emphasis added)

A specific provision relating to exemption is included in respect of other Acts of the Oireachtas.

32(1) A head shall refuse to grant a request under section 7 if –

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

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

For the purpose of considering the approach of the Commissioner and the High Court to s.26(3), s.29 is relevant. It provides:

"29(1) In this section "a request to which this section applies" means a request under section 7 to which section 26 (3) or 27 (3) applies or to which section 28 (5) applies and which, apart from this section, would fall to be granted.

(2) Subject to subsection (5), before deciding whether to grant a request to which this section applies, a head shall, not later than 2 weeks after the receipt of the request—

(a) if the request is one to which section 26 (3) applies, cause the person who gave the information concerned to the public body concerned and, if the head considers it appropriate, the person to whom the information relates, or

(b) if the request is one to which section 27 (3) or 28 (5) applies, cause the person to whom the information relates,

to be notified, in writing or in such other form as may be determined—

(i) of the request and that, apart from this section, it falls, in the public interest, to be granted,

(ii) that the person may, not later than 3 weeks after the receipt of the notification, make submissions to the head in relation to the request, and

(iii) that the head will consider any such submissions before deciding whether to grant or refuse to grant the request.

…"

(emphasis added)

By the above cited provisions, many types of information, analogous but not at all identical to those in s.26(1)(a) or s.28, and many others, are specifically exempt from disclosure, unless otherwise expressly stated, such as in s.27(2). A distinction is also drawn between those sections where the head "*shall refuse*" the request and those where the head "*may refuse*" to do so. The particular sections relevant to the appeal in the present case are s.26 and s.28, which are among those where the head "*shall refuse*" the request.

Conclusion on the legislative scheme

It seems to me that, apart from the issue of whether or not the Act applies to records created prior to its commencement, which I deal with last, the real issues which arise for consideration in this appeal stem from the correct interpretation and application, in particular of s.26 and 28 of Part III of the Act of 1997, and alongside those, how, if at all, the provisions of s.28 are relevant in the context of s.26.

The Act, as is set out earlier in this judgment makes provision for the generous availability of information to a person requesting the same, and which is held by a public body. However, as is clear from the long title to the Act of 1997 and the provisions of the Act itself, that right is not absolute. and in both legal and constitutional terms could never be absolute. This is reinforced by the terms of both s.6(1) and s.6(7) of the Act itself. S.6 is an important provision as it expresses the statutory right, called the "*right of access*", in 6(1), in the following terms:

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

However, section 6(7) is also of particular importance, especially in the context of this appeal, as it provides:

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

On the face of it, therefore, and in the clearest terms possible, there is simply no statutory "*right of access*" to any records covered by Part III of the Act. It must nevertheless be recognised, as it is in the Act, that tensions may, or will arise, between the generous right of access to information, provided by s.6(1), and the equally important rights also properly protected by law, by the exemption from disclosure in Part III, and in consequence of the express recognition, in s.6(7), that the right of access in s.6(1) is not a right to an exempt record. The tension between these respective rights may have to be resolved. The manner in which it is resolved by the Oireachtas under the Act is through the mechanism of Part III. In Part III are recognised all the other rights, many of them private rights, and how these rights are to be dealt with, *inter alia*, in the event that a person makes a request for information, even though not having a "*right of access*" under s.6(1).

When considering how the potential tension between competing rights has been resolved, it is important to consider the entire of Part III of the Act. I have set out some provisions of this in detail, in light of the particular issues arising under s.26(1) and s.28 in this appeal. It is both nuanced and sophisticated, and strikes varying balances between competing claims and policies. The Oireachtas has recognised first, that certain established legal rights must be respected, and there is clear provision for this. Among those rights are information disclosed in circumstances of confidence, and confidential information disclosed to parties pursuant to contract, or by statute, giving rise to a duty of confidence, trade secrets and similar rights. Some protections, already constitutionally protected, such as records of cabinet meetings are also protected (s.19). Others may be newly protected by the provisions of the Act of 1997, such as those in s.27(1)(b).

In all the different circumstances set out in Part III, it would clearly be contrary to public policy that a person or body incorporated by statute, such as the Commissioner in the present appeal, might infringe those rights in response to the broad right of access provided for in S.6(1), without having regard for the proper protection of a competing right, which could well arise, if the specific provisions found Part III were not also included in the Act. It would be left to the Commissioner, and subsequently to the courts in such circumstances to resolve these competing interests, a difficult task, and one not conducive to the ready implementation of the Act. In a different context in *I. O'T v. B* [1998] 2 I.R. 321 dealing with a conflict of constitutional rights, but apt to describe the dilemma faced by the Commissioner and by a court in the absence of provisions such as those in Part III of the Act, Hamilton, C.J., stated:

> *"(Where) there is a conflict of constitutional rights, the obligation on the courts is to attempt to harmonise such rights having regard to the provisions of the Constitution and in the event of a failure to so harmonise, to determine which right is the superior having regard to all the circumstances of the case. So far as the applicant and the plaintiff are concerned, the court must decide whether their constitutional rights outweigh the constitutional and legal status of their natural mothers."*

The Oireachtas has, instead, by a perfectly appropriate legislative mechanism, determined that the right holder in the information shall have the primary protection in law in those cases covered by Part III. It is not therefore a question of providing, by s.26 or s.28, or indeed by the analogous sections of Part III to which I have referred, any exception to the generous right of access provided for by s.6(1), as has been argued in the course of this appeal, and indeed as is mentioned in some academic writings, and thereafter providing further exceptions to that exception. Such an approach to legislative drafting is considered to be among the most unsatisfactory and unsuitable means as a solution to the possible tensions which may arise. It requires the application of particular norms to the interpretation and application of the exception, and more complicated norms to the application of an exception to an exception. True exceptions are of course provided for in the Act. For example, an exception to the protection for personal information in s.28(1) is provided by s.28(2)(c). I do not, with respect, agree with the judgment of the High Court (McMahon, J.) in *H.S.E. v. The Information Commissioner* [2009] ILRM 44, where he stated:

> *"First, given the policy and the object of the Act to give wide and generous access to the documents held by public bodies, any exemptions or restrictions, such as those contained in Part III of the Act (ss. 19 to 32) ought to be given a narrow restrictive interpretation so as to derogate as little as possible from the main purpose of the Act."*

Whereas, there is legal norm that "*exceptions*" to a general rule ought to be given a narrow interpretation, that applies to true exceptions, of which there are several in the Act. When read in conjunction with the clear provisions of s.6(7) which grants no right of access to exempt records, Part III is not a derogation from a statutory right. There is no reason for suggesting an intention on the part of the Oireachtas that Part III records should be treated in such a narrow or restrictive manner.

Instead, the extent or ambit of any access to information from records exempt under Part III, is quite different to that provided for in s.6(1). Given that no right of access exists, the access may even very limited or even non-existent, and lawfully so, as in the case of some provisions of Part IIII (s.19 to s.24 information for example). In the case of s.27 or s.30 information this may be available on a more generous scale. And there may be some information subject to be given at a level between the two. In consequence of such a valid policy approach by the Oireachtas, information in Part III records may legitimately be refused because the information sought, such as in the case of s.26(1)(a), has been vested in a party entitled to a competing private (or even public) right, the subject of a clear exemption from disclosure and mandated by statute to be refused. It is, in reality, a placing of any access to information in Part III records, at a level which clearly recognises the expression found in the long title to the Act "*consistent with the public interest, and the right to privacy*", and the provisions of s.6(7).

In the Act of 1997, there is also a clear distinction drawn between the availability of information covered by s.19, s.26 and s.28, for example, and the position which arises under the remaining sections of Part III. In the case of s.19, 26, 28 and other sections, the protection for the information is strong since the refusal is of a mandatory nature, the sections speaking of "*shall refuse*", whereas in the case of information not subject to such significant protection, and whose disclosure may carry less serious implications, but against which the Oireachtas has nevertheless provided there should be an exemption against disclosure, the right to refuse is permissive, in the sense that the holder of the information "*may refuse*" the information sought. And for completeness sake, although s.27(1) commences with "*shall refuse*" to cover certain situations, in other situations mentioned in s.27(2), the head "*shall grant*" the information. This latter subsection is only one in Part III having a "*shall grant*" provision, and is clearly one covering records closest to those subject to a s.6(1) right of access. It is, nevertheless one subject to s.6(7).

In consequence, I am of the view that under the provisions of Part III, a right holder in information corresponding to the various sections, being the beneficiary of a private, or public right, protected by law, and exempt from disclosure, is fully entitled to refuse to grant the information sought, provided the conditions set out in the particular corresponding section is met. Where those conditions are met, the only further issue to be considered is whether, in the sections where this is provided – and it is not provided for in all sections of Part III – there is a public interest right which can be invoked notwithstanding proper refusal of the request, and which public interest may in an appropriate case, override that refusal.

The Section 28 Issue
In light of the foregoing, I deal, first, with the issues arising under s.28 of the Act. By the provisions of s.28(1), which have already been set out above, and from which it will be seen that, if the request includes the disclosure of "*personal information",* the head "*shall refuse*" to grant the request. Nevertheless, if "*information of the same kind*" as is contained in the record, is available to the general public, then, by the application of s.28(2)(c), the exemption from disclosure in s.28(1) will not apply.

The Commissioner took the view, and the learned High Court judge agreed with that view, that insofar as age is concerned information "*of the same kind*" is available, as described above, in the Register of Births maintained by the Central Register Office. Whether or not information "*of the same kind*" is so available, is, it seems to me, a question of fact, but to some extent may also be a question of degree. Quite clearly, a date of birth, if sought by way of information in a record, is personal information of which "*information of the same kind*" is available from the Register of Births. It may be more difficult, depending on the precise information which is sought within the term "*personal information"*– the definition of which is quite broad – to determine whether "*information of the same kind*" is truly available to the public.

The Commissioner made a general finding, incorrectly in my view, that a recording of a birth in a public register is, *ipso facto,* and objectively speaking, "*information of the same kind"* as age. I would prefer not to make any general statement of principle as to whether or not, in all circumstances, the registration of a birth automatically leads to that information constituting "*information of the same kind"* as age. In a different case, for example, where the death of a person is recorded in the Register of Deaths, and a cause of death is recorded, as required by law, it would not follow that a person seeking personal information consisting of age, or say, the medical history of that person immediately before death, or as to the cause of death, could properly be met with the contention that "*information of the same kind*" was available in the Register of Deaths. I am, however, satisfied that, in the present case, the Commissioner was correct to determine that information in the Register of Births was information of the same kind as age. As is clear from her analysis of the information available for the purposes of s.26(1)(a), the Commissioner was alert to the fact that certain information was available to the requester, such as a date of birth of Thomas Walsh, and the home address of Bridie Walsh in Galway, and actually invoked these factors in the context of her determination under the latter section. With those data, I believe it could be safely deduced, or the Commissioner would be entitled to conclude that information of the same kind was publicly available.

The High Court judge agreed with the Commissioner, but the reason which the High Court judge invoked, *inter alia*, was that since there is a legal obligation to register a birth, once that legal obligation exists, age can no longer be exempt from disclosure. He dealt with age and date of birth, as he said, "*as one*".

For the reasons which I have set out above I am of the view the learned High Court judge was incorrect in law to conclude that the obligation to register a birth can properly constitute a legal basis for concluding that information of the same kind as "*age*" was available and that, for that reason, the provisions of s..28(1) and of s.28(2)(c) came into play. On the question of the provision of such information to the next of kin, also pursuant to the provisions of s.28 of the Act, I am in agreement with the learned High Court judge and the Commissioner. The wording of the provision is clear and lends itself to no other interpretation.

The Section 26 Issue
I turn now to how the Commissioner and the learned High Court judge dealt with s.26(1)(a). As to the approach of the Commissioner, she relied, in her decision, upon the above Australian report for the purpose of her finding that the provisions of s.26(1)(a) can only apply if the information covered by the section consists of "*private or secret matters"*, and thereby has the necessary "*quality of confidence*".

On this issue, the learned High Court judge considered, first, that no confidentiality could arise in respect of any material where there is a legal requirement that it be disclosed, and therefore the information provided for registration to the Register of Births could not, by reason of that very fact, be confidential. He therefore found that s.26(1) could not apply. He next moved to consider cases relating to confidential information, or a duty of confidence, upon which he relied significantly. He examined a series of very well known cases, such as *Saltman Engineering Co. Ltd., v Campbell* [1948] 65 RPC 203; *Coco v. A. N. Clark (Engineering) Ltd* [1968] FSR 415; *House of Spring Gardens Ltd. v. Point Blank Ltd.* [1984] I.R. 611, and others in the field of intellectual property. The learned High Court judge said that, as a matter of law, "*information in the public domain*" could not concern "*private and secret matters*", which he understood to be required by that case law, and found in consequence, to be a necessary ingredient in the test applicable to the issue of what was properly exempt from disclosure under s.26(1)(a), following a somewhat similar approach to the Commissioner.

Before this Court, the hospital first, disputes that the Commissioner and the learned High Court applied the correct case law, and argues that the case law invoked is inapplicable to S.26(1)(a). Secondly, it points to the fact that it is bound by the Guidelines of the Medical Council in that regard, and contends that it could never be a defence for a medical practitioner to argue that the information was in the public domain. It also submits that the learned High Court judge had ignored or failed to have regard to the requirements of the subsection as to the "*prejudice to the future supply of further similar information*", which it submits is an extremely important rationale for the existence of the exemption. The Commissioner supports the High Court judgment and continues to rely on the same arguments she presented in the High Court in support of her original decision, as well as relying on a second Australian authority, to which I will refer.

Conclusion on S.26(1)(a)
Before dealing with the provisions of s.26(1)(a) of the Act, I confess it is unclear to me upon what basis the Commissioner felt entitled to rely on the Australian decisions she invoked in considering the proper application of the section. Her powers and functions – as in the case of all persons or bodies incorporated pursuant to statute - are governed exclusively by, and limited to, the provisions of the statute by which she is appointed (see *Howard v. The Commissioner of Public Works & Others* [1994] 1 I.R. 101). She must apply Irish law. Her decision is a detailed and considered one, even if I disagree with her findings at the end of the day. The Commissioner clearly did not intend to exceed her statutory functions in any way, by seeking to develop Irish law or by adopting, as part of Irish law, principles found in other legal systems or jurisdictions, when these have not already been adopted by the Oireachtas as legislator, or by the Courts in the development of Irish law, and she undoubtedly took advice, either internally or externally. Advisers must, however, be careful to ensure that the Commissioner, or other statutory persons or bodies in analogous positions, do not inadvertently exceed their statutory role, or are not placed in a position which might lead to their decisions being challenged on the basis that they have done just that. I say this because the Commissioner might have come to a quite different decision, if the legal position concerning the protection of information given under s.26(1)(a) was not subject to a requirement of so-called "*privacy and secrecy*" requirement, adopted from these Australian sources. I will return to these later in the judgment, since the first of them – the only one mentioned in the decision - formed such a pivotal basis for the Commissioner's position on the section.

What is protected under s.26(1)(a) stems from the circumstances in which the material is given, and not from the nature of the material itself. This is clear from a simple reading of the subsection. Its terms, which, as to the record in question, provide that it should: (a) contain information, (b) given to the body in confidence, and (c) on the understanding that it would be treated by it as

confidential. When those three simple conditions as to the giving and receiving of information are met, the remainder of s.26(1)(a) comes into play. That requires (a) that the head is of opinion: (a) its disclosure would be likely to prejudice the giving to the body of further information; (b) from the same or other persons; and (c) it is of importance to the body that such further similar information … should continue to be given to the body.

In passing, I note that neither the Commissioner in her decision, nor the High Court in its judgment, challenged or criticised the hospital's approach to fulfilling these remaining terms of s.26(1)(a). In the Commissioner's submissions to this Court, however, it is suggested that she did. I can find no clear evidence to that effect. In this appeal some factual matters are raised by the Commissioner in the context of s.26(3). I will deal with those in considering that subsection.

The Commissioner appears to have proceeded on the basis that she was considering the right of access granted under s.6(1) of the Act, and indeed neither the Commissioner nor the learned High Court judge mentions the clear limitation in s.6(7) of the Act. She also appears to treat both s.26(1)(a) and (b) as dealing with the same situation, or the same type of information, and although (b) certainly covers a situation where there is a contract, for example, which contains a specific provision imposing a duty of confidence, the two subsections are different both in their ambit and in the manner in which are treated in law. It may be, of course, that the information given under s.26(1)(a) is, in fact, secret, but the section does not require it to be so. The protection extends to information provided in confidence, such as, in the present case, upon admission to hospital, but does not require it to be confidential information in the sense in which that is used in, for example, intellectual property cases, upon which the learned High Court judge relied.

The Commissioner was influenced in reaching her decision, it seems, by the Australian material she relied on and cited, and in light of that, or independently – this is not entirely clear to me from her decision –she also considered that the same kind of information appears in the Register of Births. She was influenced by, or took into account for the purposes of s.26(1)(a), but not for s.28 purposes, that the requester had additional information, and in part because of this, and her finding that the personal information in the record (age), otherwise exempt from disclosure, had lost that status by virtue of her finding on s.28(2)(c), age could not, in the context of s..26(1), have he necessary "*quality of confidence*" to support the exemption provided for. The citation from the relied on Australian decision: *B v. Brisbane North Regional Health Authority, supra.,* is, in turn, taken from an article in PD. Finn Essays in Equity, Law Book Company [1985], an Australian publication, the outcome of a seminar held in 1984 at the Australian National University, and in which F. Gurry, citing the decision, states:

> *"The definition of the term "confidence" is derived from the law relating to breach of duty of confidence: "A confidence is formed whenever one party ("the confider") imparts to another ("the confidant") private or secret matters on the express or implied understanding that the communication is for a restricted purpose."* (emphasis added)

It is an unfortunate state of affairs that this extract has been adopted by the Commissioner as the basic and fundamental law relating to the correct meaning of s.26(1)(a) of the Act of 1997, and its application, as it is stated in the papers furnished to the Court, her decision that this section has been "*the subject of many previous decisions*", and it seems to me likely that this has also been adopted as correct by persons in turn relying on decisions of the Commissioner, for some time.

The "*case*" requires some analysis. First, it is not a case at all, or a decision of any court in Australia, State of Federal, on appeal or otherwise. It is clear from the report itself that the decision is that of the Information Director for the State of Queensland on the particular provisions of that State's legislation on freedom of information. This was made in the course of a review of a refusal to disclose medical records to the person the subject of them, pursuant to an exemption from disclosure in the relevant legislation. By the decision, the information sought was, in fact refused. The necessity for the decision, as is also clearly apparent from the report, is the wide range of sometimes conflicting decisions of courts, on an equally wide range of dissimilar State and Federal legislation on the topic, and so as to give guidance to persons (recognised as not normally legally qualified) in reaching decisions on behalf of Information Authority.

Secondly, and also of significance are the terms of the legislation itself governing the exemption. The exemption is found in s.46(1) of the Queensland Act and it provides:

> *"46(1) Matter is exempt if –*
>
> *(a) its disclosure would found an action for breach of confidence; or*
>
> *(b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest."*
>
> (emphasis added)

Having accepted that the matter in issue was one falling within s.46(1)(a), all comments of the Director in relation to s.46(1)(b) were expressly stated by the Commissioner to consist of "*brief observations*", confirmed in the following terms:

> *"The Authority found that the matter in issue was exempt under s.46(1)b) without giving separate consideration to s.46(1)(a). Since I have found that s.46(1)(a) does apply, it is not necessary for me to determine whether s.46(1)(b) also applies and for reasons explained at paragraph 164 below, I do not propose to do so; but I will make some brief observations".*

It is obvious that the Director was dealing with a matter which he found fell within the closest equivalent to s.26(1)(b) of the Act of 1997, (which imposes a duty of confidence), where a breach of confidence action could be mounted. All other comments relating to s.46(1)(b) above, the closest equivalent to s.26(1)(a) of the Act of 1997, were merely "*observations*". While this Court and the High Court may consider case law of Australia's courts – generally those of its highest federal court, the High Court of Australia - I find it wholly surprising that, given the status of the above observations, they have been accepted by the Commissioner as representing Irish law on the correct interpretation of s.26(1)(a). And I find this to be so, notwithstanding that in one or two High Court cases this same so-called "*case*" has been mentioned, although without any evidence that it has been the subject of any debate or argument, or that its true status – since its title suggests it is a court decision – has ever been brought to the attention of the High Court.

I find as a matter of law, that these observations do not constitute a valid basis for the proper interpretation and application of s.26(1)(a) of the Act of 1997.

In this Court, the Commissioner also relies on another Australian decision, this time a court decision, *Australian Broadcasting Authority v. Lenah Game Meats* [2001] HCA 63 [15 November 2001] and an extract from the judgment of Gleeson, C.J., which, she argues, also contains the same requirement of "*private or secret*". As to this case, I make the following comment. It is, on any analysis, a wholly inappropriate case from which to seek to adopt principles concerning the interpretation of s.26(1)(a) of the Act of 1997. The case concerned a meat processing plant, where persons had entered the plant as trespassers, and had made a film about the meat processing activities which involved possums. These parties had subsequently furnished the Australian Broadcasting Authority with a tape or video recording for broadcasting. The Supreme Court of the State of Tazmania had granted an injunction in respect of the same. The issues which arose for consideration in the Australian High Court in a decision which was not unanimous, were primarily, and indeed overwhelmingly, those concerning: (a) whether or not an interlocutory injunction can be granted where there is no independent cause of action pleaded, or apparently available in law; (b) whether an interlocutory injunction can be granted simply on the basis of unconscionable activities, such as trespass; (c) whether or not trespass into commercial premises can give rise to a privacy right which can be invoked (there being no other possible cause of action pleaded which might support an interlocutory injunction), and (d) whether any analogous right to a breach of confidence right might be considered as a possible ground in the context of the injunction sought. In relation to the question of the slaughtering process, it was found that this was not confidential, and "*information about it was not obtained in circumstances of trust and confidence, or otherwise importing an obligation of good faith*". Presumably, if it were, such an analogous cause of action would lie. In the course of the hearing Gleeson, C.J., stated: "*In the full court, the present respondent (there the appellant) made a limited challenge to the reasoning of Underwood, J. Wright, J. recorded a concession by counsel, that the respondent had no maintainable action for breach of confidence. Spicer, J. recorded that no issue of breach of confidentiality was raised*."

A considerable exposé was undertaken of rights of privacy and other rights, in the context of the particular facts of that case, not only by Gleeson, .C.J., but by all other members of the court, those both in favour and against the continuation of the injunction. He cited *Hellewell v. Chief Constable of Derbyshire* in stating:

> *'If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence.'* (emphasis added)

It is not, however, evident to me how any statement by means of the most passing comment, at its height, an obiter dictum, could be considered in any way relevant to the questions which have to be considered in the context of s.26(1)(a) of the Act. Of particular interest from the judgment are the lengthy comments on this area of the law, in particular in relation to the overlap of rights of privacy and breach of confidence, where, as they sated, there is a division on the matter, even in the Court of Appeal in England. Apart from these comments, I know of no case in which the comment enunciated in the *Australian Broadcasting* case on any of the several relevant matters referred to in that interesting judgment, has been adopted into Irish law, nor am I aware of any Irish law which reflects the comments enunciated, in passing, in that judgment, or in the essay by Mr. Gurry, in relation to the terms of s.26(1)(a). Many cases do, of course, exist both in Ireland and elsewhere, in the context of s.26(1)(b).

In the circumstances, I do not consider it was appropriate for the Commissioner to rely upon this case as a correct statement of Irish law. The article by F. Gurry, in P.D. Finn Essays in Equity, cited in support of her decision against the hospital, appears to have been the only authority upon which the Commissioner relied for her conclusion that the information lacked the "*quality of confidence*", allegedly required by s.26(1)(a), because it was not "*private or secret matter*". I have already found that this is not an appropriate authority in relation to the matter.

It is preferable it seems to me to rely on the actual wording of s.26(1)(a) itself. Whereas, I have cited s.26 previously, it is worth citing again the provisions of subsection (1)(a) which reads as follows:

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

I am satisfied that the appropriate starting point is the specific right exempted from disclosure in this subsection, which does not impose an obligation that the information in question should have the characteristic of being "*confidential information*" or "*private and secret*" or subject to a "*duty of confidence*" of the type mentioned in the material relied upon by the learned Commissioner, or to have any so-called necessary "*quality of confidence*", as defined, other than as to the circumstances in which it was imparted and received.

As to the basis invoked by the learned High Court judge for his finding that the information lacked the same quality of confidence, I make the following findings. There can be no loss of the protection in s.26(1)(a) arising out of, for example, a legal obligation to register a birth in the Register of Births. The provisions of s.28(1)(a) are, in any event, distinct and independent from s.26(1). There is nothing in the Freedom of Information Acts which suggests that the status of personal information otherwise protected within the definition of s.2(1) of the Act, and even if lost by virtue of s.28(2)(c), on the basis that information of the same kind is available in a public record, is to affect the purpose, function or application of s.26(1)(a), an approach adopted by the learned High Court judge. There is nothing in the Act which suggests that s.26, or indeed any other provision of Part III, is subject to the provisions of s.28. On the contrary, it is certain that some information given to a public body, a hospital in the present example, would inevitably contain personal information subsequently found to correspond to "*the same kind of information*" which might be recorded on the Register of Births, or other registers, such as, for example, a home address corresponding to an address recorded in the Registry of Deeds, another public register. A simple example in the case of a hospital might be the disclosure of the names and ages and even perhaps dates of birth of parents, siblings, spouse and/or children of a patient, as well as a medical history, so far as that is known, of any one or all of them. Can the fact that all the births and any deaths (together with the causes of the same) are recorded in a public register render the exemption in s.26(1)(a) for the information given inapplicable? I think not. I am satisfied that the learned High Court judge was wrong in his interpretation of that section, and in his application of it by reference to the registration of the birth of Thomas Walsh, pursuant to s.28.

Further, the learned High Court judge, in adopting and applying a test of "*private and secret*" by reference to certain cases in the field of intellectual property, also erred in law. These are all cases arising in very different circumstances and are subject to different legal criteria, including those of novelty or secrecy. All of the cases relied upon by the learned High Court judge were cases on, what

might be called, "*the commercial side*", in which the facts made it clear that the particular information which was being sought to be protected by a duty of confidence concerned patents, copyrights, design rights or analogous rights, know how, etc., all of which are subject to very specific requirements as to confidentiality, without which the person claiming the right in the transferred intellectual property information loses the intellectual property protection. This was the position also in the case of *House of Spring Gardens v. Waite & Another, supra*. It is not surprising therefore that cases such as Saltman, or House of Spring Gardens, laid particular emphasis on whether, in these particular cases, the information communicated was truly "*confidential information*" to support a duty of confidence (a matter in any event covered by S.26(1)(b) rather than s.26(1)(a)). A very thorough analysis of the law relating to the duty of confidence is found in Intellectual Property Law in Ireland (3rd Edition) (Bloomsbury Publications, Dublin 2010). In it, considerable emphasis is placed on difficulties mentioned in the Australian cases arising from the, as yet unsettled, state of the law there and in the United Kingdom, in particular having regard to the adoption in the United Kingdom of so-called "*duty of confidence*" in cases which are, in reality, privacy cases, at least, in light of the absence of any constitutional right to privacy, or any statute law protecting such privacy, until the adoption of the Convention on Human Rights Act in the United Kingdom. All these matters establish that cases from other jurisdictions must be looked at very carefully, when seeking to apply principles enunciated in them, to the exemption from disclosure in s.26(1)(a) of the Act of 1997.

Finally, it is worth comparing s.26(1)(a) and (b) to see whether the Oireachtas intended to limit s.26(1)(a) the type of information covered, in the manner suggested, by the learned High Court judge and the Commissioner. In s.26(1)(b) is included information the subject of a duty of confidence, created (a) by agreement, (b) by enactment, or (c) otherwise by law. If what was intended to be covered in s.26(1)(a) was only such information as gave rise to such a duty of confidence, as is suggested, s.26(1)(a) would itself be redundant, because the information would fall to be considered, in that event, under s.26(1)(b), as being "*information the subject of a duty of confidence*", "*created … otherwise by law*".

The Oireachtas has enacted Part III of the Act of 1997 so as to cover several different situations, as is clear from the exposé of the legislative scheme earlier in this judgment. It has done so by recognising a series of varied rights and interests, responding to equally varied rights and interests, including public and private. It would have been a very simple matter for the Oireachtas to have included a requirement that the information covered by s.26(1)(a) be "*secret*" or "*private and secret*" but it did not do so, although the legislation was passed some years after the first Australian decision relied on. It is perfectly understandable why. There is no evident basis for inserting into s.26(1)(a) the series of tests laid down in the case of disclosures in the field of intellectual property, or those from a decision of the Information Director in Queensland in respect of different legislation. The three simple tests as to the circumstances giving rise to the status of confidential information in s.26(1)(a) serve a different function and do not have the limitations found in s.26(1)(b) to those covered by s.26(1)(b). In the present case there seems to be no dispute but that the information furnished by the mother of the child was given in circumstances meeting the terms of subsection 26(1)(a). Once they were, and the information also corresponded with the remaining matters mentioned, the refusal is permitted.

Both the Commissioner and the High Court dealt with information given under s.26(1)(a) on the basis that it must be "*private and secret*" so as to have the necessary "*quality of confidence*" supporting the exemption provided for. Having wrongly adopted an incorrect legal test with regard to the alleged requirement of secrecy and quality of confidence, relying on inapplicable material, the Commissioner was, in consequence, in error in her application of the provisions of s.26(1)(a) to the records in question. The learned High Court judge, in adopting the same approach, although by invoking different or additional arguments and case law, was incorrect in that regard also, in finding that the test in the section requires the information to be private or secret, and only if it does, does it have the necessary "*quality of confidence*". It is the case that no challenge was made to the opinion of the hospital on the prejudice likely to follow disclosure, and to the importance attached to the continued furnishing of information, also required by s.26(1)(a).

Having regard to the foregoing, I am satisfied that the hospital was not wrong in law to refuse disclosure of the information, and was entitled to do so.

The s.26(3) issue

Turning now to the provisions of s.26(3), which provide for the possibility of the information being granted, if there is an overriding public interest in that being done, I express some reservation that that provision can be applied by the Commissioner without due regard being had to the right holder's interests, and without hearing the parties involved in the giving and receiving of the information. In the present case, of course, one of the parties is deceased, as indeed is Mr. Thomas Walsh, so the same position does not necessarily apply, and the hospital was heard. Whereas a refusal to grant the information can only be overridden if a public interest is established sufficient to do so, even where it is proposed to grant the information, this situation is envisaged as being of sufficient importance to the legislator, that there is what might be called a degree of double protection, because in such a case. S.29 sets down the procedure which is to apply to requests to which, *inter alia,* s.26(3) relates, where the requests falls to be granted. This clearly implies that the interests of both the donor and the holder of the information must be considered, even then presumably so as to ensure rights are not infringed, and to provide for possible refusal.

It is, of course, true that the Commissioner, and indeed the High Court, to which judgment I will return in a moment, both considered the possible application of s.26(3). This was on the basis that, although both considered that their findings on s.26((1)(a) disposed of the entire issue, it was nevertheless appropriate to consider also the applicability of s.26(3). The Commissioner took the view that the "*public interest*" referred to in the subsection consisted of the right in the requester to have information relating to birth, and that this overrode the refusal. The learned High Court judge on the other hand, took the view that the Commissioner had failed, in assessing the public interest, to "*consider all relevant factors*" and was in error in that regard. Having found that the exemption in s.26(1)(a) was not permitted, he then offered, with some reluctance, a number of general observations on s.26(3). He cited several cases concerning the right of a person to have information concerning birth, but found that, in circumstances other than those arising in this appeal because of his decision on s.26(1)(a) and s.28, the hospital has rights, including constitutional rights, which must be considered, and were not. The Commissioner had, he found, failed to consider any aspect of public interest beyond the policy of favouring disclosure. It can gleaned from the judgment that one of his concerns appears to have been the failure of the Commissioner to have appropriate regard to the importance attached by the hospital to the issue of patient confidentiality.

On this otherwise important point, no formal decision was made by either the Commissioner or the learned High Court judge, and there was, in the circumstances, no detailed argument on that issue, before this Court. It is, therefore, inappropriate to make any definitive findings on s.26(3). My comments on how I would have approached the exercise had it been necessary to do so, are therefore wholly obiter, and must be considered from such perspective.

It seems not at all clear to me that there is anything in the Act which supports or suggests that there is, in law, an overriding public interest of the type invoked by the Commissioner. On the contrary, such an approach in considering only a so-called public interest in a requester having information relating to the circumstances of birth, suggests an interpretation of the Act coming close to establishing a right of access to exempt information, which can only be denied by some exceptional circumstances. That is not a correct application of s.26(3) of the Act, and ignores the provisions of s.6(7) of the Act of 1997 as they apply to Part III. Rather, as

mentioned above, in circumstances where a tension exists between a right of access under s.6(1) rights of access and other rights recognised as being important, and therefore exempt from disclosure under Part III of the Act, the Act mandates a refusal of information. The right generating the exemption under s.26(1)(a) is a private interest right vesting primarily in the hospital, on the facts of this case, and the information sought must be refused, provided the hospital is in a position to meet the tests set out there. In such circumstances, any "*public interest*" would, in my view, require to be a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law. In the present case, the Commissioner 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.

I am not satisfied that the private right vesting in the hospital, arising from the giving of information and its status in its hands, and the private right of a person to have information concerning his birth mother, are those which fall into the category of public interest rights contemplated by section 26(3). The structure of Part III is to permit and even mandate refusal, provided the terms of s.26(1)(a) are met, as I find they were here. A true "*public interest*" over and above the terms of the section, must therefore be found to exist. That adopted by the Commissioner does not fall into the category of a clear policy decision, which the Commissioner is not, in any event, mandated by the Act to adopt.

I recognise of course, the desire of persons to have as much information as possible about 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).

Even if, as appears to be suggested by the learned High Court judge, the public interest was of a different type, namely, one of balancing the respective rights of the parties affected, the High Court was not in error in finding that the Commissioner did not carry out that exercise correctly, by failing to take into account the rights of the hospital. This is so, despite the argument of counsel for the Commissioner, that she did so. In support of that argument, counsel points to the fact that the Commissioner, in her decision, stated as follows:

> *"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."*

It is argued, therefore, that the Commissioner clearly had regard to the hospital's submissions on confidentiality when considering the public interest issue. However, apart from the fact that this statement does not, on its face, appear to do so, that is only a very small part of the exercise that would be required to be carried out, and does not, it seems to me, comply with s.29 either. The acknowledgement of the normal confidentiality of a professional relationship does not address the remaining matters set out in s.26 itself, such as the important element attaching to disclosure having a likely prejudice on giving to the body further similar information "*from the same person or other persons*", and the importance which the body attaches to "*further similar information continuing to be given to the body*".

It might, with legitimacy, be considered that these words in the section are intended also to satisfy a public interest in ensuring, in the context of a hospital, and having regard to the critical medical impact of age in the case of women presenting to give birth the protection of such information, and the continued supply of information, as well as patient confidentiality. These matters, however, were simply not considered by the Commissioner at all, if it was though that the public interest under s.26(3) was to be met by balancing the right of Thomas Walsh to secure information concerning his birth, and the rights of the hospital.

If what is being considered is a balance between the rights of the respective parties, it seems to me, however, that another factor would have to be taken into account. This flows from the finding that information of the same kind in the Register of Births corresponds to age, and which disapplies the exemption otherwise available in respect of age in s. 28(1). Although s.28 and s.26 are not linked, in the sense of one being dependent on or subject to the other, nevertheless, in seeking to establish whether the hospital's rights are to be protected by reason of the underlying rationale of s.26(1)(a), over the requester's rights, if any, on the basis of a public interest invoked under s.26(3), all relevant and appropriate factors should be considered, including the fact that the information is available if it is from a different source. Given the exemption from disclosure in s.26(1)(a), the purpose behind the protection granted, the importance of ensuring that similar information should continue to be given to the body – such as a hospital in this appeal – and the fact that, as compared to analogous provisions, the importance of s.26(1)(a) is underlined by the mandatory nature of the refusal, it is, in my view, wholly logical and proper that the balance is best represented in this particular, but not necessarily in all, cases, by the Commissioner not interfering with the protection granted in law, when the age can be obtained elsewhere, such as from a Register of Births.

A separate argument of a more general nature is made by the Commissioner that she was entitled, in considering the application of s.26(3), to have regard to the provisions of s.34(12)(b) of the Act. It provides:

> *"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."*

This is a very clear statement which, on its face, appears to apply to all decisions. I have no difficulty in its application to all circumstances covered by the right of access in s.6(1). I have a significant difficulty in its application to requests made in respect of information exempt from disclosure under Part III of the Act, which by statute mandates a refusal, and to which no right of access exists. It is difficult to see how it would apply to the provisions s.19 to 32, other than the head in question meeting the terms of the various sections. Even then it is difficult to see how a head goes about "*justifying*" a decision in the case of, say, s.19(1)(a), which exempts from disclosure, *inter alia,* a record which has been or is proposed to be submitted to the Government for its consideration, which I take as the first example of the type of record covered. Either s.34(12) does not apply to such exempt records, or it is sufficiently satisfied by proof that the record in question is, in fact, one submitted to or is proposed to be submitted to the Government. Such proof would likely suffice if it is made by an appropriate person, and could not be rejected by the Commissioner, save in the most exceptional circumstances, of which I can imagine none. If therefore s.34(12) of the Act does apply, and I do not accept the Commissioner has established that it does, to Part III records, then compliance with the terms of S.26(1)(a) also appears sufficient to justify the decision made. In the present case I am satisfied that that legal requirement was complied with by the submissions made on the part of the hospital responding to the criteria mentioned in the section itself, and from the terms of its original refusal. As I have mentioned previously in this judgment, neither the Commissioner nor the High Court suggested that the opinion criteria mentioned in s.26(1)(a) were not met.

Whether the Act Applies to Records Created in 1922 Prior to the Commencement of the Act

Although I am dealing with this issue last, it does not mean that the issue is without considerable importance. The learned High Court

judge had to decide whether or not, this issue not having been raised before the Commissioner in the course of her review exercise, he should nevertheless deal with this issue which had been raised by the hospital, and dealt with by him, notwithstanding the hospital's objections. I have already set out the earlier in this judgment, the reasons the learned High Court judge decided to hear this issue.

Any person who has been a party to a review before the Commissioner (under s.34) may appeal to the High Court "*on a point of law from the decision*". The Commissioner has relied on the provisions of s.34(12)(b) of the Act of 1997 under this heading also. I have addressed this in relation to the legislative scheme, and s.26(3), and although the Commissioner relies on this paragraph, I do not think that it is necessary to invoke any statutory provision. Under s.42 a party may appeal from the Commissioner's decision to the High Court on a point of law. Quite clearly, this should be confined to points of law arising out of her "*decision*" and not from something outside its boundaries, upon which she naturally has made no decision at all. Apart from the implied meaning arising from s. 42, in any event, the general law requires that a party will bring forward, at least in the context of legal proceedings, his entire case, so that there is no incremental decision making process, and by analogy it seems to me appropriate to find that, save in some exceptional circumstance, which does not appear to arise here, the hospital was obliged to bring forward before the Commissioner, all points of law upon which it wished to rely, including any point concerning the applicability or otherwise, of the provisions of the Act to a record created in 1922, and therefore before its commencement.

For the most part, I do not consider that the reasons given by the learned High Court judge are those upon which he was entitled to entertain the point of law in issue, such as his finding that it was a serious matter, and he should therefore not rule out hearing the issue, or the fact that he believe the same issue will arise in other cases, because in both circumstances other parties may bring forward all of the legal points or issues which they wish properly to raise, and the issue can be disposed of at that point. Nest, whereas I do think that the matter concerns a question of the jurisdiction of the Commissioner, I am not entirely satisfied that it is such a serious point of law, having regard to the provisions of the Act, that it should, on that basis, be entertained. It is, however, impossible to come to that conclusion without an exposure of the arguments on the part of both parties to the review. On balance I am of the view that on any of the grounds mentioned by the learned High Court judge, he should not have entertained the issue.

I am more inclined, however, having regard to the circumstances of this particular case, to consider that because the learned High Court judge actually dealt with the matter, but on no other grounds, it would be incorrect for this Court to leave unaddressed a point of law on the correct interpretation of the statute, and having some importance. In the circumstances, since the High Court dealt with the matter, it is, in my view, preferable that this Court also make a ruling on it, both to avoid uncertainty and to eliminate the possibility of an incorrect finding on the matter gaining a foothold. I would however add that I am not expressing any general principle that in all such cases where the High Court has entertained a point of law not raised before a statutory body, this Court do so also. This will depend on the particular circumstances of any such case.

In my view, the answer to the question raised as to the applicability of the Act to records created prior to its commencement, in this case in 1922, is relatively simple. Section 6(4) of the Act gives a clear indication of the records intended to be included. Apart from the general rule evidence by the section itself that Acts are intended to apply for the future, in line with much of the other provisions of the Act, it does not remain silent on the matter of its application to pre 1997 records, but instead makes provision for certain access. I have out set out earlier the provisions of s.6(1) on the right of access to records. Section 6(4), however, provides as follows:

> *"(4) The records referred to in subsection (1) are records created <u>after the commencement of this Act</u> 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),*
>
> *<u>as may be prescribed</u>, after consultation with such Ministers of the Government as the Minister considers appropriate."* (emphasis added)

Section 6(5) goes on provide as follows:

> *"(5) Notwithstanding subsections (1) and (4) but subject to subsection (6), where –*
>
> > *(a) access to records created before the commencement of this Act is necessary or expedient in order to understand records created after such commencement, or*
> >
> > *(b) records created before such commencement relate to personal information about the person seeking access to them,*
>
> *subsection (1) shall be construed as conferring <u>the right of access in respect of those records</u>."* (emphasis added)

I am satisfied from the foregoing, and having regard to the definitions previously mentioned in this judgment of "*personal information",* that s. 6(5)(b) covers a record as to the age of Bridie Walsh, because it relates to "*personal information*" about Thomas Walsh, on whose behalf the information was sought. Having regard to the foregoing, I am satisfied that these particular records are not ones which are excluded by the Act, but I make no general finding beyond the finding that the particular age records sought in the present case falls within the ambit of the above mentioned provisions and therefore the Act is applicable to those records.

I would allow the appeal and set aside the decision of the Commissioner. I would reject the grounds of appeal in the Commissioner's notice to vary.