



**THE HIGH COURT**

**[2024] IEHC 456**  
**[Record No. 2023 35 MCA]**

**BETWEEN**

**HEALTH SERVICE EXECUTIVE**

**APPELLANT**

**AND**

**THE INFORMATION COMMISSIONER**

**RESPONDENT**

**AND**

**RADIÓ TELIFÍS ÉIREANN**

**NOTICE PARTY**

**Decision of Ms. Justice Bolger delivered on the 19<sup>th</sup> day of July 2024**

**1.** This is an appeal by the HSE from a decision of the Information Commissioner of 4 January 2023 permitting RTE access to records relating to the compliance of certain of their employees with the disclosure obligations that the Ethics in Public Office Act, 1995 (hereinafter referred to as 'the Ethics Act') imposes on them. For the reasons set out below, I am refusing this appeal.

**Statutory provisions**

**2.** A number of provisions of the Ethics Act and the Freedom of Information Act 2014 are relevant. Section 18(2) of the Ethics Act provides:

*"(2) A person who occupies or occupied a designated position in a public body—*

*(a) shall, subject to section 20 (3), in each year during any part of which he or she occupies or occupied the position, prepare and furnish to the relevant authority for the position a statement in writing of—*

*(i) the interests of the person, and*

*(ii) the interests of which he or she has actual knowledge of his or her spouse [or civil partner] or a child of the person or of his or her spouse,*

*during the appropriate period specified in section 20 (1) which could materially influence the person in or in relation to the performance of the*

*functions of the position by reason of the fact that such performance could so affect those interests as to confer on or withhold from the person or the [spouse or civil partner or child a substantial benefit], and*

*(b) in any case where such a function falls to be performed and he or she has actual knowledge that he or she or a connected person has a material interest in a matter to which the function relates—*

*(i) shall, as soon as may be, prepare and furnish to the relevant authority a statement in writing of those facts,*

*(ii) shall not perform the function unless there are compelling reasons requiring him or her to do so, and*

*(iii) shall, if he or she proposes to perform the function, prepare and furnish to the relevant authority, before or, if that is not reasonably practicable, as soon as may be after such performance, a statement in writing of the compelling reasons aforesaid.”*

Section 18(4) of the Ethics Act provides:

*“(4) There shall be deemed to be included in the terms of the employment of a person in a designated position referred to in subsection (2) a term that the person shall comply with that subsection.”*

“Functions” is defined in s. 2 of the Ethics Act as including “powers and duties”.

Section 35 of the Ethics Act provides:

*“(1) A person shall not disclose information obtained by him or her under this Act [or the Regulation of Lobbying Act 2015] or by being present at a sitting of a Committee or Commission held in private.*

*(2) Subsection (1) does not apply to—*

*...*

*(c) the disclosure of information by a person—*

*(i) in the performance of his or her functions, or*

*(ii) in the public interest, to a Minister of the Government, the Secretary to the Government, a Committee, the Commission or a person standing determined for the time being under section 18 as a relevant authority, or*

*(iii) pursuant to an order of a court for the purpose of proceedings in that court, [...]*

*....*

*(3) A person who contravenes subsection (1) shall be guilty of an offence."*

Section 2 of the Freedom of Information Act 2014 defines "personal information" as not including:

*"(1) in a case where the individual holds or held—*

*(A) office as a director of,*

*(B) a position as a member of the staff of, or*

*(C) any other office, or any other position, remunerated from public funds in,*

*an FOI body, the name of the individual or information relating to the office or position or its functions or the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid".*

Sections 11(1), 11(3) and 11(6) of the Freedom of Information Act provide:

*"(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.*

...

*(6) Subsection (4) shall not be construed as applying, in relation to an individual who is a member of the staff of an FOI body, the right of access to a record held by an FOI body that—*

*(a) is a personnel record, that is to say, a record relating wholly or mainly to one or more of the following, that is to say, the competence or ability of the individual*

*in his or her capacity as a member of the staff of an FOI body or his or her employment or employment history or an evaluation of the performance of his or her functions generally or a particular such function as such member,*  
*(b) was created more than 3 years before the effective date by the FOI body concerned, and*  
*(c) is not being used or proposed to be used in a manner or for a purpose that affects, or will or may affect, adversely the interests of the person."*

Section 35(1)(b) of the Freedom of Information Act states:

*"(1) Subject to this section, a head shall refuse to grant an FOI request if—*

*...*

*(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) in Part 1 or 2 of Schedule 3 of an enactment specified in that Schedule) or otherwise by law."*

Section 35(2) states:

*"(2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, an FOI body or a service provider) in the course of the performance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than an FOI body or head or a director, or member of the staff of, an FOI body or of such a service provider."*

Section 37(1) of the Freedom of Information Act states:

*"(1) Subject to this section, a head shall refuse to grant an FOI request if, in the opinion of the head, access to the record concerned would involve the disclosure of personal information (including personal information relating to a deceased individual)."*

Section 41(1) of the Freedom of Information Act states:

*"(1) A head shall refuse to grant an FOI request if—*

*(a) the disclosure of the record concerned is prohibited by law of the European Union or any enactment (other than a provision specified in column (3) of Part 1 or 2 of Schedule 3 of an enactment specified in that Schedule), or*

*(b) the non-disclosure of the record is authorised by any such enactment in certain circumstances and the case is one in which the head would, pursuant to the enactment, refuse to disclose the record."*

### **Background**

**3.** The Ethics Act requires certain employees of public bodies, including the HSE, to file a statement of interest relating to their interests and the interests of their spouses or partners or children of which they have actual knowledge, which could materially influence them in or relating to the performance of their official duties. The HSE requires their relevant employees to submit a statement of interest even if they have no such interest, in which case their statements will say "nil interest". The HSE treat its database of statements of interest confidentially in accordance with its Code of Governance.

**4.** RTE is the national public broadcaster with a statutory mandate to, *inter alia*, conduct investigative journalism. In May 2022 RTE sought copies of registers from the HSE that recorded the statements of interest submitted by certain designated employees under the Ethics Act for the years from 2015 to 2021, to include the names of those employees who submitted or who did not submit the statements of interest required of them. The HSE's Freedom of Information decision maker refused RTE's request, and that decision was upheld by an internal review. RTE lodged an appeal with the Information Commissioner. Correspondence followed in which the HSE responded to queries raised by the Commissioner. RTE confirmed to the Commissioner that they were not seeking access to details of the interest actually declared by the employees. This clarification was noted in the Commissioner's decision of 4 January 2022 in which the Commissioner held that the HSE was not justified in refusing access under s. 35(1)(b) and s. 41(1)(a) of the Freedom of Information Act, but that s. 37(1) of the Ethics Act applied to certain personal information in the records and was to be redacted. RTE was granted access to spreadsheets for 2015-2021 in respect of HSE employees who submitted statements of interest, which included the employee's name, grade, area of employment, date of receipt of return of the details of the interest, declared, work

addresses and manager details. The employees' personnel and mobile numbers were directed by the Commissioner to be redacted.

5. RTE have averred in this appeal that the disclosure granted by the Commissioner will allow them to assess the extent of compliance by HSE employees with their obligations under the Ethics Act and how the HSE is managing possible instances of non-compliance. The HSE says the Commissioner erred in law in their interpretation and application of s. 35(1)(b) and s. 41(1)(a), s. 37(1) s. 35(2)(c)(i) of the Ethics Act in determining that the records were not exempt from disclosure, and wrongly relied on s. 18(4) of the Ethics Act in determining that the information in the records fell outside of the definition of personal information in the Ethics Act. The HSE also claimed the Commissioner failed to properly consider and/or address their submissions and arguments in relation to s. 35(2) of the Freedom of Information Act vis-à-vis the confidential rights of relevant third parties.

#### **The Commissioner's decision**

6. The decision of the Commissioner addressed three issues, one of which, in relation to s. 37(1), was raised de novo by the Commissioner.

- i. Whether the HSE was justified in refusing access under s. 41(1) of the Freedom of Information Act?

Section 41(1) requires a request to be refused where disclosure is prohibited by an enactment, other than certain enactments specified in Schedule 3 of the Act which does not refer to the Ethics Act. The HSE argued that s. 35 of the Ethics Act prohibited disclosure of the records sought by RTE as they contain information obtained by the HSE under the Ethics Act. The Commissioner agreed that disclosure of any interests declared by the employees would be prohibited as coming within s. 35(1) but went on to consider s. 35(2)(c)(i) which disapplied the disclosure of information by a person in the performance of their function. The Commissioner cited one of their own decisions which had found:

*"...the disclosure of records to a requester by a decision maker in an FOI body on foot of an FOI request, when the FOI Act requires same, is deemed to be the disclosure of information by a person in the performance of his or her functions for the purpose of subsection (2)(c)(i). This means that if the records sought are not exempt from release under the FOI Act, then section 35(1) of the Ethics Act cannot serve to prohibit the release of records as subsection (2)(c)(i) serves to disapply section 35(1) in such circumstances."*

ii. Whether s. 37(1) of the Freedom of Information Act applied?

Section 37(1) requires the decision maker to refuse access to personal information, which is defined in s. 2 of the FOI Act and identifies what is excluded from the definition including at para. (I) (set out above). The Commissioner explained their understanding of that exclusion as:

*"...intended to ensure that section 37 will not be used to exempt the identity of a staff member or director of, or office/position holder in, an FOI body in the context of the particular position held or any records created by the staff member, director or office/position holder while carrying out his or her official functions. The exclusion does not deprive staff members or directors of, or office/position holders in, FOI bodies of the right to privacy generally."*

They note that s. 18(4) of the Ethics Act renders compliance with the requirement to furnish a statement of interest part of the terms of employment. From that they concluded that:

*"...the disclosure of the fact that a staff member has submitted a statement of interests is information relating to the terms of the individual's employment. Moreover, much of the information at issue is, in my view, information that can reasonably be described as information relating to the positions held."*

Therefore, the Commissioner found that the exclusion at s. 2(I) captured the information that RTE sought, other than personnel numbers and mobile telephone numbers recorded in the records and was therefore required to be disclosed.

iii. Section 35(1)(b) of the Freedom of Information Act.

Section 35(1)(b) provides that a decision maker must refuse access to information that would constitute a breach of a duty of confidence provided for in an agreement, enactment or otherwise by law. This is disapplied by s. 35(2) where the record is prepared in the course of the performance of their functions, subject to certain other sections. The Commissioner found the records sought by RTE were prepared by the HSE's employees in the performance of their functions and, given s. 18(4) of the Ethics Act, could not constitute a breach of confidence owed to a person other than the HSE's staff. The Commissioner concluded:

*"I find that the HSE was justified in refusing access, under section 37(1) of the Act, to the personnel numbers and mobile phone numbers of the relevant individuals contained in the records. I find that it was not justified in refusing access to the remaining information that falls within the scope of this review under section 35(1)(b) or section 37(1). In turn, this means that as the remaining information is not exempt from release under the FOI Act, then section 35(1) of the Ethics Act cannot serve to prohibit the release of the records as*

*subsection (2)(c)(i) serves to disapply section 35(1). Accordingly, I also find that the HSE was not justified in refusing access to the information under section 41(1)(a) of the Act as the disclosure of the information is not prohibited by section 35(1) of the Ethics Act in this case.”*

### **Appeal on a point of law**

**7.** The HSE’s appeal makes three criticisms of the Commissioner’s decision which they say give rise to appealable points of law:

- i. The interpretation of and interaction between s. 35 of the Ethics Act and s. 41(1)(a) of the Freedom of Information Act, arising from the Commissioner’s finding that the disclosure of information required by the Freedom of Information Act is an exercise of the HSE’s functions within s. 35(2)(c)(i) of the Ethics Act.

This is largely an issue of statutory interpretation on which no curial deference is owed to the first instance decision maker. It is a legal point and the HSE is entitled to appeal to this court on this point.

- ii. Disclosure of personal information; s. 37(1) of the Freedom of Information Act.

The HSE contend that the Commissioner wrongly concluded that the information sought by RTE came within the exclusions to the definition of personal information in s. 2 of the Freedom of Information Act, having had regard to the requirements imposed by s. 18(4) of the Ethics Act.

This involved some statutory interpretation in determining what the law requires, as well as some application of evidence to that law, on which some curial deference is owed to the first instance decision maker as long as there was evidence before him to ground the decision.

The HSE is entitled to appeal to this court on this point.

- iii. Confidentiality owed to third parties by virtue of s. 35 of the Freedom of Information Act.

The HSE claim that the Commissioner failed to address the arguments they made to the Commissioner that disclosure was precluded by s. 35(2) as the breach of duty of confidence provided for by an agreement, an enactment or otherwise by law which, they say, is part of the duty to give reasons. In their submission to the Commissioner, they referred to their Code of Governance which is referenced and exhibited in their pleadings but was not particularly relied on at hearing.

There is ample authority to confirm that a decision maker must engage with significant submissions made to them and the reasons given for the decision must demonstrate that



engagement. That is not to say that every single point raised requires to be specifically addressed. The HSE's case about s. 35(2) was identified in their submissions to the Commissioner, albeit to a lesser extent than the statutory interpretation point at (i) above. The HSE's assertion of a failure by the Commissioner to engage with their argument does give rise to an appeal on a point of law.

### **The Scope of the Freedom of Information Act**

8. The long title of the Freedom of Information Act says it is "*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*". It goes on to say it provides for "*necessary exceptions to that right*". The general right to access to records is set out in s. 11(1), again, widely as "*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.*" Section 11(3) requires the FOI body in performing any function under the Act to 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."*

9. The wide scope of those provisions is diluted somewhat by subs. 6 which provides:

*"Subsection (4) shall not be construed as applying, in relation to an individual who is a member of the staff of an FOI body, the right of access to a record held by an FOI body that—*

*(a) is a personnel record, that is to say, a record relating wholly or mainly to one or more of the following, that is to say, the competence or ability of the individual in his or her capacity as a member of the staff of an FOI body or his or her employment or employment history or an evaluation of the performance of his or her functions generally or a particular such function as such member,*  
*(b) was created more than 3 years before the effective date by the FOI body concerned, and*

*(c) is not being used or proposed to be used in a manner or for a purpose that affects, or will or may affect, adversely the interests of the person."*

Subsection 7 removes exempt records from the scope of s. 11 either where the exemption is "mandatory" or relating to the exercise of discretion that requires the weighing of the public interest, if the factors in favour of refusal outweigh those in favour of release.

**10.** Section 22(12) requires the Commissioner to apply a presumption in favour of disclosure in stating:

*"(12) In a review under this section—*

*(a) a decision to grant a request to which section 38 applies shall be presumed to have been justified unless the person concerned to whom subsection (2) of that section applies shows to the satisfaction of the Commissioner that the decision was not justified, and*

*(b) a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified."*

**11.** In *The Minister for Communications v. The Information Commissioner* [2022] 1 IR 1 Baker J. said:

*"The Oireachtas chose to place an onus to justify a decision to refuse. It could have placed the onus on the requester or, indeed, on the Commissioner on review, but that option may not have met the philosophy of the legislation and the clear choice was to support the right of access by requiring justification of a refusal of access whilst at the same time presuming justified a decision to disclose. The consequence of this legislative choice is that a decision to refuse access must be made for justifying reasons."*

She went on to say at para. 160 that the Commissioner "*must be conscious at all stages of the process that the overriding presumption is one of disclosure*" and at para. 162 she said:

*"Thus, the structure of the 2014 Act tends towards disclosure, such that a decision to refuse is prima facie not justified, and the decision to grant it in the public interest is prima facie justified."*

**12.** Just as the wide scope of disclosure has been repeatedly emphasised by the courts, so too has the narrow scope of the statutory exemptions thereto. In *F.P. v. Information Commissioner* [2009] IEHC 574 Clark J., in considering the predecessor to the current Freedom of Information Act, said that exemptions should be "*interpreted restrictively and applied sparingly*" as otherwise "*refusal*

of access could become the rule instead of the exception and this would clearly frustrate the primary objectives of the Act". This was expressly approved by Baker J. in *The Minister for Communications v. Information Commissioner*.

**Section 35 of the Ethics Act and s. 41 of the Freedom of Information Act**

**13.** The Commissioner's decision in relation to s. 35(2)(c)(i) of the Ethics Act disapplying s. 35(1) of the Ethics Act found that the disclosure of records by an FOI decision maker required by the Freedom of Information Act is part of the performance of their "*functions*" pursuant to section 35(2)(c)(i). "*Functions*" is not defined in the Freedom of Information Act but is widely defined at s. 2 of the Ethics Act as including:

*"...powers and duties and references to the performance of functions include, with respect to powers and duties, references to the exercise of the powers and the carrying out of the duties and, in relation to an office holder, includes functions conferred on him or her by the Government or in pursuance of a decision of the Government and functions of the office holder as a member of the Government"*.

Section 35(2)(c)(i), in fairly simple terms, includes the disclosure of information by a person in the performance of their function in the information obtained under the Ethics Act that may be disclosed. Section 18 of the Ethics Act requires persons in designated employment positions to prepare statements of their interests and those of certain persons connected to them:

*"...which could materially influence the person in or in relation to the performance of the functions of the position by reason of the fact that such performance could so affect those interests as to confer on or withhold from the person or the spouse or civil partner or child a substantial benefit"*.

The HSE say that this shows that s. 35(2)(c)(i) is intended to disapply s. 35(1) only where a person is performing their functions that are set out in, for example, sections 17, 18 and 19 i.e., where the interests could influence the performance of their functions, as otherwise disclosure requirements would apply to the relevant employee's performance of any function under any legislation. The HSE criticises the Commissioner's broader application of the Freedom of Information Act. However, the Act itself is premised on being applied broadly, in particular, in making disclosure of information the default position and in treating non-disclosure as the exception, as discussed above at paragraph 12.

**14.** Section 41 of the Freedom of Information Act provides for the circumstances in which disclosure "*shall*" be refused, described by counsel for RTE as a mandatory, class based and

conclusive exemption which she says can be contrasted with other provisions that limit the exemption of records to circumstances where the disclosure would be likely to harm a particular interest, such as s. 30(1)(a), s. 32.1(a), s. 36.1(b) and (c), s. 39(1)(b) of the Freedom of Information Act. She points out that s. 41 does not contain the public interest balancing test that is included in some of the exemptions. In light of the overall purpose and logic of the Act as evidenced by the long title and key provisions such as ss. 11(3) and 22(12)(b) as well as the caselaw on the restrictive interpretation of exemptions, counsel submitted that it must be very clear that there is an enactment which expressly bars disclosure of a record. There is merit in those submissions.

**15.** As well as the statutory presumptions in s. 22, the decision of the Supreme Court in *Heather Hill* [2022] IESC 43 makes it clear that the onus to establish that a statute does not have the effect suggested by its words rests on the party contending for that (at para. 214 of Murray J.'s decision). Murray J. went on to say (at para. 215) that the court must ask, firstly, why the Oireachtas would not have wanted to do this and secondly, where that negative purpose is in the text or context of the statute. There is no reason why the Oireachtas would have wanted to limit the s. 35.2(c)(i) exception to non-disclosure to where a person is performing their functions under the Ethics Act only. Neither is there any of that negative purpose in the text or purpose of the Freedom of Information Act. Indeed, the presumption in favour of disclosure, discussed above, seems to operate against the statutory construction urged on the court by the HSE.

**16.** Section 41 requires a decision maker to refuse disclosure that is prohibited by an enactment, but the Commissioner was correct in finding that the prohibition of s. 35 of the Ethics Act was disapplied by s. 35(2)(c)(i) as disclosure of information by the Freedom of Information decision maker in the performance of their functions. There is no basis for a restrictive application of s. 35(2)(c)(i) to the Ethics Act only (or to the other legislation it expressly applies to) urged on the court by the HSE. The functions referred to in the Ethics Act do include the decision maker's functions under the Freedom of Information Act. Those functions, referred to in s. 35(2)(c)(i), can change regularly. New legislation can expand or remove such a person's functions, as confirmed by s. 10 of the Interpretation Act which provides "*[a]n enactment continues to have effect and may be applied from time to time as occasion requires.*" In the absence of an express restriction of the application of s. 35(2)(c)(i) to functions under the Ethics Act, the reference to functions should include functions under other legislation. That interpretation is supported by the broad definition of functions in the Ethics Act as well as the fact that the Oireachtas did not consider it necessary to define functions again in the Freedom of Information Act. This was in spite of express references therein to

"functions", for example at s. 2 defining various concepts including "exempt record" and "personal information", s. 8 in relation to publication of information about Freedom of Information bodies and s. 32(3) in relation to functions of law enforcement or public safety of such information bodies. The fact that the Oireachtas wanted to be particularly clear in providing for the exemption at s. 35(2)(c)(ii) and (iii) of the Ethics Act in including disclosure by a person (who could be a member of the public) to certain bodies and court order disclosures, none of which are statutory functions, does not detract from the broad application of s. 35(2)(c)(i) to functions of a decision maker in addition to and beyond their functions under the Ethics Act.

**i) Personal information: s. 37(1)**

**17.** Section 37(1) prohibits disclosure of personal information. The Commissioner concluded that most of what was in the record came within the exclusion to the definition of personal information at s. 2(I) as:

*"...information relating to the office or position or its functions or the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid".*

They came to this conclusion because s. 18(4) of the Ethics Act requires the terms of employment of persons in designated positions to comply with the requirement to furnish a statement of interest under section 18(2). The Commissioner considered the information sought was information relating to the positions held. The HSE says the Commissioner wrongly conflated information relating to the position, its functions or its terms, with information relating to how the function was discharged, which is not excluded from personal information. The HSE accept their employee's obligations to comply with the Ethics Act as a term of their employment that can be disclosed, but they dispute that disclosure extends to the employee's compliance or non-compliance with that term. Their counsel gave the example of a term of employment requiring an employee to live in a particular location, which term could be disclosed, but information about where the employee was actually living could not be disclosed, as it is exempt personal information.

The issue for the court is whether information about the HSE's employees' compliance with their obligations to make a statement of interest is personal information exempt from the disclosures required by the Freedom of Information Act or is it information relating to the terms of their employee's employment and therefore removed from the ambit of personal information by virtue of how personal information is defined in s. 2(I) of the Freedom of Information Act. The Commissioner

was, quite properly, careful to confirm (at p. 4 of their decision) that “*details of the declared interest contained in the records at issue*” were outside their review. This had already been accepted by RTE in their application for a review to the Commissioner when they said they were “*not seeking the statements themselves nor information contained within the statements*” (confirmed at p. 2 of the Commissioner’s decision). Therefore, there is no question of RTE seeking disclosure of the information contained in any statement of interest, which could include the fact that an individual employee had filed a statement of nil interest. RTE sought information on the employee’s compliance or non-compliance with the relevant term of their employment, which is different to the analogy cited by the HSE of the disclosure of an employee’s home address in seeking information about their compliance with the term of their employment requiring them to live in a certain area. Undoubtedly, an employer could not disclose an employee’s home address as to do so would be a blatant breach of their privacy (the protection of which is recognised by the long title to the Act discussed above) but their employer might be required to disclose a record of an employee’s compliance or non-compliance with their obligation to live in a particular location.

**18.** Section 2(I) of the Freedom of Information Act recognises that it is not a breach of an employee’s right to privacy for an employer to disclose information relating to:

*“...the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid”.*

Section 18(4) of the Ethics Act requires the HSE’s designated employees to comply with their s. 18(2) obligation to prepare and furnish a statement of interest as part of the terms of their employment. That requirement is clearly part of the terms on which those employees occupy their position. Whether or not the employee has complied with that term is, equally clearly, information relating to those terms. A request to disclose that information cannot be refused as involving the disclosure of personal information pursuant to s. 37(1) of the Freedom of Information Act. The Commissioner was, therefore, correct in concluding that the HSE was not justified in refusing access to the information in the record pursuant to s. 35(1), other than the personnel numbers and mobile phone numbers of the individuals that was properly found to constitute personal information.

**ii) Section 35(1)(b): exclusion of information obtained in confidence/confidentiality owed to relevant third parties**

**19.** Section 35(1)(b) of the Freedom of Information Act prohibits disclosure of information that would breach a confidence provided for by an agreement or an enactment or otherwise by law.

Section 35(2) disapplies that where the record is prepared by a person in the course of the performance of their duties, unless it would be a breach of confidence provided for by an agreement, an enactment or otherwise by law, owed to a third party. The Commissioner found that the records sought by RTE were prepared by HSE employees in the course of the performance of their duties and that s. 35(2), therefore, disapplied 35(1). They then proceeded to consider whether the disclosure sought would breach a duty of confidence provided for by agreement or enactment or otherwise by law, owed to a third party. Having regard to the employee's duty pursuant to s. 18(2) to furnish a statement of interest, the Commissioner said they failed to see how the release of the record could constitute a breach of a duty of confidence owed to third parties.

**20.** The HSE pleaded (at paras. 10 and 11 of their notice of motion) that the Commissioner failed to properly consider and/or address the submissions and arguments they made in relation to the application of s. 35(2) as to the fact that the statements contained information of interest held by "*relevant third parties in a personal capacity and that such information can relate to third parties*". They also pleaded (at para. 12) that the Commissioner failed to give proper or any adequate reasons for his conclusion that s. 35(2) precluded reliance on section 35(1)(b). In oral submissions, counsel for the HSE suggested that disclosing information about an employee's compliance with their requirement to furnish a statement of interest pertaining to their interests or the interests of relevant third parties such as their spouse or children, could put a person in receipt of that information on "*a train of inquiry*". Such a third party was entitled to expect that the fact of their spouse/parent etc. had made a statement of interest would not be made public because the contents of that statement could include information about the financial affairs of the third party.

**21.** There are two difficulties with this submission. Firstly, it is difficult to see or understand as a matter of fact how information about an employee's compliance or non-compliance with their requirement to file a statement of interest, could lead a person to commence the train of inquiry for which the HSE contends. If RTE is advised that employee X made a statement of interest, then the HSE's argument suggests that this enables RTE to embark upon an inquiry in relation to the financial affairs of that employee's spouse or children that could not otherwise have occurred. Informing RTE of the fact that employee X has filed, or has not filed, a statement of interest without giving RTE any information about the content of that statement, including whether it confirmed if any interests of the employee or interests of third parties related to them were actually set out in the statement at all, could not allow RTE to commence an inquiry that could not have otherwise taken place. If or when RTE, or any other interested member of the public, establishes that a designated employee is

required to file a statement of interest, the information that the Commissioner has directed should be disclosed will only tell them whether that designated employee has complied with their filing obligation or not. I find no basis in fact for the HSE's contention that furnishing information about their employee's compliance, or non-compliance, could render a third party related to the employee vulnerable to a line of inquiry in relation to their personal financial affairs that could not otherwise have commenced.

**22.** Secondly, even if I am wrong in that, and there is merit in the HSE's "train of inquiry" submission, it is clear that no such submission or argument was made to the Commissioner. There is no basis to the HSE's criticism of the Commissioner for not having addressed that argument as it was never made to them. The Commissioner records, at p. 6 of their decision, the arguments made by the HSE in relation to s. 35(2) as follows:

*"In its submissions to this Office, the HSE said the ethics in public office process is undertaken annually on behalf of the Chief Executive in order to comply with its obligations as set out in the Ethics Act. It said the statements contain details of interests held by the staff members and relevant third parties 'in a personal capacity'. It is argued that the statements are not provided by the individuals in the course of their performance of their functions within the HSE. It said that in some cases the interests declared relate to third parties such as civil partners or spouses."*

In considering that argument, the Commissioner reiterated the importance of the fact that the declared interests as contained in the records at issue were outside the scope of their review.

They went on to say that, given s. 18(4) of the Ethics Act, they "fail to see how the release of the records could possibly constitute a breach of a duty of confidence owed to a person other than its staff".

**23.** An examination of the arguments and submissions made by the HSE to the Commissioner, confirms that the Commissioner's analysis properly and fairly reflects the limited submissions that were actually made to them. In inviting the HSE to make submissions, the Commissioner's letter of 17 August 2022 explained the presumption in favour of disclosure as per s. 22(12)(b) (discussed above) and how the onus was on the HSE (wrongly referred to in the letter as "the Council" but clarified at hearing that it was intended to and was understood to refer to the HSE) to justify its decision to refuse disclosure. The letter said that "full, coherent, fact specific reasoning should be provided to show how or why the particular information concerned meets the criteria of the relevant exemption provisions." A number of questions under the two statutory provisions on which the HSE



has relied in its decision to refuse disclosure were listed. Under the heading at s. 35.1(b), four questions were posed, two of which seem to be relevant to this discussion. They were numbered 10 and 11 in the Commissioner's questions but were later renumbered 11 and 12 when the document containing the HSE's answers was furnished to the Commissioner. I set out those two questions for the avoidance of any doubt:

*"[S]how that disclosure of the information contained in the record would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law.*

*Please also identify the person to whom the duty of confidence is owed and show that such person is not an FOI body, head or director or member of staff of an FOI body or a service provider."*

The HSE also furnished a table of answers to the Commissioner's other 'sample' questions, some of which overlapped with the answers given to the Commissioner's specific questions to the HSE by referring the reader back to the answer to question 11 above. A copy of the HSE's Code of Governance was also furnished to the Commissioner running to some 129 pages with appendices. The HSE's submissions to the Commissioner did not refer to any particular part of the Code or ask the Commissioner to consider any specific provision thereof.

**24.** The entirety of the limited submissions made by the HSE in relation to s. 35(2) are set out in their answers to questions 11 and 12 above, which relate to actual interests declared. I set out those answers here:

"A *The Ethics in public office process is undertaken annually by HR operations and Digital Development on behalf of the Chief Executive Officer in order to comply with our legal obligations as set out in the Ethics in Public office Act.*

*The CEO is required to operate within the HSE Code of Governance which requires that they maintain confidentiality of all information obtained by virtue of their position. This code includes the requirement of ethics in public office. Therefore in keeping with this code any employee that provides a return to the CEO in respect of their interests under the Ethics in public office would expect that any such return would be treated as being provided in confidence and thus a release of such records would constitute a breach of the duty of confidence that the CEO holds. (Code of Governance attached see attachment number 1)*

...

A *In some cases the interests declared relate to civil partner/spouse or child of holders of designated positions of employment – in many cases these individuals will not hold designated positions within the FOI Body in this case the HSE.”*

**25.** It is possible that relevant third parties whose actual interests were declared might have an expectation of confidence over the contents of the statements made, although I make no such finding as that issue is not before me. What is at issue here is entirely different, i.e., the claim made by the HSE that the Commissioner failed to engage with their submissions and arguments that the records sought by RTE contained information of interests of relevant third parties or can relate to third parties (as set out at para. 51 of the HSE’s written submissions). That argument, to the extent it was made to the Commissioner, was sufficiently engaged with and addressed by the Commissioner. The fact is that the argument was largely irrelevant in circumstances where, as found by the Commissioner, *“the declared interest contained in the records at issue do not fall within the scope of this review”*, following on the Commissioner having recorded the argument that was made by the HSE in saying *“in some cases the interests declared relate to third parties such as civil partners or spouses”*.

**26.** The Commissioner recorded and considered the arguments made by the HSE, both of which are clearly set out in the decision. The brevity with which this was done reflects the extent and relevance of the argument made by the HSE. The HSE’s criticism of the Commissioner for failing to engage with its arguments or submissions on s. 35(2) or to give reasons for the decision have neither a factual basis nor any merit.

### **Conclusion**

**27.** For the reasons set out above, I refuse the HSE’s appeal. The decision of the Commissioner stands.

### **Indicative view on costs**

**28.** My indicative view on costs, in accordance with s. 169 of the Legal Services Regulation Act 2015, is that the Commissioner, having succeeded in defending this appeal, is entitled to their costs from the HSE. Whilst RTE were not required, as notice party, to participate in these proceedings, there was considerable merit in their submissions vis-à-vis the importance of the role of the Freedom of Information Act in their mandate to conduct investigative journalism, which added features to the hearing that might otherwise not have been available to the court. I will put the matter in for mention at 10.30 am on 26 July 2024 to hear whatever submissions the parties wish to make in relation to final orders including costs.

**Counsel for the HSE:** Eoin McCullough SC, Aoife Carroll BL

**Counsel for the Information Commissioner:** Francis Kieran BL

**Counsel for RTE:** Claire Hogan BL