THE COURT OF APPEAL

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Costello J.
Haughton J.
Power J.

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT, 2014
AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 24
OF THE SAID ACT

BETWEEN

MICHAEL GRANGE

APPELLANT

AND

INFORMATION COMMISSIONER

RESPONDENT

AND

MINISTER FOR FOREIGN AFFAIRS AND TRADE

NOTICE PARTY

JUDGMENT of Mr. Justice Robert Haughton delivered on the 4th day of July 2022

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Introduction

1. This appeal arises out of the judgment of O'Regan J. delivered on 7 March 2018 in which she found that a Freedom of Information ("FOI") request made by Mr. Grange ("the appellant") to the Notice Party "seeking all records concerning the grant scheme for Short and Long Term Irish Election Observers including records of its establishment, rules and regulations and precedent cases including refusals of payment", was vexatious pursuant to s.15 of the Freedom of Information Act 2014 ("the 2014 Act"), thus upholding the decision of the Information Commissioner ("the respondent"). The Notice Party is an "FOI body" to which the 2014 Act applies.

2. There are two grounds pursued in this appeal. The first is a fair procedures point. It was argued by the appellant that the respondent should have given the appellant a copy of the Minister's submissions, rather than a précis, which it is said is partial and inaccurate, for the purposes of submitting a reply. The second ground concerns the definition of 'vexatious' and the application of the three arms of s.15(1)(g) of the 2014 Act.

The statutory framework

3. The 2014 Act, which repealed and replaced the Freedom of Information Act, 1997 (as amended) in its long title states:

> "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, other bodies in receipt of funding from the State and certain other 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, to provide for the independent review both of decisions of such bodies relating to that right and of the operation of

this Act generally (including the proceedings of such bodies pursuant to this Act) and, for those purposes, to provide for the continuance of the office of Information Commissioner and to define its functions, to provide for the publication by such bodies of certain information about them relevant to the purposes of this Act, to repeal the Freedom of Information Act 1997 and the Freedom of Information (Amendment) Act 2003, to amend the Central Bank Act 1942, to amend the Official Secrets Act 1963, to repeal certain other enactments, and to provide for related matters."

4. The provisions of the 2014 Act most relevant to this appeal are as follows:

s.11(1) and (3) **:**

"(1) Subject to this Act, every person has a right to and shall, on request therefor, be offered access to any record held by an FOI body and the right so conferred is referred to in this Act as the right of access."

"(3) An FOI body, in performing any function under this Act, shall have regard to –

(a) the need to achieve greater openness in the activities of FOI bodies and to promote adherence by them to the principle of transparency in government and public affairs,

(b) the need to strengthen the accountability and improve the quality of decision-making of FOI bodies, and

(c) the need to inform scrutiny, discussion, comment and review by the public of the activities of FOI bodies and facilitate more effective participation by the public in consultations relating to the role, responsibilities and performance of FOI bodies."

s.13(4) :

"(4) Subject to this Act, in deciding whether to grant or refuse to grant an FOI request—

(a) any reason that the requester gives for the request, and

(b) any belief or opinion of the head as to what are the reasons of the requester for the request,

shall be disregarded."

s.15(1)(g), which is critical to this appeal, provides :

"(1) A head to whom an FOI request is made may refuse to grant the request where –

(g) the request is, in the opinion of the head, frivolous or vexatious or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert."

s.22 allows for a party aggrieved by a refusal of a FOI request to seek a review by the Commissioner, who may, under s.22(2) affirm, vary or annul the decision of the head to whom the FOI request was made. The following subsections are relevant:

"(8) In relation to a proposed review under this section, the head, and the relevant person concerned and any other person who is notified under *subsection (6)* of the review may make submissions (as the Commissioner may determine, in writing or orally or in such other form as may be determined) to the Commissioner in relation to any matter relevant to the review and the Commissioner shall take any such submissions into account for the purposes of the review.

(9) (a) The Commissioner may refuse to accept an application under *subsection (2)* or may discontinue a review under this section if he or she is or becomes of the opinion that –

(i) the application aforesaid or the application to which the review relates ("the application") is frivolous or vexatious,

…

(vi) the application forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the Commissioner, appear to have made the requests acting in concert, or

…

(b) in determing whether to refuse to accept an application under *subsection (2)* or to discontinue a review under this section, the Commissioner shall, subject to this Act, act in accordance with his or her own discretion."

"(12) In a review under this section –

(a)…

(b) a decision to refuse to grant an FOI request shall be presumed to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified.

s.24 :

"(1) A party to an application under section 22 or any other person affected by the decision of the Commissioner following a review under that section may appeal to the High Court—

(a) on a point of law from the decision, or

(b) where the party or person concerned contends that the release of a record concerned would contravene a requirement imposed by European Union law, on a finding of fact set out or inherent in the decision."

Section 45(6) provides –

"Subject to this Act the procedure for conducting a review under s. 22 or an investigation under section 44 shall be such as the Commissioner considers appropriate in all the circumstances of the case and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Commissioner."

Background

5. By Notice of Motion dated 29 November 2016, the appellant sought the following reliefs in the High Court:-

"(a) An Order pursuant to section 24 of the FOI Act 2014 discharging the decision of the Respondent dated the 4th November 2016,

(b) A Declaration that the Respondent erred in law in concluding that in the Appellant's request was frivolous and vexatious for the purposes of section 15 of the FOI Act 2014,

(c) A declaration that the Respondent failed to accord the Appellant fair procedures in the conduct of its investigation,

(d) A declaration that the Respondent breached the natural and constitutional rights of the Appellant,

(e) A declaration that the Respondent took into account irrelevant matters and/or failed to take into account relevant matters in arriving at its decision,

(f) An Order directing the Respondent to remove the impugned decision from its website

(g) An Order, if appropriate, remitting the matter for further consideration by the respondent in accordance with law and in accordance with such Orders as this Honourable Court may deem fit,

(h) An Order providing for the costs of these proceedings,

(i) Such further or other Orders as this Honourable Court shall deem appropriate".

6. The respondent issued a Statement of Opposition dated 22 March 2017 stating that the appellant is not entitled to an order under s.24 of the Act discharging the decision of the respondent. Similarly, the respondent stated that reliefs (b) to (f) are "improperly constituted, and/or cannot be maintained, and/or should be struck out, including because s.24 does not provide 'that the Court may grant relief consequential upon or in addition to determining the appeal'".

7. The background is helpfully explained in the affidavit of the appellant sworn 29 November 2016. The appellant who works in the Civil Service, has a history of election observing both abroad and domestically. He was appointed to the election roster by the Department of the Minister for Foreign Affairs and Trade ("the Notice Party/Department") in/or around 2007/2008. For the next six years or so, the appellant observed elections both abroad and domestically. In early 2013, the Notice Party indicated that they wished to replace the roster by establishing a new roster that would encompass a selection process which "would be fair and would involve interviews and that late applications would not be admitted" (para. 8). A process was put in place and the appellant applied, but his application was refused. He took issue with the procedure stating "no interviews were conducted and that appointments to the new roster were made solely on this basis of a written application. I say that this caused me concern since if I had known that interviews were not envisaged I would have made my written application in a different form". (para. 8)

8. On 30 May 2016, the appellant made "a wide ranging FOI request to the Notice Party for all records concerning (1) the grant scheme, including records of its establishment, rules and regulations, (2) precedent cases including refusals of payment, (3) full details of payment of this grant to Core Team Mission consultants and (4) whether any steps have been made

to recover such grants paid". The appellant's stated motivation was the concern that a €600 departmental grant provided once in 12 months for Short and Long Term Irish Election Observers was now also being paid to "Core Team Mission Consultants" – for which he saw no justification as these consultants were "earning excellent fees and [I] believe this is contrary to the public interest."

9. An acknowledgement was sent on the 13 June 2016 with a formal response on the 27 June 2016 ("First Instance decision") authorised by Francis McKenna, the Notice Party's FOI Officer. The Notice Party rejected the request under s.15(1)(g) stating that:-

> "Officials of the Department have already engaged in correspondence with you on this issue. As I understand it in this scenario a grant payment was made to the Irish nominee who was officially nominated on a mission as an Irish observer. Subsequently, the nominee was also selected by the EU as a Core Team Member. This Department took the view that the person was entitled to the grant as they had commenced making preparations to go on the mission.
>
> Having carefully considered this request, the response has already issued to you on the matter and previous requests where access to records related to the election monitoring roster I am refusing this request under s. 15(1)(g) of the Freedom of Information Act 2014."

Mr. Kiernan then cited s. 15(1)(g), and it is apparent that the refusal was on the basis that the request was regarded as "frivolous or vexatious or forms part of a pattern of manifestly unreasonable requests". Mr. Kiernan then stated: -

> "Since 2013 colleagues in the Civil Society and Development Education Unit of Irish Aid have strived to provide you with access to classes of records on various themes around the Election Observer Roster under Freedom of Information legislation, the decisions on which have been upheld by a number of OIC and Ombudsman

> endorsements. In addition, I understand they have also responded to Parliamentary questions, ministerial representations and other requests for information putting a significant administrative burden on what is a very small section. Irish Aid has also moved to greater transparency on the operation of the election roster by significantly increasing the level of available information on the Irish Aid Website in line with a commitment given to the Office of the Information Commissioner. In that light, I hope the greater proactive publication of information on the Irish Aid website and the considerable number of records and information you have already received has addressed all gaps in your quest for information regarding the election monitoring roster."

Mr. Kiernan then notified the appellant of his right to appeal.

10. On 28 June 2016 the appellant acknowledged the First Instance Decision and asked the Notice Party to particularise which of the three heads of refusal contained in section 15(1)(g) the refusal was under. The appellant contends that he didn't receive a reply to this query but notes that the Notice Party had drafted an email dated 1 July 2016, which was never sent but was later furnished in hard copy, stating "as there is a degree of overlap, all three 'arms' of s.15 (1) apply". On its face, this email appears to have been sent by the Notice Party's FOI Officer to the appellant on 1 July 2016 at 16:51.

11. The appellant applied for an internal review of the first instance decision on 3 July 2016, stating "I do not understand the thinking of the decision maker that he had sought but not received particularisation of which 'arms' of s. 15(1(g) applied, and asserting that there was 'nothing frivolous, vexatious or unreasonable about this request'.

12. The internal review was decided on 26 July 2016 ("the Internal Review decision"). It affirmed the first instance decision to refuse the application under s.15(1)(g). The reviewer, Mr. O'Caollaí, a more senior member of the staff of the Department states that the decision

to affirm was arrived at "after the fullest consideration of all of the facts and history", and after a full consideration of "the extensive communication which has taken place since 2013 on the matter of the election roster between the Department and yourself". Mr. O'Caollai refers :-

> " A significant body of records has been released to you by way of FOI requests, data protection requests, reviews, internal and external appeals, and other information submitted together with ongoing communication with the Civil Society and Development Section of Irish Aid which deals with the Election Roster. The Department in considering your original request and in this appeal has also taken account of the external appeals and decisions on matters related to the Election Roster from organisations such as the OIC. The Department has also carefully considered your FOI request in the context of the guidance document which was issued by the Office of the Information Commissioner in August 2015 on Section 15 of the Act which is available on the Commissioner's website.
>
> It is felt that staff in Civil Society and Development Education Unit of Irish Aid had already adequately addressed the particular issue of a grant payment made to an Irish nominee who was officially nominated on a mission as an Irish observer. This payment is made to roster members and as previously advised to you in writing, you are not a member of the election roster."

The letter also states:-

> "Further, I consider it appropriate to consider this request in the context of your other dealings and previous FOI requests made to the Department on the matter of the election roster. In an effort to reduce that burden and in line with a commitment given to the Office of the Information Commissioner, Irish Aid has moved to greater

> transparency on the operation of the election roster by significantly increasing the level of available information on the Irish Aid Website.
>
> Given the history of dealing with the Department in this particular matter and the level of information that has already been released, I am of the view following the careful examination of your request in the context of all previous requests around the Election Observer Roster, that in this case your use of the FOI process is both frivolous and vexatious".

The letter also informed the appellant of his right to appeal to the Information Commissioner.

13. The appellant then sought to appeal the Internal review decision to the respondent on the same day and acceptance of the appeal was acknowledged by the respondent on 3 August 2016. Following an extension request, the appellant was given until 25 August 2016 to lodge a submission with the appointed investigator.

14. A detailed submission dated 19 August 2016 was lodged by the appellant. Given the apparent absence of Irish case law, the appellant relied on a number of Scottish and UK cases including the leading case of *Dransfield v Information Commissioner* [2016] 3 ALL ER 221. The appellant relied on a passage at para.68 of the judgment of Lady Justice Arden in the Court of Appeal in relation to the interpretation and application of the term "vexatious", in which she declined to give a comprehensive definition of the term but considered that the emphasis should be on an objective standard and opined that improper motivation would not render vexatious a request for information that ought to be publicly available. I will refer to this authority further later in this judgment.

The appellant also relied on the OIC Guidance Note, detailing the following which he regarded as useful :-

"(a) FOI bodies should not assume that the facts [*sic*] that requests cause them administrative inconvenience is a sufficient reason to refuse requests on grounds that they are frivolous or vexatious, par. 2.2.3.

(b) That the Commissioner cannot take into account 'what use may be made of the information when released.' Even is [sic] it disadvantages them, case 99151 cited.

(c) That many public bodies find requests as annoying in one way or another."

15. The appellant also referred in his submission to the three FOI requests that he had submitted to the Department in the course of 2016. The first related to the appellant's own request for draft and background papers related to parliamentary questions raised on the new election rosters since 2013, which was withdrawn by the appellant when informed by Mr. Kiernan on 11 March 2016 that the department no longer retained drafts. The second request was for "copies of all records concerning applicants for the Election Roster 2013 that applied late or were allowed to apply electronically, including details (of any…) that they subsequently participated in as well as representations made on their behalf".

16. The department invoked s. 14(1) of the 2014 Act to extend time to examine the records, and ultimately no records were released, although the appellant's submission indicates that a record was released to the Sunday Times who printed an article suggesting that one applicant to be an election monitor who missed a deadline to apply did have her application considered.

The third request in 2016 was the one the subject matter of these proceedings.

17. The appellant also recorded that he made three FOI requests in 2015, and that in addition a journalist from RTE Investigations Unit submitted a request. The appellant then set out how the department dealt with these requests.

18. The appellant then set out the background to the instant request, and the reason why it should have been acceded to. He said he was an experienced election observer and that in August 2015 he was selected as an unpaid volunteer election observer to help oversee an election in Sri Lanka, along with another unpaid volunteer who received a small grant (which the appellant was also seeking), and a third person who was "on a lucrative contract with the EU" who was paid the grant that was declined to the appellant. He argued that he had a legitimate expectation to information that will give "important insights as to eligibility". He submitted that "the motive of an FOI requestor is irrelevant … In other words, FOI should be applicant blind". He outlined the objective in submitting his request –

> "The objective was to establish whether any other individuals in addition to Ms. Boland, were paid a grant by the Department that they ought not to have benefitted from. It is hardly necessary to highlight the public interest in ensure [sic] proper accountability for taxpayer's money and the professional operation of grant schemes."

He then referred to the limited information provided by Ms. Kiernan in the First Instance Decision in relation to the grant payment made to the Irish nominee officially nominated on admission as an Irish observer who was subsequently selected by the EU as a Core Team member, and the department's view that that person was entitled to the grant as she had commenced making preparations to go on the mission. The appellant submitted that this raised further questions which needed to be answered, and that the First Instance Decision did not explain why s. 15(1)(g) was invoked. The appellant stated that because his subsequent request for particulars of which "arm" of s. 15(1)(g) was relied upon, he submitted his appeal/review request. His submission then critiques the review decision, suggesting that it affirmed the first instance decision because the Department found the request "annoying". He submitted that the request raises unanswered questions as to the

administration of the Grant Aid Scheme that are not answered by reference to the website to which he was referred. The appellant noted that the reviewer had dropped any claim that the request was burdensome and made no claim that there was an improper motive behind the request. He submits that the high threshold for "vexatiousness" is not met by the Notice Party's reliance on the facts that considerable material had been provided to the appellant, and that the departmental unit concerned had also responded to parliamentary questions, representations to the Department and other requests for information (putting a significant administrative burden on a "very small section", the Notice Party's greater proactivity in publishing information, and the appellant's history of availing of appeals processes.

19. The Notice Party lodged its submission on the 16 September 2016. On the same day, the appellant produced a letter from Professor T.G. Duffy of the Irish United Nations Association. The letter states the following :-

> "[The appellant] is a highly qualified and very experienced barrister possesses [sic] one of the great skill-sets of relevance to the task of election observation – the lawyer's ability to apply legal knowledge and skills of analysis to the field. Indeed in the future I would like to see him applying these skills at a more senior level in such election observation missions i.e. as the mission legal or election expert. [The appellant] has made great personal sacrifices to develop his career in election observation by working on his languages, accepting a number of challenging volunteer contracts, and diligently developing his training profile for such international missions."

20. On 11 October 2016, the respondent's investigator wrote to the appellant stating:-

> "I have considered the submissions received from you and the Department in this case and I intend to recommend to the Commissioner/Senior Investigator that he

issue a decision affirming the Department's decision to refuse your case on the ground that it was frivolous or vexatious.

Having taken all the arguments you made into account, it seems to me that your submission of FOI requests, Data Protection requests, PQs and applications to be nominated on missions, sent on training courses, and paid related grants, etc form part of a pattern of conduct which amounts to an abuse of the right of access".

21. In an email dated 14 October 2016 the appellant took issue with the policy of the respondent not to furnish copies of submissions, and again requested that he be furnished with the Department's submission.

22. In an important email of 14 October 2016, the respondent's investigating officer Ms. Murdiff commences with the following:-

"As discussed previously, it is not the practice of this Office to exchange submissions between the parties. However, in the circumstances of this case, I can outline the submission made by the Department to support its decision to refuse your request as frivolous and vexatious."

Ms. Murdiff then outlines the Department's submissions as follows:-

"**Department's Submission**

I asked the Department to explain why a request had been refused, and, in line with the OIC's Guidance Note on S. 15(1)(g) asked it to provide details of the background of the case and any other relevant information. In response the Department provided details of the set up of the current roster in 2013; the fact that you had been unsuccessful in your application to become a member of the roster at that time and that you had previously been a member. It contended that you had raised a number of queries following the selection process, which led to an appeal process being put into place.

It stated that of the 361 FOI requests received by the Department in 2014 – 26 August 2016, only six had been appealed to this Office, five of which were made by you (the remaining appeal was subsequently withdrawn). The Department informed this Office that you made a complaint to the Ombudsman relating to these matters, as well as requests for additional information made by you to the Minister and Minister of State's Office relating to the roster. It stated that you have submitted six applications to be nominated as an election observer since being unsuccessful in your application to become a member of the roster in 2013, on official application forms which are only circulated to roster members. It further stated that you had made FOI requests for statements of reasons as to why you were not nominated as an observer in relation to a number of those applications. It also stated that you had applied to attend a Training Course for new roster members in 2013.

The Department also provided a copy of its correspondence with you relating to your query on the payment of the grant to election observers, including your request to be paid the grant concerned. Furthermore, the Department provided a copy of an email from you to Julian Claire in Irish Aid, dated 12 June 2016, in which you stated as follows 'Now in terms of the two matters namely the non-payment to me of the small grant payable to all other Irish observers and my ongoing exclusion from nominations by DFAT for election observation opportunities it is my intention to pursue a resolution of both matters by using various fora and ultimate if necessary by litigation'.

In essence, the Department stated that it considered that your FOI requests, including the one currently under review, were made in the context of a long-running and unsuccessful pursuit of your grievance concerning your unsuccessful application for membership of the roster. It contended that there was evidence of a clear and repeated

pattern of conduct, which included Data Protection requests, PQs, Ombudsman complaints, requests for information and FOI requests. It also contended that the submission of your current requests following meetings and discussions with the Department relating to the payment of the grant demonstrated an unwillingness to co-operate on your behalf.

Ms. Murdiff in her email then made a reference to the appellant's submission and stated:-

"In essence, you argued that if a request was valid on its face, it could not be vexatious. You also argued that you have a genuine reason for seeking the information in question and while FOI requests were frequently driven by particular or vested interest, that did not make them vexatious per se. Furthermore, you argued that an FOI body should consider all relevant circumstances in order to reach a balanced conclusion in a case."

…

Having taken the background of this case into account, as well as the comprehensive submissions from both sides, I am of the opinion that you have demonstrated a clear private interest in the matters at hand. In my view, a reasonable person, would consider that your use of FOI was aimed at an objective unrelated to the right of access to records, i.e. it is being used tactically for the purpose of pursuing the dispute. In the circumstances, it is my view that a pattern of conduct exists which suggests an abuse of the FOI process."

Ms. Murdiff then indicated her intention to recommend to the Commissioner/Senior investigator that a decision be issued in that regard, and the appellant's further comment was requested by close of business on 28 October 2016.

23. By further email dated 21 October 2016 Ms. Murdiff restated to the appellant that it was the respondent's policy not to exchange submissions between the parties generally, and she stated–

"As provided in section 45(6) of the FOI Act, the procedure for conducting a review under section 22 shall be such as the Commissioner considers appropriate in all the circumstances of the case."

24. Ms. Murdiff then stated that the material issues in the Department's submissions had been outlined and that any additional submission before 4 November 2016 would be taken into account by the Senior Investigator/Commissioner. The email concluded by stating "In relation to case law I had regard to the cases referred to in this Office's Guidance Note on s.15(1)(g), including *Kelly v Information Commissioner* [2014] IEHC 479."

25. In his replying email of 25 October 2016, the appellant refers to s.45(6) and states that:-

"This section provides the Commissioner with reasonable discretion as to the procedure which may be adopted or followed. As with all legislation it must be interpreted in accordance with the Constitution. This requires that fair procedures are central to an investigation. While providing submissions are not required in all cases it is respectively submitted they are when serious allegations are made reflecting on a citizen's good name and reputation, indeed it becomes an imperative.

In the instant case, the Department has introduced new material for the first time accusing me of wrong doing. I submit that in order to fully rebut this I must be afforded a copy of the submission in order to be afforded a fair opportunity to argue against the preliminary decision that I have been in effect vexatious in my dealings with the department. My understanding is that the OIC, without any known exception, affirms the preliminary decision even when it is procedurally unfair."

26. By email dated 27 October 2016, the respondent once again reminded the appellant that he had been put on notice of all the material issues arising in the Department's submission in line with 'fair procedures'. It may be observed that at that point the appellant

was fully on notice that he would not be furnished with the Department's submission, and that if he wished to respond further to the content of Ms. Murdiff's précis he should do so by 4 November 2016.

27. The decision of the respondent dated 4 November 2016 ("the Impugned Decision") was made on behalf of the respondent by Senior Investigator, Mr. Stephen Rafferty, and affirmed the decision of the Notice Party. Under "Analysis and Findings" he finds that "by virtue of s.13(4) of the FOI Act, [you can] take into account the motive of a requester when considering whether a request is frivolous or vexatious." Citing O'Malley J. in *Kelly v Information Commissioner*, the respondent relies on the following passage from the judgment:-

> "[t]here is no obligation on the Commissioner to prove the applicant's state of mind, and inferences may be drawn on a common sense basis from a pattern of conduct".

The decision finds that:

> "According to the Department, the appellant has made 11 FOI requests to it since 2013 relating to the roster, including the request under review. Essentially, the Department is of the view that the requests submitted by the appellant, including the one currently under review, form part of a long-running and unsuccessful pursuit of his grievance concerning his unsuccessful application to be part of the roster in 2013. It argued that there is evidence of a clear and repeated pattern of conduct and communications relating to the roster, which has passed the stage of reasonableness and which the Department now considers to be vexatious. It stated that the pattern of conduct included the following:
>
> - Applying to attend a Training Course for the members of the new roster in 2013, despite not being a member

- Making six requests to be nominated on missions in 2014-2015, despite not being on the official roster
- Applying for statement of reasons under s.10 of the FOI Act when the Department informed him that he was not eligible to be nominated to the missions as he was not on the official roster
- Submitting 11 FOI requests since 2013 relating to the roster, including requests for records containing personal information of third parties, such as individual application forms
- Making applications for internal review of the Department's decisions and applications for review to this Office where the Commissioner upheld the Department's decisions in most cases
- Making a complaint to the Ombudsman
- Making requests to the Minister of State to meet to discuss various issues relating to the roster
- Submitting Parliamentary Questions (PQs) relating to the roster. The Department stated that 20 were submitted, many of which it believes were raised on the applicant's behalf, and in some cases mirror his FOI requests
- Making data protection requests to the Department relating to the roster
- Enquiring whether the Department would fund participation on a post-graduate election observation course
- Travelling to Sri Lanka and acting as an unofficial election observer in 2015 and then seeking to be paid the grant at issue
- Appealing the decision not to pay him the grant

- Raising issues with the Department in relation to the payment of the grant to a specified election observer when it wasn't paid to him and meeting with Department officials to discuss this issue
- Making an FOI request for access to records relating to the payment and administration of the grant

…

The Department contended that there is a discernible pattern to the applicant's conduct. It considered that the repetition involved in his FOI requests, PQs and applications to be sent on missions as if he were a member of the roster, as well as his requests for details relating to roster members has, 'by any reasonable measure', reached the point of being considered vexatious. Essentially, the Department has contended that the applicant has engaged in a pattern of conduct which constitutes an abuse of process.

…

Conclusion

I am satisfied that it is entirely appropriate to have regard to the broader issue of the manner in which a requester has engaged with the public body to date on a particular matter.

While the FOI Act demands that FOI bodies meet very high standards in dealing with FOI requests, this Office takes the view that the Act assumes reasonable behaviour on the part of the requesters. It seems to me that since he was unsuccessful in his application for appointment to the election observation roster in 2013, the appellant has pursued all available avenues to challenge this decision, including through making FOI requests. In fact, I note from an email he sent to the Department on 12 June 2016, a copy of which was provided to this Office for the purposes of this

review, that he stated that it was his intention to 'pursue a resolution' of the non-payment of the grant and his ongoing exclusion from nominations for election observation opportunities by the Department 'by using various 'fora' and 'ultimately if necessary by litigation'.

…

Decision

Having carried out a review under s.22(2) of the Freedom of Information Act 2014, I hereby affirm the decision of the Department"

28. A replying affidavit was sworn by Mr. Stephen Rafferty (Senior Investigator at the Office of the Information Commissioner) on 23 March 2017. Mr. Rafferty also gave the decision on 4 November 2016. At para. 34, Mr. Rafferty states in response to the appellant's claims that he was suitably qualified for the role:- " I am advised and believe that the appellant's consistent efforts to stress his suitability for the role of election observer, first to this Office and now to this Honourable Court, in fact undermine his own insistence that the present FOI request was entirely unconnected with his grievance in not being selected". At para 36. Mr Rafferty states:- " the appellant was afforded multiple opportunities to make additional submissions with respect to particular points".

29. Ms. Kiernan (Freedom of Information Manager) swore a replying affidavit on behalf of the Notice Party on 9 May 2017. She accepts and supports the decision of the respondent and states that it was "at all material times acting as independent in the performance of its duties and functions". At para 4. she states "… it seems the Appellant is seeking in the within application to widen the scope of the application beyond an appeal on a point of law, which should solely relate to a point of law in respect of the determination of a ruling of vexatious behaviour".

30. What is helpfully exhibited by Ms. Kiernan is an Information Note for Applicants on 'Selection of Members for Ireland's Roster of Election Observers'. The note states:-

> "…To provide an opportunity for new members to join the roster and to consistently strengthen the quality of Ireland's election observation, the election observation roster is now being reviewed. The new roster will provide an opportunity for individuals with the right mix of skills and experience to participate on the roster. In particular, Irish Aid wishes to maintain a strong language competency on the roster.
>
> … the new roster will replace the current election observation roster and will prevail for five years, after which point it will be reviewed. Members of the current roster who have expressed an interest in remaining on the roster are encouraged to apply. However, there is no guarantee that they will be selected for the new roster."

Under 'Remuneration' the note states:-

> "Those selected to serve on election observation missions receive a daily allowance to cover the cost of food, accommodation, and all other out-of-pocked expenses. A return air ticket from Dublin Airport and insurance cover is also provided.
>
> In addition, those who participate in missions will receive a grant of €600 to cover all pre-departure expenses including visit to doctor for medical certificate, inoculations, travel to Dublin for any briefing/debriefing, travel to/from Dublin Airport etc. this grant is paid once in any twelve-month period.".

31. Ms. Kiernan addresses the remuneration issue in para. 5 where she states that the argument that the appellant did not receive remuneration as a Short Term Observer whereas Long Term Observers do, is factually incorrect and misleading. "Following his application for admission on the election roster in 2013, the appellant was again made aware of the pre-departure grant and additional payments provided for short term observers, having received an information note which was sent to all those who applied for the 2013 election roster…

This information note clearly set out that those serving on the election observation missions were to receive a daily allowance, air travel to and from Dublin airport and insurance cover as well as the €600 pre-departure grant referred to above".

32. At para.11, Ms Kiernan states "the appellant failed to note that he was in receipt of the information note which clearly set out details relating to the grant scheme for Irish election observers below. The appellant on application to join the roster was provided with that information note which set out the details and entitlement of the €600 pre-departure grant. Nor did the appellant disclose to this Honourable Court that he had received the grant himself and therefore was fully cognisant of that information, which he purports to seek".

33. With regard to the 'vexatious' argument Ms Kiernan states:-

> "13. On page 82 of the Appellant's exhibits ref MG1, to his grounding affidavit, the appellant confirms that FOI requests were submitted in connection with his application. The appellant continues by asserting there is therefore no basis in his requests to support the respondent's essential conclusion that 'the Applicant's request to the Department was directly related to his ongoing grievance relating to his exclusion from the roster'. The appellant seeks to distract from the pattern and chain of events that ultimately led to his request being refused on the grounds of being vexatious. I say while the appellant is entitled to argue that he did not seek records directly in relation to his grievance, the Notice Party supports the decision made by the Respondent herein in respect of all matters that were considered by it including the said submissions and those made by the Appellant.
>
> 14. At paragraph 39 the Appellant refers to the fact that he made the subject access requests under the Data Protection Act and that for 'the Respondent to draw adverse conclusions in respect of me for exercising this right is ultra vires the statutory power of the Respondent, irrational and unreasonable'. The appellant appears to seek

> remedy by way of public law and of judicial review and seeks to deal with such a matter in isolation from all relevant matters in respect of the pattern of conduct that led to the respondent invoking s.15(1)(g) of the Act.
>
> …
>
> 16. Insofar as the Notice Party can comment on the submission of previous FOI requests and the legal analysis of the appellant in relation to s.15(1)(g), it is respectfully contended that the Respondent was correct to find the Appellant's request as vexatious".

34. An additional affidavit was sworn by Mr. Rafferty on 12 May 2017 in response to the correspondence between the appellant and respondent solicitors' on disclosure. This is not at issue in the case.

35. A final supplemental affidavit by the appellant was sworn on 22 May 2017. The affidavit examines the issue of disclosure, complaints to the Ombudsman, Non-submission to Respondent. This affidavit is not relevant to the appeal.

High Court Judgment

36. The judgment of the High Court was delivered on 7 March 2018 by O'Regan J.

37. The trial judge first examined the issue of additional submissions, the appellant having been afforded an opportunity by Ms. Murdiff on 14 October, 2016 to comment on the content of the Department's Submission to the respondent of which she had put him on notice./. The Trial Judge noted that the appellant was "aware of the deadline for his submissions being the 4 November 2016, was effectively advised by Ms. Murdiff that he would not be receiving third party submissions and indeed in a subsequent email of the 27 October 2016 indicated that in the absence of a positive response from the respondent he fully reserved his position". (para.11)

38. The High Court's analysis in support of this finding is outlined in the preceding para.10 as follows:- "In the body of the decision it is recorded that the respondents' policy document provided that, in general, submissions will not be exchanged, and that the appellant had previously been informed of this on a number of occasions. This statement in the decision is not challenged".

39. The trial judge examined the issue as to whether the FOI request of the 28 May 2016 should be considered on a stand-alone basis, as the appellant contended, or in conjunction with previous dealings since 2013 as the respondent argued.

40. In affidavit evidence, the respondent had argued that it was entitled by virtue of the opening words in s.13(4) of the FOI Act, "Subject to this Act", to take into account the motive of a requester when considering whether a request was frivolous or vexatious under s.15(1)(g).

41. The trial judge also relied on the decision in *Kelly v Information Commissioner* [2014] IEHC 479, where at para. 100, O'Malley J. stated

: "… in the first instance, [the trial judge] was entitled to take into account the context in which the applications were made – the long-running and unsuccessful pursuit of the appellant's grievances dating from 2002. She then set out, carefully and with specificity, why she had come to the conclusion that the appellant was using the FOI process to further prosecute his grievances and that this constituted an abuse of the FOI process".

42. The trial judge having had regard to the judgment in *Kelly,* stated at para. 19 that:-

"In the circumstances, therefore, and in particular given the fact that:-

(a) The appellant did not counter the jurisprudence aforesaid save to tender his view of the implications of s.13(4) and s.15(1)(g)

(b) The appellant does not feel constrained to attribute any particular meaning to the phrase 'Subject to this Act' save that it need not be considered in otherwise applying s.13(4) to s.15(1)(g) to the effect that s.15(1)(g) is motive blind

I am satisfied that the respondent did not err at law in taking into account matters in addition the request of 28 May 2016 in arriving at the respondent's decision and for the purposes of this judgment in *Kelly* to the effect that if the instant appellant was using the FOI process to further prosecute his grievances this constituted an abuse of the FOI process".

43. The Trial judge found that an abuse of the FOI process to prosecute a personal grievance can be vexatious as outlined in the judgment of *Nowak v DPC* [2012] IEHC 449 (Birmingham J.) quoted in *Fox v McDonald* [2017] IECA 189 (Irvine J.). The word frivolous is "deployed to describe proceedings which the court feels compelled to terminate because their continued existence cannot be justified having regard to the relevant circumstances". (para.20).

44. The trial judge then examined the extent of review under s.24. Citing the authority of Noonan J. in *McKillen v Information Commissioner* [2016] IEHC 27, she states that –

"…where a court is considering only a point of law, it cannot set aside findings of primary fact unless there is no evidence to support such findings and it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw. However if the decision making body took an erroneous view of the law or if the decision flies in the face of fundamental reason and common sense, then the decision might be set aside". (para. 22)

Having regard to the third paragraph of the impugned decision, the trial judge was satisfied "that the inference…could not possibly be set aside as representing a decision that no reasonable decision maker could have come to". (para. 25)

45. The appellant's argument for an entitlement to have the Department's submissions furnished to him was rejected by the trial judge and her reasoning is laid out at para. 28.

> "Taking into account:-
>
> (a) The fact that submissions cannot be classified as evidence.
>
> (b) The adjudicative process as a whole (see the judgment of Haughton J., in *Martin v Data Protection Commissioner* [2016] IEHC 479 at para 75 *et seq* where he distinguishes various different statutory adjudicative processes)
>
> (c) The discretion afforded to the commissioner in or about the procedures to be adopted under s.45(6) of the 2014 Act
>
> (d) The decision of Quirke J. aforesaid.
>
> (e) The respondent's policy document and prior advice on the point afforded to the appellant.
>
> I am satisfied that the non-furnishing of the third party submissions, prior to the decision on the 4 November 2016, did not in fact breach any constitutional right of the appellant or breach fair procedures."

46. At para 32. the trial judge found in favour of the respondent "to have regard to the context in which the request of the 28/5/2016 was raised including the PQs and other inquiries and no prejudice occurs to the appellant or indeed error arises by the respondent attributing an involvement between the appellant and certain PQs".

47. The trial judge found that no irrelevant matters were taken into account as they were for the purposes of establishing context.

48. The Trial Judge concluded her judgment (para.43) by stating that she was "satisfied that in accordance with s.24 of the 2014 Act, the appellant has not demonstrated an error at law sufficient to vitiate the decision of the 4 November 2016 and in the circumstances, the relief claimed in the notice of motion of the 19 November 2016 is refused".

Statutory appeal on a point of law – the standard of review

49. Before addressing the issues in this appeal, it is appropriate to briefly address the standard of review to be applied by a court in a statutory appeal on a point of law. There was no dispute between the parties that this was as set out by McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439, at p.452, in a passage approved by Fennelly J. in *Sheedy v Information Commissioner & Ors* [2005] 2 I.R. 272

> "… There is no doubt but that when a Court is considering only a point of law, … it is, in accordance with established principles, confined as to its remit, in the manner following: -
>
> - It cannot set aside findings of primary fact unless there is no evidence to support such findings;
> - it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
> - it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally
> - if the conclusion reached by such bodies shows that they had taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision…"

Kearns J., who delivered the majority judgment in *Sheedy*, also quoted this passage from *Deely*, and added at p. 294: -

> "This is a helpful resumé with which one would not disagree, but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact."

50. At para.22 of her judgment the trial judge appropriately refered to the discussion of this standard by Noonan J. in *McKillen v Information Commissioners* [2016] IEHC 27, and quotes from his judgment at para. 56: -

> "It seems to me therefore that at this juncture, it is beyond argument that the standard to be met by an appellant in a s.42 appeal is virtually indistinguishable from that applied by the Court in judicial review matters. Accordingly, a decision of the respondent will not be interfered with unless it is either based on no evidence or flies in the face of fundamental reason and common sense. It is thus immaterial if the Court would have arrived at a different decision based on the same evidence. Inferences will not be set aside unless they are such that no reasonable decision maker could have drawn them."

51. In *Fitzgibbon v Law Society of Ireland* [2015] 1 I.R. 516 at p. 559, , Clarke J., having cited McKechnie J. in *Deely*, went on to say: -

> "In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. Thus, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decision maker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to

an appeal against error. In the latter case the Court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)".

52. It is also clear that even if the respondent made a mistake of law that will not necessarily and of itself result in the decision being set aside. In *Westwood v Information Commissioner* [2015] 1 IR 489, Cross J. held at para. 74 –

> "It is contended by the respondent and I accept that a mistake or error of law in the decision will not itself result in that decision being quashed. It is only whether the mistakes are or are not material that such a decision can be made…"

53. It is also beyond dispute that a further appeal on a point of law to this court requires the application of the same standard, which is no less (and no more) deferential to the decision taken by the respondent than is the High Court. See *Utmost Paneurope DAC v Financial Services and Pension Ombudsman* [2022] IECA 77 (Binchy J. at paras 91-92), which is also further authority that an appellate court can interfere where at issue is the construction of, and inferences to be drawn from, documents considered by the decision-maker.

54. It follows from this jurisprudence that the respondent enjoys a significant discretion, particularly when it comes to the application of the law to the facts of a case. This includes the application by the respondent of the concept of vexatiousness to the FOI request at issue on this appeal as this is not only a legal assessment but also involves a qualitative assessment in the area of freedom of information, the area of the respondent's expertise. 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.

Appeal – the issues

55. Although there are 11 grounds of appeal, the appellant in essence raises two issues.

56. The first issue, raised in Ground 2, is that the appellant was not accorded fair procedures by the respondent in circumstances where he was not provided with the Notice Party's written submission and given an opportunity to comment on same.

57. Within this ground the appellant also pleads that the respondent proceeded to make a decision (dated 4 November 2016, but not published until 7 November 2016) when the appellant had understood, and had been led to understand, that the time for making submissions was still open to him. This was not pursued at hearing and, in my view, rightly so because it was not mentioned in the Notice of Motion, nor, as the trial judge notes, was it agitated in the appellant's grounding affidavit, or his replying affidavit. It is not therefore an issue that was properly before the High Court, or, by extension, before this court. In any event it was fully addressed by the trial judge at paras. 6-13, and the appellant has not identified any error with her findings or her conclusions that the appellant was aware of the deadline for reply submissions, that any expectation of an extension was not realistic, and that the timeline of the dating of the decision 4 November 2016 and its publication on 7 November 2016 gave rise to no breach of fair procedure.

58. The second issue is the substantive one of whether the respondent/trial judge erred in law in concluding that the appellant's freedom of information request was "frivolous and vexatious" for the purposes of s. 15(1)(g) of the Act of 2014. This is raised in Ground 1, and grounds 3 – 7 and 9-10 set out arguments in support of the appellant's main contention which, insofar as they were pursued before this court, will be referred to later in this judgment. The appellant's main contentions are that in relying on s.15(1)(g) the respondent was precluded by s.13(4) of the Act of 2014 from taking into account the motive for the FOI

request or intended use of the information and was precluded from drawing inferences from previous FOI requests or other communications with the Department.

59. Ground 8 alleges that the notice party had not given any adequate reasons for its decision, but this ground was not pursued. Ground 11 related to the awarding of costs to the notice party against the appellant.

First issue – fair procedures

60. Before addressing this, I observe that there is at least an argument that the complaint of fair procedures should more properly have been pursued by way of judicial review, on the basis that the complaint does not arise from a "point of law" decided by the respondent, but rather arises from an alleged want of fairness arising during the administrative decision making process. This argument arises from a reading of s.24(1) which provides for an appeal *"on a point of law <u>from the decision</u>"* (emphasis added). However, this argument does not appear to have been advanced in the High Court and is certainly not considered in the judgment; nor was it canvassed before this court. In those circumstances this question is a matter that should not be addressed on this appeal, and I have proceeded on the assumption that the High Court and this court has jurisdiction to decide the fair procedures issue. This approach is arguably consistent with observations of McKechnie J. in *Attorney General v. Davis* [2018] IESC 27 where he summarised the court's jurisdiction in an appeal on a point of law:

> "53. A statutory right of appeal on a point of law will, if its wording does not otherwise prescribe, include the following:
>
> - Errors of law as generally understood, to include those mentioned in Fitzgibbon;

- Errors such as would give rise to judicial review including illegality, irrationality, defective or no reasoning, *procedural errors of some significance*, etc.;
- Errors in the exercise of discretion which are plainly wrong, notwithstanding the latitude inherent in such exercise; and
- Errors of fact next referred to."

[Emphasis added]

It will be for the High Court in a future case to consider whether it is appropriate to raise and determine a 'want of fair procedures' point in a statutory appeal under s.24.

61. Counsel argued that the appellant had sought the Department's lengthy written submission, in response to queries raised by the respondent, on a number of occasions and that the appellant was entitled to have sight of it in order to respond. It was submitted that the précis provided by Ms. Murdiff in her email of the 14 October 2016 was partial and inaccurate in a number of respects –

(1) that it made no reference to the Department's erroneous view that the information sought had been fully addressed by Mr. Julian Clare and that the request *"was the straw that broke the camel's back"* as it *"showed an unwillingness to cooperate with the department"*, which was incorrect both as a matter of fact and as a matter of law;

(2) that the parliamentary questions mirrored the appellant's freedom of information request;

(3) that the FOI request alone or taken in combination with other requests imposed an undue burden on the Department;

(4) that he was an *"unofficial observer"* in Sri Lanka.

It was submitted that the appellant could have *"corrected"* these errors if he had received the Department's submission and been able to respond.

62. In making this case Counsel relied on various passages from *Administrative Law in Ireland* (Morgan, Hogan & Daly, Fifth Edition [2019] Round Hall, Thomson Reuters). From para. 15 – 16 the authors expand on the requirement that a person affected must have notice, and at 15 – 19 the authors state –

> "What if a deciding agency is motivated by a number of reasons about only some of which the applicant has been appraised or given an opportunity to be heard? This situation materialised in *International Fishing Vessels v Minister for Marine (No. 2)* [1991] 2 I.R. 92 where the respondent had set forth, in a letter, a number of grounds for refusing to grant the applicant's request for a renewal of his sea-fishing licence. But there were other grounds of which the applicant had not been notified. McCarthy J. held:
>
> > 'I am satisfied that if the Minister intends to take into consideration a variety of different factors in making his decision, he must notify the person or bodies seeking the renewal of a sea-fishing licence of each of the matters; if he fails to notify the applicant of a matter which, on its own causes him to make his decision, then this decision must be quashed. If, however, there are valid reasons for his decision based upon matters of which he has notified the applicants and given them ample opportunity to make representations, the fact that there are other reasons of which he had not given them notice, does not, in my view, invalidate his decisions.'"

63. In furthering the argument counsel referred to my judgment in *Martin v Data Protection Commissioner* [2016] IEHC 479, in which I quoted with approval the following

passage from the judgment of Hogan J. in *Lyons & Murray v Financial Services Ombudsman and anor* [2011] IEHC 454:

> "38….Once, however, the Ombudsman proceeds to adjudication, a legal Rubicon is thereby crossed, not least having regard to the potential legal consequences of such an adjudicatory decision identified by Charleton J. in *O'Hara [v ACC Bank plc [2011] IEHC 367]*. As agent of the State, the Ombudsman is thereby bound to uphold the constitutional right to fair procedures: see generally, *Dellway Investments Ltd. v National Asset Management Agency* [2011] IESC 14."

64. Counsel relied centrally on the decision of the Supreme Court (Finnegan J. *nem diss*) in *J & E Davy trading as Davy v Financial Services Ombudsman & Anor* [2010] 2 ILRM 305. In that case the Financial Services Ombudsman ('FSO') had ruled that J&E Davy should buy back from Enfield Credit Union, the Notice Party, three bank bonds at their original cost of €500,000. J & E Davy had been furnished with the complaint to the FSO, but not with the appendices attached to same, or other documents that J & E Davy had requested from the Credit Union, but production of which had been declined. Finnegan J. stated:

> "99. The requirement to afford fair procedures arises under Art. 40.3 of the Constitution. A basic requirement of fair procedures is to be made aware of the complaint which is being made and to have an opportunity to present a defence. This requirement, in the present case, is recognised by the Act[1]. In s. 57BX(8) which requires the Ombudsman to provide the financial service provider with a copy of the complaint. <u>The seriousness of the matter being considered and of the consequences of the came are relevant as the requirements of natural justice may vary with the particular facts and circumstances of the case</u>. There can be no doubting the

[1] Section 57BX(8) of the Central Bank Act, 1942 (as inserted by section 16 of the Central Bank and Financial Services Authority of Ireland Act, 2004).

seriousness for Davy of the complaint in terms of its reputation and the seriousness of the consequences having regard to the nature of the order made requiring Davy to purchase the bonds from the Credit Union.

In the present case having regard to the serious nature of the complaint and the serious consequences likely to flow from the same and having regard to the express statutory provision I am satisfied that Davy ought to have been furnished not just with the letter of complaint but with the appendices attached to same. However diligently a complaint is summarised there is a real danger that some nuances may not be apparent from the summary or that the turn of the complaint will be lost and that in consequence any reply may be inadequate. I am not satisfied that to furnish the letter of complaint but not the appendices meets the requirements of the Act or of fairness." [Emphasis added]

Finnegan J. considered that somewhat different considerations applied to the request by J&E Davy for documents. He stated –

"… The discovery process of the courts is not to be imported into these procedures. However access to documents may be necessary in the interest of fairness to enable a party to establish or answer a complaint. It is within the Ombudsman's power to require a complainant to produce documents. He should consider a request for documents in the light of the information before him and determine whether the documents were necessary to enable a financial service provider to deal with a complaint. In the present case the request was couched in very wide terms: none, some or indeed all of the documents may be necessary if Davy is not to be unfairly disadvantaged. The Ombudsman must consider the request in this light and where fairness so demands he should direct that documents be furnished. He is not, however, required to mimic court procedures. Finally the submission of the Credit

> Union on the report of the Deputy Ombudsman should have been furnished to Davy. Included with the submission were witness statements which were the basis of the Ombudsman's assessment of the expertise of the members of the Credit Union's investment committee and board. Also included was a further expert report. It is necessary that any factual matters which are before a decision maker and which form part of the material upon which he will base his decision should be made available to the parties to the procedure. I would dismiss the Ombudsman appeal on this ground."

65. In submissions counsel also referred to *Dellway v NAMA* [2011] 4 IR 1 to support the proposition that the constitutional right to participate is entirely set at nought when a party is given an inaccurate and misleading (as was alleged) précis of the other party's submission to the decision maker. Counsel submitted that this constituted an error in law and was a clear breach of the appellant's right to natural and constitutional justice, his right to fair procedures and his right to be heard.

66. Counsel then sought to distinguish the decision of Quirke J. in *National Maternity Hospital v Information Commissioner* [2007] 3 I.R. 643 which was quoted and followed by the trial judge. That case concerned a non-statutory enquiry set up in April 2000 to review *inter alia* post-mortem examination policy practice and procedure in the State in relation to organ removal/retention. The hospital sent in a written submission, access to which was requested by the notice party, Parents for Justice Limited. The request was refused, but on review was granted by the Commissioner. The hospital brought an appeal under s. 42(1) of the Freedom of Information Act, 1997, on a point of law. It was contended that the Commissioner failed to provide the hospital with fair procedures because she considered and relied upon submissions made to her by the inquiry, and by the Department of Health and

Children, without first giving the hospital the opportunity to see, consider and comment upon those submissions. Quirke J. referred to s. 37(6) of the Act of 1997 which provided that: -

> "(6) Subject to the provisions of this Act, the procedure for conducting a review under section 34 or an investigation under section 36 shall be such as the Commissioner considers appropriate in all the circumstances of the case and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Commissioner."

While not identical, s. 45(6) of the Act of 2014 is in substantially the same terms. Quirke J. stated –

> "[120] … The review required by the revisions of s. 34 of the Act of 1997 was intended to be inquisitorial rather than adversarial in nature. The procedures to be adopted by the Commissioner in respect of such reviews are entirely within her discretion provided they do not offend recognised principles of natural and constitutional justice. The procedures which she adopted in the review under appeal permitted all of the parties with an interest in the review to make full and detailed written submissions on every relevant aspect which affected their respective interests. Each of the parties who participated in the review was provided with full and equal access to the Commissioner and to her officials.
>
> [121] I know of no principle of natural or constitutional law or justice which confers upon parties who make submissions to a decision making body the right to respond to the submissions made by every other party who participates in the process. The review undertaken by the Commissioner was a statutory process which expressly envisaged and permitted the adoption of informal procedures."[2]

[2] Para. 121 was quoted by the trial judge at par. 27 of her judgment.

67. Counsel submitted that the judgment of Quirke J. was distinguishable, and that the review there concerned a non-statutory enquiry rather than an adjudication process. Counsel argued that in any event it was not binding on this court. He then referred to *Kelly v Information Commissioner* [2017] IESC 64 in which McKechnie J. characterised the process before the Commissioner as "adjudicative", saying –

> "61. In an earlier part of this judgment I had set out, in the most general terms, the structure of the 1997 Act relative to the underlying issues. Rights have been conferred and their exercise is structurally facilitated; this includes an adjudicative process at both internal and external levels. Apart from accessing the judicial route, the final decision at administrative level is made by the Commissioner, whose independent office was established by the 1997 Act. Many different circumstantial situations may arise, all of which have to be accommodated within her decision-making powers."

Counsel therefore submitted that the respondent was involved in an adjudicative process and submitted that the *National Maternity Hospital* case was wrongly decided. Counsel found some support for his submissions in *Administrative Law in Ireland* op. cit. at para. 15 – 22 where the authors suggest that while there may be no need for exchange of submissions that contain argument, the same does not apply to facts contained within the submission and in those circumstances the submission should be exchanged. The authors refer to the *J&E Davy* decision where Finnegan J. noted:

> "[97]. The trial judge distinguished submissions in the form of argument and which there is no need to exchange and new material in respect of which the other party does not have a chance to make submissions."

68. The court invited the parties to make supplemental written submissions to address the implications of the Supreme Court's decision in *Minister for Communications, Energy and*

Natural Resources v The Information Commissioner [2020] IESC 57, in which Baker J. briefly addressed s.13(4) of the Act of 2014, under which the FOI body is to disregard the reason the requestor gives for the request. Counsel for the appellant used the opportunity to contend that the High Court's decision in *National Maternity Hospital* should be overruled insofar as it is a precedent against the argument for disclosure of the Department's submission to the respondent. Counsel argued that the principle of *stare decisis* had prevented the appellant from arguing in the High Court that *National Maternity Hospital* should be overruled.

Respondent/Notice Party Submissions on first issue

69. Counsel for the respondent noted that the reasons why the *National Maternity Hospital* decision is alleged to be incorrect were not raised in any of the appellant's written Submissions and argued that under the principles established in *Re Worldport* [2005] IEHC 189 (endorsed by the Supreme Court in *Kadri v Governor of Wheatfield Prison* [2012] 2 ILRM 392, para. 2.1 – 2.2), that it could not now be challenged. Counsel submitted that while the appellant could have argued in the High Court that the decision in *NMH* was not based on a review of significant relevant authority or that there was a clear error of judgment, he had not done so. Consequently, the decision in *NMH* was still extant and should not be overturned on this appeal, particularly in circumstances in which the appellant's written submissions did not deal at all with the observations of Quirke J. relied on by the trial judge. Counsel argued that the reliance by the appellant on the decision in *Shatter v Data Protection Commissioner* [2017] IEHC 670 was misconceived because at para. 43 Meenan J. held in that case that as a result of not being given a copy of an email Mr. Shatter "… was deprived of an opportunity to make any observations or submissions concerning this central piece of evidence in the complaint". Counsel argued that the Department's submission could not be

styled as "evidence", and the appellant had been informed of the material points of the Department's submission and afforded multiple opportunities to respond.

70. The respondent submitted that *Dellway* was also a case where no right to make any submissions was afforded. It was contended that a right to see an FOI bodies' submission does not arise in the FOI context for a number of reasons: firstly, the duty to exchange submissions would be inconsistent with the flexibility afforded to the respondent under s. 45(6) of the Act which allows the Commissioner to adopt the procedure that is considered "appropriate in all the circumstances" and "as informal as is consistent with the due performance of the Commissioner". Secondly, the respondent relied on the observations of Quirke J. in *NMH,* already quoted and correctly relied on by the trial judge. Thirdly, it was submitted that (at para. 120) –

> "A right to the exchange of the text of written submissions could give rise to particular concerns in the FOI context which, unlike other contexts, is all about adjudicating upon the release of records or their confidentiality. A full and frank submission by a public body to the Commissioner may, for example, entail a need to quote from the very record to which access is being sought and the submissions may themselves be exempt from release. S. 25(3) mandates the respondent when conducting a review, to take all reasonable precautions to prevent the disclosure of exempt information. Records of the Respondent's office relating to performance of its functions are also exempt from the Act, by Schedule 1, Part 1(q)."

Fourthly, it was argued that not all decisions attract the same level of natural justice. Reliance was placed on the following statement of Lord Mustill in *R. v Secretary of State for the Home Department, Ex Parte Doody* [1994] 1 AC 531 at page 560: -

> "What fairness demands is dependent on the context of the decision … An essential feature of the context is the statute which creates the discretion, as regards both its

> language and the shape of the legal and administrative system within which the decision is taken."

It was argued that the rationale of s.15(1)(g) to dismiss for frivolity or vexatiousness is the allocation of scarce time/resources to applications which are considered to be more deserving of same, and this would be undermined if strict vigorous procedural standards were required regarding such determinations, effectively approximating it to a substantive review. Fifthly counsel relied on the UK Supreme Court decision in *South Lanarkshire Council v Scottish Information Commissioner* [2013] 4 All ER 629. There, a Local Authority appealed a decision of the Scottish Commissioner, alleging *inter alia* that he had breached natural justice by failing to disclose all the communications between himself, the applicant and members of the Scottish Parliament. Rejecting this, the UK Supreme Court stated: -

> "32. However, it does not follow that every communication passing between the Commissioner and the applicant, or between the Commissioner and third parties such as Members of the Scottish Parliament, has to be copied to the public authority. I have set out the substance of the communications which were not copied to the Council in some detail in para. 12 above. It is clear that the Council was fully aware that the principal questions were whether there were personal data and, if so, whether Condition 6 was made out…
>
> 33. In the circumstances, therefore, it was not a breach of the rules of natural justice for the Commissioner to refrain from copying the correspondence to the Council."

Counsel submitted that *South Lanarkshire* was a case on "all fours" with the present appeal and should be regarded by this Court as persuasive.

71. It was also submitted that the appellant could only point to two minor matters which he contended he did not have an opportunity to address, or which (he alleged) were inaccurately summarised by Ms. Murdiff. The first concerned Mr. Julian Clare's interaction with the appellant, and the respondent pointed out that the Department's submission merely stated that "I considered that Mr. Grange's query had been fully addressed by my colleague Mr. Julian Clare" and did not, as the appellant suggested, say that the information sought in the FOI request had been fully addressed by Mr. Clare. It was submitted that the appellant was well aware that the Department was taking this position, because it was referred to in the First Instance Decision and the Internal Review Decision – in the former there was a reference to the records and information that the appellant had already received and the hope was expressed that this "addressed all gaps in your quest for information regarding the election monitoring roster", and in the Internal Review there was reference to prior requests and other information submitted - and that in this context the matter had been "already adequately addressed". Ms. Murdiff's email of 14 October 2016 also made specific reference to the Department having provided copies of its correspondence with the appellant in relation to his query on the payment of the grant concerned to election observers and made specific reference to email correspondence between the appellant and Mr. Clare dated 12 June 2016. The appellant's argument based on s. 15(1)(i) (which would have permitted the Department to refuse the request because the records had already been made available to the requestor), based as it is on a misquote from the Department's submission, therefore could not succeed. It was also submitted that the appellant could not place any store on the observation in the Department's submission that the request "showed an unwillingness to cooperate with the Department" because in the First Instance Decision and in the Internal Review Decision departmental personnel had deemed his request frivolous/vexatious, and

in the First Instance Decision Ms. Keenan stated "officials of the Department have already engaged in correspondence with you on this issue".

72. As to the argument based on the Department's submission describing the appellant as having *"independently observed"* an election in Sri Lanka, it was submitted that this point was of no weight, and did not rise above the level of *"peripheral phraseology"*, because what was being conveyed was the Department's submission that the appellant was not one of its official observers, yet he was still seeking payment from it. The gravamen of the Department's submission therefore concerned the inappropriate request for payment, and the appellant had a full opportunity to respond because Ms. Murdiff's email of 14 October 2016 noted that the Department's submission had referred to the appellant's *"request to be paid the grant concerned"*. As the trial judge noted at para. 41 of her judgment –

> "… Reference to independently attending the Sri Lanka election process is equally referable to independently of the third party."

– this reference to "the third party" clearly being a reference by the trial judge to the Minister/the Department. It was further submitted that the appellant here seeks the sort of minute analysis that has no place in statutory appeals. Lavery J. in *O'Mahony v Arklow UDC* [1965] IR 710, dealing with the purported removal of a town cleck, stated at D. 735 "The issues now raised are alleged defects of form and not of substance" and cautioned against the view that –

> "… the Court should parse and construe rules of procedure in a narrow and unreal way, looking for some flaw in procedure to invalidate a transaction where the requirements of justice and substance of procedure had been observed."

As to the assertion that this constituted an allegation that the appellant had engaged in criminal activity, it was submitted that the appellant provided no evidence of the criminal

status of *"independent"* election observation, and no evidence in this regard of Sri Lankan law.

73. In a fall-back submission the respondent relied on the judgment of McCarthy J. in *International Fishing Vessels*, where he stated, at p. 103: -

> "… If [the Minister] fails to notify the applicant of a matter which, on its own, causes him to make his decision, then his decision must be quashed. If, however, there are valid reasons for his decision based upon matters of which he has notified the applicants and given them ample opportunity to make representations, the fact that there are other reasons of which he sought giving them notice, does not, in my view, invalidate his decisions."

Noting that this passage was quoted by Murphy J. in *Devlin v Minister for Arts* [1999] 1 IR 47, who stated at p. 56 *"Reliance on additional, if inappropriate reason, would not necessarily invalidate the decision"*, it was submitted that the matters complained of were peripheral, and the appellant did not suffer any prejudice from any alleged failure to refer to them more fully in Ms. Murdiff's summary of the Department's submission, or by failure to disclose the Submission to the appellant.

74. Counsel for the Notice Party adopted the respondent's submissions and submitted that the observations of Quirke J. in the *NMH* case remained good law, and were not undermined by the judgment of Finnegan J. in *J & E. Davy*. Counsel relied on the passage in para. 99 of the judgment where Finnegan J. states –

> "The seriousness of the matter being considered and of the consequences of the same are relevant as the requirements of natural justice may vary with the particular facts and circumstances of the case."

In that case there were extremely serious consequences, and it was held that the Submissions along with the appendices and Witness Statements and Expert Reports should have been

furnished because these contained a large volume of vital information relevant to the difficult facts upon which the Financial Services Ombudsman had to adjudicate. Counsel submitted that both in the High Court (Charleton J.) and in the Supreme Court the observations in *NMH* were left intact.

75. Counsel also submitted that the role of the Commissioner was inquisitorial, and he relied on the decision of this Court in *Redmond v The Commissioner for Environmental Information and Coillte Teoranta* [2020] IECA 83. It concerned access to what the appellants alleged was "environmental information". At para. 51 of his judgment Collins J. speaking for the court stated –

> "Before turning to the substantive issues on this appeal, it is necessary to say something more about the role of the Commissioner and the nature of proceedings before the Commissioner under the AIE Regulations. In my opinion, it is clear that such proceedings are inquisitorial rather than adversarial in character. There is no hearing. The extent of the inquiry is determined by the Commissioner, not by the 'parties'. As is demonstrated here, the Commissioner's office investigates each appeal and engages separately with requestor and public authority. The Commissioner decides what is disclosed to each party. In addition, the Commissioner's broad powers to require the production of information by the public authority, to require the attendance of the public authority before it and to enter any premises occupied by a public authority and require to be furnished with any environmental information available on those premises: Regulation 12(6) of the AIE Regulations."

Counsel argued that similar features apply here in respect of the role of the respondent, who decides what is to be disclosed. It was submitted that if s. 45(6) is to have any meaning, it means that the question of disclosure is a matter for the Commissioner.

76. Counsel for the Department further submitted that in the appellant's replying affidavit he refers to the Department's submission to the respondent but makes no attempt to correlate this to the précis that had been furnished by Ms. Murdiff, or what he already knew from the first instanced decision and review decision. It was submitted that the appellant in his replying affidavit failed to refer to any "new material" in respect of which he required a chance to make submissions.

Discussion and Decision

77. The starting point for consideration of the first issue is s. 45(6) of the Act of 2014. By this provision the Oireachtas has expressly conferred on the respondent the power to determine the procedure for conducting a review under s. 22 as he/she "considers appropriate in all the circumstances of the case". Moreover, the procedure adopted is to be "as informal as is consistent with the due performance of the functions of the Commissioner".

78. This applies not only to a review under s. 22, but also to the statutory obligation of the respondent under s. 44 to keep the operation of the Act under review and to carry out investigations at any time into the practices and procedures adopted by FOI bodies generally or any particular FOI body for the purpose of compliance with the Act.

79. I agree with the broad submission that if subsection (6) is to mean anything it means that it is a matter for the respondent to determine the procedure to be followed in any particular case. It also means that the procedure may vary from case to case depending on the circumstances. Thus, it is possible to conceive of circumstances in which all or part of an FOI body submission to the respondent would need to be disclosed to the person raising the FOI request in order to enable them to respond to material matters. However, the intent behind subsection (6) would be defeated if in every case the respondent was required by law to furnish the full submission, which might contain confidential or irrelevant material or

arguments, to an applicant. It also means that the procedure adopted should be as informal as possible.

80. Even if the appellant is permitted to argue in this court that the judgment of Quirke J. in the *NMH* case should be overruled, I do not find his arguments persuasive. In my view it has not been overruled, expressly or by implication, by the judgments of Finnegan J. in *J. & E. Davy*, or McKechnie J. in *Kelly v Information Commissioner*. Nor should it be. What may constitute the appropriate level of fair procedure in a given process, even where there is an adjudication, must bear some relationship to the context, the nature the rights at issue, the nature of the process, and the seriousness of the consequences for the interested parties.

81. Quirke J. held *inter alia* that the review by the Commissioner under the equivalent provision of the Act of 1997 "was intended to be inquisitorial rather than adversarial in nature". In *Redmond v The Commissioner for Environmental Information* this Court was concerned with a similar process of review undertaken by the Commissioner for Environmental Information under Art. 12(3)(a) of the EC (Access to Information on the Environment) Regulations 2007 (as amended), under which the function and role of the Commissioner is very similar. The judgment of Collins J., with which I concurred, found that such proceedings "are inquisitorial rather than adversarial in character" – see para. 51, quoted earlier. As Collins J. found, the Commissioner's Office investigates each appeal and engages separately with the requestor and with the public authority, and "the Commissioner decides what is disclosed to each party".

82. Most recently the Supreme Court in *Minister for Communications, Energy and Natural Resources v The Information Commissioner and Sheridan* in the judgment of the Court delivered on 25 September 2020 Baker J. stated at para. 163 that "the express statutory provisions can best be understood in the context of the inquisitorial nature of the statutory role of the Commissioner."

83. The inquisitorial nature of the process does not mean that the respondent is not required to make an adjudication upon a review of a refusal of a FOI Request. The respondent is required to consider the application and submissions of interested parties, and to make a decision. However, the respondent's process of decision making is not to be equated to the adversarial process before a court.

84. The appellant relied on certain decisions which in my view are clearly distinguishable. My own decision in *Martin v The Data Commissioner* concerned whether the respondent was empowered by law to conduct an oral hearing to resolve a relevant conflict of interest arising on investigation of a complaint of contravention of the Data Protection Acts, 1988 and 2003, and my references to pronouncements of Hogan J. in *Lyons & Murray v Financial Services Ombudsman* were made in that narrower context. Hogan J. in *Lyons & Murray* was concerned with an adjudication by the Financial Services Ombudsman (FSO) where regard must be had "to the potential legal consequences of such adjudicatory decision… The Ombudsman is thereby bound to uphold the constitutional right to fair procedures". Hogan J. identified that the possible effect of an adjudication of the FSO is to create "a form of issue estoppel preventing the re-litigation of these issues and subsequent litigation*"*.

85. Such considerations in general do not apply to the decision that the respondent takes in relation to a FOI review, and certainly cannot be said to apply in the instant appeal. Thus, the decision of the respondent would not have the effect of estopping the appellant from obtaining discovery in court proceedings of the documents which he sought in the FOI request, subject of course to compliance with the general principles applicable to discovery.

86. Counsel for the appellant relied heavily on the judgment of Finnegan J. in the *J & E Davy* case, a decision which also concerned the FSO. However, at para. [99], quoted more fully earlier at para. 64, Finnegan J. is cautious in the wording that he uses in reference to affording fair procedures under Art. 40.3 of the Constitution. He refers to the basic

requirement of being *"*made aware of the complaint which is being made and to have an opportunity to present a defence*"*. He then states "The seriousness of the matter being considered and of the consequences of the same are relevant as the requirements of natural justice may vary with the particular facts and circumstances of the case." Undoubtedly there were serious consequences for J & E Davy in that case because the FSO, in upholding the Notice Party's complaint, had directed that J & E Davy pay the Notice Party €500,000 in exchange for Bonds, and directed refund of fees and commissions paid under the Central Bank Act (as amended and extended) the FSO is conferred with extensive powers in relation to directing payment of compensation or other measures directed at banks or others providing financial services to remedy justifiable complaints; comparable powers are not conferred on the respondent in the 2014 Act. As Finnegan J. also points out, the FSO decision was also serious for J & E Davy in terms of its reputation as a stockbroker and a financial/investment advisor. It is also noteworthy that in para. 101 Finnegan J. observes that *"*the discovery process of the Court is not to be imported into these procedures", while acknowledging that access to documents might be necessary in the interest of fairness to enable a party to establish or answer a complaint. He stated –

> "The respondent must consider the request in this light and where fairness so demands he should direct the documents be furnished. He is not, however, required to mimic Court procedures."

87. The reliance by the appellant on *Dellway* is also misplaced because it concerned very different circumstances. In *Dellway*, unlike in the instant appeal, no right to make any submissions was afforded, and there were potentially serious consequences for the appellant flowing from the impugned NAMA decision.

88. What fairness demands is dependent on the context of the governing statute, here the 2014 Act, the right to FOI that it provides, and the limitations on that right. It is also

dependent on the factual context – in the instant case the correspondence and the adverse decisions of the Department that preceded the application to the respondent - all of which were directed to the appellant and were communications/documents of which he had full knowledge.

89. I have already referred to s. 45(6) which gives the respondent a significant discretion to determine the appropriate informal procedure. Also relevant are certain provisions of s. 22 which govern the review process. Section 22(6)(a) mandates that the respondent on receipt of an application for review causes a copy to be given to the FOI head concerned and any other relevant person who in the opinion of the respondent should be notified. S. 22(6)(b) empowers the respondent at his or her discretion to remove any personal or confidential information not intended for circulation from the application. Section 22 (8) then empowers the FOI head or other person notified to "make submissions (as the Commissioner may determine, in writing or orally or in such other form as may be determined) to the Commissioner in relation to any matter relevant to the review and the Commissioner shall take any such submissions into account for the purposes of the review." Subsection (8) is therefore an express provision allowing for the FOI body to make submissions, but it is notable that there is nothing in ss.(8) (or more generally in s.22, or elsewhere in the 2014 Act) that requires the Commissioner to take the further step of sending such a submission to the requestor or further, affording the requestor an opportunity to respond to the submission. Beyond these limited provisions the legislature has, by expressly leaving the process to the discretion of the respondent, underscored its intention that the procedure should be flexible and informal.

90. The broader context of the decision to be taken by the respondent is whether or not a member of the public should obtain access to information in the possession of a public body, including records held by such bodies, and including the requestor's personal information.

As I have indicated earlier, the adjudication by the respondent upon review is not one that creates or may create an estoppel in law, nor is it one which affects the status of the requestor (or FOI body) or which involves a wider adjudication involving directions or recommendations affecting property rights or compensation.

91. In general, therefore, in my view the practice adopted by the respondent of furnishing a précis or summary of an FOI body's response to the requestor will amount to a fair procedure, and of course the requestor usually should, as occurred here, be given an opportunity to respond, even though the statute is silent in this regard. Nor in my view is there justification for any hard distinction between FOI body submissions in the form of argument and new factual material. In principle, where an FOI body makes submissions containing *relevant and material* argument and *relevant and material facts or documents*, the content of both should be put to the party requesting a review for their response. As I stated earlier, it is conceivable that in the interests of fair procedure this might require a document, or an extract from a submission, to be put to the requestor for his or her response.

92. I therefore agree with the observations of Quirke J. at para. 121 of his decision in *NMH*, and the reliance on same by the trial judge at para. 27 of her judgment. In my view, she was correct to conclude that the non-furnishing of the Notice Party's submissions did not breach any constitutional right of the appellant, or breach fair procedures. The extract from the UK Supreme Court decision in *South Lanarkshire Council* to which I was referred in the respondent's submission, and from which I quoted earlier (at para. 70) , is an analogous case, and lends persuasive support to this conclusion.

93. In any event, I am satisfied that the complaints that the appellant makes in relation to Ms. Murdiff's summary of the Notice Party's submission, and the matters that he raises in respect of which he maintains he was deprived of an opportunity to respond, come nowhere

near to justifying an argument that he should have been provided with a copy of the Department's submission in advance of the impugned decision.

94. The appellant complains that the précis made no reference to the Department's view that "… The information sought in the Request had been fully addressed by Mr. Julian Clare", but this statement is, as the respondent points out, is inaccurate. Mr. Keenan's submission on behalf of the Department actually stated that he "… considered that Mr. Grange's query had already been fully addressed by my colleague Mr. Julian Clare*"* – it refers to 'query', not the information sought in the present FOI request.

95. The appellant was also well aware that the Department was taking this position, because it was referred to in the First Instance Decision, and the Internal Review. Moreover, the appellant was aware of the Department's stance from the email exchanges between himself and Mr. Clare which post-dated the relevant FOI request made on 28 May 2016. Notably Mr. Clare emailed the appellant on 24 June 2016 stating –

> "I regret that I have nothing further to add as the various issues that you have raised repeatedly have already been the subject of extensive, frequent and courteous replies from officials of this Department.
>
> The issue boils down to the fact that you were not included on a roster of election observers which was assembled through a thorough and objective process and are therefore not eligible to be deployed as an observer from the roster. By logical extension, you are not eligible to the payments made to roster members who are deployed as observers. Your work as an observer in your own independent capacity is clearly a separate matter and for you to pursue as you wish.
>
> Regards, Julian Clare"

Further the Internal Review refers to the records already released to the appellant by way of, *inter alia* FOI requests and "'ongoing communication' with the Civil Society and

Development Section of Irish Aid which deals with the Election Roster". It follows, incidentally, that there is no basis for any argument by the appellant based on s. 15(1)(i) - the provision that allows a refusal of a FOI Request where "the records are available to the requestor concerned" – to the effect that if the Department contended that the information had already been provided the Department, and on review the respondent, could have cited s.15(1)(i) to justify the refusal.

96. It is also notable that in Ms. Murdiff's précis she specifically refers to the Department having copied to the respondent its correspondence with the appellant including the email from the appellant to Mr. Clare dated 12 June 2016. Ms. Murdiff also referenced the submission of the "current request following meetings and discussions with the Department relating to the payment of the grant" as demonstrating an unwillingness to cooperate.

97. Ultimately in my view the trial judge was entitled to find, as she did, that reference in the submission to the content of the meeting with Mr. Julian Clare was not sufficiently material or fundamental to the respondent's decision to warrant interference with the decision on grounds of want of fair procedure. Further, and applying the dictum of McCarthy J. in *International Fishing Vessels Limited* referred to earlier, there were other valid reasons for a decision based on matters fully notified to the appellant in Ms. Murdiff's précis, and which afforded the appellant ample opportunity to make a further representation, a course which he chose not to take within the time afforded to him to do so.

98. As to the complaint that the appellant did not have an opportunity to respond to Department's submission that the FOI request, taken alone or in combination with other requests, imposed an undue burden on the Department, this "burden" was referred to in the Internal Review where "your other dealings and previous FOI requests made to the Department" are considered, and was referred to by Ms. Murdiff in her précis. It is also beyond dispute that the appellant was well aware of the extent of those dealings and prior

FOIs – the interactions set out in Annex 1 of the Department's Submission to the respondent - and that he must have been aware of the very small size of the Election Desk section of the Department that organises election observers and handles requests for information. There is therefore no substance or merit to this complaint, and the appellant had adequate opportunity to deny or contest the "burden" in question.

99. The appellant further criticises the Department's submission for describing his participation with the Sri Lanka mission inaccurately as having "independently observed the election in Sri Lanka" and alleges that there was no basis for this and that it led to a "serious error of fact in [the respondent's] decision". The impugned decision lists the pattern of conduct on the basis of which it is said the Department submitted that the current request should be regarded as vexatious, and one of the bullet points includes "Travelling to Sri Lanka and acting as an unofficial election observer in 2015 and then seeking to be paid the grant at issue". The appellant suggests this connotes criminal activity.

100. However, there is no reference to criminal conduct either in the Department's submission or in the respondent's decision. Moreover, there is no evidential basis for the appellant's averment that "it would be a serious criminal offence for any person to engage in 'unofficial' election observation"; as counsel for the respondent points out, no evidence was adduced, let alone expert evidence, bearing on whether unofficial election observation is a criminal offence under Sri Lankan law, or indeed under Irish law. The Department submission referred to the appellant having "independently observed the elections in Sri Lanka" in the context of the grant payment made to an Irish nominee, who was selected by the EU as a core team member for the Sri Lankan mission. The reference in the impugned decision to the appellant travelling and acting as "an unofficial election observer" can only reasonably be read as referring to the fact that he was not officially appointed as an election observer by the Department – an observation that the trial judge was entitled to make (see

para. 41 of her judgment). It is also clear that the impugned decision raised this issue in the context of the appellant appealing the decision not to pay him a grant. Ms. Murdiff in her email of 14 October 2016 correctly noted that the Department's submission referred to the appellant's "request to be paid the grant concerned". I agree with the respondent that the appellant's argument is based on "peripheral phraseology", is of no substance or merit, and was properly rejected by the trial judge.

101. Similar considerations apply to the appellant's complaint around the issue of parliamentary questions (PQs). Reference was made to "[PQs], ministerial representations and other requests for information" in the First Instance Decision. The appellant then mentions PQs on pages 12 15 and 17 of his written submission to the respondent. His first reference to PQs was in the context of three FOI requests having been submitted to the Department in 2016, the first being a request for records in relation to the answers given, including draft and background papers, in respect of "a number of PQ's" concerning the "new" election roster established in 2013. The second reference relies on information from a PQ answer on grant payments made to one Long Term and one Short Term Observer. At p.17 he states "PQ's are part and parcel of accountability to the Dáil". The appellant also relies on PQ replies in an email which he sent to Mr. Julian Clare on 10 May 2016 in respect of the refusal to pay him the grant, and in which he stated that he was –

> "…unfairly deselected from the roster, I don't accept the premise that the grant is conditional on being a member of the same roster. As an experienced civil servant you will be aware of the convention that applies throughout the whole common law, that a Minister does not mislead parliament. Repeated replies to PQs have told the Dáil that the grant is for Irish election observers without any qualification as to being on any particular roster."

102. I also note that it was in response to Ms. Murdiff's specific query for details on PQs that the Department in its submissions stated –

> "In addition to the FOI request, a number of cases have been appealed to the Ombudsman and they have also received a number of data protection requests from Mr. Grange. In excess of twenty parliamentary questions had been submitted which, in some cases, mirror FOI requests. These are listed in Annex 4."

103. I also note that in an email which the appellant sent on 16 October 2015 requesting the grant for his Sri Lanka trip he noted PQ88 of 14 October 2015. That PQ asked the Minister for the names of each person who took part in Ireland's international election monitoring since the beginning of 2014, the cost of each trip involved, and detailing the qualification and background of each person selected and if they were appointed to the election roster, and other related matters. The reply from the Minister ran to two pages and the appellant in his email quoted from this and stated "I was Short Term Observer to Sri Lanka in August this year and would like to claim this grant, I can confirm that I am an Irish citizen." The trial judge also referred to an email from the appellant of 9 August 2013 from which it is clear that he had some connection to the raising of certain PQs.

104. From the evidence that was before the respondent it was open to the High Court to find that the appellant was aware of relevant PQ's, that he had some connection to raising certain PQs, and that he relied on the answers given. In particular it is apparent that PQ88 – regardless of whether or not the appellant was behind it - mirrored, at least in part, the current FOI request which sought all records concerning the grant scheme for short and long term Irish election observers, and details of all payments of the grant to Core Team Mission consultants.

105. Ms. Murdiff in her précis of 14 October 2014 does say –

> "[The Department] contended that there was evidence of a clear and repeated pattern of conduct, which included data protection requests, PQs, Ombudsman complaints, requests for information and FOI requests."

This perhaps overstated what was said in the Department's submission, but it clearly put the appellant on notice that the number and content of PQs, and whether they could be included as part of a "clear and repeated pattern of conduct" on the part of the appellant, was a matter upon which he could comment or make further submissions. As we know he did not avail of that opportunity. It is also of some significance that in his grounding affidavit the appellant complains about the references to PQs in the decision, but he conspicuously fails to say that he did not request elected representatives to submit PQs in relation to the election roster or the grant, and he resorts to saying "Communications with Member of the Oireachtas members (sic) are privileged". This was pointed out in Mr. Rafferty's first affidavit, but when given the opportunity to respond the appellant in his replying affidavit again does not deny any connection, or seek to clarify any connection, that he may have had with the 20 PQs that were raised. Nor does he deny that in some cases the PQs mirrored his FOI requests, which was certainly true of PQ88.

106. In these circumstances I am not satisfied that any breach of fair procedure of occurred. It follows that the respondent was entitled, as the trial judge found, to have regard to the reference to PQs in the Department's submission, and to the appellant's connection to the PQs and their subject matter, as this was part of the context of the FOI request of 28 May 2016 and the Department's contention that the request was vexatious.

107. The trial judge also cannot be criticised for her finding that in any event the appellant suffered no prejudice (para.32). Insofar as the impugned decision relies on a pattern of conduct that includes the submission of PQs, this is only one of fourteen points summarised

from the Department's submission, and it does not feature specifically in the respondent's Conclusion.

108. In my view the appellant's objection is not a matter of substance, but rather is one raised with the benefit of hindsight and from minute comparison of the impugned decision with the Department's submission. I echo the words of Lavery J. in *O'Mahony v Arklow UDC* that "the issues now raised are alleged defects of form and not of substance" and his caution against the view that "… The Court should parse and construe rules of procedure in a narrow and unreal way looking for some flaw in procedure to invalidate a transaction where the requirements of justice and the substance of procedure have been observed." The appellant knew from Ms. Murdiff's précis that the assertion of "a clear and repeated pattern of conduct" relied inter alia on PQs, and there were clearly numerous other reasons for the decision on vexatiousness based upon matters of which the appellant was clearly notified and upon which he had ample opportunity to make representations.

109. Accordingly, I am satisfied that on the issue of fair procedures the appeal must fail.

Second issue – Vexatiousness

Appellant's submissions

110. Counsel for the appellant submitted that the respondent and the High Court erred in the interpretation of *"vexatious"* for the purposes of s. 15(1)(g) of the Act of 2014, and that this was entirely a matter of statutory interpretation for the courts to resolve and in respect of which no deference was to be paid to the respondent. In approaching the interpretation counsel emphasised the principles set out in s. 11(3) to which regard must be had in determining an FOI request, namely:

a) the principle of transparency;

b) the need to strengthen accountability and improve the quality of decision making; and

c) the need to inform scrutiny, discussion, comment and review by the public of the activities of FOI bodies and to facilitate more effective participation in public consultation relating to the role, responsibilities and performance of FOI bodies.

Counsel submitted that this reflected observations of Fennelly J. in *Sheedy v The Information Commissioner* [2005] IESC 35 made in the context of the 1997 Act. Counsel also emphasised the presumption in s. 22(12)(b) of the 2014 Act that "a decision to refuse to grant FOI requests shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified".

111. Turning to s. 15(1)(g), counsel observed that it contains three individual grounds of refusal, namely that the request is (a) frivolous or (b) vexatious or (c) forms part of a pattern of manifestly unreasonable requests from the same requestor. Counsel argued that the burden was on the Department to satisfy the respondent that one or other of the grounds in this subsection applied and argued that this was supported by the structure of s.22(9) of the Act. Section 22, which concerns review by the Information Commissioner, at ss. (9) sets out situations in which the respondent may refuse to accept an application, or may discontinue a review, where he or she is of opinion that any of the matters set out at (i) – (vii) apply. Sub clause (i) can apply where the application *"*is frivolous or vexatious", and sub clause (vi) applies where there is a "pattern of manifestly unreasonable requests", and sub clause (vii) applies where the number or nature of the records concerned would "cause a substantial and unreasonable interference with or disruption of work" of the respondent's office. Counsel submitted that the FOI request was not a frivolous request, and that the Department had failed to demonstrate "a pattern of manifestly unreasonable requests" from the appellant - as the FOI in question had "no bearing" on the appellant's 2015 grant request, or on his

complaint about de-selection from the election observer roster in 2013. It was submitted, therefore, that the respondent upheld the first instance decision and internal review only on the ground that the request was "vexatious", and the burden of showing vexatiousness had not been satisfied.

112. In written submissions counsel argued that the FOI request in question was not vexatious for a number of reasons. It was argued firstly that it was limited to the operation of "a small ad-hoc scheme", secondly that it sought records relating to the expenditure of public money, thirdly that it sought records relating to the rules and regulations of the *ad-hoc* scheme which was a matter of "significant public interest", fourthly that the request on its own terms did not suggest any motive on the part of the appellant, fifthly that it did not seek any specific personal information in relation to him or any other individual, and sixthly that it related to records which were not in his possession and to which he had no other means of access other than FOI.

113. The appellant placed particular reliance on s. 13(4) of the 2014 Act, which it will be recalled provides:

> "(4) Subject to this Act, in deciding whether to grant or refuse to grant an FOI request –
>
> (a) any reason that the requester gives for the request, and
>
> (b) any belief or opinion of the head as to what are the reasons of the requester for the request,
>
> shall be disregarded."

Counsel argued that the appellant's motive for the FOI request in question (even if it did relate to past grievances) should have been disregarded.

114. In written and oral submissions counsel referred to the decision of O'Malley J. in *Kelly v Information Commissioner* [2014] IEHC 479. Mr. Kelly had applied for a place on the

social science course in University College, Dublin and was refused. He took a complaint to the Equality Tribunal, and to the Circuit Court, and engaged in related litigation in the High Court and ultimately the European Court of justice. An Isaac Wunder order was eventually granted restraining him from issuing further proceedings without leave of the High Court. At the same time, he made a large number of requests for documents pursuant to the Freedom of Information Acts, 1997 to 2003 seeking, for example, records relating to costs orders secured by the University against him. He had also submitted a large number of access requests to Trinity College Dublin (62 in total between 2003 and 2011) in relation to a separate grievance against that institution, and which the respondent had deemed to be frivolous and vexatious. The Commissioner considered seven requests submitted by Mr. Kelly in the round and decided to discontinue reviewing them on the basis they were "frivolous and vexatious" because in the Commissioner's view, it was "undisputed that the grievance stems from the fact that you were not initially offered a place on a Masters in Social Science degree course*"* (para. 66). The Commissioner found, as quoted at para. 68 of the judgment of O'Malley J. –

> "While it seems to me that at least some of your requests were submitted for nothing other than nuisance value, I find that your use of FOI was, at a minimum, intended to increase the administrative burden which has been placed on UCD in dealing with your grievance going back to 2002…"

O'Malley J. then identified the appropriate test: -

> "99. As a matter of Irish Law, the term "frivolous or vexatious" does not, as noted by Birmingham J. in *Nowak,* necessarily carry any pejorative connotations but is more concerned with the situation where the litigation (or, in this instance, application) can be described as futile, misconceived or bound to fail. Where a person engages in a pattern of litigation (or applications as in the present instance)

> which not only come within those descriptions but can be said to be actuated by ill-will or bad faith, such conduct may properly be described as vexatious. In determining whether a particular application should be so described, the Information Commissioner is entitled by statute to use his or her discretion. There is no obligation on the Commissioner to prove the Appellant's state of mind, and inferences may be drawn on a common sense basis from a pattern of conduct."

Finding that the Commissioner had not erred in her assessment of the legal test to be applied or its application to the facts, O'Malley J. stated –

> "100. … In the first instance, she was entitled to take into account the context in which the applications were made – the long-running and successful pursuit by the appellant's grievances dating from 2002. She then set out, carefully and with specificity, why she had come to the conclusion that the appellant was using the FOI process to further prosecute his grievances and that this constituted an abuse of the FOI process.
>
> 101. Looking at the actual applications made by the appellant, it is in my view manifest that none of them were properly the subject of FOI requests. The first of the seven is, despite a slight alteration, clearly an effort to get information which the Court process (including that of the Court of Justice) had already determined he was not entitled to.
>
> 102. The remainder of the requests relate to the conduct of litigation."

115. Counsel for the appellant sought to distinguish the facts in *Kelly* from the present appeal. Firstly, it was said that in the instant review the respondent did not assess the content or scope of the appellant's request at all. Secondly, counsel argued that the observations of O'Malley J. meant that the request must be "futile, misconceived and bound fail" in order to be regarded as "frivolous" for the purposes of the 2014 Act and must have an additional

element of malice in order to be regarded as "vexatious". Counsel argued that no suggestion was ever made that the appellant's FOI request was "futile, misconceived or bound to fail", and accordingly it could only possibly be regarded as "vexatious", but it could not be characterised as vexatious because there was no evidence from which the respondent could have concluded that the request was motivated by "ill will or bad faith". Counsel argued that the appellant was entitled to pursue grievances, and that that in itself did not disqualify him from raising FOI requests in relation to information/documents not already in his possession, and that something further was required to amount to vexatiousness. Counsel suggested that the predominant purpose of the FOI request needs to be to annoy or wind up the FOI body, or a vendetta – something to indicate ill-will or bad faith, and evidence of this was absent.

116. Counsel noted that in *South Lanarkshire Council v The Scottish Information Commissioner* [2013] UKSC 55, a decision relied on by the respondent, the factual background to a refusal of a FOI request was that prior to the request in question the appellant had written nine more times making the same request; the FOI body South Lanarkshire Council, had initially refused all ten requests on the ground that they were considered to be vexatious, but it later withdrew its reliance on that ground for refusal.[3] Counsel relied on this as an example of a case where a stronger argument for vexatiousness than could be made in the instant appeal might have been made, but was dropped early on by the FOI body.

117. In written submissions the appellant also relied on the UK Court of Appeal decision in *Dransfield v Information Commissioner* [2015] EWCA Civ. 454 to support the submission that the Department, and on review the respondent, should not have had regard to the motive for the FOI request. It will be recalled that the appellant quoted from the judgment of Lady

[1] It later refused the information requested on the ground that disclosure would contravene the data protection principles. The requestor appealed that decision to the Scottish Information Commissioner who decided that the information should be disclosed, and that decision was upheld by the Inner House of the Court of Session, and by the UK Supreme Court.

Justice Arden in his submission to the Commissioner. In para. 68 of her judgment Lady Justice Arden stated –

> "… However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requestor, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requestor pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requestor, if the request was aimed at the disclosure of important information which ought to be made publicly available. …"

118. Counsel also referred the Court to a Canadian decision of *City of Nanaimo* [2021] BCIPC 02, which is a decision of an Adjudicator of the Information and Privacy Commissioner for British Columbia. The Adjudicator considered the application by the City of Nanaimo to disregard certain outstanding access requests made by the respondent on the basis that they were frivolous and vexatious. The respondent had worked for the City from 2015 to 2018, and in 2018 filed a complaint with BC Human Rights Tribunal against the City and two individuals, and in 2020 he made three FOI requests. Section 43 of the relevant

statute allowed the Information Commissioner to authorise a public body to disregard requests where they "(a) would unreasonably interfere with the operations of the public body because of the repetitious or systemic nature of the requests, or (b) are frivolous or vexatious." The Adjudicator in para. 39 addressed the meaning of these terms: -

> "39 The next issue is whether the outstanding requests are 'frivolous' and 'vexatious' under s. 43(b). These terms are not defined in FIPPA. However, past orders provide the following non-exhaustive list of factors to consider in deciding whether a request is frivolous or vexatious: -
>
> - A frivolous or vexatious request is one that is an abuse of the rights conferred under the Act.
> - The determination of whether a request is frivolous or vexatious must, in each case, keep in mind the legislative purposes of the Act, and those purposes should not be frustrated by an institution's subjective view of the annoyance quotient of particular requests.
> - A 'frivolous' request is one that is made primarily for a purpose other than gaining access to information. It will usually not be enough that a request appears on the surface to be for an ulterior purpose – other facts will usually have to exist before one can conclude that the request is made for some purpose other than gaining access to information.
> - The class of 'frivolous' requests includes those that are trivial or not serious.
> - The class of 'vexatious' requests includes those made in 'bad faith', i.e., for a malicious or oblique motive. Such requests may be made for the purpose of harassing or obstructing the public body.

- The fact that one or more requests are repetitive, may, alongside other factors, support a finding that a request is frivolous or vexatious."

Counsel also opened para 55 of the Adjudicator's decision in which he accepted the respondent's sworn evidence that she was currently involved in the human rights case and that she wanted the requested records to assist her with that case, which he held –

> "… is not an improper motive and it does not suggest bad faith. For the reasons provided above, the City's evidence falls short of establishing otherwise. Further, past s. 43 orders have found that where the respondent has a live issue or grievance with the public body and the respondent has a genuine need for, or interest in, the requested records, the requests are not frivolous or vexatious. I accept that the respondent's ongoing BCHRT case amounts to a live issue between the parties and she has a genuine need or interest in the records…"

119. Counsel also referred to the dictionary definitions of "vexatious". The Oxford Dictionary of English (2nd Ed., revised 2006) refers to "vexatious" as "causing or tending to cause annoyance, frustration or worry"; the Collins English Dictionary (6th revised edition, 2004) defines "vexatious" as "vexing or tending to vex… (of a legal action or proceedings) instituted without sufficient grounds, esp. so as to cause annoyance or embarrassment to the defendant."

120. Counsel submitted that in the present appeal the appellant has a genuine need for the records in support of his grievances, and that he has not exhibited bad faith. In the *South Lanarkshire Council* case the requestor had an equal pay claim, and there the suggestion of vexatiousness was dropped early on by the Council. It was submitted that the focus should be on the FOI request, rather than the requestor. In the instant appeal there was nothing striking about the request. Even if it was to pursue a dispute/grievances – and it was suggested by Counsel that there was no shown link between such grievances and the request

itself – such a request cannot be said to be vexatious or made in *"bad faith"* or maliciously. It was submitted that in the absence of a finding of ill will or bad faith it could not be said to be vexatious.

121. Counsel also relied on the decision of the Supreme Court in *Nowak v Data Protection Commissioners* [2016] 2 IR 585 for a distinction between requests for access "which are bound to fail and those which are truly frivolous and vexatious". Counsel relied on an *obiter* of O'Donnell J. where he stated, at page 597: -

> "There may be something to be said in this context, therefore, for limiting the term 'frivolous and vexatious' to those types of cases which all parties in this Court agreed come squarely within that term. Some examples given by counsel for the respondent were cases where the complaint was plainly misdirected and was perhaps a complaint more properly addressed to raising issues of freedom of information or Garda oversight, or circumstances where the complaint was a repetition of a matter which had been considered on perhaps more than one occasion by the Commissioner and the fresh complaint was either a restatement of an issue already determined, or an attempt to circumvent the ruling or decision already made."

This fed into a submission that a finding of "vexatious" requires first that an application must be "frivolous" in the sense that it is futile, misconceived or bound to fail, and in addition a degree of ill will or bad faith to make a frivolous application vexatious, and that a vexatious application is characterised by a degree of moral turpitude.

Respondent/Notice Party Submissions

122. The respondent submitted that there was a clear public interest in allowing for a vexatious request to be refused, thus avoiding the time and cost associated with full substantive assessment, and that this was consistent with the judgment of Fennelly J. in *Sheedy* where he said that the 1997 Act is "… for the benefit of every citizen".

123. In written and oral submissions the respondent submitted that the concept of vexatiousness is not monolithic, but is flexible, and dependent on context. The decision in *Kelly* did not assist the appellant's submission that regard cannot be had to prior conduct regarding FOI use, because the last sentence in para. 99 states –

> "There is no obligation on the Commissioner to prove the appellant's state of mind, and inferences may be drawn on a common sense basis from a pattern of conduct."

Furthermore, O'Malley J. approved the approach taken by the previous Commissioner, recited at para. 62 of the judgment: -

> "… I consider a request or an application to be 'frivolous or vexatious' within the meaning of the FOI Act where it either is made in bad faith or forms part of a pattern of conduct that amounts to an abuse of process or an abuse of the right of access. In addition, I previously explained that the outcome or cumulative effect of the requests is a relevant consideration…"

In para. 100 O'Malley J. endorsed this approach as legally correct, stating that the Commissioner was "… entitled to take into account the context in which the applications were made".

Counsel submitted that that approach was on all fours with the respondent's approach as evidenced from the Conclusion in the impugned decision.

124. Counsel responded to the appellant's submission that the different elements of s. 15(1)(g) must be treated as separate and distinct by firstly relying on the respondent's Guidance Note on s. 15(1)(g) on "frivolous or vexatious", and in particular para. 2.3.2 which states –

> "These are three separate characteristics; for example, a request may be vexatious without being part of a pattern. However, they may also overlap; thus, what is

frivolous may also be vexatious, and what is frivolous and/or vexatious may also form part of a pattern of manifestly unreasonable requests."

125. In response to the appellant's reliance on the structure of s.22(9), Counsel submitted that in separating out the same three elements in that subsection the legislature had not displayed any statutory intention to ring fence or exclude any one element, and s. 15(1)(g) should be read as it stands. Accordingly, the respondent was entitled to take into account a pattern of conduct in ultimately making a finding of vexatiousness.

126. In support of the contention that a narrow reading of vexatiousness is not part of accepted authority, counsel drew analogy with the circumstances in which litigation can be struck out as being frivolous and vexatious under O.19 r.28 R.S.C. or the inherent jurisdiction of the court. Counsel referred *Fay v Tegral Pipes Limited* [2005] 2 IR 261 in which McCracken J. identified the real purpose of the jurisdiction as being to ensure that there will not be an abuse of the process of the courts. Counsel also referred to *Kearney v Bank of Scotland* [2018] IEHC 265, where McGovern J. noted at para. 22: -

"In *Ewing v Ireland* [2013] IESC 44, McMenamin J. at para. 28 adopted the views of O'Caoimh J. in *Riordan v Ireland (No. 5)* [2001] 4 I.R. 463, who set out the following issues as tending to show that litigation was 'vexatious': -

'(a) The bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

(b) where it is obvious that an action that cannot succeed, or if the action could lead to no possible good, or if no reasonable person could reasonably expect to obtain relief;

(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious

proceedings brought for purposes other than the assertion of legitimate rights;

(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions.'"

Thus, it was submitted, the respondent was entitled to take into account the wider context, the cumulative requests, and the purpose of the FOI request at issue, including harassment and oppression of other parties or purposes other than the assertion of legitimate rights.

127. Counsel also submitted that applying a narrow test would conflict with the discretion conferred on the respondent, as identified by O'Malley J. in *Kelly* in para. 99. Counsel further submitted that if, in order to be "vexatious", an application must also satisfy the requirement of being "frivolous", this would result in a situation where the Oireachtas had achieved nothing by adding the words "or vexatious" in s. 15(1)(g) – on the principle of statutory interpretation that effect must be given, if possible, to all the words used. Dodd *Statutory Interpretation in Ireland* (2008 Edition) states at para. 5.28: -

> "An interpretation which renders other statutory phrases or provisions meaningless or surplusage may indicate that the interpretation is not the intended one."

128. Counsel sought to distinguish the decision in *Dransfield*, because the context was the English Court of Appeal's view of the FOI legislation in that jurisdiction as being a 'constitutional statute'. In any event it did not assist the appellant, in that Lady Justice Arden

held that "the decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious", which is not consistent with the appellant's submission that certain matters including previous requests should be excluded from the assessment of vexatiousness. Further, although Lady Justice Arden referred to "vengeance", it does not form an essential ingredient of vexatiousness, and that case is not authority for the proposition that a FOI request, even if it relates to a matter of public importance, cannot be vexatious.

129. Counsel also contested that the decision in *Nowak* in the Supreme Court required "moral turpitude" to be present for there to be a finding of vexatiousness, and that there might be good reasons for considering an error in interpretation of the terms "frivolous and vexatious" in the context of data protection. O'Donnell J. noted at para. 13 the "incongruity" that –

> "… perhaps the most important data protection case to emanate from this jurisdiction, and which has resulted in a landmark decision of the [CJEU] … *Schrems v Data Protection Commissioner* (Case 362/14) … concerned an issue which is determined by the [Data Protection] Commissioner to be frivolous and vexatious…"

In *Nowak* the Supreme Court made a reference to the CJEU in relation to the applicant's data protection claim in respect of his exam scripts, and the CJEU ruled that the exam script did constitute his "personal data". Any narrow reading of vexatiousness in *Nowak* must therefore be placed in context.

130. Counsel submitted that s. 13(4) cannot be interpreted as precluding the FOI body or the respondent from having regard to the reason given by the requestor for the request, or any belief or opinion of the head or the respondent as to the reasons for the request when it comes to considering refusing a request under s. 15(1)(g), because to do so would undermine the whole point of s. 15(1)(g). Counsel emphasised the opening words in subsection (4)

*"*Subject to this Act*"*. This required to be given a meaning and could only mean that other provisions of the Act could permit the FOI head or the respondent to have regard to the reasons for a request, and such a provision was s. 15(1)(g). This was also consonant with the decision of O'Malley J. in *Kelly* that the respondent was entitled to take into account context, and the decision of Lady Justice Arden in *Dansfield* indicating that all the circumstances can be taken into account. In Supplemental written submissions the respondent argued that the decision of the Supreme Court in *Minister for Communications, Energy and Natural Resources v Information Commissioner and Sheridan* [2020] IESC 57, insofar as it had any relevance, undermined rather than advanced the appeal. This is because Baker J. stated s. 13(4) of the 2014 Act was a safeguard preventing the head of an FOI body "… coming to a decision to refuse or grant the request merely on account of the identity of the person making the request.". Baker J. did not reference, much less analyse, the opening words "Subject to this Act". Further, the appellant failed in argument to address the meaning of these words.

131. Counsel for the notice party adopted the respondent's submissions and further argued that if the appellant's interpretation of s. 13(4) was correct then it would have the effect of nullifying or negating the operation of s. 15(1)(g), despite the clear administrative grounds for having the power to refuse a request on the frivolous/vexatious grounds.

132. Counsel for both the respondent and notice party emphasised the entitlement of the respondent to take into account the appellant's email of 12 June 2016 to Mr. Julian Clare in which he stated –

> "Now in terms of the two matters namely the non-payment to me of the small grant payable to all other Irish observers and by ongoing exclusion from nominations by DFAT for election observation opportunities it is my intention to pursue a resolution of both matters by using various fora and ultimately if necessary by litigation."

It was clear from this that the FOI request in question was related to these two grievances, and there was evidence from which the respondent was entitled to conclude that it was "an integral part of the a pplicant's strategy in pursuing this matter with the Department".

That letter was sent after the FOI request in question (28 May 2016) but before the First Instance decision (27 June 2016). Counsel for the notice party observed that the appellant was not making any claims or instituting proceedings against the Department, but instead was using FOI to *"harry"* the Department. Counsel referred to the letter of 9 August 2013 sent by the appellant to the Department raising Data Protection Act requests and FOI requests in relation to the disbandment of the existing roster and the process for the establishment of a new roster. Counsel submitted that there was a plain nexus between the present FOI request and the appellant's grievances in relation to the new roster and the non-payment of a grant. The present request was an "oblique pursuit of his grievances", and part of a "proxy war" related to his grievances. The trial judge was entitled to find, as she did in para. 21 of her judgment, that the present FOI request "was to further the appellant's personal grievance and it was within the jurisdiction of the respondent to classify such a request as being vexatious so that the request might be refused." This, counsel submitted, was an inference that the Court should not disturb.

133. Counsel for the respondent also submitted that the respondent's decision was balanced and fair and focused on the request/nature of the request, and gave reasons for refusing it on the grounds of being frivolous/vexatious, namely that it was used tactically for the purpose of pursuing dispute, and that a pattern of conduct existed relating to the use of FOI which suggested an abuse of the process and had no regard to the purpose of FOI. It was submitted that the respondent took into account relevant factors, and also took into account the factors set out in para. 2.4.9 of the Guidance Note on s. 15(1)(g). The decision set out the pattern

of conduct on p. 5/6 of the decision relied on by the Department, and which the respondent considered to be an abuse of the FOI process.

Discussion and Decision

134. I find myself in broad agreement with the submissions made by counsel for the respondent and the Notice Party on this issue.

135. While relying on s. 13(4), the appellant's submissions did not address the significance of the words "Subject to this Act…" The proposition in *Dodd*. op. cit. at para. 5.2 already quoted, that interpretation which renders other statutory phrases or provisions meaningless or surplusage may indicate that the interpretation is not the intended one, is well established. In *County Council of Cork v Whillock* [1993] 1 IR 231, Egan J. stated at page 239 –

> "There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain."

136. Accordingly, the words "Subject to this Act" are not to be treated as surplusage and must have the meaning that other provisions of the 2014 Act may, expressly or by implication, allow regard to be had to reason or motive for a FOI request, or the decision maker's belief as to that reason or motive.

137. The Oireachtas has included in s. 15(1)(g) reasons which, in the interests of good administration, may be adopted for refusing a FOI request, and it follows that on a review under s. 22 the respondent is entitled to affirm the FOI body decision on the same basis. The effect of s. 15(1)(g) would be set at nought if an FOI head could not have regard to the reasons, or believed reasons, for an FOI request, or the history of requests, and the context of the request.

138. This interpretation is supported by the words "pattern of manifestly unreasonable requests" which expressly entitles the FOI head to have regard to earlier FOI requests.

139. This interpretation is also consistent with the Long Title to the 2014 Act in which the right of a person to obtain access to information from a public body is qualified by the words "to the greatest extent possible consistent with the public interest…". It is clearly in the public interest, financially and administratively, that requests that are frivolous or vexatious should be capable of refusal on those grounds, and this is what is expressly provided for in s. 15(1)(g).

140. At para. 16 of his judgment in *Nowak v Data Protection Commissioner* [2016] IESC 18, O'Donnell J. stated –

> "… Any public decision maker must have the capacity to screen claims and exclude at an early stage those which are plainly misconceived. If this form of decision-making triage cannot be carried out, and all complaints must proceed through to a formal determination, then the system becomes overloaded, and will grind to a halt. This is wasteful of time and resources, and a real injustice to those with substantial complaints."

O'Donnell J. was addressing the summary disposal of data protection complaints, and his reasoning must apply with equal force to a decision of the respondent under s. 22(9) of the 2014 Act to refuse to accept an application for review, or to discontinue a review. In my view this rationale also applies to the power of the respondent, upon undertaking a review of a refusal to grant a FOI request on grounds that the request is frivolous or vexatious, or on grounds that the request is part of the pattern of manifestly unreasonable requests, to affirm that refusal on the same grounds.

141. Nor in my view does the decision of O'Malley J. in *Kelly* justify a narrower approach to the interpretation of s. 15(1)(g). The appellant relied on para. 99, but her observations in para. 100 are also relevant, and I will fully quote both: -

> "99. As a matter of Irish Law, the term 'frivolous or vexatious' does not, as noted by Birmingham J. in *Nowak*, necessarily carry any pejorative connotations but is more concerned with the situation where the litigation (or, in this instance, application) can be described as futile, misconceived or bound to fail. Where a person engages in a pattern of litigation (or applications as in the present instance) which not only come within those descriptions can be said to be actuated by ill-will or bad faith, such conduct may properly be described as vexatious. In determining whether a particular application should be so described, the Information Commissioner is entitled by statute to use his or her discretion. There is no obligation on the Commissioner to prove the applicant's state of mind, and inferences may be drawn on a common sense basis from a pattern of conduct.
>
> 100. In this case, I consider that the respondent did not err either in her assessment of the legal test to be applied or in its application to the facts. In the first instance, she was entitled to take into account the context in which the applications were made – the long-running and successful pursuit of the appellant's grievances dating from 2002. She then set out, carefully and with specificity, why she had come to the conclusion that the appellant was using the FOI process to further prosecute his grievances and that this constituted an abuse of the FOI process."

142. In my view, O'Malley J. is not attempting, in para. 99, to give an exhaustive definition of what may be *"*frivolous or vexatious", nor in my view is she prescribing "ill-will or bad faith" as necessary requirements before a decision maker can decide that a FOI request is

vexatious. In using the words *"in this instance"* the judge was, clearly, referring to the case that was before her.

143. I also agree with O'Malley J. that the Information Commissioner is entitled by statute to use his or her discretion, and that there is no obligation on the respondent to prove the appellant's state of mind, and that inferences may be drawn on a common sense basis from a pattern of conduct. This in my view applies just as much to a decision to refuse under s.15(1)(g) as it does to a decision to refuse to accept an application or discontinue a review under s. 22(9).

144. Most importantly I agree with O'Malley J. that the respondent is entitled to take into account the context in which applications for review are made. This justifies the respondent's and notice party's contention that they were entitled to take into account the history of dealings between the appellant and the Department and the previous FOI requests insofar as they were relevant to the appellant's grievances, as well as the context of the FOI request in question.

145. The idea that s. 15(1)(g) is not concerned with moral judgments but does allow the decision maker to have regard to the motive for a FOI request and to consider the broader context for a request, is I believe supported by the observations of Lady Justice Arden in her judgment in *Dransfield*. At para. 66 she states –

> "Motive is, perhaps confusingly, the reason for doing something. The reason for doing something may be bad (e.g. to cause hurt) while the thing itself (e.g. telling the truth) is good, but the law is not concerned with moral judgments in this area but with the question of entitlement to exercise a right which does not involve a moral judgment. … .
>
> If, however, the exercise of an information right under FOIA is 'vexatious', the authority may not be bound to act on it."

In a further passage of importance Lady Justice Arden states –

> "68. … The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motion can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requestor pursues his rights against an authority out of vengeance for some other decision of its, it may be said his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requestor, if the request was aimed at the disclosure of important information which ought to be made publicly available. I understand Mr. Cross to accept that proposition, which of course promotes the aims of FOIA."

146. This supports the proposition that the respondent was entitled to take into account the appellant's reasons for raising the instant FOI request, i.e. his motive, and that where that motive could be discerned – and in this regard as O'Malley J. says "inferences may be drawn on a common sense basis from a pattern of conduct*"* - there may be evidence from which vexatiousness can be inferred.

147. The narrow interpretation for which the appellant contends effectively asks the Court to read s. 15(1)(g) as precluding the FOI body or the respondent from having regard to context and the wider dealings between the FOI requestor and the FOI body. This is not justified by any wording within s.15 and is, as counsel for the respondent submitted, counterintuitive. The decision maker must be entitled to consider all relevant circumstances, including all evidence suggesting a pattern of requests and whether they are "manifestly unreasonable".

148. I am also in agreement with two further observations made by Lady Justice Arden in the opening part of para. 68 of her judgment: -

> "68. In my judgment, the UT was right not to attempt to provide any comprehensive or exhaustive definition [of vexatiousness]. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requestor, or to the public or any section of the public…"

149. I agree with the observation that "the emphasis should be on an objective standard" when a decision maker is considering an allegation of vexatiousness. It is not the Department's subjective view, still less that of the requester, nor a subjective view of the evidence on the part of the respondent, that it is appropriate, but rather a careful and balanced consideration of the evidence presented to support an allegation of vexatiousness.

150. As to the question of a definition of "vexatious", I agree that no comprehensive or exhaustive definition is possible or desirable. It may be that it is a concept that is characterised more by recognition than by definition. Every case where an allegation of vexatiousness is raised will present different facts and circumstances, and the respondent in a review is entitled under the 2014 Act to use his or her discretion. I consider that the respondent's Guidance Note on s.15(1)(g) is a helpful document, and I will refer shortly to some of the text that I believe provides useful direction.

151. In approaching s. 15(1)(g) I agree with the submissions of the respondent and notice party that although there are three elements within the sub-clause, they are not to be treated in isolation from each other. A request that is "frivolous" e.g. in the sense that it is bound to fail, may also be "vexatious", and may also form part of a manifestly unreasonable pattern

of requests. I agree with the following succinct statement in the respondent's Guidance Note on this subject -

> "2.3.2 These are three separate characteristics; for example, a request may be vexatious without being part of a pattern. However, they may also overlap; thus what is frivolous may also be vexatious, and what is frivolous and/vexatious may also form part of a pattern of manifestly unreasonable requests."

I reject the appellant's submission that simply because "frivolous and vexatious" is, under s.22(9)(a) of the 2014 Act, a separate ground for refusing to accept an application for review, or discontinuing a review, from the ground that the request is part of a "pattern of manifestly unreasonable requests" that the same should apply to s.15(1)(g). There is nothing in s.15(1) or elsewhere in the 2014 Act to justify such an interpretation, or the transposition of s.29(a) into s.15(1)(g). Moreover if the effect was to narrow the interpretation to such an extent that a FOI request, which on its face was unobjectionable but which viewed in context was an abuse of the right to FOI or an abuse of the process, could not be refused under s.15(1)(g) – which is what, in effect, the appellant contends - that would run counter to the broad intent of the statute indicated in the Long Title and the clear intent of s.15 to limit the right to FOI on various administrative grounds.

152. While dictionary definitions of "vexatious" cannot be determinative, they are of some assistance in identifying the core concept. The Oxford English Dictionary (2nd ed. Revised, 2006) defines the verb "vex" as "feel annoyed, frustrated or worried, especially with trivial matters", and "vexatious" as an adjective meaning "causing or tending to cause annoyance, frustration, or worry", and in "Law denoting an action or the bringer of an action that is brought [without] sufficient grounds for winning, purely to cause annoyance to the Defendant."

153. More important in my view is the association of the concept of vexatiousness with abuse of the process. I find helpful a statement of McCracken J. in *Faye v Tegral Pipes Ltd,* mentioned in the respondent's written submission. It is worth quoting more fully what he said at p.266:

> "While the words 'frivolous and vexatious' are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege[4] of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed."

While the context for this was the jurisdiction of the court to strike out proceedings under O.19 r.28 R.S.C. or its inherent jurisdiction, it seems to me that this passage can be applied by analogy to explain the real purpose behind s.15(1)(g), which is to ensure that there will not be abuse of the statutory entitlement to raise FOI requests, and the process for pursuing them.

154. While the right of access to public information is not of the same constitutional importance as the right of access to the courts, the idea that FOI requests that are not genuine should not be entertained is at the heart of s. 15(1)(g). In *Kelly*, in para. 100 quoted earlier, O'Malley J. refers to the respondent's conclusion in that case that the appellant was using

[4] Whilst McCracken J. uses the word 'privilege' his further reference to its constitutional importance in resolving genuine disputes makes it clear that he is referring to the right of access.

the FOI process "to further prosecute his grievances and that this constituted an abuse of the FOI process", and she upheld that decision as being within the respondent's statutory powers and entirely justifiable.

155. In the Guidance Note under the heading *"Frivolous or Vexatious"* at para 2.4.3 it is stated –

> "2.4.3 The Commissioner has found that a request is frivolous or vexatious where it is either: -
>
> **Made in bad faith** or
>
> - forms part of a **pattern of conduct** that amounts to **an abuse of process** or **an abuse of the right of access**." [Bold lettering as in the original].

In my view, this statement correctly identifies two alternative bases upon which a request may be found to be frivolous or vexatious under s.15(1)(g) – the first is bad faith and the second is "abuse of process, or abuse of the right of access."

156. The Guidance Note follows this up with further advice and examples in relation to "Pattern of Conduct" and "abuse of process/abuse of the right of access" which not only advise the reader but indicate the approach that the respondent is likely to take in considering a refusal under s. 15(1)(g). What follows are the relevant parts, without the examples given in the text: -

> "<u>Pattern of Conduct</u>
>
> 2.4.7 As stated above, one of the criteria to be taken into account when considering whether a request is frivolous or vexatious is whether the request forms part of a pattern of conduct that amounts to an abuse of process or an abuse of the right of access.

A pattern of conduct requires recurring incidents or related or similar requests on the part of the requestor. The time over which the behaviour is committed is also a relevant factor (see case 020375).

[Example given]

2.4.8 The fact that a pattern of conduct exists is not, of itself, sufficient. The pattern of conduct must be such that there is *an abuse of process* or *an abuse of the right of access*.

[Example given]

Abuse of process/abuse of the right of access

2.4.9 The following is a **non-exhaustive** list of relevant factors which may be considered in determining whether a pattern of conduct amounts to an abuse of the right of access:

(1) The actual number of requests filed: are they considered excessive by reasonable standards?

(2) The nature and scope of the requests: for example, are they excessively broad and varied in scope or unusually detailed? Alternatively, are the requests repetitive in character or are they used to revisit an issue which has previously been addressed?

(3) The purpose of the requests: for example (a) have they been submitted for their 'nuisance' value, (b) are they made without reasonable or legitimate grounds, and/or (c) are they intended to accomplish some objective unrelated to the access process?

(4) The sequencing of the requests: does the volume of requests or appeals increase following the initiation of court proceedings or the institution or the occurrence of some other related event?

(5) The intent of the requestor: is the requestor's aim to harass government or to break or burden the system?

It must be stressed that this list is non-exhaustive.

2.4.10 The outcome or cumulative effect of the request is a relevant consideration. It is appropriate to consider the request concerned in the context of other requests made to the FOI body and in the context of the requestor's other dealings with the FOI body concerned.

[Example given]

2.4.11 In *Kelly v The Information Commissioner* [2014] IEHC 479, a judgment of the High Court concerning a decision by the Commissioner to discontinue a review (see 1.3.1 above), O'Malley J. said that the Commissioner was entitled to take into account the context in which the applications were made – in that case, the long running and unsuccessful pursuit of the appellant's grievances dating back approximately 12 years (at that time) with the FOI body concerned.

2.4.12 An FOI body relying on s. 15(1)(g) for its refusal of a request should provide relevant supporting information to the Commissioner, including supporting information for factors (1) to (5) above where relevant. Such information might include, for example:

- The number of requests made to the requestor to that FOI body.
- The overall number of requests received by that FOI body generally during the relevant period.
- The subject matter and/or nature of the requests made by the requestor.
- the background, if relevant, to the requests made by the requestor and to the requestor's dealings with the FOI body.
- The pattern, if any, of the requests made."

[Italics and emphasis as in the original]

157. This extract from the Guidance Note is quoted at some length, firstly, because, in my view, it sets out an appropriate approach by the respondent where s. 15(1)(g) is engaged. Secondly, it is a publicly available document from which FOI requestors and FOI bodies can understand the approach that the respondent will take when considering an allegation of vexatiousness. Thirdly, it is evident from the process followed by the respondent in the instant appeal, and particularly from the content of the impugned decision, that this was indeed the approach taken by the respondent in coming to the conclusion that the appellant's FOI request was an abuse of the process, and that the Department was justified in deciding to refuse it on the grounds that it was vexatious.

158. In the High Court judgment in this matter, the trial judge at para. 20 of her decision found that "… an abuse of the FOI process to prosecute a personal grievance can legitimately be classified as vexatious…". For the reasons which I have given in my view this was the correct conclusion and the trial judge did not err in law. She relied *inter alia* on the decision of Irvine J. in *Fox v McDonald* [2017] IECA 189, a judgment of this Court on 20 June 2017. At para. 20, Irvine J. stated –

> "The word 'frivolous' when used in the context of O. 19 r, 28 is usually deployed to describe proceedings which the court feels compelled to terminate because their continued existence cannot be justified having regard to the relevant circumstances: see *Nowak v. Data Protection Commissioner* [2012] IEHC 449, [2013] 1 I.L.R.M. 207, 211, *per* Birmingham J.. Proceedings which are regularly struck out as 'frivolous' or 'vexatious' are proceedings clearly destined to cause irrevocable damage to a defendant, such as where a defendant is asked to defend the same claim for a second time or where a plaintiff seeks to avail of the scarce resources of the

courts to hear a claim which has no prospect of success. This is the context in which these words are used in this judgment."

159. While *Fox* was an application to dismiss proceedings as being frivolous, vexatious or an abuse of the process, and I am mindful that the jurisprudence in relation to the Rules of Court/inherent jurisdiction of the Court should not be imported to the statutory framework under the 2014 Act, nevertheless I see no error in law in the trial judge's reliance on the statement that proceedings "clearly destined to cause irrevocable damage to a defendant" applies by analogy to a FOI request intended to damage an FOI body.

160. Turning to the impugned decision, as I have said earlier it is clear from reading the entire document that the respondent broadly followed the process identified in the Guidance Note for considering whether the FOI request was vexatious. At p. 4 Mr. Rafferty sets out some of the factors listed in para. 2.4.9 of the Guidance Note, and notes that these are non-exhaustive factors to be considered. He also refers to the decision in *Kelly* as authority for the proposition that the respondent under statute has a discretion, and that in relation to an applicant's state of mind "inferences may be drawn on a common sense basis from a pattern of conduct". He then outlines the Department's case in relation to vexatious behaviour, based on numerous requests for reviews and additional information, including FOI's since 2013, of which there were 11, and he sets out in 14 bullet points the *"pattern of conduct"* which the Department contended had passed the threshold of reasonableness and considered to be vexatious. Mr. Rafferty then noted the appellant's view that the Department was not justified in its refusal on the basis that it had not demonstrated that his request posed a significant burden, nor had it claimed that he acted in bad faith or acted for a reason other than access, and his contention that it was not vexatious to seek the information at issue due to his concerns that grants were being paid in a manner contrary to the public interest.

161. Mr. Rafferty then noted that –

> "While the applicant denied that his request solely related to this particular member, he referred to the person in question in his submission to this Office and stated that it was a matter of public interest whether grants were paid in line with specific criteria and reclaimed if paid in error."

Mr. Rafferty continued –

> "In essence, the applicant argued that if the request was valid on its face, it could not be vexatious. He argued that he had a genuine reason for seeking the information in question and contended that while FOI requests were frequently driven by a particular agenda or vested interest, that did not make them vexatious per se."

That characterisation of the request, as being valid on its face, was reflected in the argument made by counsel for the appellant before this Court where it was contended that the reasons for seeking information, and the appellant's motive or agenda were not appropriate considerations under s. 15(1)(g). For the reasons given earlier, the respondent correctly rejected that contention, and Mr. Rafferty did, as he was entitled to do. He considered the evidence put before him by the Department of previous dealings between the appellant and the Department that demonstrated a pattern of FOI requests from which inferences as to motive could be drawn.

162. In his 'Conclusion' Mr. Rafferty commences by accepting that the appellant may be able to identify a particular public interest in seeking access to the information relating to the payment of grants, and the fact that requests might be driven by a particular agenda did not, of itself, make such requests vexatious. Those initial findings point to the balanced approach taken by Mr. Rafferty in considering the review.

163. He then states "However, this does not mean the request cannot be deemed frivolous or vexatious." For reasons given earlier I am satisfied that that is the correct position in law. A FOI request may be vexatious even if the requestor can point to a particular public interest

or is pursuing a particular agenda. Mr. Rafferty was entitled, in my view, to consider the broader issue of the manner in which the appellant engaged with the Department.

164. There was ample evidence from which the respondent, through Mr. Rafferty, could then come to the conclusions that he did in the following two paragraphs. He opens by observing that the 2014 Act "assumes reasonable behaviour on the part of requestors". This is enshrined in the Guidance Note at para. 2.1.2 which states: -

> "2.1.2 FOI bodies are required to go through the rigorous processing requirements of the FOI Act. However, the Commissioner also takes the view that requestors have a responsibility to act reasonably in relation to the processing of their request by FOI bodies."

That in my view is an entirely reasonable proposition, and one that follows from the decision of the legislature to include in s. 15(1)(g) a concept of reasonableness when considering a pattern of requests in the context of *"frivolous or vexatious"* determinations.

165. Mr. Rafferty was therefore entitled to rely on the history of the appellant being unsuccessful in his application for appointment as an election observer in 2013, and his pursuit of available avenues to challenge that decision, including, through making FOI requests. There was ample evidence before the respondent from which he could conclude that "the applicant's request to the Department was directly related to his ongoing grievance relating to his exclusion from the roster". In this regard, I refer, in particular, to the email which the appellant sent to the Department on 12 June 2016 in which he expressed his intention to pursue a resolution for the non-payment of the grant and his ongoing exclusion from nominations for election "by using various fora" and "ultimately if necessary by litigation".

166. Furthermore, there was ample evidence before the respondent, as summarised in the bullet points set out on pages 5 and 6 of the impugned decision, to justify the following conclusions: -

> "… It seems to me that submitting FOI requests has become an integral part of the applicant's strategy in pursuing this matter with the Department. Having considered the nature of the current application, against the background of the applicant's ongoing prolonged interaction with the Department, I find that the purpose of his request is directed at an objective unrelated to the right of access to records, i.e. it is being used tactically for the purpose of pursuing the dispute. In the circumstances, it is my view that a pattern of conduct exists relating to the use of FOI which suggests an abuse of the FOI process with no regard for the burden which the pursuit of his grievance is placed on the Department."

167. Insofar as the decision is based on findings of primary fact there was ample evidence to support those findings, for example, as to the history of dealings between the appellant and the Department. Insofar as the conclusions just stated are inferences drawn from such facts, such as the inference that the FOI Request was part of an integral strategy in pursuing matters with the Department and that it was directed at an objective unrelated to the right of access, these were inferences which the respondent was entitled to draw and could not be said to be ones which no reasonable decision making body could draw.

168. That being the case, in my view the respondent was entitled to find that a pattern of conduct existed which amounted to an abuse of the FOI process, and that, as a matter of fact and law, the Department was justified in refusing the request on the ground that it was "vexatious". It follows that I agree with the trial judge that the respondent through Mr. Rafferty properly came to the conclusions that he did, and that it was within his jurisdiction to classify the request as being "vexatious". The trial judge was further entitled to conclude

that the appellant failed to demonstrate any error of law or of fact sufficient to vitiate the respondent's decision. I would therefore affirm the decision of the trial judge.

Costs

169. As this decision is being delivered electronically, I will, as is usual, set out the order which I propose is appropriate in relation to the costs of this appeal. In the High Court, the appellant was ordered to pay the costs of the respondent and the notice party. As the respondent and notice party were entirely successful in this appeal, I would propose that the costs of the respondent and of the Notice Party be awarded to the respondent and Notice Party respectively against the appellant, such costs to be adjudicated by a legal costs adjudicator in default of agreement. Should any party wish to seek a different order they will have 14 days from the date of delivery of this judgment in which to notify the Office of the Court of Appeal, and in that event a short costs hearing will be arranged. In the event that a party seeking a costs hearing does not succeed in obtaining any change to the proposed order that party will run the risk of also bearing the costs of the costs hearing. In default of either party requesting a costs hearing within the said period the costs order which is proposed will be made.

Costello and Power JJ. having read this judgment are in agreement same and the orders proposed.