Neutral Citation Number [2008] IEHC 298

THE HIGH COURT

2007 No. 59 MCA

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

BETWEEN

THE HEALTH SERVICE EXECUTIVE

APPELLANT

AND
THE INFORMATION COMMISSIONER

RESPONDENT

AND
B. K.

NOTICE PARTY

Judgment delivered by Mr. Justice Bryan McMahon on the 1st day of October 2008

Introduction

1. This case touches on the dilemma which sometimes faces teachers when they suspect that one of their pupils is being abused at home. If they report their suspicion, they will be putting in train an investigation by the relevant authorities which may be unwarranted and which may cause serious problems for the innocent parents. Moreover, a complaint originating from the school may fracture the relationship of trust and confidence that should ideally exist between teacher and parent in the school context. The risk of ignoring the matter, however, may have very serious consequences for the child.

2. In the present case, the first intimation that the Health Service Executive (HSE) had that there may be a problem in respect of the notice party's daughter, did not come from a teacher, but from an anonymous telephone caller on 20th October, 2002, who reported a suspicion that the young pupil was being physically abused and neglected at home. When the HSE representatives visited the notice party at her home, they indicated that they would have to follow up the matter and the notice party gave her consent to contact being made with her General Practitioner (GP) and with her daughter's school. Four teachers subsequently gave interviews to the social worker involved. In the end, the HSE, having found that there were no grounds for concern, and that the allegations were unfounded, closed the inquiry.

3. The notice party then sought to establish the identity of the anonymous caller, with a view to instigating legal proceedings, and requested, in May 2005, under s. 7 of the Freedom of Information Act 1997, access to her personal records held by the Social Work department of the Midland area of the HSE. The HSE, by letter of 12th August, 2003, granted partial access to the records but exempted certain records and parts of certain other records. The dissatisfied notice party applied to the Information Commissioner (established by s. 33 of the Freedom of Information Act 1997, hereafter "the Commissioner") for a review of the HSE's decision under section 34 of the Act of 1997. On 27th March, 2007, the Commissioner declined disclosure of some information but directed disclosure by the HSE of some other information additional to the HSE's original determination. The HSE now, in these proceedings, appeals to this Court on a point of law as it is entitled to do under s. 42 of the Act of 1997, as amended by section.27 of the Act of 2003. (Order 130 of the Rules of the Superior Courts, as amended, sets out the procedure governing appeals of this type which provides, *inter alia*, that the proceedings are to be brought by way of originating notice of motion grounded on an affidavit, and are to be heard and determined on affidavit, unless the court otherwise directs).

4. The Freedom of Information Act 1997, is a radical measure which is designed to give members of the public liberal access to records held by public bodies. To promote greater transparency in public administration, the general rule granting access is very widely drawn, as provided for by s.6 of the Act of 1997, as amended by section 4 of the Act of 2003. Part III of the Act (ss. 19 to 32 inclusive) identifies exempt records where access will be denied. In the present case, the HSE argues that the Commissioner erred in law in his interpretation of two sections of the Act, in particular, i.e. s. 26 which exempts information obtained in confidence from disclosure, and s. 28 which exempts "personal information" from disclosure. Most of the focus of this judgment will therefore be trained on the wording and phraseology used in these two sections and their application to the facts of the case before the Court. The teachers favoured the restrictive approach adopted by the HSE which purported to respect the teachers' entitlement to confidentiality in s. 26, over the Commissioner's interpretation which favoured greater access in accordance with the general underlying philosophy of the Act. The teachers also favoured the HSE's wider interpretation of "personal information" under section 28.

The legislative context of the Freedom of Information Acts 1997 and 2003 and the nature of the appeal

5. In the case of *Sheedy v. The Information Commissioner* [2005] 2 I.R. 272, Fennelly J. helpfully sets out the background to the Freedom of Information Act 1997, at p. 275 which I am happy to quote at this juncture:

> *"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. The general assumption is that it originates in the Scandinavian countries. The Treaty of Amsterdam adopted a new Article 255 of the EC Treaty providing that every citizen of the European Union should have access to the documents of the European Parliament, Council and Commission.*
>
> *The long title to the Act of 1997 did something which has regrettably become uncommon. It proclaimed its purposes in a long title. This is deserving of full citation. The 1997 Act is stated to be:-*
>
> > 'An Act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons to enable them to exercise it, 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 establishment 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 amend the Official Secrets Act 1963, and to provide for related matters.'

Section 6(1) of the Act of 1997, gives effect to the general principle, thus proclaimed, of public access to documents "to the greatest extent possible consistent with the public interest and the right to privacy" as follows:-

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

(2) It shall be the duty of a public body to give reasonable assistance to a person who is seeking a record under this Act—

(a) in relation to the making of the request under section 7 for access to the record, and

(b) if the person has a disability, so as to facilitate the exercise by the person of his or her rights under this Act.'"

Adverting to the earlier decision of the High Court in *Deely v. Information Commissioner* [2001] 3 I.R. 439, Fennelly J. goes on to quote at p. 276 a number of statements of McKechnie J. of general importance in that case with which he fully agrees:

"As can thus be seen, 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." (At p. 442)

6. Fennelly J. then quotes at p. 277 McKechnie J. on the scope and limitations of an appeal on a point of law.

"It was submitted … that findings made by the respondent [the Commissioner] on questions of primary fact should not be reviewed by this court as part of the appeal process under s. 42 of the Act. There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-

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

(b) it ought not to 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 …" (At p. 452).

7. To these general comments on the context and background within which our deliberations should take place, two further comments of a general nature are appropriate. First, given the policy and the object of the Act to give wide and generous access to the documents held by public bodies, any exemptions or restrictions, such as those contained in Part III of the Act (ss. 19 to 32) ought to be given a narrow restrictive interpretation so as to derogate as little as possible from the main purpose of the Act. Second, where the Commissioner is reviewing the decision of a public body, there is a statutory presumption in favour of disclosure so that a decision to refuse to grant a request by a head of a public body shall be presumed not to have been justified unless it is shown to the satisfaction of the Commissioner that the decision was justified as provided for by section 34(12)(b). Finally, Kearns J. in the *Sheedy* case, referring to the principles mentioned by McKechnie J. in Deely, made the following comment which should also be borne in mind:-

"This is a helpful résumé 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. A legal interpretation of a statute is either correct or incorrect and the essence of this case is to determine whether the interpretation given … to s. 53 of the Education Act 1998 was correct or otherwise." (At p. 294)

8. Kearns J's cautionary remarks must be viewed in the context of the facts of the Sheedy case which will be outlined later in this judgment.

9. Bearing in mind this background, it is now appropriate to set out first the relevant provisions of s. 26 of the Freedom of Information Act 1997, as amended by section 21 of the Act of 2003.

Section 26

"26. — (1) 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 the 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.

(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, a public body or a person who is providing a service for a public body under a contract for services) 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 a public body or head or a director, or member of the staff of a public body or a person who is providing or provided a service for a public body under a contract for services.

(3) 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.

(4) Where –

(a) a request under section 7 relates to a record to which subsection (1) applies but to which subsections (2) and (3) do not apply or would not, if the record existed, apply, and,

(b) in the opinion of the head concerned, the disclosure of the existence or non-existence of the record would have an effect specified in subsection (1),he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists."

10. Section 26(1) of the Freedom of Information Act 1997, provides an exemption from disclosure in respect of information supplied on a confidential basis when several conditions are fulfilled. Section 26(2) is aimed at limiting the use of the confidentiality exemption when the records are internal records of the public body.

11. The appellant complains that the respondent erred in law in many respects in construing and interpreting s. 26(1)(a) in particular. Since s. 26(1) does not apply where the records fall within the terms of s. 26(2), it is logical to consider the provisions of s. 26(2) and its application to the facts of the present case first, as if this subsection applies it will be unnecessary to consider the arguments based on section 26(1).

12. The HSE argued that the records of the social worker of what the teachers told her were not records "prepared by":-

"…a head or any other person (being a director, or member of the staff of a public body or a person who is providing a service for a public body under a contract for services) in the course of the performance of his or her functions…" within the meaning of section 26(2).

The argument focuses on the meaning of the word "prepared".

13. All the records in question are part of the social worker's file relating to the welfare of the notice party's daughter held by the HSE and were compiled by a member of the staff of a public body within the meaning of the phrase used in section 26(2). This is not disputed by the HSE. The main argument advanced by the HSE, however, advances the proposition that the records in question were not "prepared" by the staff of the HSE insofar as the staff merely "transcribed" the statements given by the teachers and that in doing so the staff did not "prepare" a record.

14. I cannot agree with this argument. A reading of the relevant records, concerning the teacher's information, clearly shows that they are not merely *verbatim* transcriptions. The accounts recorded by the staff are all written in indirect speech which indicates that the record is in the form of a note taken after an interview or telephone conversation with the teachers. The information recorded certainly involves an element of selectivity (what to include and what to omit) and paraphrase in its composition, and this selectivity in itself involved editorial decisions which contain a preparatory element if one were needed. Where the staff member has an interview with a person and makes a note of the reasons for the meeting, of the questions and issues raised by the interviewer and paraphrases the answers given by that other person, the staff member is clearly making a record of the interview and of the information given. The notes in question also contain the dates and time and place of the interview, a description of the interviewees and the signature and description of the social worker who made the note. One cannot, by any stretch of the imagination, suggest that this was mere transcription or that the teacher in these circumstances made the record. This is not a case where the teacher wrote out a statement in her own hand without prompting and handed it in to the social worker who merely proceeded to file it. The teacher answered the questions and participated in the discussion. But if no note was made, there would be no record. Section 2 of the Act defines "record" as including "any memorandum … or other document … or thing in which information is held". There can be little doubt that the case notes made by the social worker of conversations she had with the teachers and other school personnel come within that definition. It is clear, therefore, that there is a "record" and that the record was not made or prepared by the teacher. To attempt to construe the word "prepare" as signifying something other than "compile" or "make" in that context, or to suggest that "prepare" involves some creative or original input by the note taker, is to attempt to impose an artificial meaning on a perfectly clear word in a perfectly clear context.

15. In support of its argument that s. 26(2) only comes into play when the member of staff who compiles the note is the author of the record, in the sense of having a creative input into the record, the appellant relies on dicta of Gilligan J. in the *Sheedy* case as well as *dicta* of Kearns J. in the Supreme Court in the same case. The "records" in that case were schools inspectors' reports held in the Department of Education. The appellant argues:-

"It is clear that the High Court judge was considering section 26(1)(b) and the 'breach of duty of confidence' referred to in that subsection when considering whether the school reports in question, in that case, came within the provisions of section 26(2) and were therefore open to disclosure. The judgment indicates that the respondent had taken the view that the school reports had been 'prepared' by members of the staff of the Minister for Education 'in the course of the performance of their functions'. It is worth noting that the report goes on to say, in that context:-

'they consist of the authors', i.e. the inspectors' own opinions and observations formed during the course of their visits to the schools. In his view, such matters could not be the subject of a duty of confidence, if for no other

reason than that these opinions and observations were not imparted to them by anyone'

> *Kearns J., giving the majority judgment in the Supreme Court in the same case [2005] 2 I.R. 272, confirms this view and states, at para 83, that in reaching his decision the respondent had careful regard to the fact that the report was prepared by inspectors in the course of their statutory functions and that they 'represented the fruits of the inspectors' own opinions and observations formed during the course of their visits to the schools and that he had been entitled to conclude that 'these opinions and observations were not imparted to them by anyone'".*

16. The issues being addressed by Gilligan J. in the High Court and Kearns J. in the Supreme Court clearly relate to the confidentiality aspect of the documents and, in particular, the lack of mutuality in the reports compiled in that case by the inspectors. In my view, the quotations from Sheedy cited by the appellant do not cast any light on the meaning of the word "prepared" as used in section 26(2).

17. The appellant also draws attention to s. 46(1)(a)(I) of the Act, which refers to documents "created" by the bodies in question. In *Minister for Justice and Courts Service v. Information Commissioner* [2001] 3 I.R. 43, the appellant points out that the High Court held that originality is not a necessary ingredient before it can be said that a document is "created" for the purposes of section 46. Section 46 provides that a document which is copied by the body in question is "created" by the body within the meaning of the section. From this, the appellant tries to argue that the legislator must have intended some distinction between a document "created" by a body and a document "prepared" by the body in question, and submits that the key distinction is one of originality, arguing that a document copied by a body, or a document reciting oral information given by a third party, cannot be said to be "prepared" by the body within the meaning of section 26(2).

18. I cannot agree. The argument suggests that because the word "created" in s. 46 covers the making of a copy of a document, the word "prepared" in s. 26(2) must contain an original input from the person who makes the record. Not only is there a non sequitur in the logic of the argument, but the proposition attempts to stand the ordinary meaning of language on its head. If in the Act, "creating a document" does not require originality, how can one plausibly argue that "preparing" a record necessarily involves originality on the part of the record maker. Furthermore, such a strained departure from the ordinary meaning of the language has little to commend it since it would also subvert the purpose of the section (i.e. to limit the confidentiality exclusion in s. 26(1)(a)) and thwart the main objective of the legislation which is to allow access to such documentation to the greatest extent possible.

19. It is also worth noting that s. 5 of the Interpretation Act 2005, concerning ambiguous or obscure provisions, expressly provides that "[such a] provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole".

20. In my view, the word "record" is neutral on the nature of the information stored. Whether the information stored contains observations, original opinions, or mere recitation of facts is immaterial in determining whether it is a "record". Once information is stored or held, whatever the nature of its content it becomes a "record" within the definition of the word in s. 2 of the Act of 1997.

21. The purpose of s. 26(2) is to make available to the requestor internal records prepared by staff in public bodies in the course of the performance of their functions. There can be no doubt that the social worker in the case before the court was indeed acting in such capacity when she was investigating and following up concerns expressed for the welfare of a child in her jurisdiction.

22. The subsection, however, goes on to add that such records, although usually subject to disclosure, will not have to be disclosed if "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 to" a third party. This escape clause does not apply in the present case for although the teachers, etc., may be third parties, there would be no "breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law". Teachers have no legal duty, either statutory or otherwise, to report on students in their care. It would also be very difficult to argue that an agreement of confidentiality existed between the teacher and the social worker in this case. In the context of s.26(1), the Commissioner adopts the following definition of "confidence" (taken from F.Gurry "*Breach of Confidence*" in *Essays in Equity*; P. Finn (Ed.), Law Book Company, 1985, at p.111): "A confidence is formed whenever one party ("the confider") imparts to another ("the confidant") private or secret matters on the express or implied understanding that the communication is for a restricted purpose."

23. Although the Commissioner does not repeat the definition specifically when she discusses s. 26(2) and where she finds, "All of the records in this case were created by the staff of the HSE in the performance of official functions and, as such, cannot be exempted from disclosure by Section 26 (1) (a)". It is reasonable to assume that the same definition was applied by her in the context of s. 26(2) when she considered that subsection. From the facts before her, she had ample justification for reaching this conclusion. For a breach of duty of confidentiality based on the principles of equity to arise, Megarry J., in the leading decision of *Coco v. A. N. Clark (Engineers) Limited* [1968] F.S.R. 415 states that three essential elements must be established:-

> *"[T]hree elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself … must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it." (at pp. 419 to 420). (Approved of by Costello J. in House of Spring Gardens Limited v. Point Blank Ltd. [1984] 1 I.R. 611).*

24. This test has been approved in *Sheedy*, both at High Court and Supreme Court levels ([2004] 2 I.R. 533 at 543 and [2005] 2 I.R. 272 at 292). It is difficult to see how the second element is established in the case before the court. There is nothing in the notes or records kept by the social worker suggesting that the teachers insisted or expected confidentiality when interfacing with the social worker. There was certainly no clear agreement to that effect. The principal did express concern at one point as to how teachers' concerns could be documented and dealt with and it was explained to him that any information collected would form part of "a broader picture, and would not be used in isolation". The social worker also assured the teachers on one occasion that the source of the information received would be protected "where at all possible". I interpret this as indicating that the social worker could not guarantee absolute confidentiality given the provisions of the Freedom of Information Act and the context in which she worked. Moreover, the HSE and the school must have been very conscious of the "*National Guidelines for the Protection and Welfare of Children*" ("Children First") published by the Department of Health and Children in September, 1999. These guidelines are intended in particular:-

> *"…to support and guide health professionals, teachers, members of the Garda Síochána and the many people in sporting, cultural, community and voluntary organisations who come into regular contact with children and are therefore in a position of responsibility in recognising and responding to possible child abuse." (at p. 9).*

25. These guidelines were widely debated and contain references to the rights of the members of the public to have access to documents held by the HSE in certain circumstances and that decisions made by public bodies in respect of such requests can be "reviewed" by the Information Commissioner with the possibility of an appeal on a point of law to the High Court. The very nature of the functions being performed by the HSE and the information gathered, must have caused the HSE and both the school and the teachers to realise that this information may eventually have to be disclosed in the best interest, and to satisfy the constitutional rights, of the parent. In such circumstances, any expectation of confidentiality entertained by the school would lack the requirement of mutuality and reasonable foundation on which to base an argument for breach of confidence.

26. The Supreme Court in *McK. v. Information Commissioner* [2006] 1 I.R. 260 held that there is a presumption, though rebuttable, that a parent is entitled to access information about the medical care their child is receiving and that the release of such information is in the interest of the child. While this case concerned a parent's right of access to the child's medical records, the Supreme Court did not place undue emphasis on the nature or content of the records in question and I adopt the court's reasoning as being applicable also to the records involved in this case which were concerned with allegations of physical abuse of the child.

27. Finally, there is no evidence before the court that the breach of confidence, if such there was, would result in a detriment or prejudice to the teachers, as is required in the third element of Megarry J's list. It is true that the teachers did submit that disclosure might threaten the relationship between the teacher and the parent, a relationship which needs to be based on trust, but this is not a threat to the teacher's detriment but rather a concern for the education of the child. Teachers and other professionals are frequently confronted with difficult decisions of this nature as they discharge their duties in what they hope will be an atmosphere of trust and respect. Professional life is full of such dilemmas and the law cannot guarantee that difficult decisions will never have to be made by professionals in these situations. It is this responsibility which distinguishes professional people from those who pursue non-professional careers.

28. For these reasons, I conclude that the Information Commissioner was correct in holding that the records in question in this case are covered by the provisions of s. 26(2) and accordingly are not protected from disclosure by the confidentiality provisions contained in section 26(1)(a). This conclusion also means, of course, that arguments advanced by the appellant based on the provisions of s. 26(1)(a) do not now have to be entertained by the court.

Section 28 (Personal Information)
29. Since the appellant abandoned at the hearing any argument based on s. 26(1) (b) of the Freedom of Information Act 1997, the only other ground of appeal to be considered by this court relates to provisions governing disclosure of "personal information" in the legislation. The appellant argues that the respondent erred in law in her construction of ss. 2 and 28 of the Freedom of Information Act 1997, as amended, in determining that names, employment addresses and job titles of third parties and the fixed line telephone number of a national school were not the "personal information" of third parties for the purposes of s. 2 of the Act, as amended, and were not exempt from disclosure under s. 28 of the Act, as amended.

30. Section 28 of the Freedom of Information Act 1997, as amended by s. 23 of the Act of 2003, attempts to strike the necessary balance between the right to freedom of information, on the one hand, and the right of an individual to privacy, on the other. Contrary to the general rule of disclosure, s. 28 creates an exemption from disclosure in respect of "personal information". Section 28(1) 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…."

31. Subsection 2 reads in part:-

> "(2) Subsection (1) does not apply if - … (c) information of the same kind as that contained in the record in respect of individuals generally, or a class of individuals that is, having regard to all the circumstances, of significant size, is available to the general public,".

"Personal information" is defined in s. 2 of the Act of 1997, as meaning "information about an identifiable individual that-

> (a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or
>
> (b) is held by a public body on the understanding that it would be treated by it as confidential, and, without prejudice to the generality of the foregoing, includes - … (iii) information relating to the employment or employment history of the individual."

32. Section 28(1), in summary, provides that the head of the public body shall refuse to disclose personal information in general, but s. 28(2)(c) indicates that this prohibition does not apply to information of the same kind as that contained in the record if it is already available to the general public (*i.e.* in the public domain).

33. In considering these provisions, it is also important to distinguish between the provisions of s. 28(1) and (2) on the one hand, and the definition of "personal information" contained in s. 2, on the other hand. When section 28(2) applies, it excludes the application of section 28(1). Section 28(2)(c) can be interpreted and applied without ever knowing the meaning of the phrase "personal information" as given in subsection 2. This is because if information is in the public domain, whether it is personal information or not, is immaterial to the application of section 28(2)(c). It is only where a matter is not in the public domain that the question of what is "personal information" arises in section 28(1). The fact that a piece of information (e.g. a mobile phone number) may not be in the public domain for the purposes of s. 28(2) and may also be within the definition of "personal information" for the purpose of s. 2, and possibly prohibited from disclosure under both headings, does not mean that the concepts are identical or interdependent, and care must be taken not to conflate them. Just as the logical sequence of consideration in s. 26 involved a consideration of s. 26(2) before s. 26(1), the logical sequence here in s. 28 is to consider s. 28(2)(c) before considering section 28(1) in detail.

34. The Information Commissioner in her decision under s. 34(2) of the Act, made no reference to s. 28(2)(c) preferring instead to focus on whether the information in the relevant records came within the definition of "personal information" as contained in section 2 of the Act. This focus was no doubt caused by the HSE in its submissions to the Commissioner at the review stage where no attention was paid to section 28(2). To appreciate the approach taken by the Information Commissioner, it is appropriate to quote the relevant part of her determination at this juncture:-

> "Section 28 (Personal information)

> The HSE has claimed an exemption under section 28(1) of the Freedom of Information Act, in relation to the record numbers 3, 10, 22, 25 and 36 of the social work file, on the basis that it has considered them to contain 'personal information' relating to third parties (parties other than you, yourself, or your daughter) [i.e. the notice party and her daughter]. Personal information is defined in section 2 of the FOI Act, as being information about an identifiable individual that would in the ordinary course of events, be known only to the individual or his/her family or friends, or information about the individual that is held by a public body on the understanding that it would be treated by it as confidential.
>
> Having examined the withheld parts of these five records, I note that:-
>
> 1. record number 3, contains information which, being the names and employment addresses of three employees of a national school within the State education sector, is already in the public domain;
>
> 2. record number 10, contains a telephone number which, because it is a mobile telephone number, may be regarded as personal information in a way that a fixed line telephone number at a place of employment cannot be;
>
> 3. record number 22, does contain information relating to a party other than the requestor;
>
> 4. record number 25, contains names and job titles of employees of a national school within the State education sector; and
>
> 5. record number 36 contains both a mobile telephone number and a fixed line telephone number of a national school.
>
> *I find, therefore, that the withheld parts of record numbers 3, 10, 25, and 36 (with the exception of the mobile telephone numbers on record numbers 10 and 36) are not personal information of third parties for purposes of the FOI Act and, consequently, are not protected by the exemption of section 28(1).*
>
> I find that the withheld part of record number 22 is personal information relating to a person other than you, the requestor and, therefore, that the exemption at section 28(1) applies."

35. The Commissioner then, in her decision, affirms the decision of the HSE on the notice party's request on records numbered 4, 22 (part), 24 (part) and 34. She then goes on to vary the decision on the remaining records and directs that all of the other records in dispute be disclosed except for the mobile telephone numbers contained in records numbered 10 and 36. In brief, the Commissioner, having noted the five separate matters in five numbered paragraphs, went on to base her findings by reference to section 28(1) only, and made her determinations on the interpretation of "personal information" as used in that subsection. Some of the confusion may have been caused by the use of the phrase "in the public domain" by the Commissioner in paragraph 1of her holding. This phrase is not used in the Act itself and is capable of two meanings in the present context: information already "available to the public" as covered in section 28(2)(c); or information which is not "personal information" within the definition given in section 2.

36. When considering the proper sequence of analysis to be applied to s. 28, it is my view that when the Commissioner has considered s. 28(1) in general, she should next have considered s. 28(2) (and in this case s. 28(2)(c)) before addressing the definition of "personal information" for the purposes of section 28(1). If this approach was adopted, it may not have resulted in a different decision for the requestor in the circumstances of this case, as I have little doubt that the names, employment addresses and job titles of certain teachers and the fixed line telephone numbers of the national school within the State education sector, was information available to the general public within the meaning of subsection 28(2)(c) and therefore s. 28(1) does not apply to them. Similarly, the mobile telephone numbers of the teachers would not fall within subsection 28(2)(c). In respect of the mobile telephone numbers, having concluded that this information was not covered by subsection 2(c), she would then be obliged to consider whether it was "personal information" as defined in section 2(1) or not. In fact, she found that it was "personal information" and therefore it benefited from the exemption contained in section 28(1).

37. I have emphasised the sequence of analysis because the information described in s. 28(2)(c) as information "of the same kind" available to the general public is not identical with information which does *not* amount to personal information within the meaning of section 2, and this could conceivably have some legal significance in some cases. The difference of approach is that in the preferred sequence, because of the provisions of section 28(2)(c), section 28(1) has *no application* to many of the matters in dispute, whereas in the sequence adopted by the Commissioner, the decision to disclose the relevant information or not is determined solely by reference to the term "personal information" *within* section 28(1) itself. In the present case, the Commissioner seems to have by-passed the first stage of the analysis, i.e. section 28(2)(c). Provided, however, that the Commissioner bears the distinction in mind, and applies the two stage analysis in relevant cases, whatever the sequence, there will be no error of law.

38. The appellant, addressing the method or approach adopted by the Commissioner, does not complain about the sequence of analysis followed but criticises the Commissioner's interpretation and application of the phrase "personal information" as used in s. 2 of the Act. I reproduce the appellant's argument on this issue in full:-

> "The respondent held, *inter alia*, that the names and employment addresses of three employees of a national school was in what she described as 'the State sector' and the names and job titles of employees of a national school within the State education sector did not constitute personal information within the meaning of the Act because they were all 'within the public domain' in any event. Leaving aside the question of whether, in fact, these employees were employed within the 'State' sector, it is submitted that in reviewing the appellant's decision in relation to these matters, the respondent failed entirely to consider subsections (b) and/or (iii) of the definition of 'personal information' set out in section 2 of the Act. Instead, she focused *exclusively* on the first part of the definition in basing her decision on a finding that the information was 'in the public domain' – and was 'accordingly and presumably', not information that 'would, in the ordinary course of events', be known only to the individual or members of the family, or friends, of the individual as provided for by subsection (a) of the definition. It is clear that the various parts of the definition are disjunctive – it is possible e.g. for information to be known outside the immediate family and friends of an individual but still be 'personal information' on the basis that it is held on the understanding that it will be treated as confidential by a public body and/or that it is information relating to the employment of the individual. It is submitted that in failing to consider, interpret and apply all relevant parts of the definition of 'personal information', the respondent was wrong in law."

39. One must have some sympathy with the appellant's argument in this respect, and I accept the appellant's submission that the

various parts of the definition are indeed disjunctive. Nevertheless, I am of the view that it is a complaint that goes to the form of the Commissioner's decision rather than to the substance. Bearing in mind McKechnie J's principles relating to the function of this Court where there is an appeal on a point of law, I am of the view that it would be inappropriate to intervene in the decision of the Commissioner for the following reasons: (i) there was no finding by the Commissioner that the relevant matters were not covered by the terms of section 28(2)(c); the subsection was simply not referred to either in her submission or in her determination; (ii) had the suggested sequence of analysis been adhered to, the Commissioner's conclusions could be more easily justified in terms of s. 28(2)(c) in respect of all the relevant information, except the mobile phone numbers, and the appellant has no complaint in this regard as the Commissioner held that these numbers were not subject to disclosure being "personal information" within the definition of section 2. To remit the matter back to the Commissioner would only result in her reformulating her conclusions, for the most part, in terms of section 28(2) and this, as I have found, would be of no benefit to the appellant.

40. There was no error in law in the determinations of the Commissioner and if there was an error it was only in the reasoning process and in my view, having regard to the nature of the information at issue, this would not have affected the outcome had the proper analysis been done.

41. For these reasons, I hold that in her decision of the 27th March, 2007, the Commissioner committed no error of law and that the appeal should be dismissed.