Minister for Agriculture and Food v the Information Commissioner

This judgement was given by the High Court on an appeal by the Minister for Agriculture and Food against the Commissioner's decision in Case number 98109 - Mr. ABI and the Department of Agriculture and Food.

The full text of the High Court's judgement (text approved by the Courts Service) is shown below :

THE HIGH COURT

1999 No.48 CA

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT, 1997 AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42(1) OF THAT ACT BETWEEN

THE MINISTER FOR AGRICULTURE AND FOOD - APPELLANT

AND

THE INFORMATION COMMISSIONER - RESPONDENT

JUDGEMENT of Mr. Justice Diarmuid B O'Donovan delivered on the 17th day of December 1999.

This is an appeal by the Appellant pursuant to the provisions of section 42(1) of the Freedom of Information Act, 1997 against a decision of the Respondent dated the 29th day of April 1999 following a review by the Respondent under Section 34 of the said Act of 1997 of a decision of the Appellant made on the 24th day of June 1998 pursuant to section 14 of the Act. I believe that this is the first appeal against a decision of the Respondent made pursuant to the provisions of section 42 of the said Act since the Act came into effect on the 21st day of April 1998.

The background to the case is that, on the 16th day of April 1998, Mr. Sean Glynn, an employee of the Department of Agriculture and Food made a request to the Department pursuant to the provisions of Section 7 of the Freedom of Information Act, 1997 for a "sight of my entire personnel file". The said request was deemed by the Department to have been received on the 21st day of April, 1998; being the date of commencement of the said Act. On the 18th day of May 1998, the Department granted to Mr. Glynn access to the records on his personnel file from the 21st day of April 1995 but, in purported reliance upon the provisions of Section 6(6)(c) of the said

Act, refused to grant access to records created prior to that date on the grounds that those records were not being used, or were not proposed to be used in a manner or for a purpose that effects, or would or may effect, adversely the interests of Mr. Glynn. On the 20th day of May 1998, pursuant to the provisions of Section 14 of the said Act, Mr. Glynn sought a review of the said refusal to grant him access to records on his personnel file created prior to the 21st day of April 1995 and, on the 24th day of June 1998, the Appellant affirmed the decision to refuse to grant Mr. Glynn access to those records. From that decision, Mr. Glynn, by letter in writing dated the 5th day of October 1998 addressed to the Respondent, sought a review pursuant to the provisions of Section 34 of the said Act; to which request the Respondent acceded and, having reviewed that decision in the light of the relevant records and of submissions by Mr. Glynn and by the Department of Agriculture and Food, the Respondent, in a decision given pursuant to the provisions of Section (34)(2) of the Act and dated the 29th day of April, 1999, decided to vary the said decision of the Appellant and to grant to Mr. Glynn full access to certain records specified in the said decision and partial access to other records also specified in the said decision.

Pursuant to the provisions of Section 42(1) of the Act and by notice dated the 26th day of May 1999 the Appellant has appealed against the said decision of the Respondent dated the 29th day of April 1999 seeking relief in the following terms, namely: -

(a) an order discharging the decision of the Respondent dated the 29th day of April 1999 insofar as it directed the Appellant to give access to Mr. Glynn to records specified in the schedule to the said notice.

(b) a Declaration that the said decision of the 29th day of April 1999 and the consequential directions given by the Respondent in connection with access by Mr. Glynn to the said records are wrong in point of law.

(c) a Declaration and/or a direction that Mr. Glynn is not entitled to access to the said records, or any of them.

(d) (if appropriate) an Order remitting Mr. Glynn's request for further consideration by the Respondent in accordance with law and in accordance with such Orders as this Honourable Court may seem meet.

At the outset, I think it relevant to emphasise the following matters with regard to the provisions of the Freedom of Information Act, 1997 and, in particular, with regard to the rights conferred by the Act on members of the public to access to records held by public bodies, the manner in which those rights may be exercised and the limitations to the right of appeal to the High Court against a decision by the Respondent following a review by him under section 34 of the Act. In this regard, I think that it is very significant that, in its preamble, the Freedom of Information Act, 1997 is

described (inter alia) as " 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, (my emphasis) to information in the possession of public bodies" and that, by virtue of the provisions of Section (6)(1) of the Act, every person has a right to and shall, on request therefore, be offered access to any records held by a public body, subject only to the provisions of the Act. Moreover, by virtue of the provisions of section 8(4) of the Act, the reason why any person might seek access to records to which he/she is entitled is irrelevant, by virtue of the provisions of Section 34(12)(b) of the Act, in a review by the Respondent pursuant to Section 34, a decision to refuse to grant a request under Section 7 of the Act shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified and the right to appeal to the High Court against a decision by the Respondent following a review by him under Section 34 of the Act, which is conferred by Section 42(1) of the Act, is specifically limited to points of law. In those circumstances, I think that it follows that, save where access to records is specifically prohibited by the Act e.g. an "exempt record" within the meaning of section 2(1) of the Act, there is a very heavy onus on a public body, which refuses to grant access to records sought from it, to justify that refusal. Moreover, given that the reason for requesting access to records is not relevant when considering whether or not access should be granted, then, in reviewing a decision to refuse to grant such access, it is not always necessary or desirable that the content of those records be considered.

As I have indicated, in response to Mr. Glynn's request of the 16th day of April 1998, the Appellant purported to be entitled to restrict access to records on his personnel file which were created after the 21st day of April 1995 by virtue of the provisions of Section 6(6)(c) of the said Act of 1997 which provides as follows :-

"(6) Subsection (5) shall not be construed as applying, in relation to an individual who is a member of the staff of a public body, the right of access to a record held by a public body that :

(a) is a personal record, that is to say, a record related 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 a public 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 three years before the commencement of this Act 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."

In his said decision dated the 29th day of April 1997, the Respondent indicated that, in reviewing the decision of the Appellant of the 24th day of June 1998, he considered Mr. Glynn's records and submissions from Mr. Glynn and from the Department of Agriculture and Food. Given that by virtue of the provisions of Section 8(4) of the said Act of 1997 which provides:-

"(4) In deciding whether to grant or refuse a request under Section 7 -

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

(b) any belief or opinion of the head as to what are the reasons of the requester for the request, shall be disregarded."

I am not persuaded that, when the provisions of Section 6(6)(c) of the Act are relied on to withhold access to records to which the Applicant for access is otherwise entitled, it is either necessary or desirable that, when considering a review under Section 34 of the Act of a decision to refuse such access, the Respondent should examine or consider those records. In this regard, it seems to me that, as with a request under Section 7, a review by the Respondent under Section 34 is not concerned with the reason why the requester seeks access to the records or with the belief or opinion of the head of the public body from whom access to the records are sought as to what those reasons are, no regard may be had to those reasons or opinions in conducting a review under section 34 of the Act and, accordingly, the contents of those records are totally irrelevant to the decision that the Respondent may arrive at following such review. Indeed, it seems to me that a consideration of the contents of such records, when conducting a review under section 34, is likely to distract the Respondent from the real question that he has to decide, which of course, is whether or not, irrespective of those reasons or opinions, the body refusing access to the records is entitled to do so or, at least, is likely to colour his view in that regard.

Having regard to the foregoing, it is my view that, when reviewing the decision of the Appellant of the 24th day of June 1998 to withhold access from Mr. Glynn to the records in question, the respondent unnecessarily and wrongly embarked upon a consideration of the contents of those records with the result that , it is, clear from his decision of the 29th day of April 1998 that the contents of the records to which Mr. Glynn had been refused access were the subject of discussion between Mr. Glynn, representatives of the Department of Agriculture and Food and the Respondent and clearly influenced the decision which the respondent ultimately arrived at. Moreover it is manifest that, during the course of the review being conducted by the Respondent, the Representatives of the Department maintained that some of the records to which Mr. Glynn was being denied access were, in fact, exempt records within the meaning of

Sections 23(1)(a)(i) to (iii) and (b) and Section 26(1)(a) of the said Act, in that, they contained information obtained in confidence so that their release would materially prejudice or impair the Department's ability to carry out investigations in the work area in question; these being allegations which were not included among the grounds upon which Mr. Glynn had originally been refused access to the records which he sought, and, consequently, were not grounds which were included in the decision of the Appellant of the 24th day of June 1998 which he (the Respondent) was in the act of reviewing. Moreover, the Respondent, himself, concluded that some of those records are records to which Section 22 of the Act applied and were exempt on the grounds of legal professional privilege which, again, was not a ground relied upon by the Appellant in reaching his decision of the 24th June 1998. In those circumstances, it seem to me that the Respondent, when conducting his review of the Appellant's decision of the 24th of June 1998, was not entitled to take into account the relevance, or otherwise, of the provisions of either Section 22, Section 23 or section 26 of the said Act to the records with which he was dealing but was limited to considering the application of Section 6(6)(c) of the Act to those records because that was the only section upon which the Department of Agriculture and Food relied in their decision of the 24th of June 1998 when they decided to withhold access to those records from Mr. Glynn.

In his decision of the 29th of April 1999, the Respondent points to the fact that there are 41 records on Mr. Glynn's Personnel file created in the period from the 1st of November 1990 to the 21st of April 1995, which he (the Respondent) numbered consecutively and he maintained that, with one exception, all of those records were concerned with an incident involving Mr. Glynn in the month of July 1992 and its aftermath. Given that some of those records were created prior to the month of July 1992, that assertion would not appear to be correct. However, as it is my view that the contents of those records were not relevant to any issue which the Respondent had to decide when reviewing the Appellant's decision of the 24th of June 1998 and indeed, are not relevant to any issue which I have to decide, I do not consider that that error (if it be one) is of any consequence. In his said decision of the 29th of April 1999, the respondent also records that, in the course of reviewing the said decision of the 24th of June 1998, Mr. Glynn produced to him a letter dated the 2nd day of December 1993 addressed to Mr. Glynn and purporting to have been sent by the Department of Agriculture and Food but that there was no copy of that letter in the personnel file relating to Mr. Glynn which was submitted to the Respondent by the Department. That omission was never explained and I can only speculate on the reason for the absence of a copy of that letter on Mr. Glynn's personnel file. However, that as it may be, in his decision of the 29th of April 1999, the Respondent also records that, on the 27th of October 1998, which was well after Mr. Glynn's request for a "sight of my

entire personnel file" a total of 16 of the 41 records, which the Respondent noted on Mr. Glynn's personnel file, were placed by the Department of Agriculture and Food in a sealed envelope to which was attached a notice signed by the personnel officer in the said Department in the following terms, namely;

"Please note that the records contained in the sealed envelope attached are to be regarded as closed records and, to ensure that they are not used in any manner or form which might adversely effect Mr. Glynn's interests, are not to be consulted in the future".

On behalf of the Appellant, it is submitted that the fact that the said records were placed in a sealed envelope to which was attached a notice in the terms aforesaid, is persuasive evidence that the said records were not currently being used, nor was it proposed that they be used in a manner or for a purpose that effects, or will or may effect, adversely the interests of Mr. Glynn, as required by Section 6(6)(c) of the said Act of 1997, and, moreover, as it is evidence which was uncontroverted in the course of the review being conducted by the Respondent and the bona fides of the Department of Agriculture and Food was not challenged in the course of that review, the Respondent was not entitled, as he did, to conclude that the provisions of Section (6)(6)(c) of the said Act did not apply to those records. In that regard, it is clear from the Respondent's decision of the 29th of April 1999 that Mr. Glynn was not prepared to accept that the sealing of his records in the manner aforesaid indicated that those records would not be used in the future in any way that might adversely effect his interests; arguing that it was possible, that in the future, the notice attached to sealed envelope would be ignored by the then staff in the personnel section of the Department of Agriculture and Food. For his part, it is clear that the Respondent's reaction to the sealing by the Department of the records in question was that, that fact, by itself, was not sufficient to refuse Mr. Glynn access to those records. Given that the Department of Agriculture and Food had not seen fit to seal those records until after Mr. Glynn had sought access to them and given that the personnel file relating to Mr. Glynn, which was submitted to the Respondent by the Department of Agriculture and Food, does not appear to have been complete, in that, a copy of a letter dated the 2nd of December 1993 from the Department to Mr. Glynn was not included in it, I have sympathy for the views in that behalf expressed by both Mr. Glynn and by the Respondent. However, I think that it is also clear from the Respondent's decision of the 29th of April 1999 that his view that the sealing of Mr. Glynn's records in the manner described was not sufficient to allow the Department to refuse Mr. Glynn access to those records was influenced by the fact that he (the Respondent) believed that a further consultation of those records could easily effect Mr. Glynn's future in an adverse way. In other words, he was

influenced by the contents of those records which, in my view, he was not entitled to take into account when considering the application of the provisions of Section 6(6)(c) to them. This begs the question; if placing the said records in a sealed envelope to which is attached a notice in the terms aforesaid is not sufficient evidence that those records are not being used and are not proposed to be used in a manner adverse to Mr. Glynn's interests, then, in the absence of evidence of mala fides on the part of the Department, what evidence is necessary to satisfy the requirements of Section 6(6)(c) of the said Act? In this regard, I think that it is significant that the wording of Section 6(6)(c) is that the record to which access is sought is not "being used" or "proposed" to be used and not "will not" be used. Accordingly, it seems to me that one must construe that subsection as relating to a situation which exists at the time when the implications of the subsection are being considered and not in relation to what might happen in the future. In other words, when considering whether or not a record in respect of which access is sought is being used or is proposed to be used in a manner which might adversely effect the interests of the person to whom the record relates, one can only take into account what is actually happening to the record and what is the stated intention of the keeper of the record unless there are reasonable grounds for doubting the evidence of one's own eyes or the stated intention of the keeper.

Arising out of the foregoing, as I interpret the Respondent's decision of the 29th April 1999, there was no evidence available to him to suggest, or even to give rise to the suspicion, that, at the time that Mr. Glynn sought access to his records, or at any time thereafter, those records were being used by the Department of Agriculture and Food and, accordingly, I do not think that he was entitled to come to any conclusion other than that those records were not being used at any material time. However, what of the future? It is now stated on behalf of the Appellant and noted on Mr. Glynn's personnel file (or, at least, on a sealed envelope on his file which contains many of the records to which Mr. Glynn seeks access) that those records may be regarded as "closed records" and, so as to ensure that they are not used in any manner which might adversely affect Mr. Glynn's interests, they are not to be consulted in the future. Taken at its face value, the combination of the sealing of those records and the accompanying notice would appear to satisfy the requirements of Section 6(6)(c) of the said Act of 1997 whereby the Appellant is entitled to withhold access to those records. However, is the Respondent bound to accept that a record is not proposed to be used in a manner which might adversely affect the interests of the person to whom the record relates merely because it is enclosed in a sealed envelope to which is attached a notice to the effect that it is not to be so used? In this regard, as I have already indicated, it seems to me that, when considering whether or not a record in respect of which access is sought is proposed to be used in a manner which might adversely affect the interests

of the person to whom the record relates, regard must be had to the stated intention of the keeper of the record unless there are reasonable grounds for doubting that stated intention; always bearing in mind that the onus is on the keeper of the record to justify a refusal to grant access to it. Accordingly, if it were the case that the records to which Mr. Glynn sought access had been sealed in an envelope to which a notice was attached that they were not to be consulted in the future before Mr. Glynn had requested access to them, I think that the Respondent would be bound to accept that that was compelling evidence that those were records to which Section 6(6)(c) of the Act applied. However, given that the personnel file relating to Mr. Glynn which was submitted to the Respondent by the Department does not appear to have been complete, given that only some of the records on Mr. Glynn's personnel file had been placed in a sealed envelope and not only had that sealing taken place after Mr. Glynn had requested access to them, but it took place after the Respondent had commenced his review, and, given that the sealed envelope was permitted to remain in Mr. Glynn's personnel file so that its mere presence, with a note attached to it that it was not to be consulted in the future, is more likely than not to excite the curiosity of anyone who consulted the file; so much so, that such a person would be tempted to open the sealed envelope, in which event, its contents might well be used to Mr. Glynn's detriment and I think that those are reasonable grounds for doubting the stated intention that it was not proposed that that the records would be used in a manner which might adversely affect Mr. Glynn's interests. This is all the more so when regard is had to the fact that the note attached to the sealed envelope is only signed by the Personnel Officer and, therefore, is unlikely to be perceived as having binding effect on a superior officer or even an officer of equal rank and, in any event, the Respondent was entitled to ask himself why was the file being maintained at all, if it was not proposed to use it? Is not its continued maintenance a statement of intent to use? I would accept the validity of the submission on behalf of the Appellant that, when considering the application of Section 6(6)(c) of the Act to records in respect of which access is sought, one does not have to be satisfied as a matter of certainty that those records will not be used in a manner adverse to the interests of the person to whom they relate before deciding that the subsection does not apply to them. Indeed, far from requiring certainty as to the future use of those records, I would accept that the subsection does not even contemplate consideration of a remote or hypothetical possibility with regard to the use to which those records might be put at some time in the future; assuming that there are no circumstances which obtain at the time when the request for access to them is made which might suggest that the possibility of future use has been contemplated. However, if, when considering whether or not the provisions of Section 6(6)(c) of the Act apply to a record in respect of which access is sought, there are reasonable

grounds for believing that the possibility of future use has not been ruled out, then I think that it would be wrong to conclude that the provisions of the subsection apply to such a record. In this case, for the reasons that I have given, I think that there were grounds upon which the Respondent was entitled to conclude that the Department of Agriculture and Food had not ruled out the possibility of future use of the records in respect of which Mr. Glynn sought access.

Arising from the foregoing, in the case of James Howard and Others v. The Commissioner of Public Works in Ireland and Sean Byrne, Garech de Brur and Dieter Clissman v. The Commissioners of Public Works in Ireland (1994) 1 I.R. at page 101) it was held by the Supreme Court that, in interpreting statutes, the task of the Courts is to ascertain the intention of the legislature and this intention was primarily to be sought in the words used in the statute. As Denham J. stated in the course of one of the judgements of the Court :-

"The correct conclusion to be drawn is that the plain language of the Act must not be extended beyond its natural meaning so as to supply omissions or remedy defects. The Court should neither misconstrue words so as to amend defects in the legislation nor legislate to fill gaps left by the legislature. If there is a plain intention expressed by the words of the statute then the courts should not speculate but rather construe the Act as enacted".

In this regard, in the light of its preamble, it seems to me that there can be no doubt but that it was the intention of the legislature, when enacting the provisions of the Freedom of Information Act, 1997, that it was only in exceptional cases that members of the public at large should be deprived of access to information in the possession of public bodies and this intention is exemplified by the provisions of section 34(12)(b) of the Act which provides that a decision to refuse to grant access to information sought shall be presumed not to have been justified until the contrary is shown. Accordingly, it seems to me that the entire Act must be construed in that light and, in particular, the provisions of Section 6(6)(c) of the Act must be construed as meaning that, if there is evidence to suggest that future use of a record to which access is sought appears to be contemplated, then that subsection cannot be used to justify a refusal to grant access to that record. In this regard, the case of Henry Denny and Sons (Ireland) Limited T/A Kerry Foods v. The Minister for Social Welfare (1998) 1 I.R. at page 34) to which I was referred, is authority for the proposition that the High Court should not interfere with findings of a person, whose decision is being reviewed by the Court, unless those findings are incapable of being supported by the facts or are based on an erroneous view of the law. As I have already indicated, as a matter of law, I am satisfied that when reviewing the Appellant's decision of 24th June, 1998, the Respondent was

not entitled to take into account the relevance or otherwise of the provisions of Sections 22, 23 or 26 of the said Act to the records in respect of which access was sought by Mr. Glynn for the reason that the provisions of those sections were not relied on by the Appellant when arriving at his decision of the 24th June, 1998. To that extent, in the light of the decision given in Henry Denny and Sons (Ireland) Limited v. The Minister for Social Welfare, I think that I am obliged to conclude that, insofar as the Respondent affirmed the decision of the Appellant to refuse access to any portion of the records in respect of which Mr. Glynn sought access on the grounds that they were records to which the provisions of Sections 22, 23 or 26 of the Act applied, he was wrong in law. However, for the reasons that I have already given, I am satisfied that there was adequate evidence to support the Respondent's findings that the provisions of section 6(6)(c) of the Act did not apply to any of the records to which Mr. Glynn sought access. For the sake of completeness, I should add that, in the circumstance that it is my judgement that the Respondent was not entitled to take into account the relevance , or otherwise, of the provisions of Sections 22, 23 or 26 of the said Act when reviewing the Appellant's decision of the 24th June, 1998, the Australian cases of Department of Health and Another v. Jepcott (62 A.L.R. at page 42) and Corrs, Pavey, Whiting and Byrne v. Collector of Customs (V.I.C.) and Another (74 A.L.R. at page 428) and the New Zealand case of Commissioner of Police v. Ombudsman (1998 1 NZ LR at page 385) to which I was referred by Counsel for the Appellants do not appear to have any relevance to the issues which I have to decide in this case. I might add that, in the circumstances that Counsel for the Appellant challenged the entitlement of the Respondent to alter the records in respect of which he was conducting a review under the provisions of section 34 of the Act by deleting portions therefrom to the intent that the remaining portions would not offend the provisions of Sections 22, 23 and 26 of the Act and while, as I have already indicated, I am satisfied that no one of these three sections had any relevance to any issue which the Respondent had to decide, or which I have to decide in these proceedings, nevertheless, I am quite satisfied that, by virtue of the provisions of Section 13 of the Act, the Respondent would have been quite entitled to make those alterations.

In the light of the foregoing, I will vary the decision of the Respondent of the 29th April, 1999 and grant access to Mr. Glynn to all records on his personnel file in the Department of Agriculture and Food.