THE HIGH COURT

Record No. 2022/195MCA

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 24 OF THE FREEDOM OF INFORMATION ACT 2014 AND ORDER 130 AND ORDER 84C OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

MICHELLE DOHERTY

APELLANT

AND

INFORMATION COMMISSIONER

RESPONDENT

AND

AN GARDA SÍOCHÁNA

NOTICE PARTY

JUDGMENT of Ms. Justice Hyland of 28 June 2023

Introduction

1. This is a statutory appeal by the appellant whereby she seeks to challenge a decision of Mr. Rafferty acting on behalf of the Commissioner of 27 June 2022 (the "Decision"). By that Decision, the Commissioner affirmed the decision of An Garda Síochána ("AGS") to refuse, under s.37(1) of the Freedom of Information Act 2014 as amended (the "FOIA"),

the appellant's request for details of the Garda stations at which a named member of AGS has been stationed over the years.

Factual Background and request under FOIA

2. The application was initially made by the appellant on 2 November 2021. It was refused by decision of Paul Bassett of AGS on 4 November 2021. The grounds for the refusal did not include s.37(5) of the FOIA. The appellant appealed that decision by way of internal appeal by letter of 30 November 2021.
3. There was a conversation between the appellant and Mr. Bassett on the telephone about the appeal and he wrongly understood she was withdrawing her appeal. However, that misunderstanding was sorted out swiftly, the internal appeal went ahead, and a decision was given on 21 December 2021 whereby the appeal was refused. As part of her statutory appeal, she has challenged the actions of Mr. Bassett in treating her appeal as withdrawn but given that is not relevant to the decision the subject of the appeal i.e., that of the Commissioner, I will not further consider that as a ground of appeal. I should add that no prejudice accrued to the appellant due to the misunderstanding.
4. Following the refusal, an appeal was lodged with the Commissioner on 21 March 2022. In her letter of appeal, the appellant says that the records are important as they may have a bearing on an ongoing investigation and need to be disclosed.
5. This is an opportune place to summarise the facts underlying the appeal. In short, as set out in her submission of 13 April 2022 to the Commissioner, and in her legal submissions for this appeal, the appellant identifies that her father was convicted of a historic sexual assault in 2020 and sentenced to 4 years and 6 months. He was investigated by a member of AGS named Garda Kieran Shields. Garda Shields also investigated two further relatives of the appellant's father. There were four complainants in total. It is alleged by the appellant that Garda Shields had been identified as being personally known to one of the

complainants, although not the one who complained about the appellant's father. The appellant states that that complainant was from Naas and that she knew of many matters in relation to the appellant's father's investigation that she ought not to have been aware of. The appellant states that she believes that Garda Shields was stationed in the Co. Kildare area, likely Naas Garda Station at some point during his career.

6. She argues that Garda Shields failed to identify himself as being personally known to one of the complainants, failed to conduct the investigation in line with the code of ethics as published by AGS, failed to comply with the policing principles and failed to afford her father the entitlement to fair investigative procedures. She indicated in her legal submissions that the refusal to release Garda Shields' service history is preventing a formal application to be made for a judicial review into the investigation of the appellant's father.
7. By letter of 9 June 2022, an investigator with the Commission wrote to the appellant summarising the submissions of AGS, including in relation to s.37 of the FOIA. She noted that AGS was now invoking s.37 as a reason to refuse the records and summarised its submission on s.37. AGS had submitted that the information sought i.e., the Garda stations to which Garda Shields had been stationed during his career., was personal information as defined by the FOIA, namely information relating to his employment history. It was argued that the release of an individual Garda member's employment history would be contrary to his right to privacy and that while it was clear that the requester had a private interest in obtaining certain records, the requester had not demonstrated any public interest sufficient to outweigh the Garda member's right to privacy in respect of his employment history.
8. The investigator indicated that she intended to recommend that the Commissioner affirm the decision of AGS on the ground that s.37 applied.
9. By submission of 23 June 2022, the appellant submitted that the response was contradictory as the investigator had, on the one hand, pointed out that the reason that the

requester gives for the request shall be disregarded and motive could not be taken into account, but on the other, that motive could be taken into account insofar as it reflects what might be regarded as public interest factors in favour of release of the information.

10. I pause at this point to deal with the approach of the appellant in this regard, as a similar argument was made by her at the hearing. I do not consider the Commissioner's approach to be contradictory. The Act excludes personal motives from being taken into account, except in relation to the question of what the public interest requires. In the context of that question, the motives of an appellant, insofar as they demonstrate a public interest in the disclosure, are potentially relevant. It is for that reason the Commissioner sought to understand and obtain same. There is no error of law in the approach of the Commissioner in this respect.
11. Separately, the appellant identified that the information should be regarded as having a public interest factor and should be released where the Act requires a consideration of the public interest, because she believed Garda Shields was personally known to a complainant in relation to an allegation of historic sexual assault and that the investigation was therefore not carried out in line with the policing principles.

Decision of 27 June 2022

12. By decision of 27 June 2022 the Commissioner held that the records would properly be regarded as personnel records of the Garda and therefore AGS was not justified in refusing the request pursuant to Schedule 1, Part 1(n) of the FOIA. In relation to s.37, the Commissioner concluded that the disclosure of the information sought involved the disclosure of personal information and therefore s.37(1) applies.
13. Section 37(5) provides:

"(5) Where, as respects an FOI request 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 38, grant the request."

14. Reference was made to the finding in *Minister for Communications v Information Commissioner* [2020] IESC 57 ("*Enet*") that general principles of openness and transparency do not provide a sufficient basis for directing the release of otherwise exempt information in the public interest and that a sufficiently specific cogent and fact-based reason is required to tip the balance in favour of disclosure. Reference is also made to the decision of the Supreme Court in the *Rotunda Hospital v Information Commissioner* [2011] IESC 26 decision, and it is stated that a public interest should be distinguished from a private interest.

15. Critically for my decision, at paragraph 3 on page 6 it is stated as follows:

"In her submissions to this Office, the applicant explained why she was seeking access to the information in question. I am satisfied that the applicant has essentially expressed a private interest in release of the records. I can appreciate the importance the applicant may attach to accessing the information. However, the above judgments make clear that in considering where the balance of the public interest lies, I cannot take into account the applicant's private interest in seeking access to the records.

…

Privacy rights will therefore be set aside only where the public interest served by granting the request (and breaching those rights) is sufficiently strong to outweigh the public interest in protecting privacy.

…

In this case, I find no relevant public interest in granting access to the records that on balance outweighs the public interest in upholding the privacy rights of the individual whose personal information would be disclosed by releasing the records. In the circumstances I find that section 37(5)(a) does not apply."

16. In short, it appears to me that the decision of the Commissioner that the balancing act favours refusal is implicitly based on a finding that the appellant has expressed what is exclusively a private interest in relation to the release of the records, and same cannot be taken into account.

17. Therefore, the finding that there is no relevant public interest in granting access outweighing the public interest in upholding the privacy rights appears to be based exclusively on the fact that the only interest in granting access identified by the appellant is a private one. However, that is not stated in explicit terms in the Decision.

Pleadings

18. On 27 July 2022 the appellant issued a Notice of Motion. That notice did not identify the question of law to be raised, in contravention of the requirements of Order 84C(2)(3) of the Rules of the Superior Courts, which requires the Notice of Motion to state concisely the point of law on which the appeal is made. Nor did her affidavit grounding the motion sworn 27 July 2022 do anything more than identify the nature of her request. When it was identified to her that her appeal was deficient and the Commissioner asked her to set out her grounds, she swore a second affidavit on 26 October 2022.. In that affidavit she averred as follows:

"My motives for the above information request which, if granted, is in the interest of the public to establish whether An Garda Síochána and its members have provided a service that supports the proper and effective administration of justice, independently, impartially and in a manner that respects human rights.

The disclosure of where Garda Kieran Shields has been stationed is part of this information request."

Legal Submissions

19. The Commissioner in his submissions identifies the principles applicable to statutory appeals under the FOIA and identifies from the *Enet* decision the well-established principle that deference should be shown to a decision of the Commissioner in the exercise of discretion. Reference is also in this respect made to the decision in *FP v Information Commissioner* [2019] IECA 19:

> *"...considerable deference will be afforded to an expert decision-maker such as the Commissioner, that a wide margin of appreciation will be afforded to him, being the person who has, by the Act, been charged with the making of decisions in relation to requests under s.7 of the Act. It is not sufficient, even were it to be the case, that in the exercise of the same discretion the court hearing an appeal might itself have reached a different decision. There must be a clear error of law established."*

20. The decision that there was no relevant public interest in granting the request outweighing the interest in upholding the privacy rights is characterised at paragraph 20 of the written submissions as a finding of fact where the Commissioner exercised his discretion.
21. The Commissioner identifies the deficiencies in the appeal in that it does not set out the reliefs sought and does not identify any error of law. The Commissioner invokes the case

of *Baskaran v Financial Services and Pensions Ombudsman* [2019] IEHC 167 where there was an issue about the appellant raising new grounds of appeal not pleaded. In that case, Binchy J. found as follows:

> *"The first is a procedural issue. This issue was not raised on behalf of the appellant until the first day of the hearing of this appeal. Accordingly, it was not raised or pleaded in accordance with the RSC. This is in spite of the fact that the appellant was furnished with copies of the private investigator's reports early on in the course of the investigation process of the respondent, and raised no comment or objection. Since the appellant has not pleaded the point, the respondent did not have the opportunity to put forward any evidence of his own on the issue. For this reason alone, this argument should be rejected."*

22. It is argued that the failure to comply with Order 84C is fatal to the appellant's case, and that she is not entitled to seek to identify errors of law when none have been identified in the pleadings or written submissions.

23. The submissions of AGS argue that insofar as the appellant makes allegations in respect of the conduct of AGS, they must be disregarded as part of this appeal. I agree with that submission and will therefore give no further consideration to any such complaints as the appeal is only in relation to the Decision of the Commissioner and not to any acts of AGS in relation to the application for documents under the FOIA. Importantly, the submissions identify as one of the appellant's four arguments that it is in the interests of the public that justice is carried out correctly. AGS were therefore able to identify this complaint from the appellant's paperwork. In this respect, AGS relies upon the case of *Grange v Information Commissioner* [2022] IECA 153 where the Court held:

> *"It also follows that the High Court and this court should be slow to interfere and should only overturn inferences on the facts if they are such that no reasonable*

decision maker would have drawn them, while acknowledging that the High Court and this court on appeal are entitled to construe documents without any deference to a statutory decision maker and draw their own inferences accordingly"

It is argued by AGS that the appellant's evidence and submissions could not lead to a conclusion that no reasonable decision maker would have decided that her request was not in the public interest.

Admissibility of appeal

24. Before dealing with the substance of the complaint, I should rule on the argument made by the Commissioner that the appellant's appeal is inadmissible due to the failure to identify the point of law and the relevant material. There is always a balance to be struck in relation to litigants who are not professionally represented. The nature of the exercise was described in the decision of *Dowling v Irish Life & Permanent plc and Ors* [2012] IESC 32 as follows:

> *"In addition, while acknowledging that the lay applicants are not legally represented and that the courts generally will, in those circumstances, endeavour to ensure that unrepresented parties are not unfairly prejudiced, it nonetheless remains the case that parties cannot expect to benefit by being unrepresented to the extent of being permitted to conduct their proceedings in a way that would not be allowed to a represented party."*

25. In seeking to strike this balance I must seek to ensure fairness to both sets of parties. The critical question is whether the point of law was sufficiently formulated in advance so as to give both sets of respondents the opportunity to reply to it prior to the hearing. It would be quite unfair to allow an appellant to make a point that has never been agitated prior to the hearing.

26. I do not find that to be the case here. The appellant's second affidavit clearly set out that public interest required disclosure, and by implication that the wrong balance had been struck by the Commissioner. The submissions made by the appellant to the Commissioner in the course of the appeal process had also identified that point, both those made on 13 April 2022 where the appellant identified the public interest to a right to a fair trial as protected by Article 38.1 of the Constitution, and in her submissions of 23 June 2022 where she identifies the public interest aspect to her request.
27. In those circumstances I do not think I should refuse to entertain her appeal on the basis that the point of law was not specified. In relation to the reliefs sought, it is true that the appellant did not specify the reliefs sought. However, by implication, I am satisfied that she was seeking to quash the Decision of the Commissioner upholding the refusal by AGS to release the documents she sought.
28. Separately, AGS has identified that the appellant is out of time by two days in bringing her appeal. She has explained that delay, albeit orally rather than on affidavit. Nonetheless, given the very minor delay in bringing proceedings, I am willing to extend time pursuant to Order 84C of the RSC.
29. In those circumstances I will proceed to determine the appeal.

Discussion and Decision

30. The appellant has not challenged the Decision on the basis of a failure to give reasons. Nonetheless she has sought to challenge the Decision on the basis that the Commissioner erred in the way in which the public interest balancing exercise under s.37(5) was carried out. I fully acknowledge that any such decision by the Commissioner is one to which I should afford a very significant degree of deference given the expertise of the Commissioner in this area. That approach has been confirmed in many decisions of the Superior Courts.

31. However, it remains the case that I have a review function in respect of any alleged error on a point of law. Unless I understand the basis upon which a decision has been made, I cannot exercise that function. Here, no reasons are given as to why the Commissioner has decided that the interest was private. No identification of the distinction between private and public has been provided. There is a publicly available Guidance Note from the Office of the Information Commissioner on Section 37, although I was not provided with a copy of it, and no reference was made to it at the hearing. That Guidance Note indicates that a further guidance note dealing with the public interest test under s.37(5) will be available in due course (see paragraph 6.2.1). I have not been able to locate a copy of same and it may not yet be available. Nonetheless, the Guidance Note on Section 37 makes reference to the public interest test under s.37(5) and the balancing exercise and there is some limited discussion of the distinction between private and public interests, by reference to case law including the decision of McDermott J. in *FP v Information Commissioner* [2016] IEHC 771 and the decision of the Supreme Court in the *Rotunda* case. No case law was invoked by the Commissioner in the Decision to assist in understanding why the interests in this case were treated as private.

32. The conclusion in the Decision is that there is no relevant public interest in granting access sufficient to outweigh the interest in privacy. There is no explanation of why this is so. It may be that this is because the interests are considered exclusively private. If that is so, one would expect the Commissioner to address why the public interest invoked by the appellant i.e., the administration of justice by AGS in accordance with its code of ethics and its policing principles, and the obligation on AGS under Article 38.1 of the Constitution to ensure a fair trial, are not matters of public interest and/or are not sufficiently engaged by the request having regard to the nature of the documents sought.

33. The distinction between private interests and public interests is a difficult one in certain contexts. The concepts are treated implicitly in the Decision as if they are mutually exclusive but that is not necessarily so. Certain requests under the FOIA might raise both private and public interests. Moreover, there is no engagement at all with the nature of the documents here. The appellant bears the burden of proof in any statutory appeal; nonetheless, the decision in *Enet* demonstrates the importance of an engagement with the documents and no such engagement is evident here. Nor is there an engagement with the nature of the privacy interests affected by any disclosure, having regard to the documents sought.

34. Counsel for the Commissioner reminded me of my decision in *Jackson Way v Information Commissioner* [2020] IEHC 73 where I identified that decisions of the Commissioner should not be treated as if they were a statute. I remain of that view. However, here it is not possible to understand why the request was treated as private, why the appellant's arguments were rejected and whether it was considered that there was any public interest in releasing those particular documents, albeit an interest outweighed by the privacy considerations. To place an obligation on the Commissioner to explain those matters does not appear to me to place an over onerous obligation on him, nor to expect a level of precision from his decisions that is disproportionate or excessive.

35. Because of the approach of the Commissioner, I am not in a position to exercise the power of review granted to me by the FOIA on a point of law since the nature of the Decision does not allow me to understand the reasons for the conclusion. Therefore, although the appellant has not identified a point of law in respect of inadequate reasoning, I am nonetheless forced to engage with the lack of reasons as I cannot conclude the Decision represented a correct exercise by the Commissioner of his undoubted discretion under

s.37(5) unless I understand the reasons for the conclusions in the Decision in relation to the balancing test under s.37(5).

36. In those circumstances, I have decided to quash the Decision on the basis of the Commissioner's failure to give reasons for the conclusion reached in respect of s.37(5) and remit the appeal to the Commissioner for further consideration in accordance with law.