

THE HIGH COURT

1999 No. 96 M.C.A

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 1997

BETWEEN

E H

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

THE HIGH COURT

1999 No. 107 M.C.A

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 1997

E H

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

JUDGMENT of O'Neill J. delivered the 21st day of December, 2001.

In this case I delivered judgment on the 4th April, 2001. *Inter alia* I concluded that so far as the documents listed in categories B, C and D of the Boards case and Category B of the Ministers case in respect of which access was refused by the Commissioner on the basis of Section 6(4) and (5) of the Act, that for the reasons stated in that judgment, that it was necessary for the Court to examine those documents to determine whether or not there existed grounds for appeal on a point of law, pursuant to Section 42(1) of the Act.

In due course I was furnished with the documents in question, but before proceeding to a determination on those documents, I invited submissions on the proper construction of various aspects of Section 6(5) of the Act.

On the question of the interpretation of the phrase "*relate to personal information*" as contained in Section 6(5)(b) the Appellant submitted that this phrase must include all documentation which directly or indirectly refers to the requester and his personal circumstances. He submitted that it was the intention of the Oireachtas that all citizens should have access to all personal information irrespective of when it was created, that while it was impossible to anticipate the wide variety of documents which might "*relate to personal information about the person seeking access to them*", he submitted it was clear that, judged against that policy background and those statutory objectives, that every document which concerns or mentions, expressly or by implication, directly or indirectly, the requester may be said to "*relate to personal information about the person ...*", making that request.

For the Commissioner, Mr. O'Donnell submitted on this topic, that "*records (which) relate to personal information*" is not restricted to records which contain personal information within the meaning of that expression as defined in Section 2 of the Act. He further submitted that it appeared to be wider than Section 28 of the Act which refers to "*access to (a particular record involving) the disclosure of personal information*". He submitted that Section 28 is thus limited to allow access to a record which is "*capable of disclosing personal information*", whereas under Section 6(5)(b) records are included within the ambit of the act if they simply relate to personal information (and even if they do not contain or involve disclosure of the personal information in question).

Mr. O'Donnell points out that the act creates a statutory right of access to *records* and not to *information per se*. He submitted that Section 6(5)(b) was inserted to ensure that records which would normally fall outside the ambit of the act by reason of their creation prior to its commencement, ought nevertheless to be accessible if a requester can

demonstrate a sufficient personal link with them. He then posed the problem of ascertaining, when a record was to be considered to have a sufficiently proximate relationship to personal information about the requester to be brought within the terms of the provision.

Having cited two illustrations to demonstrate examples of situations which fell inside and outside the scope of the act, he then submitted that in reaching a decision on this topic, that the Commissioner should not adhere to any kind of rigid formula but rather his approach should be that all cases must be viewed in the light of the particular facts and circumstances obtaining and he submitted that the Commissioner should have regard to the following factors which he submitted would not be an exhaustive list:-

- (a) Whether there is a sufficiently substantial link between the requesters personal information (as defined in the act) and the record in question:
- (b) The circumstances in which the record was created:
- (c) The purposes behind the creation of the record and in particular whether it was created with the affairs of the particular individual in question in mind notwithstanding the fact that the record may not specifically mention or refer to that individual:
- (d) What was in the mind of the author at the time of creation of the record and in particular whether or not the requester was in the mind of the author.

Mr. O'Donnell goes on to refer to a decision of the Commissioner in the case of *ABM & Others -v- The Revenue Commissioners* (case 99017 and others) and he quotes the following passage from that decision:-

"I should point out that not all the records in question could be said to contain personal information about each requester. However, Section 6(5)(b) does not require this; it is sufficient that the record relates to personal information about each requester for the section to apply....."

As a starting point it seems to me to be absolutely clear from the use of the phrase "*relates to*" that a document need not itself contain "*personal information*" about the requester. When one is talking about "*personal information*" in this context, it is of course "*personal information*" as defined in Section 2 of the Act.

In my view the test to be applied to determine whether or not a record "*relates to*" is that which is postulated by Mr. O'Donnell at paragraph (a) above namely "*whether there is a sufficiently substantial link between the requesters personal information (as defined in the act) and the record in question*". I do not think one should go further than this in formulating a test in this regard. Specifically, I would deprecate as determinative factors in themselves, the matters set out at paragraphs (b), (c) and (d) above namely, "*The circumstances in which the record was created, the purposes behind the creation of the record and in particular whether it was created with the affairs of the particular individual in question in mind notwithstanding the fact that the record may not specifically mention or refer to that individual and what was in the mind of the author at the time of creation of the record and in particular whether or not the requester was in the mind of the author.*"

A requester has a right of access to "*records*". The record will generally speak for itself. Where a doubt or ambiguity exists, as to the connection of the record to the requester, a consideration of factors such as the circumstances in which the record was created, the purpose for which the record was created and whether it was created with the affairs of a particular individual in mind, may *inter alia*, assist in determining "whether there is a sufficiently substantial link between the requesters personal information (as defined in the Act) and the record in question.

Attempting to ascertain what is in the mind of the author of the record, where that is not disclosed in the record, would usually be futile in the normal circumstance, where

the Head of a Public Body or the Commissioner was not in a position to conduct a very detailed enquiry and could lead to the misapplication of the subsection.

As said earlier the record will speak for itself. If the record contains an express reference to the requester, be it however, insubstantial or trivial then clearly it "*relates to personal information*", about the requester. Here one would have in mind records such as letters which contained no personal information but are about or refer to the requester, such as holding type letters or pro forma or replies. Where the record does not name or has no express reference to the requester a substantial link will be established, if the record relates to something in which the requester has a substantial personal interest, as distinct from something in which he has an interest as a member of the general community or of large scale class of the same.

Turning to the documents which have been submitted to me to ascertain whether or not grounds of appeal exist pursuant to Section 42 of the Act.

Both files numbered respectively C.20.02.06 and C.10.03.07 contain documents which relate to other parties exclusively and no grounds of appeal could exist in relation to these two files and I would accordingly uphold the decision of the Commissioner in regard to them.

Paragraphs 15, 16 and 17, only of the Affidavit of H C refer to the Appellant. However, it would appear that all of the contents of this Affidavit may have been derived from the material which was subject to the In Camera rule in the case of ***Eastern Health Board -v- The Fitness to Practice Committee of the Medical Council*** (1998) 3 IR 399 and hence in my view must be excluded from disclosure under Section 22(1)(b). In this regard I agree with the decision of the Commissioner and would uphold it.

On the question of the Affidavit of Dr. W, I have come to a conclusion different from that of the Commissioner for the following reason. Whereas the Affidavit of H C deposes to facts in respect of which there was a substantial risk of a breach of the In

Camera rule, the Affidavit of Dr. W is essentially a submission and at no part of it is there any reference to facts which could have being part of the material disclosed in the earlier proceedings and in respect of which the In Camera rule was imposed by Barr J. In my view, therefore, this Affidavit is not caught by the In Camera rule imposed in that case.

Whilst the Affidavit does not expressly refer to the Appellant or his child, the Affidavit addressed itself to matters in respect of which the Appellant had a real and substantial interest, namely the proceedings before the Fitness to Practice Committee of the Medical Council, and as such in my view satisfies the test set out above as to the meaning of the phrase "*relate to personal information about*".

Finally, there remains the questions of documents numbered 3, 8, 12, 13, 16, 17, 18 and 19 contained in category D and in respect of which the Commissioner said the following:-

"Records numbered 3 and 8 are hand-written notes which are very disjointed. They appear to relate to E H's complaints to the Department of Health. However, it does not seem to me that they can be said to relate to personal information about E H. Records numbered 12, 13, 16, 17, 18 and 19 are simply reminder letters. Again they do not relate to personal information about E H. In my view access to records numbered 3, 8, 12, 13, 16, 17, 18 and 19 is not necessary or expedient in order to understand a record created after the commencement of the act. I find therefore that E H is not entitled to access to them."

Here the Commissioner very accurately describes the content of these documents. Whilst it may be the case that none of these numbered documents in themselves contains personal information about the Appellant, they do make express reference to him by name and as such in my view come within the ambit of the test set out above. Documents of

this sort, whilst not as he said, containing in themselves personal information may assist in achieving a complete picture from the point of view of an Appellant.

CONCLUSION

In my view, in refusing disclosure to the Affidavit of M W, the Commissioner erred in law in holding that the disclosure of this Affidavit would breach the In Camera rule in the case of *Eastern Health Board -v- The Fitness to Practice Committee of the Medical Council* (1998) 3 IR 399 and in holding that the content of this Affidavit did not relate to personal information about the Appellant. The Commissioner erred in law in refusing disclosure of documents numbered 3, 8, 12, 13, 16, 17, 18 and 19, by holding that these documents did not "*relate to personal information*" about the Appellant.

The Commissioners decision to refuse disclosure to files numbered C.20.02.06 and file C.10.03.07 and the Affidavit of H C was correct in law.

I would therefore vary his decisions so as to direct disclosure of the affidavit of M W, and the foregoing numbered documents.

cf96mca(jon)

Approved 21/12/01

Raymond O'Neill