THE HIGH COURT

[2014 No. 114 MCA]

IN THE MATTER OF THE FREEDOM OF INFORMATION

ACTS 1997 AND 2003

BETWEEN

F.P.

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

THE CHILD AND FAMILY AGENCY, OUR LADYS CHILDRENS HOSPITAL CRUMLIN, SP AND SF

NOTICE PARTIES

JUDGMENT of Mr. Justice McDermott delivered on the 20th day of December, 2016

1. This is an appeal on a point of law pursuant to s. 42(1) of the Freedom of Information Act 1997 as amended from a decision of the Information Commissioner made 23rd January 2014 by notice of motion dated 20th March 2014 on the ground that the respondent erred in law in respect of decisions reached concerning case numbers 090261, 090262 and 090263 refusing requests for records relating to himself and his former step daughter following a review carried out by the respondent in accordance with s. 34(2) of the 1997 Act. In the alternative, the appellant seeks orders granting access to the records sought in these cases or remitting the appellant's requests to the respondent for fresh consideration.

Background

2. The appellant's wife gave birth to a daughter in 1993. At the time he believed the child to be his biological daughter and they lived together as a family unit. It subsequently emerged that the appellant was not the child's natural father. Unknown to him, his wife applied for an amendment of the child's birth certificate and the natural father's name was substituted for his. The appellant's wife also obtained DNA tests confirming the natural father's paternity and obtained court orders providing for a payment of birth expenses and financial support by the natural father in respect of the child which heretofore the applicant had provided.

3. The facts concerning the relationship between the appellant and his wife are set out in the judgment of Clark J. in *P. v. the Information Commissioner* [2009] IEHC 574 :-

> "2. The appellant's wife gave birth to a daughter in 1993. The appellant believed the child to be his biological daughter and he formed a strong parental bond with her. They lived together as a family unit. It emerged however that the child was the result of his wife's extra-marital relationship with another man. Unknown to the appellant, his wife applied for the child's birth certificate to be amended so that the biological father's name was substituted for the appellant's name. She also secretly obtained DNA tests confirming the other man's paternity of the child and obtained Court orders providing for birth expenses and support for the child from the biological father which were expenses already provided for by the appellant.
>
> 3. Not unsurprisingly, the appellant and his wife split acrimoniously in 1997 and their relationship was thereafter very strained. His wife moved out of the family home, taking the child with her. It is fair to say that the appellant had great difficulty in accepting that the child who he had raised as his daughter and who he deeply loved was not his. On the 12th January, 1998 he commenced proceedings for access under the Guardian of Infants Act 1964. Those proceedings were served on his wife during the following week. On the 19th January, 1998 his estranged wife reported to the Eastern Health Board that the child had told her that she had been touched inappropriately by the appellant.
>
> 4. By letter dated the 30th January, 1998 the Health Board notified the appellant that his wife (referred to by her maiden name) had attended at its clinic and indicated that she had "concerns" for her daughter who had indicated to her that the appellant allegedly touched her on her "front" and "back bottom" and also that he allegedly "put [his] tongue on her tongue", and that the child had demonstrated to his wife an action which he allegedly did in her company. He was informed that the Health Board had an obligation to investigate such allegations. A fortnight later he was informed that the child had been referred for assessment to St. Louise's Unit of Our Lady's Hospital, Crumlin, and that the Gardaí had been notified.
>
> 5. The appellant was invited to take part in the Unit's assessment but, following correspondence in which he sought assurances that fair procedures would be accorded to him, he declined to do so. The Unit could not ensure that any interviews with the appellant would be recorded or that he would be furnished in advance with guidelines under which the Unit operated. It subsequently appeared that no such written guidelines were in existence. He had no further access to the child. The nature of the allegations was not disclosed to him apart from being told that the child had said "he had touched her back bottom and her front bottom."
>
> 6. This Court cannot help but feel that the events which occurred thereafter could have been avoided if the social workers had agreed to meet the appellant's concerns by furnishing him with a full account of the allegations which were reported to have been made by the child to her mother concerning him. If, in addition, he had been permitted to have a transcript or a record of his interviews with the social workers to protect his interests, much expense and grief could have been avoided. I also use the word "allegation" to describe what the notice parties in this case have been careful to refer to as "concerns" expressed by the mother of what the child is alleged to have told her concerning the appellant's

behaviour which if established would have profound effects on both the appellant and the child."

4. There was extensive correspondence between the appellant and the Eastern Health Board and St. Louise's Unit concerning the alleged abuse. By letter dated 5th April 1998 the appellant sought details of the allegations and guidelines under which the investigation was being conducted. By reply dated 21st April St. Louisa's Unit noted that he appeared to be unaware that the child's mother had decided not to proceed with the assessment at the unit.

5. Thereafter correspondence continued in relation to the process which had been undertaken in relation to the case and the guidelines which applied to such a review. On 24th November 1998 the appellant was informed that "in the last couple of months our unit was notified of (the mother's) request that the assessment of (the child) proceed". The appellant was informed that a planning meeting had been held with a number of community care social workers who agreed that an assessment might be useful. The appellant was notified on 27th November 1998 that the child's mother was now happy that an assessment should take place and it was intended to proceed with it. He declined to partake in an interview on 15th December 1998 because he was not satisfied with the procedures and facilities to be provided to him in respect of same and the assessment of the child. In further correspondence St. Louisa's Unit declined to give the date upon which the child's mother consented to the assessment which she had previously declined. By letter dated 29th March 1999 the applicant was informed that the Unit had completed its assessment of the child and a report had been prepared.

6. On 31st March the Eastern Health Board wrote to the appellant indicating that it had made a re-referral to St. Louisa's Unit in respect of the child on 11th of September 1998. A copy of the Unit's assessment was made available to the Circuit Court in respect of an access application by letter dated 1st April 1999.

7. By letter dated 6th October 1999 the appellant was informed of the outcome of the investigation into the "concerns" concerning the girl. It stated:

> "Taking into account all information available to this department, including the information contained in the assessment in St. Louisa's Unit, the concerns or allegations are unconfirmed.
>
> As the gardaí were notified of the allegation, they will be notified of the outcome."

8. On the 26th October, the applicant sought information concerning any other possible classifications or outcomes open to the Eastern Health Board at the time of reaching its determination. He asked whether the investigation was still continuing or if the matter was now deemed to be closed by the Board. He requested the name of the contact person within An Garda Síochána referred to in the letter and information as to whether his family doctor had been informed of the outcome of the investigation. He also enquired as to whether his superior at the school at which he was a teacher was informed by the Eastern Health Board at any time of the allegations and whether the recent decision reached by the Board had been conveyed to him/her. He also sought clarification as to whether any other allegations subsequent to the initial report made in January 1998 were made by his wife or whether these initial allegations were given "further substance" by her in later months.

9. On 28th October 1999 the Eastern Health Board responded confirming that the investigation of the matter was now closed. Although notification had been given to An Garda Síochána in the area his name had not been stated in correspondence. His general practitioner had not been notified of the outcome but this would be "rectified". No contact had been made with his school principal or the Board of Management of the school where he worked about the allegations but it was noted that had that been necessary it would not have been done without prior notification to him. Since the outcome was "unconfirmed" this was not considered appropriate or necessary.

10. At para. 6 of the letter he was informed that he might be able to gain access to the file under the terms of the Freedom of Information Act but that;-

> "the matter has been investigated on the basis of the initial referral. The process of investigation did not lead to any substantiation of the allegation and the outcome is unconfirmed".

Freedom of Information Act Applications

11. On 25th February 1999, the appellant made a request under s. 7 of the Freedom of Information Act 1997 for all records held by the Eastern Health Board (then South Western Area Health Board) relating to himself and the child. On 28th June the former Eastern Health Board informed him that it was releasing those records which related to him but withholding those which related to the child in accordance with s. 28 of the Act. On 15th November the appellant sought access to those records created by the Board subsequent to the date of his last request. On 25th November the Board informed him that with the exception of one record which it was releasing, the only records on its files which related to him and created subsequent to his first request consisted of correspondence between him and the Board. Four records relating to the child had been created in the interim and these were being withheld under s. 28 of the Act. The applicant then sought an internal review of this decision on the 18th of December 1999. In the course of that review he indicated that he no longer sought access to records relating solely to the child. He limited his request to all records concerning himself and the child and himself. On 27th April 2000 the applicant was informed by the Board that it was upholding the original decision made in respect of all the withheld records and on 25th October an application was made to the respondent for review of that decision.

12. On the 7th October 1999 the applicant made a request for all records relating to himself and the child held in St. Louisa's Unit at Our Lady's Hospital for Sick Children, Crumlin and all hospital records relating to the child including those relating to outpatient visits and an admission to the hospital. A decision was issued by the hospital on the 16th of November which gave access to some records but refused access to others including two videos. This decision was upheld by the hospital following an internal review on 25th May 2000. Thereafter on 25th October 2000 the applicant sought a review by the respondent of this decision.

13. By letter dated 8th March 2000 to the respondent the applicant informed her that he no longer wished access to records relating solely to the child. He only sought access to all records concerning himself and the child and himself. In particular, he specified that he wished to have access to

> "each and any record, or portion thereof, as was considered by St. Louisa's Unit in Crumlin in its evaluation/assessment/investigation/validation"
>
> of the allegations made against him.

14. Two preliminary reviews by the respondent's officials were concluded on 9th April and 19th July 2003 and furnished to the applicant. These indicated that the decisions of the hospital and the Board should be affirmed on the basis that the records of joint personal information sought were exempt as personal information protected by s. 28 of the Act and the applicant was invited to demonstrate that on balance the public interest in granting access to the records outweighed the child's right to privacy within the meaning of s. 28(5)(a) of the Act.

15. On 17th November 2005 the then Information Commissioner, Ms. Emily O'Reilly, confirmed the decision of the Board on the basis that the records of joint personal information were exempt under s. 28(5B) of the Act. On 28th November 2005, the Commissioner also affirmed the decision of the hospital on the basis that the records of joint personal information were exempt under s. 28(5B) of the Act for similar reasons. Although the Board and hospital relied upon s. 26 of the Act in refusing access to the records the respondent did not find it necessary to make a determination under that section.

16. This decision was the subject of the appeal on a point of law to the High Court in *P. v. Information Commissioner* [2009] IEHC 574 to which I have already made reference. Clark J. in allowing the appeal held that the respondent had misdirected herself in law in her consideration and application of the public interest test under s. 28 (5)(a) of the Act. The learned judge granted declarations that the decisions was erroneous in law as (i) the Commissioner found that the child's mother had not made any allegation against the applicant; and (ii) the Commissioner found there was an absence of evidence of malice in the making of that allegation. As a result the learned judge was satisfied that the Commissioner's decision as to whether the public interest that the request should be granted outweighed the public interest in upholding the child's right to privacy was flawed. The court therefore set aside the decisions of the Commissioner dated the 17th and 28th November 2005 and remitted the matter for fresh consideration.

17. The court acknowledged that a decision had not been made by the respondent in respect of s. 26(1) but nevertheless stated at para. 47:

> "The Court cannot review the legality of a decision which was not made but I nevertheless voice my belief that for many of the reasons which I have expressed in relation to personal information, the public interest is not served when a request for access to records is refused because the records contain information that was provided in circumstances where the motive for the complaint was highly suspect in the context of recently commenced access proceedings on almost unique facts. The laudable protection to providers of information of child abuse was never intended to guarantee a blanket embargo on the release of that information in appropriate circumstances."

18. Following this order extensive correspondence followed between the appellant and the respondent in respect of the fresh review. A preliminary review was issued to the appellant by Ms. Campbell, an investigator with the respondent, on 14th November 2013. The appellant's further comments in relation to the issues raised were sought and furnished in a submission dated 6th December 2013.

19. By letter dated 23rd January 2014 Ms. Campbell wrote to the applicant enclosing a copy of the decision of the Information Commissioner (now Mr. Peter Tyndall) in relation to the request. The respondent upheld the refusal to grant access to the records sought.

Statutory Provisions

20. The Freedom of Information Act 1997 in its preamble is described as an Act to enable members of the public to obtain access to the greatest extent possible consistent with the public interest and the right to privacy to information in the possession of public bodies and "to enable persons to have personal information relating to them in the possession of such bodies corrected and accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons to enable them to exercise it."

21. Under Part II of the Act s. 6(1) provides that subject to other provisions every person has a right to and "shall, on request therefor, be offered access to any records held by a public body" to be known as "the right of access" under the statute. A request may be made under s. 7 which lays out the procedure to be followed upon its receipt. Under s. 8, the head of a public body upon receipt of a request must decide to refuse or grant it within four weeks. If a decision is made to grant the request wholly or in part, the head shall determine the form and manner in which the right of access is to be exercised and cause notice of the decision to be given to the requester. If the request is refused a notice must issue under s. 8(2)(d)(i) specifying the reasons for the refusal and under subpara. (ii) the notice must contain any provision of the Act pursuant to which the request is refused and the findings on any material issues relevant to the decision, including particulars of any matter relating to the public interest which were taken into consideration for the purposes of the decision (unless the refusal is pursuant to s. 19(5), 22(2), 23(2) or 24(3)).

22. Section 8(4) provides that in deciding whether to grant or refuse a request any reason that the requester gives for the request and any belief or opinion of the head as to the reasons for seeking the records "shall be disregarded".

23. The decision of a head to refuse access is subject to a review under s. 14. Following a review the head of a public body may affirm or vary the decision or annul it or make such decision in respect of the matter as he or she considers proper in accordance with the Act.

24. Under section 17(1), where personal information in a record held by a public body is incomplete, incorrect or misleading, the head of the body shall on application to him or her amend the record in a number of ways:

> "(i) by altering it so as to make the information complete or correct or not misleading, as may be appropriate,
>
> (ii) by adding to the record a statement specifying the respects in which the body is satisfied that the information is incomplete, incorrect or misleading, as may be appropriate, or
>
> (iii) by deleting the information from it."

An application under s. 17(1) must specify the record concerned and the amendment required and includes appropriate information in support of the application. If the application is refused notice of same must be furnished to the applicant. If a record is amended the public body concerned must take all reasonable steps to notify the amendment to:

> "(a) any person to whom access to the record was granted under this Act, and
>
> (b) any other public body to whom a copy of the record was given,

during the period of one year ending on the date on which the amendment was effected."

25. Section 26(1) as amended by s. 21 of the Freedom of Information (Amendment) Act 2003 provides that a head shall refuse to grant a request under s. 7 if:

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

26. Section 26(3) as amended provides that:

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

27. The issue of personal information is dealt with under s. 28 which provides:

> "(1) Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if, in the opinion of the head, access to the record concerned would involve the disclosure of personal information (including personal information relating to a deceased individual).
>
> (2) Subsection (1) does not apply if —
>
> (a) subject to subsection (3), the information concerned relates to the requester concerned,
>
> (b) any individual to whom the information relates consents, in writing or such other form as may be determined, to its disclosure to the requester,
>
> (c) information of the same kind as that contained in the record in respect of individuals generally, or a class of individuals that is, having regard to all the circumstances, of significant size, is available to the general public,
>
> (d) the information was given to the public body concerned by the individual to whom it relates and the individual was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public, or
>
> (e) disclosure of the information is necessary in order to avoid a serious and imminent danger to the life or health of an individual,
>
> but, in a case falling within paragraph (a) or (b), the head concerned shall ensure that, before the request under section 7 concerned is granted, the identity of the requester or, as the case may be, the consent of the individual is established to the satisfaction of the head.

(3) Where a request under section 7 relates to —

> (a) a record of a medical or psychiatric nature relating to the requester concerned, or
>
> (b) a record kept for the purposes of, or obtained in the course of the carrying out of, social work in relation to the requester,
>
> and, in the opinion of the head concerned, disclosure of the information concerned to the requester might be prejudicial to his or her physical or mental health, well-being or emotional condition, the head may decide to refuse to grant the request."

28. Subsection 4 provides for a procedure whereby a health professional may be granted access to records the subject of subsection (3).

29. Two further subsections of the s. 28 are relevant to these proceedings. Section 28(5) on the 1997 Act provides:

> "(5) Where, as respects a request under section 7 the grant of which would, but for this subsection, fall to be refused under subsection (1), in the opinion of the head concerned, on balance —
>
> (a) the public interest that the request should be granted outweighs the public interest that the right to privacy of the individual to whom the information relates should be upheld, or
>
> (b) the grant of the request would benefit the individual aforesaid,
>
> the head may, subject to section 29, grant the request."

Section 28(5B) as inserted by s. 23 of the 2003 Act provides:

> "(5B) Notwithstanding paragraph (a) of subsection (2), a head shall, subject to paragraphs (b) to (e) of that subsection and subsections (5) and (6), refuse to grant a request under section 7 if, in the opinion of the head, access to the record concerned would, in addition to involving the disclosure of personal information relating to the requester, also involve the disclosure of personal information relating to an individual or individuals other than the requester."

30. The High Court previously determined that the respondent erred under s. 28(5)(a) of the 1997 Act in determining that the mother did not make an allegation and that there was an absence of evidence of malice in the making of that allegation and therefore misdirected herself in the application of the public interest test. Following the remittal of the case the respondent made a further decision of the 23rd January, 2014 which is the subject matter of the challenge in these proceedings.

31. The appellant's submission of the 6th December set out in considerable detail the elements of the public interest upon which he relied and which are summarised at para. 31 of his grounding affidavit. He identified these elements as relevant to the assessment of whether access should be granted to records under s. 7 including the making of false allegations of child sexual abuse. It was submitted that the public interest was served by ensuring that full details of such allegations and related documentation should always be furnished to the person accused, as a matter of routine, at an early stage. False allegations of sexual abuse must be regarded as a very serious issue of public interest and in particular, when they arise in the course of a matrimonial or parental dispute merit special weight in the Commissioner's assessment of the public interest.

32. The appellant submitted that the likely effect of giving such access would be to deter any person contemplating making false allegations from doing so if they knew that such false allegations would be furnished to the accused. The appellant also relied upon a general right to fair procedures which was dependant upon the granting of access to records. This would enable accused persons to protect themselves from any potential interference with their family or employment rights and their good name. The furnishing of such documentation in early course would also reduce the risk of an erroneous prejudicial finding such as an inconclusive but nevertheless damaging one of "unconfirmed".

33. The appellant placed considerable emphasis in this submission on the following factors:

> (i) Access to the records would ensure that an applicant would not be deprived of a right of action which would be facilitated by the non-disclosure of records concerning the allegations and their investigation by the two public bodies concerned: access would enable the appellant to determine whether or not he had a cause of action.
>
> (ii) Access would enable the appellant to make a complaint to An Garda Síochána or the Office of the Director of Public Prosecutions about any such false allegations if they gave rise to a potential criminal liability.
>
> (iii) Access would facilitate the correction of records held by the two bodies: the appellant might use the records to test the accuracy of the allegations and the finding of "unconfirmed".
>
> (iv) Access would promote "equality of arms" by ensuring that all parties to any potential dispute concerning the allegations whether arising in civil or criminal proceedings before an administrative body or a court would have equal access to the records.

34. These submissions focus on the process by which decisions were reached and the purpose for which an applicant might seek records under the Act. That purpose is irrelevant to an application under section 8(4). Furthermore, this appeal is not concerned with the fairness of procedures in civil or criminal proceedings in the appellant's case which might arise from the behaviour of those making false allegations in this case or any cause of action that may be vested in the appellant arising therefrom. Civil and criminal proceedings are governed by rules of practice and procedure whereby discovery may be directed in civil proceedings or disclosure in criminal proceedings. These issues are determined in the course of those proceedings pursuant to rules of court or case law calculated to ensure fair procedures. The question of whether the Eastern Health Board or St. Louise's Unit acted in accordance with fair procedures in respect of their investigation of allegations made against the applicant may be the subject of judicial review if there was a failure to observe fair procedures in reaching any determination. If there was such a breach an application may be made to have a decision quashed; the rules of discovery apply to such proceedings. These processes are not in issue in these proceedings which relate to a discrete issue under s. 28(a) and s. 28(5B) of the Act. I am not satisfied that the appellant may use the process of this appeal to mount something akin to a collateral attack on the investigations and determinations made by the notice parties and in particular the finding that the allegations were "unconfirmed".

35. The court is therefore satisfied that insofar as the request is made in order to deter future false allegations by others, or to provide material to the appellant whereby he might establish whether he has a cause of action against the complainant and/or her mother, or a cause for criminal complaint against any person, or a basis upon which to challenge the administrative conclusion reached in respect of the allegations by way of judicial review, such matters must be disregarded by the Information Commissioner except insofar as they might be relevant to consideration of some overall public interest. The court is satisfied that the respondent's determination that he does not have authority to investigate complaints against public bodies or to act as an alternative dispute mechanism with respect to actions taken by them is correct as a matter of law. Furthermore, the court is satisfied that the procedures available in the course of civil and criminal proceedings are calculated to ensure that a plaintiff or applicant or accused person or indeed the court does not operate on the basis of an absence of relevant documentation which may be made available by order of the court on the basis of well established legal principles.

The Preliminary Review

36. It is noted at para. 20 of the Preliminary View that the appellant accepted that the records sought contained joint personal information relating to the appellant and the child who was no longer a minor. The records were considered to fall into three broad categories insofar as they effect the child's and other third parties' interests. These were:

> (1) "Form documents" which originated from the HSE or the hospital and which referred to the allegations from which names and other personal details could fairly easily be redacted such that release, subject to redaction would involve only a minimal invasion of privacy in the circumstances of the case;
>
> (2) Records in which personal information relating to the child and other relatives such as her biological father and her siblings is so prevalent throughout that it could not be redacted;
>
> (3) A large number of records relating primarily to the child's mother and issues which she was addressing at the time including court proceedings, her health and family circumstances.

37. The child in a written submission dated 28th October, 2013 objected to the release of her records held by the HSE and the hospital. Her objection was based on ss. 26 and 28 of the Act. She claimed that the information contained in her records was personal and of a sensitive nature. It was currently held by a public body on the understanding that it would be treated as confidential. She also submitted that the Act should protect her right to privacy in respect of her personal information including her name and personal matters. It is clear from that submission that the child strongly objected to the release of these records in respect

of events of which she has no present memory. She found the idea that her personal records could be made public to be both "disturbing and alarming". She stated that she could not understand what public interest could outweigh her right to privacy having regard to the sensitive nature of the information that was given in confidence to a public body by a small child. The child's mother also objected to the release of any records held by the HSE and the hospital in relation to her daughter and in particular, emphasised advice which she had received from a senior clinical psychologist at the conclusion of the child's assessment that the matter should not be mentioned to her daughter again. She was concerned that her daughter as a young adult might be disturbed at the reopening of this matter after so many years.

38. The hospital in it's submission dated 31st October, 2013 identified a number of considerations as relevant to the public interest namely:

> (1) The extent to which the applicant was already aware of the allegations of child sexual abuse made against him and the conclusion of the assessment that the allegations were "unlikely".(The appellant objects to the summary of this submission by the Commissioner in which the word "unlikely" was changed to "unconfirmed" – a matter to which I will return).
>
> (2) The knowledge that the applicant has gained through his freedom of information request regarding the type of records held by St. Louise's Unit.
>
> (3) The extent to which relevant records have already been released to the applicant.
>
> (4) The lapse of time.
>
> (5) The objection by the child to the release of her personal information.
>
> (6) The child's age at the time for assessment.

The hospital emphasised it's obligation to uphold the child's right to privacy in accordance with Article 3 of the United Nations Convention on the Rights of a Child and the right to privacy as guaranteed by Article 8 of the European Convention on Human Rights and Article 16 of the United Nations Convention. It also emphasised its practice guidelines by which it endeavours to create a safe environment to allow children and their parents to talk about potentially distressing material. The hospital submitted that it must operate within such an environment as without this guarantee children and their families may not be willing to engage in the services provided. However, the hospital was also mindful of it's obligations to share potential child protection information with the HSE because of its statutory obligations relating to issues of child protection.

39. The appellant relied upon his previous submissions to the Commissioner and the High Court in support of the access request to which I have already referred and which are summarised at para. 31 of his grounding affidavit.

40. The reviewer concluded that it was undeniable that the appellant's position as a person against whom allegations were made in relation to the child was a relevant factor in determining the weight which should be accorded to the child's right to privacy and that of her mother because the appellant had a constitutional right to defend and vindicate his good name in the face of these allegations. She noted that the office had taken a strong view that there is a public interest in promoting procedural fairness where a public body engages with a member of the public in a context which may carry adverse consequences for that individual. She noted that s. 28(2)(a) provided an exception to the personal information exemption where the information related to the requester alone, but s. 28(5B) specified that this exception did not apply to a record containing joint personal information. It was also noted that while s. 17 may be regarded as recognising a public interest in the personal information held by public bodies being accurate, complete and not misleading, it did not give a right of access to an otherwise exempt record.

41. The reviewer also accepted that at the time of the investigations the child's mother ceded any right to privacy which she and the child may have had concerning the allegations insofar as disclosure was necessary to the competent authorities for the purposes of procedural fairness. As a result the appellant was informed of the substance of the allegations and the outcome of the investigation.

42. The issue of malice was also considered in the context of the judgment of Ms. Justice Clark. The reviewer stated:

> "It is important to emphasise, however, that many of the records at issue reveal far more than merely the details of the allegations. Indeed, even in the light of the evidence that the allegations were made for malicious purposes, the records reveal what may be described, at best, as deeply troubled family circumstances. Moreover, some of the descriptions of the alleged abuse involved what may be regarded as disturbing conduct by the child concerned. The records also include references to the medical and psychological histories of certain family members, as well as other information from which the psychological history of one individual may be inferred. In my view, the right to privacy in relation to such information is entitled to very strong protection under FOI notwithstanding the evidence of malice in relation to the allegations."

43. The reviewer concluded that having regard to the information already made available to the appellant within and outside the FOI procedure certain "form documents" subject to redaction of names and other identifying details of third parties would involve only a minimal invasion of privacy while serving the public interest in openness and accountability. She then listed the documents. However she noted that even with redactions "it is still a close call as to whether the public interest in granting access to these records is sufficiently strong to outweigh the minimal privacy interest involved". The reviewer therefore concluded "on balance" that the release under s. 28(5)(a) of the listed documents was warranted but stressed that this view might not be accepted by the Commissioner. These documents did not include any records of correspondence between the child's mother, her solicitor's or the HSE and the hospital. While acknowledging that some of these records such as appointment letters might not include many personal details or sensitive information, it was of an inherently private nature and she concluded that the public interest in upholding the privacy rights of the third parties' concerned outweighed the public interest in granting access to any records at issue apart from the form documents identified, subject to redaction.

44. The reviewer also considered the application of s. 26 having regard to her view that the form documents identified were subject to release under section 28(5)(a). She considered that because the records were created by the staff of public bodies they were within the ambit of s. 26(2) and therefore s. 26(1) did not apply unless disclosure of the information concerned would constitute a breach of the duty of confidence owed to a third party. Although the mother claimed she was given an assurance of confidentiality, the reviewer concluded that no evidence of a relevant confidentiality agreement had been presented and that in any event it would be subject to the obligation to observe the requirements of procedural fairness. She did not accept that any equitable duty of confidence existed in relation to the records as defined by Fennelly J. in *Mahon v. Post Publications* [2007] IESC 15. The reviewer was

therefore not satisfied that the form records contained information that was communicated in circumstances imposing an obligation of confidence or that their release would amount to an unauthorised or wrongful use of information in the circumstances and that s. 26(1) did not apply.

The Information Commissioner's Decision

45. The respondent in a decision delivered on the 23rd January, 2014 was satisfied that all the records in issue were exempt under s. 28 (1) of the Act and that granting the applicant's request was not warranted under s. 28(5)(a) by virtue of any overriding public interest in the matter. This included the documents described as "form documents" in the preliminary view discussed above. The scope of the review is set out at para. 10 of the decision in which the nature of the documents sought are described (including two videos). The Commissioner was satisfied that the records in issue concerned "intensely private matters" and summarised the point at issue as follows:

> *"Does the public interest in granting the applicant's request outweigh the public interest in protecting the privacy rights of (the child) and the other individuals (apart from the appellant) to whom the information relates, including (the child's) mother, the applicant's former spouse?"*

He concluded that it did not.

46. The respondent engaged with the issue of malice at pages 7-9 of the rulings and the findings of Ms. Justice Clark on this topic. He noted that the judgment was not appealed to the Supreme Court and concluded that it was not open to him to reconsider the matter or form a different view on the question of malice. He added however that the former Commissioner (Ms. O'Reilly) had in his view mistakenly made a finding on the question of malice in the first instance. He preferred the view of an earlier Commissioner as described in N.S. ACF and the North Eastern Health Board (4 July 2001) case 99001 wherein it was argued that s. 28 should not protect information about allegations of abuse that in the view of the requester were not truthful, that it was neither necessary or practicable for the Information Commissioner to decide on the truth or accuracy of such information and that even if it were established that information provided to a public body was not truthful, the Information Commissioner might still be satisfied that the information was personal information about the requester's family within the meaning of the Act. He stated:

> "In this case, even if the allegations were made for what may be regarded as malicious purposes, the records at issue related to the deeply troubled family history of the applicant …, his estranged wife at the time, and (the child) who was then the four year old child at the centre of the marital breakdown. Moreover, whether true or not, descriptions of alleged sexual abuse given by a four year old child are disturbing and suggestive of serious dysfunction in the family. The records also include references to the medical and psychological histories of certain family members, as well as other information from which the psychological history of one individual may be inferred."

47. The court is satisfied the respondent is correct in this view. However, as the respondent also acknowledges, the context in which the allegations were made is relevant to the strong public interest in openness and accountability in relation to the manner in which public bodies carry out their functions in dealing with allegations of child sex abuse. There is a public interest in promoting procedural fairness where a public body engages with a member of the public in a context which may carry adverse consequences for that individual. In considering the balance of private and public interests he defined what he regarded as the limits of his remit in respect of that issue.

> *"I believe that the recognition of a public interest in promoting procedural fairness through FOI is more properly understood as an acknowledgment that the public interest in openness and accountability is entitled to significant weight when the constitutional rights of individuals may be affected by the actions of public bodies. It does not mean that it is for me as the Information Commissioner to determine the precise scope of what fair procedures would have required of a public body in a certain set of circumstances. As applied in this case, it means that there is a strong public interest in revealing information that would shed light on whether the HSE and the hospital carried out their functions in a manner that was consistent with the principles of natural and constitutional justice as well as the right to privacy. The public interest in openness and accountability also extends to the related public interest considerations identified by the applicant (e.g. the public interest in fair and equal treatment by public bodies and in promoting the rights of individuals under the European Convention on Human Rights) ….*
>
> Thus while I accept that there is a strong public interest in openness and accountability in relation to the manner in which public bodies carry out their functions in dealing with allegations of child sex abuse, this does not mean that it is within my remit as Information Commissioner to determine or to make value judgements as to whether the applicant should have been provided with further personal information in the course of the assessment process or the investigation, whether as a matter of fair procedures, "equality of arms" or simply good administrative practice. It does not permit me to review the question of whether the outcome of the investigation was correct or not. In other words, it is not open to me as Information Commissioner to determine that further personal information should be provided to the applicant now, in the public interest under s. 28(5)(a) of the FOI Act, as a means of remedying any actual or suspected wrongdoing by the HSE, the hospital or any third party individuals such as (the appellant's wife). The question of whether the applicant should have access to further information in order to pursue a remedy or some other form of redress is a matter for the courts which have been given exclusive power under the Constitution for the administration of justice. It would be in the context of relevant court proceedings, such as an action for judicial review or defamation, that the applicant's identity as the person against whom allegations of child sexual abuse were made and his personal reasons for seeking disclosure of sensitive personal information relating to others in addition to himself would be of relevance."

48. The respondent also addressed the submission that access should be granted as a means of deterring false allegations of child abuse. He stated:

> *"I do not believe that it was intended by the Oireachtas that the FOI Act should be used as a means of deterring false allegations of child abuse in the manner suggested by the applicant. Finding that all relevant information relating to an allegation of child abuse should be made available to an accused person or a certain class of accused person as a general rule under FOI notwithstanding the privacy rights of the alleged victim and any other third party individuals involved would require a change in policy to be adopted by the Oireachtas."*

49. The respondent relied on the fact that the applicant had previously been granted access to a large number of records relevant to his requests. He accepted that the vast majority consisted of his own correspondence with the public bodies. In addition he also accepted that the mother necessarily ceded her right to privacy on her own behalf and that of the child insofar as disclosure would have been necessary to the competent authorities for the purposes of procedural fairness at the time of the investigation. He

outlined the main records which had been released to the appellant at pages 15 to 16 of the ruling. He stated in respect of the released records:

> "I find that the released records have served the public interest in openness and accountability to some degree. They may not provide a level of detail that the applicant seeks, but they provide a good outline of how the HSE and the hospital dealt with the allegations made against him. In other words, they shed some light on the "working of government and administration" in relation to the investigation of allegations of child sexual abuse at the time. The applicant has suggested that the outcome of "unconfirmed" as opposed to "unfounded" was itself prejudicial to him. However, it seems to me that, having been made aware of the outcome he should have been in a position to challenge it through the appropriate channels without recourse to FOI if he believed that it was somehow erroneous. In any event I do not accept that the applicant's dissatisfaction with the investigative process and its outcome provides a basis for undermining the privacy rights of the third party individuals concerned under s. 28 of the FOI Act in relation to the remaining information at issue. I conclude that, on balance, the public interest in granting the applicant's request for access to the remaining records at issue is not sufficiently strong to outweigh the public interest in upholding the privacy rights of the third parties concerned."

50. The Commissioner also considered the investigator's preliminary view in respect of the "form documents" which he listed. He noted that the investigator took the view that because of the information which had already been made available to the appellant within and outside the FOI, release of these documents subject to redaction would involve only a minimal invasion of privacy while serving the public interest in openness and accountability. The Commissioner concluded that records created in a confidential medical context were entitled to strong protection under FOI even if their contents may appear innocuous. He stated at page 17:

> "In any event even assuming that release of the records would involve only a minimal invasion of privacy, I consider that the public interest to be served by the release of these records, given their contents, is also minimal in the circumstances. Over fourteen years have now passed since the records were created. In the time which has passed since the investigation into the child abuse allegations concluded, (the child) has been allowed "to get on with her life". I do not agree that any further invasion of her privacy or that of her mothers, through the release of their personal information under FOI is now warranted in the public interest."

Grounds of Appeal

51. The grounds of appeal said to arise as points of law are set out at paras. (i) to (xii) of para. 36 of the appellant's grounding affidavit. The courts jurisdiction in respect of s. 42 appeals has been considered in a number of cases. In *Deely v. the Information Commissioners* [2001] 3 I.R. 439 McKechnie J. set out the following principles:-

> (1) That the onus of proving that a decision by the respondent was erroneous in law rested on the appellant;
>
> (2) A person accessing information under the 1997 Act did so as of right, rather than by grace or favour of the public body in question. A requester must show that his request is made pursuant to a right of access founded on and contained within the Act;
>
> (3) No record or information which was exempt under s. 46 of the Act could be obtained;
>
> (4) The court cannot set aside findings of primary fact unless there is no evidence to support such findings;
>
> (5) The court ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
>
> (6) The court may reverse inferences of fact, if the same were based on the interpretation of documents and should do so if incorrect; and
>
> (7) If the conclusion reached shows that the respondent has taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision.

52. In *Sheedy v. Information Commissioner* [2005] 2 I.R. 272 Kearns J. (as he then was) delivering the judgment of the Supreme Court adopted the legal principles set out by McKechnie J. in Deely while emphasising the intention of the 1997 Act as then constituted that members of the public at large should not be deprived of access to information in the possession of public bodies save in exceptional circumstances such as those provided pursuant to the statute.

Ground (i)

53. The appellant submits that the respondent misdirected himself in the application of the public interest test under s.28(5)(a) by wrongly adopting a fixed or inflexible policy to refuse access to documents in requests concerning allegations of child abuse. I am completely satisfied that there is no basis for this submission, having regard to the careful analysis which was carried out by the respondent in reaching the decision and the extensive work carried out by the investigator as evidenced in the preliminary view. Both documents contain extensive consideration of the facts of this particular case which arose out of an allegation of child sexual abuse. The various issues and rights of the respective parties the subject of the relevant records were carefully assessed and balanced.

54. The scheme of the 1997 Act as amended provides for a right of access to documents concerning personal information. There is no doubt that the records in this case refer to personal information concerning the appellant, the child and the child's mother. It is clearly "joint personal information". The appellant does not have an absolute right of access to these records under the statute: the right conferred under ss. 6 and 7 is subject to the other provisions of the Act including Part III and in particular s. 6(7) excludes a right to access to exempt records.

55. In *The Governors and Guardians of the Hospital for the Relief of Poor Lying-in Women v. The Information Commissioner* [2013] 1 I.R. 1 (the Rotunda case) the Supreme Court considered the nature and extent of the right of access to personal records and the exemptions applicable thereto. Macken J. stated:

> "209. On the face of it, therefore, and in the clearest terms possible, there is simply no statutory 'right of access' to any records covered by Part III of the Act. It must nevertheless be recognised, as it is in the Act, that tensions may, or will arise, between the generous right of access to information, provided by s. 6(1), and the equally important rights also properly protected by law, by the exemption from disclosure in Part III, and in consequence of the express recognition, in

s. 6(7), that the right of access in s. 6(1) is not a right to an exempt record. The tension between these respective rights may have to be resolved. The manner in which it is resolved by the Oireachtas under the Act is through the mechanism of Part III. In Part III are recognised all the other rights, many of them private rights, and how these rights are to be dealt with, inter alia, in the event that a person makes a request for information, even though not having a 'right of access' under section 6(1).

…

211. In all the different circumstances set out in Part III, it would clearly be contrary to public policy that a person or body incorporated by statute, such as the respondent in the present appeal, might infringe those rights in response to the broad right of access provided for in s. 6(1), without having regard for the proper protection of a competing right, which could well arise, if the specific provisions found in Part III were not also included in the Act. It would be left to the respondent, and subsequently to the courts in such circumstances, to resolve these competing interests, a difficult task, and one not conducive to the ready implementation of the Act. …

212. The Oireachtas has, instead, by a perfectly appropriate legislative mechanism, determined that the right holder in the information shall have the primary protection in law in those cases covered by Part III. It is not therefore a question of providing, by ss. 26 or 28, or indeed by the analogous sections of Part III to which I have referred, any exception to the generous right of access provided for by s. 6(1), as has been argued in the course of this appeal, and indeed as is mentioned in some academic writings, and thereafter providing further exceptions to that exception. Such an approach to legislative drafting is considered to be among the most unsatisfactory and unsuitable means as a solution to the possible tensions which may arise. It requires the application of particular norms to the interpretation and application of the exception, and more complicated norms to the application of an exception to an exception. True exceptions are of course provided for in the Act. For example, an exception to the protection for personal information in s. 28(1) is provided by s. 28(2)(c). I do not, with respect, agree with the judgment of the High Court (McMahon J.) in Health Service Executive v. Information Commissioner [2008] IEHC 298, [2009] 1 I.R. 700, where he stated at p. 705 that:

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

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

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

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

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

56. In this case the appellant concedes that the information is personal information and that it affects the right to privacy amongst others of mother and child. The acute sensitivity of the information concerned is further acknowledged by his offer of an undertaking to protect the privacy rights of mother and child and to limit distribution or disclosure of the records if released. I am satisfied that the records were exempt from disclosure unless they came within the exception under section 28. It is the respondent's application of the provisions of s. 28 (5)(a) and 28(5B) that is the subject of a somewhat more focussed challenge in other grounds of this appeal.

Grounds (ii), (iii),(iv), (v), (vi), (vii), (viii), (ix), (x),(xi),(xii),(xiii),(xiv),(xv),(xvi)(xvii) and(xviii)

57. These grounds raise a number of issues in respect of the consideration by the respondent of the rights of the appellant, the child and her mother to privacy having regard to the "public interest" test under s. 28(5)(a) concerning exempted records. The appellant submits that the Commissioner failed in the course of his decision to have due regard to the joint character of the information and in particular that it concerned information which was relevant primarily to the appellant. It was emphasised that the requests were in relation to personal information concerning the appellant and the mother and child in the context of the false allegations of child abuse made against him. While accepting that the Commissioner initially recognised the joint character of the information, he complains that thereafter, the respondent considered the personal information almost exclusively from the perspective of the notice

parties to whom it also related. In that regard the appellant highlighted references in the decision to the information as "personal information about a third party individual" without acknowledging or taking into account that it was also information relevant to the appellant. He referred to the conclusion reached that there was no overriding public interest to warrant access to the records on the basis that it was essentially information relating to another party as opposed to the appellant's information which also includes information about another party. In relation to the "form" documents, it is claimed that the Commissioner treated the personal information as exclusively that of the notice parties referring to the "release of their personal information under the FOI". I am not satisfied that there is any substance in this submission. The reality of the case is that the records sought are exempt as personal information under s. 28(1). The appellant sought access to the records on the very numerous grounds which were considered in detail and at length in the preliminary view and the decision. It was inevitable that considerable emphasis was placed on the rights of the other two parties affected by the granting of access to the documents having regard to the case for access made by the appellant, the nature of the allegation made, the submissions made by the notice parties and the fact that the records constituted joint personal information under s.28(5B). It is clear that the Commissioner considered all submissions made and documentation furnished by the appellant in respect of the rights, whether public or private, which he raised.

58. The appellant submits that the Commissioner erred in giving undue weight to the right to privacy of mother and child though he accepted that the right was expressly recognised under section 28(5)(a). It provides that a request "may" be granted if "on balance" the public interest that it would serve, if granted, outweighed the public interest in upholding the right to privacy of the individuals concerned. It is simply incorrect to suggest that the Commissioner failed to recognise or have regard to any limitations on the right to privacy as protected under the Constitution and/or the European Convention on Human Rights. The right to privacy is a personal right guaranteed under Article 40 of the Constitution by which the State guarantees in its laws to respect and as far as practicable, by its laws to defend and vindicate that right. Article 8 of the European Convention on Human Rights was relied upon by the decision maker. The power vested in the Commissioner under s. 28 is the means by which the State provides for the protection to the parties' rights to access records and to privacy in accordance with its obligations under the Constitution and the Convention.

59. The Commissioner's consideration or weighing of the particular factors raised in the course of submissions made to him is a central feature of the challenge under these grounds. The particular matters relied upon in the submissions made to the Commissioner were set out at p. 11 of the decision. The Commissioner noted that the competing considerations were summarised by the appellant to the High Court in the previous decision as:

> "- the constitutional right to privacy
>
> - the public interest in confidentiality afforded a third party.
>
> Versus
>
> - the constitutional right to fair procedures for a person accused of serious wrongdoing
>
> - the constitutionally protected right to defend and vindicate one's good name
>
> - the public interest in defeating wrongdoing."

60. These issues were extensively elaborated upon in the submissions furnished to and considered by the Commissioner and exhibited in these proceedings. Of particular concern to the appellant was the potential deterrent effect that access to documents might have on others who might otherwise be tempted to make false allegations of child sexual abuse. He also submitted that access would promote good administration and the holding of correct information by a public body. It would also promote the principle of "equality of arms" thereby ensuring that all parties to potential civil proceedings would have equal access to whatever materials and resources were available. Access would ensure that he was not deprived of any potential cause of action of which he might otherwise remain ignorant: access to the records might yield information which would allow him to determine whether he had a cause of action, for example, under s. 5 of the Protection for Persons Reporting Child Abuse Act 1998. It would also contribute in a general way to a reduction in the risk of erroneous "validation" of child sexual abuse allegations in the future.

61. The appellant also submits that the designation of the alleged abuse as "unconfirmed" is a matter of particular concern. In his second affidavit he notes that in a submission dated the 31st October, 2013(referred to earlier), the hospital made reference to the extent to which he was already aware of the allegations of child sexual abuse made against him, and an assessment which concluded that the allegations were "unlikely" as well as a High Court judgment which deemed the concerns to be "unconfirmed". This suggested finding is, of course, of a much more favourable nature than "unconfirmed" and the appellant considers that the record ought to reflect this fact. He objects to the summary contained at p.9 of the Preliminary View that the submission is referred to as stating that the allegations were "unconfirmed" rather than "unlikely". However, the records released to the appellant and examined by the reviewer and the Commissioner state that the finding was that the allegations were "unconfirmed" not "unlikely". There appear to have been a number of errors in the hospital's submission to the respondent on this aspect of the case as deposed to at paragraphs 11 – 17 of Ms Campbell's affidavit. The appellant was informed on the 6th October 1999 that the outcome was that the allegations were "unconfirmed" and this was explained in more detail on the 28th October. The range of potential findings indicated in the letter were "confirmed", "unconfirmed" and "unfounded". A finding that an allegation was "unfounded" was a finding that "the concern raised was factually incorrect" and very few complaints resulted in such a finding. There was no specified category of finding of "unlikely". The court is satisfied that the actual decision made and disclosed to the appellant was addressed in the preliminary view and by the Commissioner. There is no suggestion that the decision in this case was conducted on a basis other than the conclusion that the allegations were "unconfirmed" nor is any such ground set out in the grounds of appeal. These matters were addressed by Ms Campbell's evidence that the review was conducted on the basis of the finding that the allegations were "unconfirmed".

62. The Commissioner accepted the appellant's argument that the public interest in openness and accountability was entitled to great weight in the circumstances of his case because of the rights involved, the seriousness of the functions being performed by the HSE and the hospital in investigating allegations of child sexual abuse against him and his contention that the allegations were false.

63. This submission was considered in great detail by the Commissioner. He did so within the parameters of s. 8(4) which precluded him from considering any reason advanced for making the request or any opinion held by the decision maker as to such reasons. It is clear that "private" as opposed to "public" interests are not a sufficient basis upon which to exercise the discretion in favour of the appellant under s. 28(5)(a). Thus the suggestion that access to the records might assist in some way in determining whether he had a cause of action against any of the parties or in advancing such a claim or might provide the basis for making a criminal complaint or mounting a judicial review against the HSE or the hospital do not qualify as matters of public interest in that respect.

64. In *K. v. the Information Commissioner and Health Service Executive* [2013] IEHC 373 O'Malley J. considered the refusal by the

Commissioner of access to a report written by a social worker in contemplation of childcare proceedings concerning the appellant's child. Access to the report was sought under s. 22(1)(b) of the 1997 Act which allowed a refusal of a request under s. 7 if the record concerned is one the disclosure of which would constitute contempt of court. The court concluded that the appeal was:

> "…not about the rights and wrongs of the childcare proceedings, or about the propriety of the taking of the copy report, as perceived by the appellant. There is, as a matter of law, authority for the course of action taken by the District Judge but that is not the issue here. Any legitimate grievances about the operation of the court system can only be litigated within the court system, through the normal channels of appeal or judicial review. The Freedom of Information Act is not, as O'Neill J. makes clear (in *E.H. v. Information Commissioner* [2001] 2 I.R. 463) intended to be used in a manner that
>
> bypasses the constitutionally established structures for the administration of justice.
>
> In this case, it is clear that the respondent was bound by s. 22(1)(b) to refuse disclosure if he considered that it would constitute contempt of court. The Information Commissioner has no authority to disregard either the statutory provisions relating to the in camera nature of the child care proceedings or the court order made in the case. It is no part of his powers to decide that the order was wrong, or that the appellant's right to a copy of the report under s. 27 of the Child Care Act should prevail over such an order. Neither the status of the appellant as a party to the District Court proceedings nor the purpose for which she wishes to use the report are relevant to his powers in this respect."

I am satisfied that the "public interest" in granting access is not to be determined on the basis of the appellant's personal circumstances or desire to explore or pursue civil proceedings or criminal complaints. The issue of public interest was also considered in the Rotunda case in which Fennelly J. stated at para. 164 that he did not accept that the appellant was entitled to the benefit of s. 26(3) of the 1997 Act to be granted access to a record under s. 7 when the reason for seeking access to the record was exclusively private. He held that the jurisdiction pursuant to the subsection was to decide whether the provision of access to a particular record was in the public interest.

65. The learned judge noted that the issue of a child seeking information about his or her family concerns intensely private matters which could give rise to a conflict with the profound wish for privacy on behalf of the other party. In that case the appellant was seeking information about his mother who in all probability had died many years previously. However, Fennelly J. was satisfied that the requester sought access to the record as a private individual for a private purpose: it was not an application made in the public interest. He considered that whether people should be granted access to such information concerning their origins was a matter of policy which could have been inserted in the legislation: this had not been done. He was satisfied that it was not open to the Commissioner to adopt a general policy in the public interest.

66. Macken J. in considering the provisions of s. 26(3) and the finding by the Commissioner that there was an overriding policy constituting a public interest that the requester had a right to information relating to his birth pursuant to which access could be granted to the birth records stated:

> "251. It seems not at all clear to me that there is anything in the Act which supports or suggests that there is, in law, an overriding public interest of the type invoked by the respondent. On the contrary, such an approach in considering only a so called public interest in a requester having information relating to the circumstances of birth, suggests an interpretation of the Act coming close to establishing a right of access to exempt information, which can only be denied by some exceptional circumstances. That is not a correct application of s. 26(3) … and ignores the provisions of s. 6(7) … The right generating the exemption under s. 26(1)(a) is a private interest right vesting primarily in the appellant, on the facts of this case, and the information sought must be refused, provided the appellant is in a position to meet the tests set out there. In such circumstances, any "public interest" would, in my view, require to be a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law. In the present case, the respondent made a statement of alleged policy as constituting the "public interest". There is no evidence that the Oireachtas has adopted such a policy. I am of the view that, at least on the materials mentioned, no established public interest has been properly identified."

The learned judge was not satisfied that the private right which vested in the appellant arising from the giving of information and its status in his hands and the private right of a person to have information concerning his birth mother, were those which fell into the category of public interest rights contemplated by s. 26(3). It was therefore necessary that a true "public interest" over and above the terms of the section, must be found to exist.

67. The court is satisfied that the "public interest" elements asserted by the appellant are in reality matters of "private interest". It is also satisfied that, as already noted, there are extensive legal remedies and procedures available in civil and criminal proceedings to ensure that legally admissible, discoverable or disclosable materials are made available to the parties and to the court in the course of civil and criminal proceedings. In my view, it would require a legislative change to permit the right of access to records as a matter of course to persons claiming to be falsely accused of child sexual abuse or any other crime.

68. The court is satisfied that the reviewer and the Commissioner (at pages 12 to 13 of the decision already quoted) carefully distinguished between the appellant's assertion of private rights and his claim, which was accepted, that there was a general public interest in openness and transparency in respect of information held by public bodies. The respondent acknowledged the strong public interest in openness and accountability in relation to the manner in which public bodies carried out their functions when dealing with allegations of child sexual abuse. However, he determined that the records that were released to the appellant were sufficient to serve the public interest in openness and accountability. They shed light on the working of government administration concerning the investigation of the abuse at the time. The court is satisfied that the respondent gave appropriate weight to the considerations of public interest relevant to his determination and in accordance with the legal principles applicable.

69. The respondent also considered the rights to privacy as asserted by the two notice parties, the mother and child. He took into account that the child was four years old when the allegations were originally made. At the time of the determination, the views of the child were taken into account concerning her right to privacy. She was then a young adult and a student and no longer had any familial contact with the appellant. She wished to move on with her life and the Commissioner took account of her submission and her mother's submission that a senior clinical psychologist had indicated that no further reference should be made to these events in her own best interest. The Commissioner concluded that since over fourteen years had passed since the records were created their release was not warranted nor was any further invasion of her or her mother's right to privacy. The court is satisfied that the appellant's private interests which constitute a significant element of his grounds for access to the records did not qualify as a "public interest" and that the important public interest concerning good governance was taken into account in the decision to release a significant body of material to him. It was open to the Commissioner to consider that this important public interest was outweighed by

the public interest in upholding the rights to privacy of mother and child for the reasons given.

70. The Commissioner also considered the appellant's submission that the granting of the requests should not be regarded as a release of information to the "world at large". The appellant submitted that he was one of the very few people who could properly apply for the release of this joint personal information under the Act and accepted that the personal information of the other individuals required protection. In that respect he was willing to make a declaration of his willingness to protect and uphold the privacy rights of the third parties concerned if his request were granted. The Commissioner noted that the appellant accepted that the Act did not make any provision for restricting the use of information released pursuant to a request. He concluded that there was little value in the offer made as his office would have no means of enforcing any such declaration, nor would any such declaration provide any "comfort" to mother and child.

71. The consequences of granting access under the Act were considered by O'Neill J. in *E.H. v. Information Commissioner* [2001] 2 I.R. 463 in which he stated (at p. 483):

> "I accept that neither a head of public body nor the Commissioner has any jurisdiction under the Act of 1997 to impose any conditions on the type or extent of disclosure or the use of the documents after disclosure and hence, in permitting disclosure, a head of public body and the Commissioner must assume that the disclosure of a record will be to the world at large. Indeed this is at the heart of the scheme of the Act of 1997 , which as was submitted … creates in the circumstances in which the Act operates, an untrammelled right to information, based on a philosophy of disclosure wholly different to that which is at the root of the discovery process in Court proceedings."

The court is satisfied that the Commissioner was correct in his conclusions in this regard.

72. It was also submitted on behalf of the appellant that the court, if it directed that access be granted, might impose such conditions on the dissemination or use of the material as it thought fit. However, the Court is not conducting a hearing de novo. The appeal is conducted on the grounds that errors of law were allegedly made by the Commissioner in applying the provisions of the legislation. The court does not consider it appropriate that it should assume an additional jurisdiction in a s.42 appeal which the Commissioner did not and could not have exercised under the statute.

73. The Commissioner did not consider that the issue of malice was relevant to his determination notwithstanding the findings of Clark J., on the issue. I am satisfied having considered the earlier judgment of the High Court that the issue of malice was argued and determined on the basis that evidence of malice was considered by the former Commissioner (Ms O'Reilly) and the manner in which she reached her conclusions on the matter gave rise to legal error. The learned judge found that a reasonable decision-making body could not find that there was no evidence of malice in the making of the allegations: the issue of relevance was not in issue. That decision was not appealed and indeed at all stages since the reviewer and the Commissioner have emphasised that the findings of the learned judge must be accepted which, of course, is correct.

74. The Commissioner's determination on malice in the decision under challenge is not the subject of a ground of appeal though limited argument was addressed to the court on the issue. This court is not satisfied that the issue of malice as raised, in particular against the child's mother, is to be regarded as central to or determinative of the issue of access to records. The motivation for or validity or truthfulness of any allegation is a matter to be pursued by other forms of remedy. The remedy for malicious prosecution or defamation lies in the civil courts. The remedy for any decision arising by reason of unfair procedures lies by way of judicial review. I am satisfied that the approach adopted by the Commissioner to this issue in this case was correct.

75. There is no doubt that the facts of this case are unusual and very difficult for the appellant and the child. It is a very long time since the records were sought in this case. The child is now a young adult. The delay in deciding whether the appellant is entitled to access is not and should not, in my view, determine the issue. The merits of the case lie for the most part in the contents of the records when viewed by the Commissioner in the context of the complex rights and duties of the parties. The passage of time was clearly and properly relevant to some aspects of the final decision such as the views of the child which had to be sought and considered. The appellant has sought and seeks more than it has been possible to allow by way of access to records. In some of his submissions he appears to acknowledge the difficulties occasioned for the child by what he seeks: the same difficulties are in my opinion reasonably reflected in the careful consideration given to the competing rights and interests by the Commissioner.

76. For all of the above reasons I am not satisfied to allow the appeal on any of the grounds advanced.