

THE HIGH COURT

[2013 No. 265 MCA]

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS

1997AND 2003

BETWEEN

THE MINISTER FOR HEALTH

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

FIRST NAMED NOTICE PARTY

AND

THE HONOURABLE THOMAS C. SMYTH

NOTICE PARTIES

JUDGMENT of O'Neill delivered on the 9th day of May 2014

1. This appeal arises from a Freedom of Information request made by the first named notice party on 16th May 2012, in relation to records relating to an inquiry carried out by the second named notice party into certain practices at Our Lady of Lourdes Hospital, Drogheda. By decision of 7th June 2013, the respondent determined that the appellant held or controlled certain records for the purposes of the Freedom of Information Act 1997 ('the 1997 Act'). The appellant contends that the Department of Health ('the Department') is in physical possession of the relevant records for safe-keeping purposes only, and that this does not amount to legal possession under the 1997 Act. The appeal is taken pursuant to s. 42(1) of the 1997 Act, on the grounds that the respondent made a number of errors of law in arriving at its decision.

Background

2. On 18th December 2009, Mr. Fergal Lynch, Assistant Secretary in the Department, wrote to Mr. Justice Smyth in relation to his prospective appointment to conduct the review and stated the following in relation to the records of the review:

" . . . it would be possible for the Enquiry to agree with persons or bodies to the terms in which documents would be supplied and if documents are given on a confidential basis and on condition that they will be returned or destroyed that is acceptable in my view but there should be a form of written agreement. The records of the Enquiry itself should be preserved in any event and could be used by any subsequent statutory tribunal which will have its own powers in relation to witnesses and documents."

3. The terms of reference for the review were attached to this letter and provided that the review was to examine and recommend to the Minister for Health and Children whether a further investigation into the procedures and practices operating at Our Lady of Lourdes Hospital, Drogheda, during the period 1964 to 1995, to protect patients from sexual abuse while undergoing treatment or care at the hospital and to deal with allegations of sexual abuse against Mr. Michael Shine, would be likely to provide additional information or insight which would be of significant public benefit. Subject to these terms and conditions, on 15th January 2010, Mr. Justice Smyth was formally appointed to carry out a review. A review was carried out over the next number of months and a report was provided to the Minister in September 2010. During the course of this review, Mr. Justice Smyth met with various persons and conducted interviews with them. One such person was the first notice party, and a transcript was made of this meeting which occurred sometime between March and June 2010.

4. On the 23rd September 2010, following the completion of the review, Mr. Justice Smyth delivered a number of boxes of documents and records to the offices of the Department with a letter attached detailing the basis on which these documents were being handed over. Four boxes contained information which Mr Justice Smyth had received from the Department. One box contained records of the review which had been maintained by Ms. Mary Reynolds. It was stated that *"the only circumstance in which this may be opened, on notice to us, is if it is necessary for the verification of information relating to recoupment of personal expenses by individuals."* A box labelled 'G' was unaffected by any restrictions. The final category of boxes, which contains the documents relevant to these proceedings, contained a total of six boxes labelled A-F. In relation to these documents Mr. Justice Smyth stated that they:

" . . . may not be disclosed or opened in any circumstances except by court Order for Discovery, of which I wish to be notified. These contain information received by me on the assurance given by me to each participant that their communications with the review would be treated as confidential. In the absence of such assurance I am satisfied that many individuals would not have participated in the Review."

[Emphasis in original]

5. On 16th May 2012, first named notice party sent an email to Ms. Madeline Meade in the Department requesting, under the Freedom of Information Act, a copy of the transcript of his meeting with Mr. Justice Smyth. By letter dated 15th June 2012, Mr. Charlie Hardy replied to the first named notice party stating that:

"Unfortunately, this Department is not in a position to provide the information at this time for the following reason.

The Department has sought legal advice on the issue and all of the necessary advice is not yet available.

The documents generated in the course of the Review were furnished to the Department by Judge Smyth in the

strictest stipulations of confidentiality, and accordingly the Department considers itself bound by these stipulations. The Department is effectively a depository for these documents. As your request relates to your personal records from the Review, the Department must therefore, seek definitive legal advice on this matter to effectively deal with your request."

6. The first named notice party again contacted the Department by email on 19th June 2012, stating that he was not happy with the response and requesting an internal review of the decision. An internal review was carried out and the determination was communicated to the first named notice party by letter dated 2nd July 2012. In this letter, Mr. Paul Barron, Assistant Secretary and Chairperson of the Internal Review Panel, accepted that the first named notice party should have received an explicit decision in respect of his request. He went on to state:

"The Department can only give access to records which it holds and which are under its control. The records created by the Drogheda Review have been sealed by Judge Smyth who placed them with the Department for safe-keeping. The Department has been advised that the records are not in the control of this Department and cannot be accessed or released by the Department under FOI legislation.

In the circumstances, I must refuse your request on the basis that the records requested are not held by this Department. This decision takes into account the provision in Section 2(5)(a) of the FOI Act which states that "a reference to records held by a public body includes a reference to records under the control of the body."

7. By email dated 4th July 2012, the first named notice party referred the matter to the respondent Information Commissioner. Meanwhile, on 5th July 2012, Mr. Justice Smyth replied to correspondence from the Department in relation to the first named notice party's request and stated:

"From recollection I made it perfectly clear to each individual at the outset of our meeting that the transcript was exclusively for my use only and would not be made available to them or anyone else. The purpose of having a transcript was (inter alia) too enable me to conduct a free flowing dialogue with each person, and that they could tell me in an ordinary conversational manner, their recollections, and freely discuss their concerns with me. I specifically told them that I did not wish to appear like a (Garda) Station Sergeant taking down all they said sentence for sentence. I considered such an approach would have created a too formal atmosphere and that some complainants would have felt inhibited in freely expressing themselves and their history to me.

These documents are essentially my documents, not those of anyone else, which are on deposit for safekeeping in the Department. If a Court order for Discovery is made I will comply with it - having first explained to the Court the background and purpose of their existence, not otherwise. . ."

[Emphasis in original]

8. The respondent contacted the Department on 24th July 2012, and informed it that the first named notice party had sought a review of its decision. Further information was sought in respect of a number of matters, including details of the nature of the "legal relationship between the Department and the Drogheda Review". The Department replied by letter dated 11th September 2012, setting out the circumstances of Mr. Justice Smyth's appointment by the Minister and reiterating its view that the records are not held by the Department.

9. By letter dated 14th November 2012, a preliminary view in relation to the first named notice party's application was communicated to the Department by the respondent. The purpose of this letter was to allow the Department an opportunity to comment on the preliminary view of the investigator before a final decision was made. It stated that:

". . . it is accepted by this Office that situations may arise where records are physically held on the premises of a public body but are not under its control. However, apart from suggesting that the records are records of the Drogheda Review, the Department has not provided any further supporting evidence which might confirm that the records are not under its control . . . In earlier FOI cases, the former Information Commissioner provided his view on what is meant by control in the context of the FOI Act as follows:

'In deciding whether such control exists, I consider that it is necessary to have regard to the relationship between the parties, to any agreement between them concerning the records and to any legal rights which a party seeking to assert control over the records might have.'

10. After considering the purpose for establishing the review, the investigator went on to state:

". . . the Minister appointed Judge Smyth to conduct the review and in doing so, directed that the review should have regard to the views of groups or individuals representing complainants including the group Dignity4Patients. Judge Smyth was also directed to preserve the records of the Enquiry itself and was informed that they might be required at some stage in the future. Judge Smyth, in my view, was effectively providing a service for or on behalf of the minister, and clear instructions were given in the terms of reference of the review and the need to retain records. No evidence has been presented to this Office to suggest that there was ever any agreement between Judge Smyth and the Department/Minister that the records would remain under Judge Smyth's control, nor am I aware of any legal right of Judge Smyth to assert control over the records. It is not sufficient for Judge Smyth to simply claim that the records are under his control."

11. The investigator also noted that the situation was similar in nature to that set out in s. 6(9) of the 1997 Act, in relation to records in the possession of a person undertaking a contract for services, though it was acknowledged that "it appears no such contract exists in this case". The investigator's conclusion in his preliminary view was:

". . .the Department has not shown, to the satisfaction of this Office, that its decision to refuse access to the records sought on the ground that they are not under its control was justified."

12. The Department responded to the preliminary view by letter dated 13th December 2012. It was stated that it "was the common understanding of both parties that all documentation should be the property of Judge Smyth . . . Judge Smyth has pointed out to us that the transcripts are his property which he has lodged with the Department for safekeeping . . . Our firm view is that these records are not held by or in the control of the Department . . .". It was reiterated that the Department does not have access to the

documents and therefore could not possibly hold them within the meaning of the Act. Mr. Justice Smyth was said to have performed his functions entirely independent of the Department and it was denied that a direction had been given to preserve the records of the review.

13. The final decision of the respondent issued on 7th June 2013. Having regard to the ordinary meaning of the word 'hold', it was found that the relevant records are held by the Department as it has physical possession of the records. In relation to whether or not the records are in the 'control' of the Department, the view of the previous Information Commissioner in relation to the meaning of control, as outlined above, was reiterated. It was determined that the 'Drogheda Review' is not, and never was, a statutory body and that it is not a legal entity and has no legal basis. Therefore, it was concluded that *"the records cannot be deemed to be under the control of the 'Drogheda Review' as no such entity exists."* In relation to whether or not Mr. Justice Smyth was providing a service, it was decided that he was appointed by the Minister, who is Head of the Department, and that *"while no written contract for service exists, Judge Smyth was indeed providing a service for the Minister"* and by extension, for the Department. It was stated that the role of Mr. Justice Smyth was now at an end and that it is *"unreasonable for the Department to take the view that the reviewer holds veto over the potential further uses to which the records might be put, given that his role is now completed . . ."* The final decision was set out as follows:

"Having carried out a review under section 34(2) of the Freedom of Information Act 1997, as amended, I hereby annul the decision of the Department of Health in this case. I direct that the Department must now deal with the applicant's request as first made by him on 16 May 2012, subject only to the provisions of the FOI Act."

Statutory Provisions

14. It is clear from the provisions of the Freedom of Information Act 1997, that in order to come within the Act, a record must be 'held' by a public body. Section 2(5) states:

"(a) a reference to records held by a public body includes a reference to records under the control of the body."

15. Section 6(1) provides :

"Subject to the provisions of this Act, every person has a right to and shall, on request therefore, 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."

16. Section 6(9) of the Act provides:

"A record in the possession of a person who is or was providing a service for a public body under a contract for services shall, if and in so far as it relates to the service, be deemed for the purposes of this Act to be held by the body, and there shall be deemed to be included in the contract a provision that the person shall, if so requested by the body for the purposes of this Act, give the record to the body for retention by it for such period as is reasonable in the particular circumstances."

17. The respondent's power to review decisions is set out in s. 34(2):

"Subject to the provisions of this Act, the Commissioner may, on application to him or her in that behalf, in writing or in 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."

18. Section 42(1) sets out the position in relation to appeals to this court:

"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."

Appellant's Submissions

19. The primary submission of the appellant is that the respondent erred in law by finding that the records are 'held' by the Department under the FOI Act 1997. The appellant contends that in reaching this conclusion, the respondent laboured under a fundamental misapprehension that the letter of 18th December 2009, indicates that the Department, at the outset of the review, sought to create an entitlement to access the records. It was submitted that this letter is clear on its face and creates no entitlement in the Department to access the relevant record. The Minister has never exercised or assumed control of the documents and is not even aware of the contents of the boxes, which are kept at the Department merely for safekeeping. It was submitted that the relevant records are not records of the review and should be given the same status as would be given to Mr. Justice Smyth's own personal notes. In the case of *Leicestershire County Council v. Michael Faraday and Partners Limited* [1941] 2 K.B. 205, the plaintiff sought certain documents, which it alleged were its property. The defendant had prepared the documents during the course of carrying out its business as ratings valuers and surveyors. The court held that:

"If there is nothing in the contract on which the plaintiffs can rely to establish that they are right in saying that these pieces of paper are their property, by what rule of law otherwise can they assert that that is so? I know of none. . .

If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over, but the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. I think it would be entirely wrong to extend to such a relation what may be the legal result of the quite different relation of principal and agent. These pieces of paper, as it seems to me, cannot be shown to be in any

sense the property of the plaintiffs. . . They are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal and, therefore, they cannot be said to be the property of the principal."

20. Counsel for the appellant submitted that the meaning of 'held' in a Freedom of Information context is closely analogous to 'possession' in O. 31 of the Rules of Superior Courts in relation to discovery. In *Linfen Ltd & Ors v. Rocca & Ors* [2009] IEHC 292, MacMenamin J. followed the above passage in the *Leicestershire County Council* case and stated:

"Where, for example, professional advisers hold a document arising out of a professional relationship with their client, such documents will not necessarily be in the 'possession' of the client."

21. The judge went on to state that:

". . . documents held by an agent in that capacity are deemed to be in the possession of that agent's principal, while, by contrast, documents prepared by a professional adviser...are not deemed to be in the client's possession."

22. In 'Discovery and Disclosure' (Abrahamson W., Dwyer J.B., and Fitzpatrick A., 2013, 2nd Ed.) the authors refer to the case of *Chantrey Martin v. Martin* [1953] 3 W.L.R. 459, where it was held that a firm of Chartered Accountants was obliged to discover documents, which had been created in the course of a relationship with a client who was not a party as the documents, were held to be in their possession. However, correspondence on behalf of the client between the accountants and Inland Revenue was held to have been created in their capacity as agent of the client and was not discoverable. The authors state that:

". . .it is clear that documents held by an agent while deemed to be in the possession of the principal are deemed not to be in the possession of the agent, although he may physically hold them."

23. It was submitted that the same can be said of the relevant transcript. It was prepared on behalf of Mr. Justice Smyth to assist him in his role as reviewer, and was done in order to avoid the creation of an intimidating atmosphere where Mr. Justice Smyth was required to keep a written note of oral evidence to the point that those providing evidence felt as though they were being interrogated and prevented from speaking freely. Therefore, it is argued that the transcript belongs to Judge Smyth and cannot be 'held' by the Department under the 1997 Act.

24. Counsel for the appellant argued that the respondent erred by finding that physical possession alone equates to holding the records under the Act. It was argued that the Department must have some interest in the documents that extends beyond mere physical possession, as to extend the meaning of the word 'held' to render physical possession sufficient for the purposes of the Act would bring a wide range of unintended situations within the meaning of the Act. While it is not denied that the appellant has physical possession of the records, it was submitted that a right to exercise power or control over the records is required. In *Bula v. Tara Mines Limited* [1994] 1 ILRM, O'Flaherty J. stated that –

"A document is within the power of a party if he has an enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else."

25. In *Johnston v. Church of Scientology Mission of Dublin & Ors* [2001] 1 I.R. 682, the Supreme Court, in allowing the defendants appeal from the High Court, held that "subject to rare exceptions in the exercise of discretion in the circumstances of particular cases, to be discovered, a document must be in the possession, custody or power of a party". Denham J. (as she then was) stated:

"The documents now in issue between the parties originated in England, were created by the English Church of Scientology and have never been in Ireland. It has not been established by the plaintiff that the English corporation created or has custody of those documents as the agent for the first defendant. Indeed, in this case the evidence is that the English corporation acted independently and not as agent for the other in respect of those documents. Accordingly, the plaintiff has not established that the first defendant had an enforceable legal right to obtain the documents in question from the English corporation."

26. It was submitted that the Department has no enforceable legal right to the relevant records and that Mr. Justice Smyth performed his function in an entirely independent manner. Counsel for the appellant contends that to extend the meaning of 'held' to include mere physical possession ignores the context in which documents are held. In *EH v. The Information Commissioner* [1999], the court held that:

"A requester has right of access to "records". The record will generally speak for itself. Where doubt or ambiguity exists, as to the connection of the record to the requester, a consideration of factors such as the circumstances in which the record was created, the purpose for which the record was created and whether it was created with the affairs of a particular individual in mind, may inter alia, assist in determining whether there is a sufficiently substantial link between the requesters personal information (as defined in the Act) and the record in question."

27. It was submitted that a similar consideration of the circumstances in which the relevant document was created and the purpose of its creation was required in this case. Counsel for the appellant says that the respondent has adopted a holistic view in previous decisions, whereby it considered the relationship between the parties and the relevance of 'control' of the documents. In a previous decision of the respondent in the case of *Mr. X and the Department of Public Enterprise* (22nd September 2000), the respondent held:

"For the purposes of the present decision it is not necessary for me to give a detailed explanation of what is meant by control; in the context of the FOI Act. However, in my view, records which are not physically held by a public body can only be said to be under its control if, at the very least, the public body has a legal entitlement of some kind to procure those records. In deciding whether such control exists, I believe that it is necessary to have regard to the relationship between the parties, to any agreement between them concerning the record and to any legal rights which a party seeking to assert control over the records might have. I would also have regard to the National Archives Act, 1986 which defines 'Departmental records' as records 'made or received, and held in the course of its business, by a Department of State. . .'. The Act imposes obligations on the public bodies to which it applies to retain and preserve Departmental records. In my view the records at issue in this case are not Departmental records and the Department is under no obligation to retain them."

28. It was submitted that had this approach been adopted by the respondent in this case, it could not possibly have held that the

Department holds the records for the purposes of the 1997 Act. Counsel for the appellant submitted that it is clear the Minister does not control the records for the purposes of s. 2(5)(a) of the 1997 Act, and the respondent erred in this regard. Mr. Justice Smyth's letter, which accompanied the boxes delivered to the Department, makes clear that the relevant records remain under his control, despite him not retaining physical possession. This letter was not, as the respondent describes it, a unilateral assertion of confidentiality, but rather, it is submitted, sets out the terms on which the documents were accepted by the Department. It is submitted that there is no statutory provision which would entitle the Minister to exercise any control over the documents and the decision of the respondent makes no finding in this regard. It was submitted that the respondent has failed to identify at what point the records came under the control of the Minister, and that the mere fact that the review was concluded does not interfere with the reviewer's control.

29. The appellant also contends that the respondent erred by finding that no separate entity exists which could be said to control the relevant records. It is submitted that the fact that no statutory body exists is irrelevant. Mr. Justice Smyth performed a quasi-judicial function and was specifically appointed to carry out the review by virtue of his independence and his status as a retired High Court Judge. At no point has he ceded control of the relevant documents to the Department, and his letter of 23rd September outlining the terms on which the documents were delivered to the Department, makes it expressly clear that the opposite is what is anticipated. The appellant contends that the independence of the reviewer must be recognised by the respondent, and that judicial inquiries of this nature warrant protection by the courts. It is submitted that it would be extremely disruptive to the system of judicial inquiries if the reviewer's records which he created for his own purposes were deemed to be records of a public body.

30. The appellant also contends that Mr. Justice Smyth was not a service provider within the meaning of s. 6(9) of the 1997 Act. It was submitted that as Mr. Justice Smyth was not an employee or agent of the appellant and was acting in an independent capacity, it follows that documents in his control are not under the control of the Minister. A parallel is drawn with a situation where a receiver appointed by a bank is not deemed to be an agent of the bank. It was submitted that for the purposes of the 1997 Act, no other method of engaging services trigger responsibilities under the Act except "*providing a service for a public body under a contract for services*". It was contended that this is not so broad as to include the relationship between the appellant and Mr. Justice Smyth. The respondent has made no finding that a contract to provide services exists but has merely stated that Mr. Justice Smyth was "*in essence*" providing a service. It was stated elsewhere in the decision that ". . . *it appears that no such contract exists in this case*". It is submitted that the relationship between the appellant and Mr. Justice Smyth was merely administrative in nature and that there was no intention to create legally binding relations of a commercial nature.

Respondent's Submissions

31. Counsel for the respondent submitted that the 1997 Act has been interpreted by the courts in a broad and purposive manner. It was described by McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439. as "*a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy*". In *HSE v. Information Commissioner* [2009] 1 I.R. 700, McMahon J. said the Act is ". . . *a radical measure which is designed to give members of the public liberal access to records held by public bodies.*" In *Sheedy v. Information Commissioner* [2005] 2 I.R. 272, Fennelly J. said that the 1997 Act 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.*" It was submitted that it is well established that the Act casts the right of access broadly and then makes exceptions. Therefore, it was argued that it would be contrary to the intention of the Act to interpret the term 'held' in a narrow way or in a manner analogous only to 'control' of records.

32. In relation to the appellant's specific grounds of appeal, counsel for the respondent submitted that the primary finding of the Commissioner was that the Department has physical possession of the records and that they are therefore held by it within the meaning of s. 6(1). It was submitted that records, which are lawfully and legitimately held by a public body, come within the ambit of the Act. Counsel for the respondent contended that the respondent has determined that the records are held by the Department and therefore many of the appellant's arguments are premature or irrelevant at this stage.

33. Having made the determination that the records are 'held' by the Department, the respondent proceeded, in the alternative, to consider the issue of control of the records under s. 2(5)(a). Counsel for the respondent argued that the appellant's grounds of appeal focus almost exclusively on this secondary finding in relation to control, which it was submitted is only a sub-set of 'held' under the Act. It was argued that under s. 2(5)(a), control is only one way in which a document can be deemed to be 'held' by a public body. The Commissioner interpreted control as referring to a range of factors including ownership, physical possession, the circumstances of the records' creation and the existence of some form of legal entitlement to access or procure the records in question. It was submitted that the terms of agreement of the review as set out in the letter of 18th December 2009, are sufficient to justify the decision. The Department, it was argued, clearly sought to have the records preserved so that they would be available for future use, if necessary. Specific uses are contemplated beyond the records simply being kept for use solely by the reviewer. It was argued that oral evidence cannot be said to be merely akin to the reviewer's handwritten note of the record, but rather, that it is the record of the evidence given to the reviewer. It was pointed out that the reviewer's personal notes of the record are not sought. Counsel for the respondent acknowledges that Mr. Justice Smyth performed his duties in an independent capacity, but argues that the appellant is confusing the reviewer's independence over the conduct of the inquiry with what was to happen the records of inquiry upon its completion.

34. The respondent contends that much of the case law relied upon by the appellant in relation to discovery matters does not apply in these proceedings and that the cases are distinguishable on their facts. However, it was submitted that where documents in a discovery context are in the physical possession of the person against whom discovery is sought, but that person alleges that a third party has a right or interest in the documents, they may still fall to be discovered. In *Kettlewell v. Barstow* (1872) L.R. 7 Ch. App. it was held that "*it is no ground for resisting production that a person not before the court has an interest in the documents.*" In addition, the respondent points out that a situation may arise in discovery matters where parties are found to have joint possession of documents. Where this is so, the documents may still be found to be discoverable. Counsel for the appellant, however, replied that the decision of the respondent makes no finding in relation to joint or shared possession and expressly found that no separate entity exists which could hold the records.

35. Counsel for the respondent submitted that there was no evidence before the respondent which established that the reviewer had an absolute legal entitlement to deny access to the records. Confidentiality is dealt with under s. 26 of the Act, and the respondent asserts that the Oireachtas intended it to be dealt with under that provision of the Act. So, while the Department may well have considered itself bound by some duty of confidentiality by virtue of Mr. Justice Smyth's letter of 23rd September, it was submitted that the issue of confidentiality is dealt with as an exemption under the Act, and raising it is premature at this stage. It was argued that confidentiality does not, as a matter of law, exist simply because a party makes a unilateral stipulation of confidentiality. As a general principle of law, certain objectives must be satisfied before a duty of confidentiality arises. In *Coco v. Clarke (AN) Engineers* [1969] RPC 41, Megarry J. set out the following test -

"First, the information itself must. . . have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

36. It was submitted that the respondent was entitled to form the view that the reviewer did not have any absolute right of veto, such that would preclude the Department from having control of the documents. The respondent's decision states:

". . . it is not a matter for any individual to lay down conditions as to the uses to which the records might be put once that individual has completed his/her body of work"

37. In *'Discovery and Disclosure'* (2013, 2nd Ed.), the authors refer to Bray, *'Principles and Practice of Discovery'* (1885, p. 206), which states:

"The mere fact that the giving of discovery will involve a breach of confidence as against some third person or in any way affect or prejudice his interests does not of itself constitute an independent objection to giving the discovery, a disclosure under the compulsion of the court being for this purpose distinguished from a voluntary disclosure out of court."

38. In *Mahon v. Post Publications* [2007] 3 I.R. 338, the Supreme Court determined that a duty of confidentiality did not arise simply because the Mahon Tribunal had expressly claimed that the documents in question were confidential. In that case, a letter setting out the confidentiality requirement stated at p. 368:

"The enclosed documents remain the property of the tribunal and the information contained therein is confidential to the tribunal and may not be disclosed to any person, other than your legal adviser, who is likewise restrained from disclosing the contents thereof . . ."

39. Counsel for the respondent contended that the Commissioner's finding that Mr. Justice Smyth was providing a service within the meaning of s. 6(9) was a secondary finding. It is submitted that even if the respondent erred in this regard, which is not accepted, this does not impugn the primary determination that the relevant records are 'held' under section 6(1). In any event, it was submitted that the letter dated 18th December 2009, clearly indicates that a service was being provided - terms and conditions are outlined; the consideration to be provided is detailed; the commencement date of the review is set out and conditions relating to the preservation and future use of records are discussed.

Decision

40. The first issue for this court to consider in this matter is the correct construction of the term 'held' in s. 6(1) of the Freedom of Information Act 1997. While counsel for the defendant has argued that lawful physical possession is sufficient to trigger the provisions of the Act, the appellant contends that this could not possibly be the case. During the course of the hearing, counsel for the appellant argued that it is possible to envisage a variety of situations where lawful possession of a document by a public body would not be sufficient to render that document amenable to a request under the 1997 Act. One such example was a scenario where a person accidentally leaves a document in the possession of a public body, say by leaving it at the reception desk. It was submitted that while the public body may have physical possession of the document and this possession is lawful, the public body has no interest in the document and it couldn't possibly be said to be held by them for the purposes of the Act.

41. I am satisfied that to hold that mere lawful possession of a document was sufficient to make that document amenable to disclosure under the 1997 Act, on the basis that the document was "held" by the public body within the meaning of s. 6(1) would give rise to absurd and wholly unintended consequences, albeit in rare circumstances. In my opinion, for a document to be "held" within the meaning of s. 6(1) of the 1997 Act, it must be either lawfully created by the public body in question or lawfully provided to that public body or lawfully obtained by the public body, in connection with the functions or business of that public body and the document must not be subject to any prior legal prohibition affecting its disclosure. For example, the use of documents discovered in legal proceedings can only be used in those proceedings and for no other purpose. Thus, documents which came into the possession of a public body by way of discovery in legal proceedings, could not subsequently be released by the public body in response to a request under the 1997 Act, unless the party in the legal proceedings, who had discovered the document consented to the disclosure under the 1997 Act.

42. Part III of the 1997 Act containing ss.19 to 32 inclusive, deals with exempt records. Whilst s. 32 creates an exemption from disclosure for certain records, the disclosure of which is prohibited by any enactment other than a provision specified in Column (3) of the Third Schedule to the Act, any legal prohibition on disclosure in private law, or generally, in common law, unless it falls within one of the exemptions set out in ss. 19 to 32, is not the subject of an exemption under Part III of the 1997 Act. The Act of 1997 does not make any express provision by way of a saver in respect of binding legal prohibition from disclosure, such as by expressly subjecting such legal prohibitions to the provisions of the Act in the future, and perhaps a saver for those existing on the coming into effect of the Act. In the absence of any provision in the Act in this regard, and to ensure harmony between the Act and other co-existing binding legal prohibition on disclosure, not contemplated in the Act, it is necessary, in my opinion, to construe the term "held" in s. 6(1) in the manner set out above.

43. Turning to the circumstances encountered in this case, the first issue to be considered is the function which was being discharged by Mr. Justice Smyth in the 'Drogheda Review'. It is to be observed that the 'Drogheda Review' was clearly a convenient name or label attached to the function or process carried out by Mr. Justice Smyth, and as such, the 'Drogheda Review' did not have a distinct legal personality. The legal personality which was the 'Drogheda Review' was Mr. Justice Smyth.

44. The task undertaken by Mr. Justice Smyth was, as set out in the Terms of Reference for the review. The reason Mr. Justice Smyth was asked to carry out this review was because he was a retired judge of the High Court and therefore the primary and essential characteristic of the review was that it was to be an exercise conducted in an entirely independent and impartial way. Independent in this context means independent of all those who had an interest in the outcome of the review, and that included the Minister for Health, the Department of Health, staff members of Our Lady of Lourdes Hospital in Drogheda and former patients of that hospital and any interest groups formed by those patients.

45. Without that essential characteristic of independence, it is highly probable that this review would not have been commissioned in the first place.

46. For Mr. Justice Smyth to conduct the review in this way, it was essential that he had unfettered control over every aspect of the review, including the documents to be procured and examined by him, the persons from whom statements were to be taken or with

whom interviews were to be conducted, the terms upon which this would take place, including the manner in which the material assembled would be disposed of at the conclusion of the review. In this respect, one must bear in mind the highly sensitive nature of the subject matter of the review and the probable difficulties of gaining the necessary degree of cooperation from all those who could contribute to the review in circumstances where Mr. Justice Smyth did not have available to him the normal judicial powers of compellability.

47. At this point, it is useful to consider the nature of the relationship between Mr. Justice Smyth and either the Minister for Health or the Department of Health. As Mr. Justice Smyth was not an employee of the Minister or the Department, in discharging his function in this review, he was not the holder of an office and subject to the terms and conditions upon which that office was set up. Neither was the relationship one of principal and agent. In her determination, the respondent concluded that Mr. Justice Smyth was the provider of a service for the Minister or the Department, and so far as the Act of 1997 was concerned, fell within the terms of s. 6(9) of that Act.

48. I cannot agree that this was the nature of the relationship between Mr. Justice Smyth and the Department or the Minister. In my view, if one were to say at the outset of this review, that because of the nature of the relationship between Mr. Justice Smyth and the Department, that all of the material which was brought into existence in the course of the review was to be deemed to be "held" by the Department and thereby amenable to requests under the Act of 1997, that would be wholly inconsistent with the necessary independence of Mr. Justice Smyth in discharging his function in the review, and, I have no doubt, would have been wholly unacceptable to many of those persons whose cooperation with the review was necessary for there to be a successful conclusion to the review.

49. It is easy to say what the relationship between Mr. Justice Smyth and the Department was not, and in that respect, I am quite satisfied that whilst in a general sense, it could be said that Mr. Justice Smyth was providing a service in consideration of the payment of an agreed fee, the provision of this service cannot be considered as falling within the terms of s. 6(9) because the application of s. 6(9) in the circumstances would be wholly inconsistent with the independent nature of the function discharged by Mr. Justice Smyth.

50. Next to be considered are the records or documents that were generated in the course of the review. By his letter of 23rd September 2010, Mr. Justice Smyth, in precise detail, distinguished between the various types of record contained in the sealed boxes which he placed with the Department for safekeeping. In one of these boxes *i.e.* the one strapped in brown masking tape, was contained what he described as "*the records of the review maintained by Ms. Mary Reynolds*". This description would seem to echo or correspond with the content of the letter of 18th December 2009, from Mr. Fergal Lynch, the Assistant Secretary in the Department, where he says "*the records of the inquiry itself should be preserved in any event and could be used in any subsequent statutory Tribunal which will have its own powers in relation to witnesses and documents*". The document at issue in these proceedings is not included in that category of document. At issue in these proceedings is a transcript of a conversation or interview between Mr. Justice Smyth and the first named party. In his letter of 23rd September 2010, and his subsequent letter of 5th July, 2012, Mr Justice Smyth sets out two reasons as to why a transcript of this interview is included amongst the boxes of material in respect of which there is to be no disclosure in any circumstances except by court order for discovery. His first reason in this regard was based upon an assurance of confidentiality given to all participants that their communications with the review would be treated as confidential, without which, Mr. Justice Smyth was satisfied, many individuals would not have participated in the review. Secondly, as outlined in his letter of 5th July 2012, the transcript of these interviews, and specifically, the first named notice party's, was brought into existence so as to avoid the necessity of Mr. Justice Smyth having to laboriously take a handwritten note of the conversation as it was taking place, thereby impeding the flow of the interview and perhaps inhibiting the interview by an excessively formalistic approach. Mr. Justice Smyth asserts that the transcript was his note of the interview. Mr. Justice Smyth states in this letter that these transcripts were prepared exclusively for his own use, that it was made clear to all of the participants that this was the position and that they would not be made available to anybody else.

51. No party to the proceedings has ever challenged these statements which are exhibits in the affidavit of Derek McCormack, and hence, evidence in these proceedings.

52. This brings me to a consideration of who owns or has control over the records of the review, and specifically, the document at issue in this case, the transcript of the interview with the first named notice party. Can it be said that the Department owns or controls these records? First, it is to be noted that the Department itself vehemently asserts that it does not. The Minister commissioned the Drogheda Review and did so on a basis which constituted Mr. Justice Smyth as the person carrying out the review, as entirely independent of the Department and the Minister. It would seem to me to be wholly inconsistent with the status of Mr. Justice Smyth in this regard, for the Department to, at the same time, claim that it either had a proprietorial interest or was entitled to exercise legal control over the material that was brought into existence by Mr. Justice Smyth in the conduct of the review. I am quite satisfied that the Minister or the Department is not the legal owner of these records, nor is there any basis upon which it could legitimately assert any form of control over these documents or records so that it could, against any other party, assert a legal entitlement to them, resulting in these documents being "held" by the Department for the purposes of the Act of 1997.

53. On the other hand, there is no doubt that the document or record at issue in this case was brought into existence by Mr. Justice Smyth, and was at all times in his possession and under his control, and was brought into existence and retained by him solely for the purpose of discharging his function in the review in which, as a matter of law, he was independent of all other parties.

54. In my opinion, because of his independent status, as the reviewer, and because the document in question in question was brought into existence by Mr. Justice Smyth for the purpose of the review, the only party who could assert any proprietorial interest or any other form of legal control over the document in question is Mr. Justice Smyth. He, alone, could and did determine the terms upon which various interviews were conducted, no doubt by agreement with the parties being interviewed, and as the unchallenged evidence in these proceedings is to the effect that a transcript of the interview with the first named notice party and others, was created solely for Mr. Justice Smyth's exclusive use and no others, that arrangement, which appears to have been accepted at the time by the participants in the review, and specifically, the first named notice party, now binds all concerned. In his capacity as the independent reviewer, Mr. Justice Smyth was entitled, for the purposes of carrying out the review, to settle the terms upon which cooperation could be obtained from persons who could contribute to the review. Manifestly, those terms could include the basis upon which the material generated in the review, including written records, would be used and, ultimately, disposed. It is not, in my opinion, within the competence of any other party, and specifically, the Minister or the Department now, after the event, to attempt to set aside the arrangements made by Mr. Justice Smyth for the purposes of conducting the review, nor does the Department seek to do anything of the kind.

55. This brings me, finally, to the question of what effect, if any, on the foregoing arrangements made by Mr. Justice Smyth with regard to the disposal of these records, does the fact that he deposited them, and specifically, the transcript of the interview with

the first named notice party, with the Department for safekeeping have.

56. Adopting a broad, expansive approach to the nature of the document in issue in this case, the transcript of the interview with the first named notice party, there is no doubt but that the content of this document concerned or related to the business or functions of the Department of Health. However, as the Minister or the Department had no right of ownership or control over this document or record, the terms upon which it came into their possession by being placed with them by Mr. Justice Smyth are crucial as to whether or not it could be said that the document was "held" by the Department within the meaning of s. 6(1) of the 1997 Act. It is quite clear from the letter of 23rd September 2010, that Mr. Justice Smyth did not transfer to the Department any proprietary right or right of control over the document in issue in this case, nor did he give the Department any permission to disclose the document to anyone, the only circumstance in which he conceded disclosure was in the event of an order for discovery by a court.

57. As Mr. Justice Smyth was entitled to impose these terms and conditions, and as the Department accepted into their custody this document on those terms, unless Mr. Justice Smyth agrees otherwise, the Department is bound by those terms and lawfully prohibited from any disclosure, save as excepted by Mr. Justice Smyth.

58. Thus, as the Department has no control over these documents within the meaning of s. 2(5) of the Act of 1997, and as they are in their possession, subject to a legally enforceable prohibition on disclosure, notwithstanding the fact that they have physical possession of the document in question, it cannot be deemed to be "held" by the Department within the meaning of s. 6(1) of the 1997 Act.

59. Accordingly, I must respectfully disagree with the determination of the respondent in this matter and I will make the order sought at paragraph 1 of the notice of motion, namely, an order pursuant to s. 42(1) of the 1997 Act, setting aside the decision of the respondent dated 7th June 2013, and I will substitute for that decision my own decision that the record sought is not a record "held" by the appellant.