Neutral Citation: [2014] IEHC 479

THE HIGH COURT

Record No: 2013 325 MCA

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS 1997 - 2003

Between/

PATRICK KELLY

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Judgment of Ms Justice Iseult O'Malley delivered the 7th day of October, 2014

Introduction
1. This is an appeal against a decision of the respondent to discontinue reviews in relation to seven separate applications made by the appellant under the provisions of the Freedom of Information Acts, 1997 to 2003 ("the Act", or "FOI"). Each of the reviews related to requests made to University College Dublin ("UCD"). The respondent's decision was made pursuant to s.34(9)(a)(i) of the Act, on the basis that the applications were considered to be vexatious.

2. The central issue raised by the appellant is whether the respondent correctly exercised her jurisdiction under that provision. He argues that she did not correctly interpret the phrase "frivolous or vexatious".

3. The appellant also asserts that the respondent breached his right to fair procedures in that she is alleged to have heard representations from UCD "behind his back".

4. An issue has also been raised as to the authority of the principal deponent on behalf of the respondent to make affidavits, in circumstances where the Information Commissioner who made the decision under consideration moved on from that office and was replaced during the course of these proceedings.

5. The respondent wishes the court to determine these issues, although maintaining that there is as a matter of law no right of appeal against the finding in question.

6. The appellant also seeks an order directing the respondent to display on the official website of the Information Commissioner a copy of an order made by Herbert J. on the 16th April, 2008 in proceedings entitled *Kelly v Information Commissioner* 2006/40 MCA. This relates to an order made on consent, by which the Court declared invalid a decision of the respondent on the basis that the procedure adopted by the respondent had been unfair.

7. UCD was originally a notice party to the present appeal. By order of O'Neill J made on the 20th January, 2014 the proceedings, in so far as UCD was concerned, were dismissed as being frivolous and vexatious.

Background
8. All of the appellant's applications to the respondent, so far as this appeal is concerned, related to information requests made to UCD. To put them in context, it is necessary to describe briefly the history of the appellant's dealings with that institution. A fuller account will be found in the judgment of Hedigan J. in *Patrick Kelly v University College Dublin* [2013] IEHC 23.

9. In 2001 the appellant applied for a place in UCD on a Masters in Social Science (Social Worker) degree course ("the course"). He was not offered a place and made a complaint to the Equality Tribunal of discrimination on grounds of gender. Meanwhile he was offered and accepted a place on a similar course in Trinity College. It appears from the correspondence in this case that over the years the appellant made a large number of applications to Trinity under the Act, which are referred to below.

10. The appellant was unsuccessful before the Equality Tribunal and on appeal in the Circuit Court. He was also largely unsuccessful in extensive related litigation before the High Court and in a reference to the European Court of Justice under Article 234 of the Treaty.

11. There are a number of written judgments of the superior courts dealing with the appellant's litigation against UCD. It is not necessary to refer to all of them, but it should be noted that in the course of the proceedings it was determined that the appellant was not entitled to disclosure of personal information relating to successful applicants for the UCD course. This was first determined by the President of the Circuit Court, and further dealt with, on appeal, by McKechnie J. who referred certain questions to the Court of Justice of the European Union and, on foot of the decision of that Court, ruled against the appellant. A motion by the appellant to set aside the ruling of McKechnie J. on grounds of alleged fraud was refused by Hedigan J. in a written judgment delivered on the 30th March 2012.

12. On the 29th January 2013, Hedigan J. granted an application by UCD for an order permanently staying all of the appellant's proceedings against it and prohibiting the appellant from issuing any further proceedings or applications arising out of his application for the place on the above- mentioned course. He did so on the basis that he was satisfied that the Court's processes had been

> *" ...repeatedly invoked to pursue groundless litigation incapable of leading to any possible good"*

and that the proper administration of justice required the making of such an order. It is relevant for the purposes of this case to note that Hedigan J. awarded the university the costs of the application against the appellant, and that there had previously been other

costs orders against him.

13. An appeal was lodged against Hedigan J.'s decision. So far as this court is aware it has not yet been disposed of.

14. While his litigation was ongoing the appellant commenced a series of applications under the Freedom of Information Acts.

Relevant provisions of the Act
15. In so far as it is relevant to this case the scheme of the Act is summarised here.

16. The objective of the Freedom of Information Act, 1997 is encapsulated in s.6(1) of the Act, which provides that:

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

17. Pursuant to the Act, the right of access is exercised in the first instance by making a request to the designated head of the public body concerned. This person may delegate the initial decision-making function. In general, a decision whether to grant or refuse the request, or grant it in part, is to be made within four weeks after receipt of the request. The head may in certain circumstances extend that time by a further period of four weeks. Notice of the decision is to be given in writing. Section 41 provides that if notice of a decision is not given to the requester within the specified period, a decision refusing to grant the request is deemed to have been made.

18. Section 8(4) of the Act, as amended, provides that:

> *"Subject to the provisions of this Act, in deciding whether to grant or refuse to grant a request under section 7 -*
>
> *(a) any reason that the requester gives for the request, and*
>
> *(b) any belief or opinion of the head as to what are the reasons of the requester for the request, shall be disregarded. "*

19. The grounds upon which a request *may* be refused are set out in s. 10 and include the opinion of the head that the request is frivolous or vexatious. Part III of the Act sets out certain matters in respect of which requests *must* be refused. These include records that would be exempt from production in a court on grounds of legal privilage (s.22(1)(a)) and records the disclosure of which would constitute contempt of court (s.22(1)(b)).

20. Where a decision to refuse a request is made by a person exercising a delegated function, the requester may apply to the head to review that decision.

21. Section 17, as amended, provides a procedure whereby a person may apply to a public body to amend a record containing personal information held by it relating to himself or herself, where such information is incomplete, incorrect or misleading.

22. Section 18, as amended, deals with the right to information regarding acts of public bodies where the requester is affected by such an act and has a material interest in a matter affected by the act or to which it relates. Where it arises, the requester's right is to be furnished with a statement of, firstly, the reasons for the act and, secondly, any findings on any material issues of fact made for the purposes of the act.

23. For the purposes of this section, a person has a material interest

> *"...if the consequence or effect of the act may be to confer on or withhold from the person a benefit without also conferring it on or withholding it from persons in general or a class of persons which is of significant size having regard to all the circumstances and of which the person is a member. "*

24. The term "act" includes a decision. "Benefit" includes

> *"the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage affecting the person. "*

25. By virtue of s. 34, the Information Commissioner has power to review refusals by heads of public bodies to grant requests made under the Act. Section 34 (2) provides as follows:

> *"Subject to the provisions of this Act, the Commissioner may, on application made to him or her in that behalf, in writing or such other form as may be determined, by a relevant person-*
>
> *(a) review a decision to which this section applies, and*
>
> *(b) following the review, may, as he or she considers appropriate,*
>
>> *(i) affirm or vary the decision, or*
>>
>> *(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper, in accordance with this Act.*

26. A decision by the Commissioner under this subsection is to be made "as soon as may be and, in so far as practicable" not more than four months after receipt of the application.

27. Subsection (6) deals with notification procedures, which are not in issue in this case. However, the wording of the subsection is significant.

> *"As soon as may be after the receipt by the Commissioner of an application under subsection (2), the Commissioner shall cause a copy of the application to be given to the head concerned, and, as may be appropriate, to the relevant person concerned and**, if the Commissioner proposes to review the decision concerned**, he or she shall cause the head and the relevant person and any other person who, in the opinion of the Commissioner, should be notified of the*

proposal to be so notified ..." (Emphasis added.)

28. Subsections (8) and (9) read in full as follows:

> *"(8) In relation to* ***a proposed review*** *under this section, the head, and the relevant person concerned and any other person who is notified under subsection (6) of the review may make submissions (as the Commissioner may determine, in writing or orally or in such other form as may be determined) to the Commissioner in relation to any matter relevant to the review and the Commissioner shall take any such submissions into account for the purposes of the review. (Emphasis added.)*
>
> *(9) (a) The Commissioner may refuse to grant an application under subsection (2) or discontinue a review under this section if he or she is or becomes of the opinion that-*
>
> > *(i) the application aforesaid or the application to which the review relates ("the application") is frivolous or vexatious,*
> >
> > *(ii) the application does not relate to a decision specified in subsection(1), or*
> >
> > *(iii) the matter to which the application relates is, has been or will be, the subject of another review under this section.*
>
> *(b) In determining whether to refuse to grant an application under subsection(2) or to discontinue a review under this section, the Commissioner shall, subject to the provisions of this Act, act in accordance with his or her own discretion. "*

29. Subsection (12) provides that in a review by the Commissioner of a decision to refuse a request, it is to be presumed that the refusal was not justified

> *" unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified. "*

30. Section 46 of the Act, as amended, sets out a list of records to which the Act does not apply. Included in the list (at s.46(1)(c)(i)) is any record relating to a review under s.34, other than any such record that was created before the commencement of the review.

The appellant's information requests

31. The reviews in question concern the following applications by the appellant.

32. On the 10th April, 2012 the appellant applied to UCD for a statement of reasons for its refusal to disclose to him certain specific information it held on the successful applicants for the course. The response, affirmed in an internal review by UCD's Freedom of information Unit, was that the reasons for the decision to withhold the information had been set out in the course of the proceedings then pending before the courts and it would be inappropriate to deal with the matter outside of those proceedings.

33. The appellant applied to the respondent for a review of this decision on the 11th June, 2012. The respondent then invited submissions from both parties. UCD responded on the 11th December, 2012, stating *inter alia* that it had been confirmed by the courts that the records in question were not to be furnished to the appellant and that this fact was known to and understood by him. It considered that the reasons given to him for the refusal were intelligible and adequate. It was also submitted that, having regard to the judgments of Hedigan J and the Court of Justice, both of which were attached, the records were exempt from production to the appellant pursuant to s.22(1)(b) of the Act. This submission was not forwarded to the appellant.

34. On the 2nd December, 2012 the appellant applied to UCD for any records held by it

> *"relating to a servant or agent of University College Dublin gaining entry into my apartment building on 3 November 2012 ".*

35. No response, other than *pro forma* acknowledgements, was made by UCD and the appellant accordingly sought a review from the respondent on the 9th February, 2013. On the 1st July, 2013 UCD wrote to the appellant stating that papers m preparation for the then current court proceedings had been served on him m accordance with law. It also said that there were no relevant records held by it regarding the incident and accordingly it invoked s.10 (1)(a) of the Act (applicable where the record concerned does not exist or cannot be found). On the same date it wrote to the respondent, enclosing a copy of the letter sent to the appellant and also enclosing a copy of the judgment of Hedigan J. delivered on the 29th January, 2013. No submission, as such, was made. The correspondence was not forwarded to the appellant.

36. On the 8th February, 2013 the appellant applied to UCD pursuant to s.18 of the Act for

> *"a statement of reasons why University College Dublin has not served on me any bills of costs or served on me a notice of commencement of taxation".*

37. Section 18(1), as noted above, obliges a public body to give reasons in certain circumstances, on request, to a person affected by an act of such body.

38. The context for this request was that the High Court had, apparently, been informed on the 29th January, 2013 by counsel for UCD that its bill of costs on foot of orders made prior to that date was in the process of going to taxation. It appears that the appellant did not receive a response within the statutory timeframe and on the 11th March he sought a review from the respondent. UCD contended that it had sent a response, dated the 11th March, which stated that as no bill of costs or notice of commencement of taxation had been served, there was no "act" on the part of UCD to which the section might apply. This decision was upheld after an internal review on the 5th April, 2013. The appellant then applied for a review of the decision.

39. UCD did not make submissions to the respondent on this matter. The respondent determined that it could be dealt with on the basis that UCD's position was as set out in the letters.

40. On the 15th March, 2013, the appellant applied to UCD for copies of its records

> *"relating to those 'costs orders ...going to taxation ' or being 'in the process of going to taxation'. "*

41. UCD did not respond within the statutory timeframe and the applicant sought a review from the respondent.

42. UCD then stated, by letter to the appellant dated the 3rd July, 2013, that there were no records answering to the request, apart from an email sent to the appellant by its solicitors on the 15th April, 2013 notifying him that the University was reserving its position in respect of all costs orders pending the outcome of his appeal to the Supreme Court. UCD did not make any submissions to the respondent in relation to this matter.

43. On the 11th April, 2013 the appellant applied to UCD, pursuant to the provisions of s.7(1) of the Act, for copies of records held by it which contained

> *"information required for the purpose of assessing [my] liability ...in respect of a ...payment owed or payable to [UCD] or for the purpose of collecting an amount due from [me] in respect of such a ...payment. "*

44. UCD did not respond within the statutory timeframe and the appellant sought a review by the respondent. UCD did not make any submissions or give any further response to the appellant on this issue.

45. On the 17th April, 2013 the appellant applied to UCD under the terms of s.17 of the Act for the amendment of

> *"records held by University College Dublin which state or imply that bills of costs of University College Dublin have been served on me and that bills of costs of University College Dublin were on 29 January 2013 'in the process of going to taxation'. "*

46. UCD did not respond to this request and the appellants sought a review by the respondent. UCD made no submissions on the matter.

47. On the 19th April, 2013 the appellant applied to UCD for a statement of reasons, pursuant to s.18 of the Act, as to why it was "*reserving its position*" in respect of costs orders that, according to him, could not be affected by the appeal to the Supreme Court.

48. UCD did not respond to this request and on the 12th June, 2013 the appellant sought a review by the respondent. No submissions were made by UCD.

Processing of the applications in the respondent's office

49. All of the applications listed above were, in the first instance, processed in the normal way by the respondent's office.

50. On the 5th April, 2013 the appellant applied to the respondent under s.34(2) of the Act seeking a copy of any submissions made by UCD and requested an opportunity to reply to any such submission. The response, sent on the 8th May, 2013, was that

> *" ...all information obtained in the course of a review by the Information Commissioner is treated as confidential. Therefore it will not be possible to accede to your request. "*

51. In late August 2013 Mr Stephen Rafferty, Senior Investigator in the respondent's office, decided to review all of the appellant's applications. On the 4th September, 2013 he sent what he terms a "composite preliminary views letter", covering all of the seven matters, to the appellant.

52. Mr Rafferty informed the appellant that his preliminary view was that all of the reviews should be discontinued under s.34(9)(a)(i) of the Act on the basis that the applications to which the reviews related were "frivolous or vexatious".

53. The letter referred to the fact that the respondent had previously decided, in 2003, to discontinue a number of applications relating to Trinity College on the same basis. It further referred to the fact that the respondent had on that occasion explained her view that a request or application was to be considered frivolous or vexatious within the meaning of the Act

> *"where either it is made in bad faith or forms part of a pattern of conduct that amounts to an abuse of process or an abuse of the right of access. In addition, the Commissioner explained that the outcome or cumulative effect of the requests is a relevant consideration and that it it appropriate to consider the requests under review in the context of other requests made to the public body and the requester's dealings with this Office. "*

54. Mr Rafferty added that in his view it was also appropriate to consider the request under review in the context of the requester's dealings with the public body concerned. He then referred to the fact that the seven applications in question all related to the long-running dispute between the appellant and UCD; the fact that the appellant had failed to establish a *prima facie* case of discrimination; and the fact that Hedigan J. had in his judgment of the 29th March, 2013 expressed concern that the processes of the courts had been abused and court time wasted in the litigation.

55. Mr Rafferty continued:

> *"While the comments of Hedigan J relate to the various Court proceedings, it seems to me that the comments give a clear indication of a pattern of conduct by you which has placed enormous burdens on UCD. Having regard to the nature of your FOI requests to UCD, it further seems to me that your use of the FOI Act in these cases constitutes yet another part of your strategy for furthering and/or prolonging your grievance with UCD and also constitutes a pattern of conduct suggesting an abuse of the FOI process. You are clearly aware of the enormous burden which your pursuit of your grievance through the Courts has placed on UCD. Having regard to the nature of your requests, I am of the view that your use of the FOI process serves to increase that administrative burden and very little else.*
>
> *Having considered the nature of all seven applications, against the background of your ongoing prolonged litigation with UCD, I am of the view that the purpose of your requests is directed at an objective unrelated to the access process. If not submitted for their nuisance value, it seems to me that they were, at a minimum, submitted with a view to increasing the administrative burden which has been placed on UCD in dealing with your grievance dating back to 2002 and in prolonging the process of dealing with your grievance. In summary, therefore, I am of the view that your*

applications for review indicate a pattern of conduct which amounts to an abuse of the FOI process. For this reason, I propose to recommend to the Commissioner that these reviews should be discontinued under section 34(9)(a)(i) of the FOI Act on the basis that your applications or the applications to which the reviews relate are frivolous or vexatious. "

56. The appellant was given an opportunity to reply and did so. He asked Mr Rafferty to specify whether he considered that the applications were frivolous ***or*** vexatious. In drawing a distinction between the two concepts he referred to a decision of the High Court of Hong Kong in 2003, in which that court had adopted the definition of the terms "frivolous" and "vexatious" set down in *Prajapati v Richard Thomas and Baldwins Limited* [1966] 1 ITR 564 (a decision of an Industrial Tribunal in England):

"We take it that an application in order to be frivolous must be made with knowledge that it is doomed to failure, as a 'try on''; and that 'vexatiousness ' involves the same knowledge with an added intention of putting the respondents to unjustified trouble and expense. "

57. The appellant said that none of his applications had been shown to have been made "with knowledge" that they were "doomed to failure, or as a 'try on', still less that they had the "added intention" of putting UCD to unjustified trouble and expense.

58. He objected to the reference to the Trinity College applications as relating to "*a ten-year-old decision of the Information Commissioner involving a different prescribed body*" which were not capable of constituting evidence in the current matter.

59. The appellant also stated that he had appealed the decision of Hedigan J.

The decision of the respondent

60. On the 11th September, 2013 the respondent wrote to the appellant to inform him that she had decided to discontinue the reviews on the basis that they were frivolous or vexatious.

61. It was stated by the respondent that in considering what course of action to take, she had had regard to the applicant's correspondence with UCD and with her office on all seven applications, including his submission in response to Mr Rafferty's letter. She had also had regard to correspondence between her office and UCD and to the High Court judgments referred to by Mr Rafferty.

62. The letter referred to previous decisions made by the respondent as to the criteria used by her in determining that an application was frivolous or vexatious.

" ...I consider a request or an application to be "frivolous or vexatious" within the meaning of the FOI Act where it either is made in bad faith or forms part of a pattern of conduct that amounts to an abuse of process or an abuse of the right of access. In addition, I previously explained that the outcome or cumulative effect of the requests is a relevant consideration and that it is appropriate to consider the requests under review in the context of other requests made to the public body and the requester's dealings with my Office."

63. The respondent said that she also agreed with Mr Rafferty's suggestion that it was appropriate to consider the requests under review in the context of other requests made to the public body.

64. The reference by Mr Rafferty to the 2003 decision was explained as being simply a reminder of the respondent's approach to such matters, and it was stated that it was not to be understood as meaning that the decision was evidence relied upon by Mr Rafferty in the cases now in issue. However, the respondent said that it appeared pertinent that she had previously found the appellant's use of the Act to be an abuse of process.

"I note, for example, that in 2003 I discontinued 12 separate review applications made by you to my Office on the ground that the applications or the applications to which the reviews related were frivolous or vexatious. In 2006, I refused to accept a further 26 separate review applications relating to Trinity College Dublin for the same reason. Similarly, in 2011, I discontinued 30 further review applications relating, yet again, to Trinity College Dublin."

65. The respondent said that she was satisfied that s.34(9) entitled her to discontinue an application for a review where she considered the application for review, or the application to which the review related, to be either frivolous or vexatious. It was not necessary for her to find that an application was both, although it would often be the case that both concepts applied. As far as the meanings of the terms were concerned, she saw no reason to alter the approach previously set out by her.

66. The respondent stated that she agreed with Mr Rafferty that the making of seven applications for review of decisions by the same body was not, on the face of it, necessarily excessive. She continued:

"However, it is an undisputed fact that all seven applications relate to a long running grievance you have with UCD, stemming back almost twelve years. It is also undisputed that the grievance stems from the fact that you were not initially offered a place on a Masters in Social Science (Social Worker) degree course at UCD for which you had applied in late 2001 and, following a determination by the Office of the Equality Tribunal in 2006 that you had failed to establish a prima facie case of discrimination on the gender ground, that you have since engaged in ongoing litigation with UCD on matters relating to that determination. In my view, the comments of Hedigan J. in related High Court judgments of 9 May 2012 and 29 January 2013 give a clear account of how the Courts perceive your conduct in terms of your ongoing litigation with UCD. In his judgment of 9 May 2012, Hedigan J. stated the following:

'The plaintiff has a pattern of continual application to the Courts which has served to prolong his proceedings. Counsel for UCD has indicated that her clients are very concerned about the repeated applications to the Court and that these applications are part of tactics to prolong the proceedings which has put UCD to untold cost. This Court is equally concerned that the processes of the Court are being abused and that valuable Court time is being wasted.'

Hedigan J. further stated:

'The limited resources of the judicial system should not be squandered on actions of little merit when so many parties are seeking to have real disputes of great import resolved by these courts. Having spent considerable time hearing this matter and reading the pleadings, it seems to me that the dispute between the parties herein does not rise above the level of hurt feelings. Balancing this against the inordinate time the proceedings have taken and the pattern of continuous applications by the plaintiff, it seems to me that there are grounds upon which the court would be justified in making a restraining order.'

In his later judgment of 29 January 2013, Hedigan J stated the following:

'The affidavit of Seamus Given for the respondentlappplicant herein is particularly striking. It recounts a sad and sorry tale of interminable, highly complex applications, most of which were found to be groundless. Vast amounts of court time here in Ireland and in Luxembourg have been expended. Immense costs on behalf of the defendants have been incurred. '

67. The respondent noted the making of the order by Hedigan J. restraining the appellant from further litigating against UCD without the prior consent of the High Court. She considered that the fact that an appeal had been lodged did not mean that she was not entitled to take into account the reasons for the order.

68. Having summarised the nature of the seven requests under consideration, against the background of the "*ongoing prolonged litigation*", the respondent stated that she found that the purpose of the requests was directed at an objective unrelated to the access process.

"While it seems to me that at least some of your requests were submitted for nothing other than nuisance value, I find that your use of FOI was, at a minimum, intended to increase the administrative burden which has been placed on UCD in dealing with your grievance dating back to 2002 and to prolong the process of dealing with that grievance. I would add that I would have arrived at the same conclusion regardless of whether or not the High Court had made the order of 29 January 2013 referred to above. "

69. The respondent's conclusion was as follows:

"I conclude, based on the evidence before me, that you are using FOI tactically in pursuit of your long-standing grievance with UCD. I am satisfied, therefore, that these reviews form part of a pattern of conduct that amounts to an abuse of the FOI process and I find, therefore, that your applications or the applications to which the reviews relate are vexatious. Accordingly, in the exercise of my discretion under section 34(9)(b), I discontinue these reviews pursuant to the provisions of section 34(9)(a)(i) of the FOI Act."

70. The following day, the appellant sought a copy of the correspondence between UCD and the respondent's office, and an explanation as to why this correspondence had not been disclosed to him. In response, Mr Rafferty said:

"While I note that you did not specifically make your request under the FOI Act, section 46(1)(c)(i) of that Act provides that the Act does not apply to a record relating to a review under section 34. The correspondence in question was submitted to during the course of the respective reviews. "

71. The appellant commenced this appeal by lodging a notice of motion on the 7th October, 2013.

Admissibility of the respondent's affidavits
72. The issue raised by the appellant in this regard relates to the fact that the Information Commissioner who made the decision in his case, Ms Emily O'Reilly, resigned from that office on the 29th September, 2013, having been elected by the European Parliament to the office of European Ombudsman. On the 8th October, 2013 Mr Peter Tyndall was nominated by the Government for appointment by the President as Information Commissioner, and this nomination was approved by Dail Eireann and Seanad Eireann on the 5th November, 2013.

73. The affidavits filed on behalf of the respondent are sworn by Mr Rafferty. In his first affidavit, sworn on the 5th November, 2013, he set out the sequence of seven applications and exhibited the documentation relating thereto. This documentation includes the correspondence between the respondent's office and UCD referred to above. Mr Rafferty confirmed that the respondent had made her decision for the reasons set out in her letter of the 11th September, 2013.

74. On the 11th November, 2013 the appellant filed an affidavit in which he queried the authority of Mr Rafferty to make an affidavit on behalf of the respondent for the purpose of opposing the appeal, in circumstances where the appeal had been lodged at a time when no Information Commissioner was in place and there was thus no person empowered to delegate this function to him.

75. On the 20th November, 2013 Mr Rafferty swore a further affidavit in which he averred that he had been appointed as a senior investigator in the respondent's office in November, 2011. He said that since that date he had been authorised by Ms O'Reilly to swear affidavits on behalf of the Commissioner in relation to appeals to the High Court brought pursuant to s.42 of the Act. However, he said that in the light of the concerns raised by the appellant, he had instructed the legal representatives of the respondent to seek an adjournment of the proceedings pending the appointment of Mr Tyndall by the President. The appellant responded that Mr Rafferty was giving illegal instructions to the solicitors and that he had committed perjury in averring that he was authorised to make the affidavits.

76. Mr Tyndall was duly appointed by the President on the 2nd December, 2013. According to Mr Rafferty, he then read and approved the contents of an affidavit sworn by Mr Rafferty on the 18th December, which set out a comprehensive account of the matter from the point of view of the respondent.

77. In my view there is no substance to the appellant's argument on this point. It is not the law that the staff of public service bodies or agencies necessarily lose the legal right to continue to do their jobs and to make the decisions that they were previously authorised to make every time there is an interregnum in the position of head of such agency. Such a rule would, *inter alia*, mean that any such body would present an open goal for litigants during such periods.

Jurisdictional issue - whether an appeal lies against the decision of the respondent
78. The respondent contends that no appeal lies against a determination that an application is frivolous or vexatious.

79. Section 42(1) of the Act provides as follows:

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

80. The respondent says, firstly, that the decision in question in these proceedings was a decision to discontinue the reviews, and therefore was not a decision "following" the reviews.

81. Secondly, the respondent relies upon the decision of Birmingham J. in *Nowak v Data Protection Commissioner* [2012] IEHC 449. In that case, the respondent had determined that the appellant's complaint was frivolous and vexatious and had therefore declined to investigate it. The Circuit Court had held that there was no right of appeal against such a decision under the Data Protection Acts, 1988 and 2003. The primary issue before the High Court was whether or not this was a correct finding.

82. The relevant statutory regime provides, under section 10(1)(a) of the Data Protection Act, 1988, as amended, that the Data Protection Commissioner may investigate, or cause to be investigated, a complaint made to him or her. Pursuant to s.10(1)(b), where a complaint is made,

> *" ...the Commissioner shall-*
>
> *(i) investigate the complaint or cause it to be investigated, unless he is of opinion that it is frivolous or vexatious ... "*

83. Section 10(1)(b)(ii) provides that if the Commissioner cannot resolve the matter amicably he or she is to notify the complainant of his or her "decision" in relation to it. Section 26(1) of that Act deals with appeals to the Circuit Court and provides *inter alia* that an appeal may be made against

> *" ...a decision by the Commissioner in relation to a complaint under section JO(l)(a) of this Act."*

84. Birmingham J. considered that the sequence envisaged by the legislation involves a decision by the Commissioner in the first instance as to whether or not the complaint was frivolous or vexatious. If it is, the Commissioner does not investigate it, the procedure "comes to a halt" and no decision is made within the meaning of s.26 - i.e. a decision arrived at after an investigation. The Circuit Court therefore had no jurisdiction to hear an appeal where there had been no investigation.

85. The respondent in the instant case also submits that, in cases of this nature, judicial review would be a more appropriate procedure than a statutory appeal because the leave of the Court would have to be obtained. Judicial review is also more suited to complaints about procedural fairness than an appeal that is limited to a point of law. It is argued that this must be what the Oireachtas intended.

86. The appellant submits that the provisions under consideration by this court are materially different to those of the Data Protection Acts. In particular, he says that the Data Protection Commissioner makes a determination as to whether or not a complaint is frivolous or vexatious before deciding whether or not to embark upon an investigation, whereas the Information Commissioner is empowered to discontinue a review on this basis. To "discontinue" presupposes that there is a review in being.

87. The appellant relies upon the decision of Murphy J. in *Killilea v Information Commissioner* [2003] 2 I.R. 402 in support of this interpretation. In that case, the respondent had discontinued a review, pursuant to s.34(9)(a)(ii). The decision was, therefore, on the basis that the application did not relate to a decision specified in the Act as being within the jurisdiction of the Commissioner. At the hearing of the appeal, the respondent submitted that the right of appeal under s.42 did not encompass a right to appeal against a decision to discontinue a review. This, it was argued, was the exercise of a statutorily conferred discretionary power and as such challengeable only by way of judicial review. However, having set out this argument (at p.423 of the judgment), Murphy J. went on to state that

> *"As the appellant has, until recently, represented himself in these proceedings, this procedural point was not taken. "*

88. The submission was again referred to in Murphy J.'s conclusions and he continued:

> *"It seems to me that there has been a review. The respondent states: 'In carrying out my review in this case, I had regard to ... ' and refers to various letters and applications. Having carried out the review his decision was to discontinue it: 'I have decided to discontinue this review in accordance with the provisions of s.34(9)(a)(ii) of the Freedom of Information Act 1997."*

89. The respondent in the instant case submits that *Killilea* ought to be distinguished on the basis that it concerns a different subsection; that in this case the respondent has made no admission that there was a review; that the point was not argued, or fully argued, in *Killilea*; that it is clear that judicial review is more appropriate and that *Killilea* has been "overtaken" by *Nowak*. Finally, on this issue, it is contended that "*following a review*" means following a full rather than partial review.

Decision on jurisdictional issue

90. The legislative scheme under the Act is somewhat more complex than that under the Data Protection Act, 1988 as amended and the sequential analysis of the latter Act adopted by Birmingham J. does not quite match its provisions. However, it seems to me that the following analysis can be applied.

91. Under s.34(2), an application is made to the Commissioner for a review of the relevant decision.

92. When an application is received, the Information Commissioner is not constrained to make a decision as to whether the matter raised by an applicant is frivolous or vexatious at the commencement of the process but can, it seems, do so at any stage.

93. The Commissioner may invite the parties to make submissions in relation to a "proposed" review.

94. Pursuant to s.34(9)(a), if he or she "*is* ***or becomes*** *of the opinion*" (emphasis added) that the application for a review, or the application to which the review relates, is frivolous or vexatious, he or she may then refuse to grant the application under subs.(2) - that is, an application for a review - or may discontinue a review. There are therefore two possible scenarios here. The Commissioner can decide, whether before or after receipt of submissions as to a "proposed review", not to embark upon a review or may, having embarked upon it, decide to discontinue it for the reason stated. I agree with the appellant that one can only "discontinue" a process if it is in being, but that is not the end of the matter.

95. "Following the review" the Commissioner may decide to affirm, vary or annul (and, in the latter case, effectively re-decide) the decision in question - s.34(2)(b). This, in my view, has to mean "following the completion of a full process of review". It would not, I believe, be open to the Commissioner to make any of these decisions on the basis of a partly completed process.

96. The appellate jurisdiction of the High Court (for the purposes of this case) is limited to a point of law arising from "*the decision of the Commissioner following a review*"- s.42(1). It seems to me that the use of the phrase "following a review" in this subsection must

be given the same meaning as in s.34(2)(b), and that it therefore must be taken as meaning a substantive decision on the merits of the matter after completion of the full process of review. The statutory appeal process is intended therefore to relate to points of law arising from such substantive decisions and not to a decision made by the Commissioner as to whether to carry out a review, or to discontinue one that has commenced. Complaints as to these latter decisions, as with any other aspect of the process adopted by the Commissioner, are more properly addressed by judicial review.

97. I am conscious of the fact that this analysis may not fully accord with that of Murphy J. in *Killilea*. However, it is clear from that judgment that this issue was not fully pressed or argued.

98. It follows that I am of the view that the Court has no jurisdiction to entertain this appeal. However, in case I am wrong on this, and having regard to a potential argument that the legal definition of "frivolous and vexatious" is itself a point of law, it seems to me to be appropriate (following the example of Birmingham J. in *Nowak*) to express a view on this and the other aspects of the case giving rise to points of legal interpretation as opposed to legality of procedures. I make this distinction because it does not seem to me to be appropriate to give an advisory opinion on matters that are clearly reserved to the judicial review process.

The test for determining whether an application is "frivolous or vexatious"

99. As a matter of Irish law, the term "frivolous or vexatious" does not, as noted by Birmingham J. in *Nowak*, necessarily carry any pejorative connotations but is more concerned with the situation where the litigation (or, in this instance, application) can be described as futile, misconceived or bound to fail. Where a person engages in a pattern of litigation (or applications as in the present instance) which not only come within those descriptions but can be said to be actuated by ill-will or bad faith, such conduct may properly be described as vexatious. In determining whether a particular application should be so described, the Information Commissioner is entitled by statute to use his or her discretion. There is no obligation on the Commissioner to prove the applicant's state of mind, and inferences may be drawn on a common sense basis from a pattern of conduct.

100. In this case, I consider that the respondent did not err either in her assessment of the legal test to be applied or in its application to the facts. In the first instance, she was entitled to take into account the context in which the applications were made - the long-running and unsuccessful pursuit of the appellant's grievances dating from 2002. She then set out, carefully and with specificity, why she had come to the conclusion that the appellant was using the FOI process to further prosecute his grievances and that this constituted an abuse of the FOI process.

101. Looking at the actual applications made by the appellant, it is in my view manifest that none of them were properly the subject of FOI requests. The first of the seven is, despite a slight alteration, clearly an effort to get information which the court process (including that of the Court of Justice) had already determined he was not entitled to.

102. The remainder of the requests relate to the conduct of litigation.

103. If a litigant has a legitimate grievance arising from the manner in which court papers are served, the proper method of dealing with it is, in the first instance, by raising it with the court having seisin of the proceedings. The appellant made no such complaint but rather, made a request under the Act for information as to how the papers were served.

104. There is no entitlement, under the Act or otherwise, to compel a litigant to explain to an opposing party why a particular attitude is being adopted - this is a matter protected by privilege and by the court process. The Act is not intended as a means by which the administration of justice can be interfered with - see the judgment of O'Neill J. in *E.H. v Information Commissioner* [2001] 2 IR 463 and of this court in *K v Information Commissioner* [2013] IEHC 373.

105. Section 18 of the Act has no application to a decision by a public body to enforce, or not to enforce, an order for costs against an individual, where that individual is not part of a class of persons in a similar situation.

106. In these circumstances I am satisfied that the respondent's interpretation of the statutory terms and her application of them were within her statutory powers and entirely justifiable.

107. Finally, in relation to the order made by Herbert J. in 2008, I do not see that this court has any power under the Act to direct any person or body to publish any particular material on its website. This being a statutory appeal under the Act, I must refuse this relief.

108. I therefore dismiss the appeal.