F. P. & The Information Commissioner

THE HIGH COURT

IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS 1997 AND 2003

[2006 No. 4 M.C.A.]

BETWEEN

F. P.

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

THE HEALTH SERVICE EXECUTIVE (FORMERLY THE EASTERN HEALTH BOARD), OUR LADY'S HOSPITAL FOR SICK CHILDREN AND S. P.

NOTICE PARTIES

JUDGMENT OF MS. JUSTICE MAUREEN H. CLARK, delivered on the 13th. day of July, 2009.

1. This is an appeal on a point of law pursuant to s. 42(1) of the Freedom of Information Act 1997 from two decisions of the Information Commissioner delivered on the 17th and 28th November, 2005. Those decisions affirmed the earlier decisions of the former Eastern Health Board and St. Louise's Unit of Our Lady's Hospital for Sick Children, Crumlin to refuse the appellant's request for access to certain records, finding them to be exempt under ss. 26 and 28 of the Act of 1997. The records to which the appellant sought access were generated between January and October, 1998 and related to allegations of child sexual abuse made against him and an assessment which concluded that the allegations were "unconfirmed". The essential question in this case is whether the Commissioner misdirected herself as to the application of s. 28(5) (a) of the Act of 1997.

Background

2. The appellant's requests for access to records in the present case were made following a series of disturbing events. The appellant's wife gave birth to a daughter in 1993. The appellant believed the child to be his biological daughter and he formed a strong parental bond with her. They lived together as a family unit. It emerged however that the child was the result of his wife's extra-marital relationship with another man. Unknown to the appellant, his wife applied for the child's birth certificate to be amended so that the biological father's name was substituted for the appellant's name. She also secretly obtained DNA tests confirming the other man's paternity of the child and obtained Court orders providing for birth expenses and support for the child from the biological father which were expenses already provided for by the appellant.

3. Not unsurprisingly, the appellant and his wife split acrimoniously in 1997 and their relationship was thereafter very strained. His wife moved out of the family home, taking the child with her. It is fair to say that the appellant had great difficulty in accepting that the child who he had raised as his daughter and who he deeply loved was not his. On the 12th January, 1998 he commenced proceedings for access under the Guardianship of Infants Act 1964. Those proceedings were served on his wife during the following week. On the 19th January, 1998 his estranged wife reported to the Eastern Health Board that the child had told her that she had been touched inappropriately by the appellant.

4. By letter dated the 30th January, 1998 the Health Board notified the appellant that his wife (referred to by her maiden name) had attended at its clinic and indicated that she had "concerns" for her daughter who had indicated to her that the appellant allegedly touched her on her "front" and "back bottom" and also that he allegedly "put [his] tongue on her tongue", and that the child had demonstrated to his wife an action which he allegedly did in her company. He was informed that the Health Board had an obligation to investigate such allegations. A fortnight later he was informed that the child had been referred for assessment to St. Louise's Unit of Our Lady's Hospital, Crumlin, and that the Gardaí had been notified.

5. The appellant was invited to take part in the Unit's assessment but, following correspondence in which he sought assurances that fair procedures would be accorded to him, he declined to do so. The Unit could not ensure that any interviews with the appellant would be recorded or that he would be furnished in advance with guidelines under which the Unit operated. It subsequently appeared that no such written guidelines were in existence. He had no further access to the child. The nature of the allegations was not disclosed to him apart from being told that the child had said "he had touched her back bottom and her front bottom."

6. This Court cannot help but feel that the events which occurred thereafter could have been avoided if the social workers had agreed to meet the appellant's concerns by furnishing him with a full account of the allegations which were reported to have been made by the child to her mother concerning him. If, in addition, he had been permitted to have a transcript or a record of his interviews with the social workers to protect his interests, much expense and grief could have been avoided. I also use the word "allegation" to describe what the notice parties in this case have been careful to refer to as "concerns" expressed by the mother of what the child is alleged to have told her concerning the appellant's behaviour which if established would have profound effects on both the appellant and the child.

The Appellant's FOI Requests

7. In February, 1999 the appellant made requests to the Health Board and to the Hospital pursuant to s. 7 of the Freedom of Information Act 1997, seeking access to all records relating to himself and to the child. The Board released to him some records relating to himself but withheld records which it contended were exempt by virtue of s. 26(1) of the Act of 1997 because they contained information given to the Board in confidence and all records relating to the child as it considered those to be exempt under s. 28(1) of the Act of 1997. In addition it withheld a number of documents which were exempt under s. 22(1) (a) of the FOI Act on the basis that they were confidential communications made between the Board and its legal adviser for the purpose of obtaining and / or giving legal advice.

8. In the meanwhile St Louise's Unit had proceeded with its assessment of the alleged abuse. There was some delay as the child's mother initially decided not to proceed with the assessment but new complaints were made in October, 1998 and the mother and child were then interviewed. Three recorded interviews took place between the child and experts in the area of child sexual abuse allegations. In October, 1999 the appellant was notified that the "concerns or allegations are unconfirmed". The Gardaí were notified of the same conclusion. Later that month the Board explained to the appellant that there are three categories of outcome – confirmed, unconfirmed and unfounded and that the "unfounded" category was used only where there was proof that the concern raised was factually incorrect.

9. A report subsequently compiled for the purpose of the access proceedings, with respect to the interests of the child, noted that the allegations were unconfirmed. The report was sympathetic to the appellant's position but it noted that he had not seen the child in two years. It recorded that the child had been told who her biological father was but she had not met him and she was aware that her mother was in a new relationship with a further man, with whom she went on to have five more children. The report concluded that, given her confusion as to the roles of

the various men in her life, it would not be in her interests to add further confusion. The appellant's application for access rights therefore failed.

10. In October, 1999 the appellant made a request to St Louise's Unit ("the Hospital") seeking all records relating to himself and to the child. The Hospital granted his request in part but refused access to certain files which would permit him to know the extent and content of the complaints alleged to have been made against him.

11. In November, 1999 the appellant made a further request to the then Health Board pursuant to s. 7 of the Act, seeking access to any additional related records created by the Board since February, 1999. Later that month the Board released one record to the appellant and refused him access to four records relating to the child which had been created in the intervening period, which it considered exempt on the basis of s. 28(1) of the Act.

12. In December, 1999 the appellant sought internal review of the decisions of the Health Board. At that time he narrowed the scope of his request to exclude any records of the child other than those which referred jointly to himself and to the child. He clarified that he was not seeking the child's personal records as her parentage had been established by the courts in the interim and he was not her biological father. The initial decision was nevertheless affirmed by the Board in April, 2000. That month, the appellant sought internal review of the decision of the Hospital which upheld its previous decision in May, 2000.

Review by the Commissioner

13. In October, 2000 the appellant made a review application to the Information Commissioner. In April, 2002 he wrote to the Commissioner, clarifying that he was not pursuing any records as related exclusively to the child but was seeking all records that referred to himself and to the child and also each and every record as was considered by the Hospital in its assessment of the alleged abuse.

14. In April, 2003 an Investigator wrote to the appellant indicating that her preliminary view was that the decisions of the Board and the Unit should be affirmed on the basis that all of the information was personal information relative to the child or third parties and exempt from access as the appellant was neither the parent nor the guardian of the child. He was invited to demonstrate to the Commissioner that on balance, the public interest in granting access to the records outweighed the child's right to privacy within the meaning of s. 28(5) of the Act of 1997.

15. In reply the appellant furnished a 98-page submission with supporting materials, in which he outlined the reasons for which he sought access to the records. He was at pains to present the allegations made against him

as malicious and untrue and as having been made in the context of a matrimonial break-up. He submitted that it was in the public interest that false allegations should be investigated and that his constitutional right to a reputation should be vindicated. He pointed out that because he had no access to the records he was unable to assess whether to pursue a civil action in the event of the allegations having been made maliciously. He also argued that there was a public interest in individuals having access to their personal records in order to be in a position to ensure that such records are not incorrect or misleading.

16. On the 17th November, 2005 the Commissioner affirmed the decisions of the Health Board. She was satisfied that the documents were exempt pursuant to s. 28(5B) of the Act of 2007. She did not go to on to assess whether the documents were (also) exempt pursuant to s. 26. On the 28th November, 2005 the Commissioner affirmed the decisions of the Hospital. She stated that the analysis carried out in the previous decision was relevant also to that decision and she again concluded that the documents were exempt pursuant to s. 28(5B) and that he was not entitled to the documents under s. 28(5) of the Act.

The Commissioner's Assessment

17. In her decision of the 17th November the Commissioner examined the records withheld and she found that all of them disclosed personal information relating not just to the appellant but also to the child. She therefore found that, on the face of it, the records were exempt by virtue of s. 28(5B) of the Act, as amended. Having determined that no issues arose under ss. 28(2) (b) to (e), she turned to consider the application of the public interest test set out in s. 28(5). Her conclusions on the application of s. 28(5) are challenged in these proceedings.

18. In assessing the application of s. 28(5), the Commissioner stated that she examined the appellant’s submissions with respect to the public interest. Of relevance to the appellant’s arguments in this case is that she noted that “the complaints or allegations were unconfirmed”.She stated that the Hospital had taken the position that this was a category covering a wide spectrum ranging from “almost sufficient evidence to confirm” to “nearly no evidence” and where it is not possible to form a clear opinion in that the allegations have neither been confirmed nor completely ruled out. In those circumstances she took it to be the position of the Hospital that “it does not regard the allegations as having been made maliciously.” She stated that she understood the position of the Board to be in line with the Hospital’s position and she stated that this was not a case where she would feel entitled to take a view as to whether a particular allegation had been made falsely. She concluded:-

“It is clear from the records in question that the information provided to the Board, and which formed the basis for the Board's decision to refer [the child] to the Hospital, was provided on the basis of possible grounds for concern; the person conveying the information did not make any allegation. In the absence of any evidence that the matter was raised with the Board for malicious purposes, and in the light of the positions adopted by the Board and the Hospital, I have no basis for concluding that the approach to the Board was malicious.” (emphasis added)

19. The Commissioner stated that the appellant’s arguments in that regard were not of significance when considering the application of s. 28(5) (a) in the case.

20. She went on to assess various other arguments made by the appellant with respect to the public interest. Having determined none of those arguments were of significance when considering the application of s. 28(5) (a), she stated as follows with respect to the right to privacy:-

“It is clear that the protection of personal information provided at section 28 of the FOI Act reflects the constitutionally recognised right to privacy. The right to privacy, to the extent that it is recognised in the Constitution, is not absolute. However, it seems reasonable to believe that the extent to which this right must be recognised is, to some extent, governed by the nature of the material whose release would result in a breach of privacy. In the present case, the records at issue constitute not just personal information in relation to [the child]; they constitute extremely sensitive personal information the release of which would constitute a very significant breach of [the child]’s right to privacy."

21. The Commissioner acknowledged that the appellant’s submissions contained elements which constitute valid public interest arguments in support of granting his request but her overall finding was that:-

“the cumulative impact of these public interest arguments is not such as to displace the very strong public interest served by the protection of the privacy rights of [the child] in relation to an aspect of [the child]’s life which is particularly sensitive. On this basis, I find that the public interest in granting your request does not outweigh the public interest in upholding [the child]’s right to privacy.”

22. The Commissioner went on to assess the application of ss. 28(5) (b) and 28(6). Nothing turns on her assessment of those provisions in these proceedings.

Appeal to the High Court

23. The appellant, a litigant in person, made a large number of written and oral submissions encompassing many arguments which were sometimes lacking in cohesion over a number of days. While his arguments were far

ranging, his constant primary submission was that the Information Commissioner erred in law in the manner in which she directed herself as to the application of the public interest test set out in s. 28(5) (a) of the Act of 1997 and, in particular, in finding that the report made by his wife to the Health Board was not a malicious allegation. The appellant has asked the Court to remit the matter to the Information Commissioner for a new determination.

24. All other parties to these proceedings opposed the application and stood over the decision of the Commissioner.

25. This being an appeal on a point of law pursuant to s. 42 of the Act of 1997, the Court is (as was held by McKechnie J. in Deely v. The Information Commissioner [2001] 3 I.R. 439) confined as to its remit as follows:-

“(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings

(b) it ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw,

(c) it can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect, and finally,

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision.”

The application of section 28(5) (a)

26. The appellant accepts that if he is granted access to the records sought, personal information relating not just to him but also to the child will be disclosed. He did not take issue with the Commissioner’s determination that the exemption provided for in s. 28 applies in this case, as a result of the operation of ss. 29(2) (a) and 29(5B), subject to the overriding public interest test set out in s. 28(5).

27. Section 28(1) of the Act provides as follows:-

“Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if, in the opinion of the head, access to the record concerned would involve the disclosure of personal information (including personal information relating to a deceased individual).”

A request made under s. 7 of the Act of 1997 is a request for access to records.

28. The exemption provided for by s. 28(1) is subject to sub-sections 2 to 5B of section 28. Sub-sections 2 (b) to (e) of section 28 are of no relevance

to this case nor are sub-sections (3), (4) or 5A. Of particular relevance however are sub-sections 2(a), 5 and 5B. Section 28(2) (a) provides that section 28(1) does not apply if the information concerned relates to the requester concerned. This is in turn subject to section 28(5B), as inserted by section 23 of the Freedom of Information (Amendment) Act 2003, which provides:-

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

29. It is clear that this provision is applicable in the case of the appellant, as the grant of access to the records will result in the disclosure of information relating not only to the appellant (i.e. the requester) but also to the child. Thus, the Health Board, the Unit and the Commissioner were, on the face of it, justified in refusing the application made by the appellant seeking access to the records, pursuant to s. 28(1) of the Act of 1997, as amended.

30. That is not the end of the matter however. The operation of s. 28(1) and s. 28(5B) are subject to an overriding public interest test imposed by s. 28(5) which provides:-

“Where, as respects a request under section 7 the grant of which would, but for this subsection, fall to be refused under subsection (1), in the opinion of the head concerned, on balance_

(a) the public interest that the request should be granted outweighs the public interest that the right to privacy of the individual to whom the information relates should be upheld, or

(b) the grant of the request would benefit the individual aforesaid,

the head may, subject to section 29, grant the request.”

31. Section 29 sets out consultation requirements which are not at issue in this case.

32. The essential question for the Court is whether the Commissioner erred in law in the manner in which she directed herself to the application of s. 28(5) (a) in this case.

33. The appellant argues that the Commissioner’s determination that the report made by his wife to the Health Board was not a malicious allegation constitutes an error of law. He argued strenuously that the timing of the allegations, immediately after his application for access to the child, demonstrates that the allegations were made for malicious purposes and in

the context of their marital animosity. He reminded the Court that while he was engaged in establishing fair procedures which he believed would protect him in his proposed interview with the Board he was informed that his wife has withdrawn the allegations. Then they were revived and enhance them following the birth of a new child in October. He argued that in the circumstances there was a clear public interest in granting a request for access to the documents, particularly as he was contemplating the commencement of proceedings pursuant to s. 5 of the Protections for Persons Reporting Child Abuse Act 1998.

34. The Court with the consent of all parties has examined the video recordings and the documents in dispute and is satisfied that the inferences that the Commissioner drew that the complaints did not constitute allegations and that they were not made maliciously were incorrect. It is the view of the Court that in assessing the allegations, the Commissioner placed undue emphasis on the position of the Board and the Hospital in protecting the processes of the receiving and investigating of possible child sexual abuse. It seems to the Court that in ensuring the protection of their sources and the very valuable work in investigating those allegations, the Commissioner failed to give adequate consideration to the circumstances in which the allegations were reported in this case. The circumstances were that the mother's marriage to the appellant had broken down and the appellant had commenced access proceedings in respect of the child who he loved and had treated since birth as his biological daughter. The records reveal that the appellant's wife had refused to engage in the Hospital's assessment for a period of time (this is said to be because she was pregnant with a different partner) and it seems that she pursued the allegations at a time when it became apparent that the appellant might possibly be granted access.

35. The Commissioner gave no consideration to the unusual role of the complainant as the mother of the child and the estranged wife of the applicant. The appellant was not a stranger to the child and had been considered by the learned Judge of the Circuit Court as being a person entitled to seek access to the child subject to a Consultant Psychiatrist's report on the child's best interests. The documents which the Commissioner had available to her and which the Court has seen indicate that from the earliest stage that caution was advised regarding the allegations. The documents indicate evidence of a woman who was prepared to go to great lengths to prevent disclosure of the documents to the appellant. She had refused to proceed with the investigation of the allegations at the Unit unless her child was referred to by the surname of her biological father, who the child had never met. As previously noted, she had the child's birth certificate altered so that the appellant's name was

removed without his knowledge and she pursued the biological father through the courts for expenses already paid by the appellant.

36. In the circumstances, I do not believe it was correct for the Commissioner to draw the inference from material before her that there was an absence of any evidence that the matter was raised with the Health Board for malicious purposes and that there was no basis for concluding that the approach made by the appellant's wife to the Board was malicious. The Court is struck by the conspicuous temporal connection between the court proceedings for access and the making of the report to the Health Board. Having seen the documents this court would go so far as to find that no reasonable decision-making body could draw the inference that the appellant's submissions as to the malicious nature of the allegations were of no significance to the application of s. 28(5) (a). The Court is of the view that any reasonable decision-maker would find those submissions to be of particular significance to the weighing of the public interest in disclosure of the documents against the right to privacy of the child.

37. These conclusions fall therefore within the second and third category of case outlined by McKechnie J. in Deery, and the Court is therefore satisfied that it may set aside the decision of the Commissioner.

38. The Court is uncomfortable with the very heavy emphasis placed in this case on the right to privacy of the child. The Commissioner stated that the Act of 1997 "recognises a very strong public interest in protecting privacy rights" and that privacy rights "will be set aside only where the public interest served by granting the request (and breaching those rights) is sufficiently strong to outweigh the public interest in protecting privacy." The Commissioner characterised the information in the records as being "extremely sensitive personal information" concerning the child the release of which would constitute a "very significant breach of her right to privacy".

39. The allegations were however immediately informed to the gardai and the irony is that if the allegations were deemed well founded and the appellant had been charged, he would have been entitled to all the files, reports and video recordings. The information deemed extremely sensitive personal information concerning the child is in fact information relating to the applicant alleged to have come from the child.

40. It is therefore the view of this Court that the Commissioner placed an undue emphasis on the right to privacy of the very young child who it was asserted had made allegations against a person who until recently she had known as her father and whose allegations had been determined as unconfirmed.

41. In doing so the Commissioner failed to have sufficient regard to the cornerstone of the Freedom of Information Acts 1997 and 2003, which is that members of the public should have access, to the greatest possible

extent, to records held by public bodies which contain personal information about them. At para. 14 of his decision in The Minister for Information and Science v. The Information Commissioner [2008] I.E.H.C. 279 McGovern J. held that the Act of 1997 provides that “it was the intention of the Oireachtas that it is only in exceptional cases that members of the public should be deprived of access to information in the possession of public bodies”. He cited the decision of the Supreme Court in Sheedy v. The Information Commissioner [2005] 2 I.R. 272 where Fennelly J. held that:-

“The passing of the Freedom of Information Act 1997 constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers. The principle of free access to publicly held information is part of a world-wide trend.”

42. Fennelly J. cited the long title of the Act of 1997 and found that:-

“the clear intention is that, subject to certain specific and defined exceptions, the rights so conferred on members of the public and their exercise should be as extensive as possible, this viewed, in the context of and in a way to positively further the aims, principles and policies underpinning this statute, subject and subject only to necessary restrictions. It is on any view, a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy.”

43. In the light of those decisions it is clear that the intention of the Oireachtas was that the exemptions allowed by Part III of the Act of 1997 are to be interpreted restrictively and applied sparingly. If the exemptions are afforded too wide an interpretation, the refusal of access could become the rule instead of the exception and this would clearly frustrate the primary objectives of the Act of 1997.

Download the Judgement

Conclusion

I am satisfied that the Commissioner erred in law in her application of the public interest test set out in s. 28(5) (a) of the Freedom of Information Act 1997. I propose to make the following orders:

1. An order allowing the appeal;

2. A declaration that the decisions of the Commissioner were erroneous on a point of law insofar as:

i. the Commissioner found that the third named notice party did not to make any allegation;

ii. the Commissioner found that there was an absence of evidence of malice in the making of that allegation

and consequent to same thereby misdirected herself as to the application of the public interest test as set out in s.25(5A) of the Freedom of Information Acts;

3. An order setting aside the decisions of the Commissioner dated the 17th and 28th November, 2005;

4. An order remitting the matter for fresh consideration; and

5. An order for the costs and reasonable expenses incurred by the applicant in pursuing this action.

45. Although the Health Board additionally refused to grant the appellant access to the records on the basis of the exemption under s. 26 of the Act of 1997, the Commissioner ruled against the grant of access on the basis that it would result in the disclosure of personal information contrary to s. 28 and she did not deem it necessary to assess whether the information was exempt pursuant to the confidence exemption provided by s. 26 (1) which states:

“Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if_

(a) the record concerned contains information given to a public body in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body,

or

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

46. Section 26(1), like s. 28(1), is subject to an overriding public interest test as subsection (3) of s. 26 states that:

“subject to section 29, subsection (1) (a) shall not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on

balance, be better served by granting than by refusing to grant the request under section 7 concerned.”

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

I propose to grant the following reliefs:

6. An order allowing the appeal;

7. A declaration that the decision of the Commissioner was erroneous on a point of law insofar as the Commissioner found the third named notice party not to have made an allegation and insofar as the Commissioner found that there was an absence of evidence of malice in the making of that allegation and consequent to same thereby misdirected herself as to the application of the public interest test as set out in s.25(5A) of the Freedom of Information Acts;

8. An order setting aside the decision of the Commissioner; and

9. An order remitting the matter for fresh consideration.

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Conclusion

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

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