Denham J.
Fennelly J.
Kearns J.

THE SUPREME COURT

[339/2004]

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT, 1997

BETWEEN

BARNEY SHEEDY

APPELLANT

AND
THE INFORMATION COMMISSIONER

RESPONDENT

AND
MINISTER FOR EDUCATION AND SCIENCE

FIRST NOTICE PARTY

AND
THE IRISH TIMES LIMITED

SECOND NOTICE PARTY

JUDGMENT of Mr. Justice Kearns delivered the 30th day of May, 2005

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

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

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

3. The report (Tuairisc Scoile) in this case was completed on 30th July, 2001. The report presented a favourable view of Scoil Choilm and contained a considerable amount of information about the school, including factual background material about the history and location of the school, school accommodation, management arrangements within the school, links with parents and the wider community, organisation of classes, preparation and planning of educational programmes, languages and mathematics, social, personal and health education, creative and aesthetic activities, pupils with special needs, a post inspection meeting and a conclusion.

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

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

6. In a reserved judgment delivered on the 20th May, 2004, Gilligan J. found that the appellant had *locus standi* to bring the proceedings (a finding which has not been challenged in the appeal to this court) but nonetheless found in favour of the respondent on the same grounds as those relied upon by the Commissioner. He then stayed publication of the Tuairisc Scoile report dated the 30th July, 2001, pending the final determination of an appeal to this court. The grounds of the appeal to this court may be summarised as follows:-

> (1) That the learned trial judge misdirected himself in law and in fact in his interpretation of and/or his application of s.53 of the Education Act, 1998.
>
> (2) That the learned trial judge erred in law and in fact in his interpretation of and/or his application of s.32 (1) of the Freedom of Information Act, 1997.
>
> (3) That the learned trial judge erred in law and in fact in his interpretation of and/or his application of s.21 (1) (a) and (b), and s. 21 (2) of the Freedom of Information Act, 1997.
>
> (4) That the learned trial judge erred in law and in fact in his interpretation of and/or his application of s.26 of the Freedom of Information Act, 1997.

7. It is perhaps appropriate to note that the Department of Education did not itself appeal the respondent's decision to the High Court.

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

together.

9. Section 53 provides that:-

> *"Notwithstanding any other enactment the Minister may -*
>
> > *(a) Refuse access to any information which would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievement of students enrolled therein, including, without prejudice to the generality of the foregoing -*
> >
> > *(i) The overall results in any year of students in a particular school in an examination, or*
> >
> > *(ii) The comparative overall results in any year of students in different schools in an examination, and*
> >
> > *(b) Refuse access to information relating to the identity of examiners."*

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

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

12. The long title to the Act of 1997 states that it is:-

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

13. S. 32 (1) of the Act of 1997 provides:-

> *"(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.*

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

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

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

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

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

> *"Very impressive standards are found through the school and across the spread of the curriculum…"*
>
> *"Caitheann na Muinteoiri an-dua le teagasc na Gaeilge… is leir go bhfuil greim an-mhaith ag formhor na ndaltai ar dheilbhiocht agus comhreir na teanga."*
>
> *"The pupils written work (in English) is of a very high standard in terms of the range of topics covered, presentation and standard of spelling."*
>
> *"The teachers are very effective in explaining and consolidating understanding of the basic concepts in Mathematics… written work is of an impressive standard, inclusive of the range of assignments and neatness and accuracy of presentation."*

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

19. In dealing with this issue, the Commissioner stated:-

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

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

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

"(1) A head may refuse to grant a request under section 7 if access to the record concerned could, in the opinion of the head, reasonably be expected to - (a) Prejudice the effectiveness of tests, examinations, investigations, enquiries or audits conducted by or on behalf of the public body concerned or the procedures or methods employed for the conduct thereof,

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

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

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

22. In describing his approach to a claim for exemption under s. 21, the Commissioner stated as follows:-

"In arriving at a decision to claim a section 21 exemption, a decision maker must, firstly, identify the potential harm to the functions covered by the exemption that might arise from disclosure and, having identified that harm, consider the reasonableness of any expectation that the harm will occur. The test of whether the expectation is reasonable is not concerned with the question of probabilities or possibilities. It is concerned simply with whether or not the decision maker's expectation is reasonable. In the case of a claimant at s.21(1)(b) the establishment of 'significant, adverse effect' requires stronger evidence of damage than the 'prejudice' standard of s.21(1)(a). When invoking s.21 (1)(b), the public body must make an assessment of the degree of importance or significance attaching to the adverse effects claimed. Not only must the harm be reasonably expected but it must also be expected that the harm will be of a more significant nature than that required under s.21 (1)(a).

The Department claims that the effectiveness of future inspections of schools could be prejudiced as the release of the reports would lead directly to the compilation of league tables which is prohibited under the Education Act. The Department has elaborated on this argument in its submissions to me. It also contends that the compilation of such league tables could have a significant adverse effect on one of its management functions i.e. its duty to report on schools in accordance with the provisions of circular 12/83. I accept that the compilation, from the contents of the reports, of such school league tables could have an adverse effect on the effectiveness of the reports in question. However, it will follow from my comments in relation to s.53 of the Education Act that I do not accept that disclosure of the contents of the reports could result in the compilation of any meaningful league tables as feared by the Department."

23. The Commissioner also pointed to the statutory nature of the mandate for the work of Inspectors under s.13 of the Act of 1998 as meeting any concerns that schools would not co-operate with the compilation of future inspection reports if disclosure were to be directed.

24. Section 13 (a)(i) Act of 1998 provides for the appointment by the Minister of Inspectors who -

"Shall visit recognised schools and centres for education on the initiative of the Inspectorate, and, following consultation with the board, patron, parents of students and teachers, as appropriate, do any or all of the following:…evaluate the organisation and operation of those schools and centres and the quality and effectiveness of the education provided in those schools or centres… evaluate the education standards in such schools… assess the implementation and effectiveness of any programmes of education… and report to the Minister, or to the board, patron, parents of students and teachers, as appropriate, on these matters…an Inspector shall have all such powers as are necessary or expedient for the purpose of performing his or her functions and shall be accorded every reasonable facility and co-operation by the board and the staff of the school"

25. Having noted these provisions the Commissioner was satisfied that they provided the Department with the necessary authority to effectively require the co-operation of schools in the compilation of school reports so that any suggestion that schools would not in future co-operate was without substance.

26. He noted that the Department's second submission suggested that difficulties with 'partners' could arise if information which could lead to the creation of league tables were to be released, thereby frustrating the aims of the Act of 1998. The Commissioner took 'partners' in this context to mean the relevant trade unions and/or board of management. He further took it as an alternatively based claim for exemption under s.21 (1)(a) or s.21(1)(b) of the Act of 1997. However, by an application of the same reasoning which informed his decision in relation to s.53 of the Act of 1998, he concluded that he did not believe the information contained in the reports could give rise to the compilation of information envisaged in the Act of 1998 and therefore did not accept such argument. He invoked s.34 (12) of the Act of 1997 to conclude that the Department had not justified its decision to refuse access under s.21(1)(a) or (b).

27. At a later point in his decision the Commissioner found that, even if s.21 (1)(a) or 21(1)(b) applied, s. 21(2) still permitted him to hold that release would be justified given that in his view the public interest would, on balance, be better served by granting than by refusing to grant the request . He concluded:-

> *"I consider that there is a significant public interest in information about schools being available to the public. Given the vast expenditure of public funds on the education system, it can hardly be argued that what goes on in a school is always the business only of the board of management, teachers, parents or pupils. The protection of the right to privacy may require access to some records or parts of records relating to schools to be withheld. However, I find it difficult to see why records of the kind at issue in this review need to be withheld from the public. I have already stated that I am satisfied that disclosure of the contents of these reports would not be in breach of the provisions of the Education Act or lead to any meaningful comparisons between schools. In the absence of any countervailing public interest and if I had to decide this case on whether the public interest would be better served by release, I would find in favour of release"*

Section 26 of the Act of 1997
28. Section 26 of the Act of 1997 relates to information obtained in confidence and provides that a head shall refuse to grant a request under s.7 if:-

> *"(a) The record concerned contains information given to the public body concerned in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or*
>
> *(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule) or otherwise by law.*
>
> *(2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, a public body or a person who is providing a service for a public body under a contract for services) in the course of the performance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than a public body or head or a director or a member of the staff of, a public body or a person who is providing or provided a service for a public body under a contract for services.*
>
> *(3) Subject to section 29, subsection (1)(a) shall not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under section 7 concerned".*

29. In dealing with this issue, the Commissioner noted that s.26 provided exemption for certain information given to a public body in confidence. However, he noted that s.26 (2) provided that such exemption would not apply to a record which was prepared by a head, director or member of staff in the course of the performance of his/her functions. The one exception to that rule was where the disclosure of the information concerned would constitute a breach of a duty of confidence owed to a person *other than* a public body or head or director, or member of staff of a public body. It followed therefore, the Commissioner stated, that the exemptions in s.26 (1) were capable of applying, but only if disclosure of the information in the reports would constitute breach of a duty of confidence owed by the Department to the staff, principal or board of management of the schools in question.

30. He noted that no argument had been made in relation to any specific agreement or enactment in relation to this matter, so he had thus considered whether an equitable duty of confidence existed in this case. He accepted as correct the test set out by Megarry J in the case of *Coco v A.N. Clarke (Engineers) Limited* [1969]R.P.C.48, [1968] F.S.R. 415 and as adopted by Costello J in *House of Spring Gardens Limited v Point Blank Limited* [1984] I.R. 611 at pp. 638-639:-

> *"Three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself…must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances imposing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it"*

31. The Commissioner was satisfied that no circumstances arose in the instant case such as would create a duty of confidence and stated:-

"These school reports were prepared by inspectors who are members of staff of the Department. They were prepared on the course of the performance of their functions. They consist of the authors', i.e. the inspectors', own opinions and observations formed during the course of their visits to the schools. In my view such matters cannot be the subject of a duty of confidence if for no other reason than these opinions and observations were not 'imparted' to them by anyone".

32. While accepting there was information in the reports which may have been provided to the Inspectors, such as details of a school's size, accommodation and resources, it was information which he felt was available to any member of the public and did not consist of *"private or secret matters".* While some opinions expressed by the Inspectors were formed as a result of discussion with teachers and management in the schools concerned, it was highly unlikely – given the purpose of the reports and the circumstances of their creation – that these views or some of them were expressed in confidence. Having examined the reports he was satisfied that they did not contain any information that could be said to have been imparted in circumstances imposing an obligation of confidence or have the necessary quality of confidence about it. He thus did not accept that release of any part of the reports would give rise to a breach of any duty of confidence and in the circumstances found that by virtue of s.26(2), the exemptions in s.26(1) could not apply.

DECISION
33. Before addressing the three issues that arise for determination on this appeal, it is perhaps appropriate to consider the legal principles applicable where an appeal from a review of the Commissioner is made to the court.

34. As was emphasised by O'Donovan J in the *Minister for Agriculture and Food v The Information Commissioner* (2000) 1 I.R. 309 at 319:-

"…in the light of its preamble, it seems to me that there can be no doubt but that it was the intention of the legislature when enacting the provisions of the Freedom of Information Act, 1997, that it was only in exceptional cases that members of the public at large should be deprived of access to information in the possession of public bodies and this intention is exemplified by the provision of s. 34 (12)(b) of the Act which provides that a decision to refuse to grant access to information sought shall be presumed not to have been justified until the contrary is shown".

35. It is clear that the learned trial judge in this case brought an approach to the appeal before him which reflected this sentiment, not only as regards the decision making power of the Commissioner under the Act of 1997, but also as regards the Commissioner's interpretation of s.53 of the Act of 1998.

36. In his conclusion, the learned trial judge brought to all issues the principles which McKechnie J. suggested were appropriate in *Deely v The Information Commissioner* [2001] 3 I.R. 439 when he stated (at 452):-

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

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

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

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

37. This is a helpful resume with which one would not disagree, but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect, and the essence of this case is to determine whether the interpretation given first by the Commissioner and later by Gilligan J. to s.53 of the Education Act, 1998 was correct or otherwise.

S.53 of the Act of 1998
38. The learned High Court judge adopted entirely the reasoning of the Commissioner to hold on this issue as follows at p.19:-

"The Information Commissioner acknowledged that an analysis of the reports in question could give rise to comparisons being drawn between overall views of the schools. He takes the view however that such comparisons would be highly subjective and he does not believe that any empirical league table of schools, even one based on overall impressions, could be compiled. In any event he states that he does not believe that such information would breach the provisions of s. 53 of the Education Act and it was on this ground that he found that access to the reports before him were not exempt under s. 32 (1)(a) of the Freedom of Information Act. I also have had the benefit of reading the redacted version of the Inspector's report relating to Scoil Choilm and I take the view that the appellant has failed to demonstrate that granting access to the school report from Scoil Choilm would enable the compilation of information in relation to the comparative performance of schools in respect of academic achievements of students. In my view the appellant has failed to discharge the onus of proof that rests with him to demonstrate that the Information Commissioner erred in law in coming to the conclusion arrived at that the report was not exempt pursuant to s.32(1)(a) of the Freedom of Information Act, 1997."

39. What this conclusion does not address is the meaning and appropriate construction to be given to s. 53 of the Act of 1998, which was clearly evaluated both by the Commissioner and the learned trial judge exclusively through the prism of s.34 (12)(b) and s. 32(1)(a) of the Act of 1997.

40. One might again pause at this point to observe that s. 32(1)(a) provides that a head *"shall refuse"* a request to disclose where disclosure is "*prohibited by any enactment"*. There is no discretion of any sort where this sub-section applies. It does not appear to have been considered that the non-disclosure in this case might more properly have been seen to have been one falling within s.

32(1)(b) of the Act of 1997 where non-disclosure is authorised (as distinct from prohibited) by an enactment and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record. Section 53 is clearly discretionary in nature.

41. The question however, regardless of which part of s.32(1) is invoked, is whether or not this section can, or should, as has been urged upon this court, inform the interpretation of s. 53, the critical portion of which in this context is the following:-

> *"Notwithstanding any other enactment, the Minister may refuse access to any information which would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievements of students…"*

42. The use of a "*notwithstanding"* clause is a convenient form of drafting which skirts or avoids textual amendments to existing legislation but nonetheless operates by implication to bring about amendments or repeals of such legislation. A recent example is to be found in the constitutional amendment effected pursuant to the Citizenship Referendum, 2004, whereby Article 2 of the Constitution (which provided that every person born in the island of Ireland enjoyed a constitutional right to citizenship) was effectively amended by the addition of Article 9.2.1 which now provides:-

> "***Notwithstanding any other provision of this Constitution****, a person born in the island of Ireland….who does not have, at the time of birth of that person, at least one parent who is an Irish citizen…is not entitled to Irish citizenship or nationality, unless provided by law"* (emphasis added).

43. Such a clause can clearly operate to nullify or override other provisions of the same piece of legislation or inconsistent provisions contained in previous legislation.

44. Because of the *"notwithstanding"* clause in s. 53 it seems to me impossible to construe the Acts of 1997 and 1998 together, or as forming part of a continuum. The word *"notwithstanding"* is in this instance a prepositional sentence-starter which unequivocally means, and can only mean, *"despite"* or *"in spite of"* **any** other enactment. It underlines in the clearest possible manner the free-standing nature of the provision thereafter set out in s.53. As Bennion (Statutory Interpretation) 3rd Ed. points out (at 214):-

> *"Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them"*

45. To the extent that the later enactment may be seen as an implied partial repeal of a former enactment, Bennion also states (at p.225):-

> *"Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim leges posteriors priores contrarias abrogant (later laws abrogate earlier contrary laws)."*

46. If these were two Acts *in pari materia* a case might be made that they should be construed together and as interpreting and enforcing each other. Thus Lord Mansfield in *R v Loxdale* (1758) 1 Burr 445 (at 447) was able to state:-

> *"where there are different statutes in pari materia, though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other."*

47. These are not however two Acts *in pari materia* – they do not have a collective title nor do they address the same or a single subject matter. They are as far removed from a 'code' - such as, for example, the Road Traffic Acts – as one could imagine. There is no way in which s. 32 can be seen as explanatory of s.53 or vice-versa. The court cannot force a construction on s. 53 of the Act of 1998 in some way so as to yield up an interpretation which fits the aims and policy of the Act of 1997 when there is no ambiguity whatsoever in the opening words of s. 53.

48. On the contrary, it seems quite possible, having regard to the temporal proximity of its enactment in 1998 to the Act of 1997, that s. 53 may well have been inserted in the Act of 1998 with the unspoken intention of "batting off' the application of the Freedom of Information Act, 1997, to what historically has been a highly contentious issue, namely, that of making public certain findings in relation to the comparative performance of schools.

49. In my view s. 53 of the Act of 1998 overrides or 'trumps' any provision of the Act of 1997, unless of course, it can be shown that the school reports in question do not come within the protection offered by s.53.

50. In this regard it is common case that the information gathered does not contain examination results. However, the general words of s.53 go further than examination results and I think it obvious that the reference to "*comparative performance of schools in respect of academic achievement of students"* may include a whole range of other considerations in respect of which comparisons between different schools could still nevertheless be drawn up. Academic achievements include examinations. Academic achievement can however be taken as meaning something more and the parties to this appeal have not argued that a purely mechanistic and functional meaning should be given to the words "*academic achievement"* so as to limit the meaning of those words to examination results alone. A range of other considerations must be included, some of which will show one school to differ from another and perhaps be performing better than another across a range of subjects or activities. These might include considerations of how pupils appear to be doing in particular subjects, such as Irish or English, or in activities such as sport or drama. Even without the criteria of examination results being brought to bear, significant performance related differences may be evident from a description of the

activities carried out in any school or group of schools. These are precisely the kind of matters addressed by the school report. Given that primary schools, with which we are here concerned, no longer have examinations, so that s. 53 (a)(i) and(ii) can never apply to them in any event, it is not difficult to see that the general words of s.53 have a particular relevance to their situation and it is equally clear that the release of the information in the reports could lead to comparisons being drawn between different schools. Indeed there is a recognition and acknowledgement of that fact in the Commissioner's review. That recognition having been given, it does not seem to me to be open to the Commissioner to then dis-apply the section's general words by introducing the concept of subjectivity to downplay any comparison that might be drawn. The section itself does not distinguish between any subjective or objective test for comparisons which might be drawn, and the importation of this concept may be seen as effectively re-writing the section to a particular end.

51. I am fortified in the view I have taken by reference to s.13 (3)(a)(i) of the Act of 1998. It provides that inspectors shall:-

> *"evaluate the organisation and operation of those schools and centres and the quality and effectiveness of the education provided in those schools or centres...".*

52. Reports which comply with these requirements must, it seems to me, provide a basis for a real comparison between the various schools where such reports are compiled.

53. Whatever the desirability of making such information available to the public, it must also be said that this is not information *"otherwise available to the general public".* If it was, the application by the Irish Times would be completely superfluous and unnecessary. Such information may be available to the Department or to the board, patron, parents of students and/or teachers in an individual school, but that is a group or category which falls well short of the *"general public".* I am satisfied that the information contained in the report meets this further requirement of the section also.

54. For these various reasons I would allow the appeal on the s.53 point.

S. 21 of the Act of 1997
55. On this issue the learned trial judge found that the appellant had not discharged the onus of showing that a significant adverse effect could result in the granting of access to the records and that no satisfactory evidence had been adduced in this regard.

56. He also found that, having regard to the provisions of s. 13 of the Act of 1998, on foot of which teaching staff are required to co-operate in the provision of information leading to the compilation of school reports, that the Commissioner was entitled to take the view that no prejudice or adverse effect could follow a direction to release the reports, because co-operation would still have to be forthcoming from teachers and staff in schools because of their statutory obligations in that regard.

57. I believe he was absolutely correct in so holding.

58. On the hearing of this appeal, counsel for the appellant argued that the finding of the Commissioner on this point was unsupported by any evidence and, secondly, the mere fact that s.13 compelled compliance did not of itself mean that s. 21(1)(a) could never apply. He submitted that the overall effectiveness of the inspection regime might well be hampered if information which would otherwise be volunteered by teachers would not be forthcoming for the very good reason that it is likely to wind up in the particular tuairisc scoile of that school and, in turn, if it were to be published more widely following a successful Freedom of Information Act request in respect of the particular school report.

59. It was further suggested that the Commissioner, having failed to carry out an analysis on proper evidence under s.21(a) or (b) could not then proceed to apply the public interest consideration contained at s.21(2).

60. In my view the onus to produce evidence of prejudice fell on the Department and in the absence of same the Commissioner was entitled, under s. 34 of the Act of 1997, to hold against the Department. A mere assertion of an expectation of non co-operation from teaching staff could never constitute sufficient evidence in this regard, particularly in the circumstances shown to apply, namely, that as a consequence of both Circular 12/83 and s.13 of the Act of 1998, there was no choice left to schools or their staff as to whether or not to co-operate with the Department's inspectors in terms of furnishing the information sought.

61. Nor do I believe that any exhaustive analysis conducted by reference to detailed evidence was necessary before the Commissioner could decide to apply the public interest provision of s. 21(2) to direct release of the reports. Once there was some evidence before him as to the circumstances in which these reports are compiled, as undoubtedly was the case here, the well established principles of *O'Keeffe v an Bord Pleanala* [1993] 1 I.R.391 make it clear that his decision is not to be interfered with. This assessment, which involved a balancing exercise between various competing interests, was one uniquely within his particular remit.

62. I would dismiss this ground of appeal

S. 26 of the Act of 1997
63. The learned trial judge also upheld the Commissioner on the *'confidentiality'* arguments and, again, I am in complete agreement with the learned trial judge on this issue.

64. Section 26 (1) (a) is triggered where information is given or imparted in confidence, so that the Commissioner's first task was to inquire and assess whether or not the material or information going into the tuairisci scoile had that quality or not. It is agreed by both parties to the appeal that he applied correct legal principles, as set out by Megarry J in *Coco v A. N. Clarke (Engineers) Limited* [1968] F.S.R. 415, in performing this function.

65. He took the position that while some of the views *might* have been imparted to the inspectors in confidence, he thought it unlikely given the purpose of the reports and the circumstances of their creation. However, he went further and based his decision on his own reading of the reports. Having examined the contents of the reports, he was thus in a position to state that he was satisfied that they did not contain any information that could be said to have been imparted in circumstances imposing an obligation of confidence or have the necessary quality of confidence about it. He thus felt that by virtue of s. 26 (2) the exemption in s.26(1) could not apply. He had earlier, of course, found that there was no agreement or enactment in relation to the matter which would bring s. 26(1)(a) into consideration.

66. In reaching his decision the Commissioner had careful regard to the fact that the reports were prepared by inspectors in the

course of their statutory functions and that they represented the fruits of the inspectors' own opinions and observations formed during the course of their visits to the schools. He concluded, as in my view he was entitled to do, that these opinions and observations were not imparted to them by anyone. He further noted that much of the information would in any event already have been in the possession of the Department and that it did not consist of private or secret matters.

67. I would also dismiss this ground of appeal