

**UNAPPROVED**



**AN ARD-CHÚIRT  
THE HIGH COURT**

**Record No. 2023/260MCA**

**BETWEEN:**

**OISIN QUINN MCDONAGH**

**APPELLANT**

**-AND-**

**THE INFORMATION COMMISSIONER**

**RESPONDENT**

**-AND-**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Conleth Bradley delivered on the 19<sup>th</sup> day of September 2024**

## INTRODUCTION

### *Background*

1. This is a statutory appeal brought under section 24 of the Freedom of Information Act 2014 (“the FOI Act 2014”) seeking to set aside the decision of the Information Commissioner (“the Respondent”) dated 19<sup>th</sup> July 2023 refusing a request made on behalf of Mr. McDonagh (“the Appellant”) by Mulholland Law, his solicitors, seeking access to records in relation to: (i) a breakdown of all An Garda Síochána stops and searches from 1<sup>st</sup> January 2022 until 1<sup>st</sup> January 2023 in the Dundalk/Louth district; (ii) the legal provisions (if any) that were utilised to ground the stops and searches; and (iii) a breakdown of the stops and searches concerned by age, gender, and ethnicity.
2. Conor Power SC and Glenn Lynch BL appeared for the Appellant. Louise Beirne BL appeared for the Respondent. Gerard Downey BL appeared for the Commissioner of An Garda Síochána (“the Notice Party”).
3. The central issue which arises for consideration in this appeal is the correct meaning of the following provisions in Part 1 of Schedule 1, paragraph (n) of the FOI Act 2014:  
  
*“Section 6 does not include a reference to ... (n) the Garda Síochána, other than insofar as it relates to administrative records relating to human resources, or finance or procurement matters”.*

4. While the following matters are addressed further in this judgment, the essence of the Appellant's arguments, in this statutory appeal, can be summarised in the following three propositions, made on his behalf:
- (i) first, it is submitted that, depending on the context, the same records can be regarded as *an administrative record dealing with human resources* (and therefore can be released), and can also constitute a record comprising *an operational matter* (and therefore can be excluded);
  - (ii) second, it is submitted that the three categories of records sought (described above) comprise records relating to the administration, *i.e.*, the 'running and management' of human resources which typically includes records in relation to time management, productivity, and performance is not operational from the Appellant's perspective, whereas operational matters may include the same information or records but in a context which may include, for example, consideration of a referral to the Director of Public Prosecutions or a court application;
  - (iii) third, because the Appellant is seeking the information from an 'administrative record' perspective and not in an 'operational context', these records should, it is argued, be released.
5. Accordingly, the Appellant argues that the Respondent erred in law in applying too narrow a definition or construction when refusing the records sought in the decision dated 19<sup>th</sup> July 2023.

## SUMMARY OF FACTS – CHRONOLOGY

### 21<sup>st</sup> March 2023

6. On 21<sup>st</sup> March 2023, the Appellant’s solicitor made the initial request for access to the three sets of records just mentioned.

### 22<sup>nd</sup> March 2023

7. On 22<sup>nd</sup> March 2023, the Notice Party refused the request and relied on Schedule 1, Part 1(n) of the FOI Act 2014. This decision and the letter setting out the decision was from Assistant Principal Mr. Paul Bassett, Freedom of Information Officer, and stated as follows:

*“(1) Findings, particulars and reasons for decision:*

*Part 1(n) of Schedule 1 of the FOI Act states that An Garda Síochána is listed as a partially included agency “insofar as it relates to administrative records relating to human resources, finance or procurement matters”. Therefore, only administrative records that relate to human resources, finance or procurement shall be considered. Your request is in relation to an operational policing matter which does not come within the ambit of this partially included agency as set out in Part 1(n) of Schedule 1 of the FOI Act.*

*Part 1(n) of Schedule 1 of the FOI Act provides that An Garda Síochána is not a public body for the purpose of the FOI Act... in relation to administrative records relating to human resources, or finance, or procurement matters.*

*The term “administrative records” is understood to mean records relating to the process of running and managing a business or organisation. The FOI Act excludes operational policing business as opposed to the defined administrative processes of An Garda Síochána. As a result, the core business of An Garda Síochána is safeguarded from release under the provisions of the FOI Act.*

*The records that you seek pertain to the core functions of An Garda Síochána, that is, operational policing matters as opposed to matters relating to human resources, or finance or procurement.*

*I am therefore refusing your request as it falls outside the scope of the FOI Act insofar as the records do not meet the criteria of administrative records as defined in the Act.”*

29<sup>th</sup> March 2023

8. Accordingly, on 29<sup>th</sup> March 2023 (the letter was date stamped as being received on 30<sup>th</sup> March 2023), Mulholland Law, the Appellant’s solicitors, in effect requested an internal review<sup>1</sup> of the decision and set out the grounds of appeal in this correspondence.
  
9. Under sub-heading “3 *The Adjudicator’s Refusal*”, for example, this letter described the refusal decision by the Respondent (“*adjudicator*”) as being a decision “*based on*

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<sup>1</sup> Section 21 of the FOI Act 2014.

*the notion that An Garda Síochána is only a partially included agency within the FOI Act that are required to release records only in respect of “administrative records relating to human resources”. The adjudicator reasons that this means that the core business of An Garda Síochána is safeguarded from release under the Act. Hence, the adjudicator states that the FOI Act does not have the remit to apply to records relating to policing operational matters, which are the records that the Applicant seeks.”*

10. Six points of appeal (as part of this internal review) relating to an interpretation of section 42(b) of the FOI Act 2014 are then proffered on behalf of the Appellant in paragraph 4 under the sub-heading “*The Issue with the Adjudicator’s refusal – Section 42(b) of the Freedom of Information Act, 2014*”, as follows:

*“(a) The adjudicator’s interpretation of “administrative records relating to human resources” is unhelpfully isolationist and restrictive given that administrative records relating to human resources has not [no] [sic.] definition within the Act. When we look at the entirety of the Act it is clear that Section 42(b) of the FOI Act is a complete contradiction of the adjudicator’s reasoning that the “core business” of An Garda Síochána is “safeguarded” from release due to the Act not extending to policing business.*

*(b) Part 5, Section 42(b) states that:*

*i. this Act does not apply to: a record held or created by An Garda Síochána that relates to any of the following:*

*(i) the Emergency Response Unit;*

- (ii) *the Secret Service Fund maintained by it;*
- (iii) *the Special Detective Unit (SDU);*
- (iv) *the Witness Protection Programme sponsored by it;*
- (v) *the Security and Intelligence Section*
- (vi) *the Management and use of Covert Intelligence Operations;*
- (vii) *the Intervention of Postal Packets and Telecommunications Messages (Regulation) Act 1993;*
- (viii) *the Criminal Justice (Terrorist Offences) Act 2005;*
- (ix) *the Criminal Justice (Surveillance) Act 2009;*
- (x) *the Communications (Retention of Data) Act 2011.*

*(c) Therefore, the adjudicator's reasoning that the [2014] Act does not apply to policing operational matters is contradicted by the fact that the [2014] Act has specifically excluded from its application certain covert/security/intelligence elements of policing operations, meaning that the draftsman had intended for "administrative records relating to human resources" to apply to non-convert/security/intelligence related policing operation of An Garda Síochána.*

*(d) An important maxim of interpretation is 'expressio unius exclusio alterius' which translates as 'to express one thing is to exclude another' meaning that the expression of Section 42(b) of the Freedom of Information Act 2014 excluding records relating to*

*covert/intelligence/security operations prevents the adjudicator's reasoning that records of An Garda Síochána relating to non-covert policing operations are excluded from the Act.*

*(e) Hence by excluding certain things, the inclusion of others is implied. For example in A(PP) v Refugee Appeals Tribunal & Ors, Section 19(4A) of the Refugee Act 1996 provided that 'the Chairperson of the Tribunal may, at his or her discretion, decide not to publish (other than to the persons referred to in Section 16(17), a decision of the Tribunal which in his or her opinion is not of legal importance'.*

*(f) It was held that:*

*(i) Although phrased unusually at Section 19(4A)(a), it is clear that the discretion therein is not to publish unimportant decisions of the Tribunal. But this does not preclude publication of all. For in reading s.4A(a) and (b) together it is clear that there must be vested in the Chairman a positive discretion to publish decisions which are of legal importance. Otherwise s.19(4A)(b) has no meaning at all and is otiose. The court must lean against such interpretation. Only by adopting this approach can effect be given to the maxims of interpretation, **first that it is common sense to assume that if a particular proposition is laid down by enactment the converse also applies.**"*



11. The next ground in the Appellant's appeal dated 29<sup>th</sup> March 2023, at paragraph number 5, is under the sub-heading "*The Issue with the Adjudicator's Refusal – Part 1 (o) of Schedule 1 of the Freedom of Information Act 2014*". As referred to earlier in this judgment, at the hearing before me it was indicated, on behalf of the Appellant, that this ground was no longer being relied upon.

12. The sixth paragraph of the Appellant's appeal was under the following sub-heading: "*The issue with the Adjudicator's refusal Section 32(3) of the Freedom of Information Act 2014*". Under this sub-heading, the following points were set out at paragraphs (a) to (d) inclusive in relation to section 32(3) of the FOI Act 2014:-

*“(a) Giving the interpretation of the adjudicator weight would also question the draftsman's inclusion of elements of the FOI Act such as Section 32(3) which allows for disclosure of certain law-enforcement records, where in the opinion of the head of the FOI body concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request for access.*

*(b) Three categories of record covered by this test are:*

*(i) records that disclose an investigation for the purpose of the enforcement of the law, or anything done in the course of such investigation or for the purposes of the prevention or detection of offences or the apprehension or prosecution of offenders, is not authorised by or contravenes any law;*

*(ii) records containing information concerning the performance of the functions of an FOI body, including functions relating to the enforcement of the law or the ensuring of the safety of the public; and*

*(iii) records containing information concerning the merits or the success or otherwise of any programme, scheme or policy of an FOI body for preventing, detecting or investigating contraventions of the law or the effectiveness or efficiency of the implementation of any such programme, scheme or policy by an FOI body.*

*(c) Records falling into the first of these categories include records that reveal the commission of crimes or civil wrongs in the course of investigation, such as, for example, the use of breaking and entering or assault by law enforcement officers in order to obtain evidence. Given that this category extends to cover activities which are “not authorised by law”, it also extends to records revealing activities of law enforcement authorities which exceed their powers without attracting tortious or criminal liability. It also extends to investigations based on improper motives. For example, an investigation which is aimed at discrediting the person under investigation, other than uncovering any wrongdoing, would arguably, not be “authorised by law.”*

*(d) What would be the point of the draftsman allowing the Commissioner to have this public interest override if the Act did not apply to the policing business of An Garda Síochána. It is of note that the public interest override provided for in s.32 has not been applied by the Commissioner in any decision to date.”*

#### 4<sup>th</sup> April 2023

13. On 4<sup>th</sup> April 2023 Assistant Principal Mr. Paul Bassett, Freedom of Information Officer for An Garda Síochána, acknowledged the appeal and indicated that a final decision would be sent within three weeks of receipt of the appeal, (which meant that the Appellant could expect to receive a decision on the request for an appeal by 21<sup>st</sup> April 2022).

#### 16<sup>th</sup> May 2023

14. As matters transpired, on 16<sup>th</sup> May 2023, Mr. Bassett informed Mulholland Law that the Internal Reviewer, who was a Chief Superintendent of An Garda Síochána, had concluded his internal review. The letter stated that in arriving at his decision, the Internal Reviewer had regard to the original request, Mr. Bassett’s decision of 22<sup>nd</sup> March 2023, and the request for an internal review from Mulholland Law. The letter further set out that, having reviewed the request on behalf of Mulholland Law and the associated correspondence, the Internal Reviewer had affirmed Mr. Bassett’s original decision that the material sought should not be released on the grounds that it did not relate to administrative records pertaining to human resources, finance or procurement matters as statutorily provided for. The letter stated that:

*“The records sought in your request do not consist of administrative records relating to human resources, finance or procurement matters. Therefore, the records sought are excluded from the provisions of the FOI Act and no right of access to these records exists.”*

15. The letter of 16<sup>th</sup> May 2023 indicated that this decision could be appealed to the Office of the Information Commissioner not later than six months from the date of notification of the decision.
16. Section 22(2) of the FOI Act 2014 provides that subject to that Act, the Information Commissioner may, consequent upon an application made in writing (or in such other form as may be determined) by a relevant person, review a decision to which section 22 of the FOI Act 2014 applies and following the review, he or she may, as they consider appropriate: (i) affirm or vary the decision; and (ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers it proper, in accordance with the FOI Act 2014.
17. On the same day that An Garda Síochána issued an internal review decision affirming its original decision (16<sup>th</sup> May 2023), the Appellant applied to the Respondent (the Information Commissioner) for a review of the decision of affirmation dated 16<sup>th</sup> May 2023 of An Garda Síochána.
18. This review was carried out by Ms. Sandra Murdiff (“the Investigating Officer”) pursuant to section 22(2) of the FOI Act 2014.

20<sup>th</sup> June 2023

19. On 20<sup>th</sup> June 2023, the Investigating Officer provided the Appellant with details of the submissions of An Garda Síochána in support of its refusal of the Appellant's request and invited the Appellant to comment. The Appellant made no further substantive comments.

19<sup>th</sup> July 2023

20. Having carried out the review, Ms. Murdiff, on 19<sup>th</sup> July 2023, made a binding decision affirming the decision made by An Garda Síochána refusing the request for access to the records pursuant to Schedule 1, Part 1(n) of the FOI Act 2014.

21. As the Appellant has not pursued the arguments made pursuant to Schedule 1, Part 1(o) of the FOI Act 2014, the relevant part of the Investigator's decision, dated 19<sup>th</sup> July 2023, is set out as follows, under the sub-heading "Analysis":-

*"I do not accept the applicant's arguments. First, as I have outlined above, pursuant to Schedule 1, Part 1(n), the only records held by An Garda Síochána that are subject to the FOI Act are those that relate to administrative matters concerning human resources, finance or procurement. Only where such records are at issue is it necessary to go on to consider whether any of the other exemptions or restrictions might also apply. Essentially, section 42(b) serves as a further restriction of those records held by AGS to which the Act applies. For example, even if a record relates to administrative matters concerning human resources, the FOI Act will not apply to that record if it also relates to the Emergency Response Unit (section 42(b)(i) refers).*

*Similarly, section 32(3) does not fall to be considered if the record held by AGS does not relate to administrative matters concerning human resources, finance or procurement. Instead, it falls to be considered only where the record relates to administrative matters concerning human resources, finance or procurement and where section 32(1) applies. It is worth noting that section 32, which provides for the exemption of records relating to law enforcement and public safety, may be relied upon by any public body that is subject to the Act. It is simply not the case that the provision would serve no purpose if the Act did not apply to the place and business of the AGS.*

*[On the matter of the Applicant's arguments concerning Schedule 1, Part 1(o) of the FOI Act, the provision does not, as the Applicant suggests, provide that records concerning an inspection and enquiry carried out by An Garda Síochána Inspectorate are within the remit of the Act. Instead, it provides that An Garda Síochána Inspectorate is not an FOI body in relation to such records. In any event, the restrictions in Schedule 1 are specific to the bodies identified. The fact that certain types of records held by an FOI body may be subject to the Act does not mean that all such records must be subject to the Act regardless of what body holds them].<sup>[2]</sup>*

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<sup>2</sup> This argument, quoted between the square brackets, was no longer pursued by the Appellant at the hearing before me.

*Having regard to this Office's understanding of the term "administrative record" as outlined above, I am satisfied that records relating to stops and searches cannot be said to relate to administrative matters relating to human resources, finance or procurement. I find, therefore, the AGS was justified in refusing, pursuant to Schedule 1, Part 1(n), the Applicant's request.*

**Decision**

*Having carried out a review under Section 22(2) of the FOI Act, I hereby affirm AGS's decision to refuse the Applicant's request pursuant to Schedule 1, Part 1(n) of the FOI Act."*

22. The Investigating Officer's decision of 19<sup>th</sup> July 2023 also contained a notification to the Appellant of a right to appeal to the High Court pursuant to section 24 of the FOI Act 2014.

23. It is that appeal which is the subject matter of this judgment.

**SUMMARY OF THE APPELLANT'S CASE**

24. On behalf of the Appellant, it is contended that a correct interpretation of Schedule 1, Part 1(n) of the FOI Act 2014 would encompass the records which are sought on his behalf, namely: (i) a breakdown of all An Garda Síochána stops and searches from 1<sup>st</sup> January 2022 until 1<sup>st</sup> January 2023 in the Dundalk/Louth district; (ii) the legal provisions (if any) that were utilised to ground the stops and searches; and (iii) a

breakdown of the stops and searches concerned by age, gender, and ethnicity. It is argued that these three categories of records encompass anonymised records relating to policing matters that have in the past occurred, *i.e.*, statistical type data, for example, how many stops and searches, what provision was used and who was the subject of these powers.

25. It is submitted on behalf of the Appellant that details of individual cases, such as why someone was arrested, are not being sought and there is ‘conditional’ acceptance that records relating to ‘*core operational policing functions*’ do not come within the category of records sought. The Appellant’s acceptance can be described as ‘conditional’ because he submits that while the term *operational matters* or *core operational policing* are often-used and is a convenient shorthand when used to describe that which falls outside Schedule 1, Part 1(n) of the FOI Act 2014, such acceptance is predicated on there being no bright-line or clear/categorical statutory distinction<sup>3</sup> of what is, for example, an administrative record dealing with human resources (and therefore included), on the one hand, and in contrast a record dealing with operational matters (and therefore excluded), on the other hand. On behalf of the Appellant, it is suggested that the same records may fall into either category and are dependent on the context (or ‘guise’) in which they apply. Here, the Appellant submits that he does not seek names of individuals, or records of phone calls or what might be described as operational matters but seeks rather certain features of anonymised information about the global exercise of the stop and search power in a certain area.

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<sup>3</sup> Synonyms such ‘*division*’, ‘*mutual exclusivity*’ and ‘*hermetical seal*’ were also used.



26. It is argued that as “*administrative records relating to human resources, or finance or procurement matters*” encompasses ‘administration’, this includes records relating to ‘running and managing’ a business organisation which encompasses running and managing human resources, finance and procurement matters, *i.e.*, what An Garda Síochána has done as a matter of record, including, for example, time management, productivity data, protocols, guidance, etc. It is contended that what is excluded is what might be characterised as ‘core policing’ strategies and individual cases.
27. The Appellant contends that the point of law which arises in this statutory appeal was summarised in Mr. Bassett’s initial decision dated 22<sup>nd</sup> March, 2023 (quoted earlier in this judgment) where Schedule 1, Part 1(n) of the FOI Act 2014 – “[s]ection 6 does not include a reference to ... (n) the Garda Síochána, other than insofar as it relates to administrative records relating to human resources, or finance or procurement matters” – was interpreted as “*the term ‘administrative records’ is understood to mean records relating to the process of running and managing a business or organisation*” (emphasis added), and it is argued on his behalf that this includes records relating to: (i) a breakdown of all An Garda Síochána stops and searches from 1<sup>st</sup> January 2022 until 1<sup>st</sup> January 2023 in the Dundalk/Louth district; (ii) the legal provisions (if any) that were utilised to ground the stops and searches; and (iii) a breakdown of the stops and searches concerned by age, gender, and ethnicity.
28. In this context, the Appellant submits that “*administrative records*” must relate to “*administration*” which encompasses the phrase “*running and managing*” and he agrees with the definition of “*administration*” referred to at paragraph 44 of the Respondent’s Legal Submissions which states that:

*“Further, “administration” is defined as: “ The action of carrying out or overseeing the tasks necessary to run an organization, bring about a state of affairs, etc.; the process or activity of running a business, organization, etc.” [“Administration, N.” Oxford English Dictionary, Oxford UP, July 2023, <https://doi.org/10.1093/OED/6518532514>].”*

## **SUMMARY OF THE RESPONDENT’S CASE**

29. In response, the view expressed by the Respondent and confirmed through the process of statutory appeals and reviews was that the records requested on behalf of the Appellant – relating to (i) a breakdown of all An Garda Síochána stops and searches from 1<sup>st</sup> January 2022 until 1<sup>st</sup> January 2023 in the Dundalk/Louth district; (ii) the legal provisions (if any) that were utilised to ground the stops and searches; (iii) a breakdown of the stops and searches concerned by age, gender, and ethnicity – all relate to core policing functions and do not come within the meaning of *“administrative records relating to human resources, or finance or procurement matters”* in Schedule 1, Part 1(n) of the FOI Act 2014, and, therefore, the request must be refused.

## **ASSESSMENT & DECISION**

30. The question which arises in this appeal is whether or not the Respondent was correct in his interpretation on 19<sup>th</sup> July 2023 that Schedule 1, Part 1(n) (in the context of section 6) of the FOI Act 2014 – which addresses *“Partially Included Agencies”* (and provides that *“[s]ection 6 does not include a reference to ... (n) the Garda Síochána, other than insofar as it relates to administrative records relating to human resources,*

*or finance or procurement matters*”) – precluded the Appellant (or his lawyers) from being granted access to records in relation to: (i) a breakdown of all An Garda Síochána stops and searches from 1<sup>st</sup> January 2022 until 1<sup>st</sup> January 2023 in the Dundalk/Louth district; (ii) the legal provisions (if any) that were utilised to ground the stops and searches; and (iii) a breakdown of the stops and searches concerned by age, gender, and ethnicity, *i.e.*, whether the Respondent’s decision constituted an error of law.

31. On behalf of the Appellant, it is submitted that as the initial application which was made on his behalf for access to records in relation to stops and searches (as set out above) was essentially dismissed *in limine*, any questions concerning whether or not the records exist and whether they are available must await a ruling on the correct interpretation of Schedule 1, Part 1(n) of the FOI Act 2014.

32. As set out in this judgment, section 6 and Schedule 1, Part 1(n) of the FOI Act 2014 together provide that An Garda Síochána *is* a public body for the purposes of the FOI Act 2014 insofar as it relates to *administrative records relating to human resources, or finance or procurement matters*. Pursuant to the Freedom of Information Act 2014 (Commencement Date for Certain Bodies) Order 2015 (S.I. No. 103 of 2015), 14<sup>th</sup> October 2015 was the appointed date on which the FOI Act 2014<sup>4</sup> (other than section 8) came into operation in relation to, *inter alia*, An Garda Síochána. Consistent with this interpretation, in relation to the Garda Síochána, the “*head of an FOI body*” means the Garda Commissioner.<sup>5</sup> For the following reasons, I consider that the

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<sup>4</sup> Other than section 8 of the FOI Act 2014 which provides for the publication of information about FOI bodies.

<sup>5</sup> Section 2(1) addressing head of an FOI body in relation to the Garda Síochána.

Information Commissioner correctly applied the provisions of Schedule 1, Part 1(n) of the FOI Act 2014 in refusing access to records in relation to: (i) a breakdown of all An Garda Síochána stops and searches from 1<sup>st</sup> January 2022 until 1<sup>st</sup> January 2023 in the Dundalk/Louth district; (ii) the legal provisions (if any) that were utilised to ground the stops and searches; and (iii) a breakdown of the stops and searches concerned by age, gender, and ethnicity.

### ***Statutory appeal***

33. Section 24 of the FOI Act 2014 provides for an appeal to the High Court as follows:

*“(1) A party to an application under section 22 or any other person affected by the decision of the Commissioner following a review under that section may appeal to the High Court—*

*(a) on a point of law from the decision, or*

*(b) where the party or person concerned contends that the release of a record concerned would contravene a requirement imposed by European Union law, on a finding of fact set out or inherent in the decision.*

*(2) The requester concerned or any other person affected by—*

*(a) the issue of a certificate under section 34,*

*(b) a decision, pursuant to section 13, to refuse to grant an FOI request in relation to a record the subject of such a certificate, or*

*(c) a decision, pursuant to section 21, to refuse to grant, or to uphold a decision to refuse to grant, such a request,*

*may appeal to the High Court on a point of law against such issue or from such decision.*

*(3) A person may appeal to the High Court from—*

*(a) a decision under section 21, or*

*(b) a decision specified in any of paragraphs (a) to (g) of subsection (1) of that section (other than such a decision made by a person to whom the function stood delegated under section 20 at the time of the making of the decision),*

*made by the Commissioner in respect of a record held by the Office of the Commissioner or (in a case where the same person holds the office of Ombudsman and the office of Commissioner) made by the Ombudsman in respect of a record held by the Office of the Ombudsman.*

*(4) (a) Subject to paragraph (b), an appeal under subsection (1), (2) or (3) shall be initiated not later than 4 weeks after notice of the decision concerned was given to the person bringing the appeal.*

*(b) Where the Commissioner has decided that access should be granted to some records (including parts of records) but not all records requested—*

*(i) the requester shall have 8 weeks after the date of the notification of the decision concerned to initiate an appeal to the High Court under this section, and*

*(ii) the public body concerned shall grant access to those records that it intends to release after expiration of 4 weeks from the decision of the Commissioner.*

*(5) A decision of the High Court following an appeal under subsection (1), (2) or (3) shall, where appropriate, specify the period within which effect shall be given to the decision.*

*(6) The Commissioner may refer any question of law arising in a review under section 22 to the High Court for determination, and the Commissioner may postpone the making of a decision following the review until such time as he or she considers convenient after the determination of the High Court.*

*(7) (a) Where an appeal under subsection (1), (2) or (3) by a person (other than a head) is dismissed by the High Court, that Court may, if it considers that the point of law concerned was of exceptional public importance, order that some or all of the costs of the person in relation to the appeal be paid by the FOI body concerned.*

*(b) Where a reference under subsection (6) is heard by the High Court, that Court may order that some or all of the costs of a person (other than a head) in relation to such reference be paid by the FOI body concerned.*

*(8) Where an appeal to the Supreme Court is taken from a decision of the High Court under this section, that Court may order that some or all of the costs of a person (other than a head) in relation to an appeal to that Court be paid by the FOI body concerned, if it considers that a point of law of exceptional public importance was involved in the appeal and, but for this subsection, that Court would not so order.”*

34. The principles applicable to an appeal on a point of law from the Information Commissioner were set out by the High Court (McKechnie J.) in *Deely v Information Commissioner* [2001] IEHC 91; [2001] 3 I.R. 439 at 452, which concerned the equivalent provisions dealing with a statutory appeal under section 24 of the Freedom of Information Act 1997.

35. It is common case between the parties that, in a manner similar to the issue which arose in *Minister for Communications v Information Commissioner* [2020] IESC 57; [2022] 1 I.R. 1 at 29 (paragraphs 112-118), the question which arises in this appeal is that which was identified at paragraph (d) in the following passage set out by the High Court in *Deely v Information Commissioner*:

**“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...<sup>6</sup>**

(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”<sup>7</sup>**

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<sup>6</sup> Emphasis added.

<sup>7</sup> Emphasis added. [2001] 3 I.R. 439 at 452.



36. Accordingly, as the resolution of this appeal involves a question of *statutory interpretation*, it is, therefore, a matter for judicial determination: see *Minister for Communications Energy and Natural Resources v Information Commissioner* [2020] IESC 57; [2022] 1 I.R. 1 as applied by the High Court (Simons J.) in *The DPP v The Information Commissioner* [2021] IEHC 752 at paragraph 15.

### ***The approach to statutory interpretation***

37. The Supreme Court has recently emphasised that language, context and purpose are potentially involved in every exercise of statutory interpretation, with none ever operating to the complete exclusion of the other.<sup>8</sup> The exercise involved in the proper construction of legislation is to seek to glean what the intention of the Oireachtas was in enacting words and text contained in section 6 and Schedule 1, Part 1(n) of the FOI Act 2014 read in their correct context. The starting point in the exercise of statutory interpretation is the language used in these provisions which must be construed having regard to the relationship of these provisions to the FOI Act 2014 (as a whole), the location of the FOI Act 2014 in the legal context in which it was enacted, and the connection between the words used in section 6 and Schedule 1, Part 1(n) of the FOI Act 2014, the whole of the FOI Act 2014, that context and the discernible objective of the FOI Act 2014.

38. In seeking to set out the correct meaning of section 6 and Schedule 1, Part 1(n) of the FOI Act 2014, I must do so by reference to their language, place, function and

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<sup>8</sup> *A, B and C (a minor) v Minister for Foreign Affairs* [2023] IESC 10; [2023] 1 I.L.R.M 335 at paragraph 73, per Murray J., [2023] 1 I.L.R.M. 335; *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313.

context. The plain and ordinary meaning of the language used in section 6 and Schedule 1, Part 1(n) of the FOI Act 2014 remains the predominant factor in identifying the effect of these provisions but the other facts remain potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of the words used in these provisions.<sup>9</sup>

39. In the context of the similar provisions of the Freedom of Information Act 1997, the Supreme Court (Finlay Geoghegan J.) in *Minister for Health v Information Commissioner* [2020] IESC 40; [2020] 2 I.R. 417 observed that in identifying the intention of the Oireachtas from the ordinary meaning of the words used, regard was to be had to the provisions of the legislation (including, for example, its Long Title or preamble) and its purpose as per the decision of the High Court (McKechnie J.) in *Deely v Information Commissioner* [2001] IEHC 91; [2001] 3 I.R. 439, at p. 451 which in turn applied the decision of the Supreme Court in *Howard v Commissioners of Public Works* [1994] 1 I.R. 101.

40. Whilst the FOI Act 2014 reflects the “*perceived desirability of creating openness and transparency in public bodies and to provide the tools by which members of the public may engage in informed scrutiny*”, the Long Title and the provisions of the FOI Act

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<sup>9</sup> *The People (DPP) v McAreavey* [2024] IESC 23 per Collins J. at paragraph 24; *Delaney v The Personal Injuries Assessment Board & Ors* [2024] IESC 10 per Collins J. at paragraphs 112 and 113; *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43; [2022] 2 I.L.R.M. 313; *A, B and C (a minor) v Minister for Foreign Affairs* [2023] IESC 10; [2023] 1 I.L.R.M. 335; *Dunnes Stores v Revenue Commissioners* [2019] IESC 50; [2020] 3 I.R. 480; *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60; *People (DPP) v AC* [2021] IESC 74; [2022] 2 I.R. 49.

2014 provide that ‘the right of access’ is ***not*** absolute.<sup>10</sup> An important consideration relates to the identity of the body who holds the records and the context in which those records are held. The same records may be held by separate public bodies and the head of that body may have to engage in a balancing exercise in assessing whether or not those records may be released (for example, section 32 of the FOI Act 2014 in the context of law enforcement and public safety). Similarly, in relation to the first proposition posited on behalf of the Appellant at the beginning of this judgment, it was accepted on behalf of the Respondent that insofar as the terms ‘operational’ and ‘administration’ are concerned, administrative records can include records which ‘touch on’ operational activities. An example was suggested that where the Gardaí had been engaged in providing security at a concert, records of the costs of the security may be provided but not how that service was carried out. This appeal, however, is concerned with whether An Garda Síochána is a partially included agency (‘partially included public body’ as per section 6 of the FOI Act 2014) regarding records concerning An Garda Síochána stops and searches from 1<sup>st</sup> January 2022 to 1<sup>st</sup> January 2023 in the Dundalk/Louth district, including the legal provisions (if any) that were utilised to ground the stops and searches and a breakdown of the stops and searches concerned by age, gender, and ethnicity and whether such records relates to administrative records relating to human resources, or finance or procurement matters.

41. Insofar, therefore, as An Garda Síochána (and this statutory appeal) are concerned, the non-absolute nature of the right of access is made clear – in addition to the Long Title – by the provisions of the FOI Act 2014 which provide that the reference to ‘public bodies’ in section 6 of the FOI Act 2014 envisages “*partially included agencies*” and

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<sup>10</sup> *Minister for Communications v Information Commissioner* [2020] IESC 57; [2022] 1 I.R. 1 at 33 per Baker J.

is applied with the following words of qualification “[s]ubject to this section, each of the following shall be a public body for the purpose of this Act”; the effective disapplication of section 6 of the FOI Act 2014 by the words used in Part 1 of Schedule 1 which states that “[s]ection 6 does not include a reference to”; Part 4 of the FOI Act 2014 which deals with “*Exempt Records*”, where section 32 gives a head of an FOI body the discretion to refuse to grant an FOI request for access in relation to “*law enforcement and public safety*” and Part V of the FOI Act 2014 which makes express provision for the “*Restriction of [the 2014] Act*” where, for example, the terminology used in section 42(b)(i) to (x) of the FOI Act 2014 is that “*This Act [i.e., the FOI Act 2014] does not apply to*”.

42. The Long Act to the FOI Act 2014, for example, provides for “[a]n 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, other bodies in receipt of funding from the State and certain other 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 continuance 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 repeal the Freedom of Information Act 1997 and the Freedom of Information (Amendment)

*Act 2003, to amend the Central Bank Act 1942, to amend the Official Secrets Act 1963, to repeal certain other enactments, and to provide for related matters.”*

43. The following observation of the Supreme Court (Finlay Geoghegan J.) in *Minister for Health v Information Commissioner* [2019] IESC 40; [2020] 2 I.R. 417 at paragraph 60) has equal application to the FOI Act 2014:

*“The purpose of the 1997 Act, as set out in the long title, is to “enable members of the public to obtain access, to the greatest extent possible... 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, for necessary exceptions to that right... ””.*

44. Section 2 of the FOI Act 2014 (Interpretation) provides that an *FOI body* is defined as meaning a *public body* or prescribed body. A *public body* is defined as meaning a body or entity referred to in section 6(1) of the FOI Act 2014.

45. Section 6(1) of the FOI Act 2014, under the sub-heading “*Public bodies*”, provides that:

*“6. (1) **Subject to this section**, each of the following shall be a public body for the purposes of this Act:*

*(a) a Department of State;*

*(b) an entity established by or under any enactment (other than the Companies Acts);*

- (c) any other entity established (other than under the Companies Acts) or appointed by the Government or a Minister of the Government, including an entity established (other than under the Companies Acts) by a Minister of the Government under any scheme;
- (d) a company (within the meaning of the Companies Acts) a majority of the shares in which are held by or on behalf of a Minister of the Government;
- (e) a subsidiary (within the meaning of the Companies Acts) of a company to which paragraph (d) relates;
- (f) an entity (other than a subsidiary to which paragraph (e) relates) that is directly or indirectly controlled by an entity to which paragraph (b), (c), (d) or (e) relates;
- (g) a higher education institution in receipt of public funding;
- (h) notwithstanding the repeal of the Act of 1997 by section 5, and subject to this Act, any entity that was a public body (including bodies or elements of bodies prescribed as such) within the meaning of the Act of 1997 on the enactment of this Act” (emphasis added).

46. Section 6(2)(a) of the FOI Act 2014 provides that an “entity specified in Part 1 of Schedule 1 (“the parent entity”) shall, **subject to the provisions of that Part**, be a public body for the purposes of” the FOI Act 2014.<sup>11</sup> Schedule 1, Part 1 of the FOI Act 2014 refers to section 6 of the FOI Act 2014 and deals with “Partially Included Agencies”. It is therefore in that context that Schedule 1, Part 1(n) of the FOI Act 2014 provides as follows:

“Section 6 **does not include a reference to** –

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<sup>11</sup> Emphasis added.

... (n) the Garda Síochána, other than insofar as it relates to administrative records relating to human resources, or finance or procurement matters” (emphasis added).

47. Section 6(2)(b) of the FOI Act 2014 provides that a subsidiary of a parent entity, or a body directly or indirectly controlled by a parent entity, shall be a public body for the purposes of this Act but only to the extent that the functions of the subsidiary or other body coincide with those functions of the parent entity that are subject to the FOI Act 2014.

48. Section 6(4) of the FOI Act 2014 provides that a reference in section 6(1)(a) of the FOI Act 2014 to a Department of State shall be construed as including a reference to a body, organisation or group specified in relation to that Department of State in the Schedule to the Ministers and Secretaries Act 1924.

49. In a similar vein, Schedule 1, Part 1(m) of the FOI Act 2014 provides as follows:

“Section 6 **does not include a reference to** –

... (m) the Forensic Science Laboratory of the Department of Justice and Equality, insofar as it relates to records concerning, or arising from, the forensic criminal investigation functions performed by that Laboratory, including the analysis of specimens or **in connection with an investigation being undertaken by the Garda Síochána** or the Garda Síochána Ombudsman Commission and the approval, supply, testing and maintenance of apparatus and of equipment” (emphasis added).

50. Likewise, Schedule 1, Part 1(o) of the FOI Act 2014 provides as follows:

*“Section 6 **does not include a reference to** –*

*... (o) the Garda Síochána Inspectorate, insofar as it relates to records concerning an inspection or inquiry carried out by that Inspectorate under section 117(2) of the Garda Síochána Act 2005”*  
(emphasis added).

51. Schedule 1, Part 1(y) of the FOI Act 2014 provides as follows:

*“Section 6 **does not include a reference to** –*

*... (y) the Garda Síochána Ombudsman Commission, insofar as it relates to records concerning an examination or investigation carried out by the Garda Síochána Ombudsman Commission under Part 4 of the Garda Síochána Act 2005”* (emphasis added).

52. Schedule 1, Part 1(ag) of the FOI Act 2014 provides as follows:

*“Section 6 **does not include a reference to** –*

*... (ag) the Office of the State Pathologist, insofar as it relates to records in connection with an investigation being undertaken by the Garda Síochána, or other records (not relating to the general administration of the Office) concerning, or arising from, functions performed by the Office under the Coroner’s Act 1962”* (emphasis added).



53. Separately, it is noted that Part 4 of the FOI Act 2014 which deals with “**Exempt Records**” provides at section 32(1)(a)(x) of the FOI Act 2014 that a head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to “(a) *prejudice or impair— ... (x) the security of any system of communications, whether internal or external, of the Garda Síochána, the Defence Forces, the Revenue Commissioners or a penal institution*”.

54. Further, Part V of the FOI Act 2014 addresses the “**Restriction of (the 2014) Act**” and section 42(b)(i) to (x) of the FOI Act 2014 states that “**This Act** [i.e., the FOI Act 2014] **does not apply to** – (b) *a record held or created by the Garda Síochána that relates to any of the following: (i) the Emergency Response Unit; (ii) the Secret Service Fund maintained by it; (iii) the Special Detective Unit (SDU); (iv) the witness protection programme sponsored by it; (v) the Security and Intelligence Section; (vi) the management and use of covert intelligence operations; (vii) the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993; (viii) the Criminal Justice (Terrorist Offences) Act 2005; (ix) the Criminal Justice (Surveillance) Act 2009; (x) the Communications (Retention of Data) Act 2011*”.

55. Part VI of the FOI Act 2014 provides for the **Information Commissioner** and section 45(1) gives the Information Commissioner certain powers in the context of a *review* (under section 22 of the FOI Act 2014) and an *investigation* (under section 44 of the FOI Act 2014).

56. Section 45(2) of the FOI Act 2014 provides that the Information Commissioner may for the purposes of such a *review* or *investigation* enter any premises occupied by an

FOI body and: (a) require any person found on the premises to furnish him or her with such information in the possession of the person as he or she may reasonably require for the purposes aforesaid and to make available to him or her any record in his or her power or control that, in the opinion of the Commissioner, is relevant to those purposes; and (b) examine and take copies of, or of extracts from, any record made available to him or her as aforesaid or found on the premises.

57. Section 45(10) of the FOI Act 2014 provides that section 45(2) shall not apply to —  
“(a) information, documents or things designated by regulations made under section 126(1)(a) of the Garda Síochána Act 2005, or (b) Garda Síochána stations designated by regulations made under section 126(1)(b) of the Garda Síochána Act 2005, except to the extent specified in a direction of the Minister for Justice and Equality.”<sup>12</sup>

58. The question before me relates to the scope of the FOI Act 2014 itself rather than the application of exemptions or restrictions. As referred to earlier, section 6 and Schedule 1, Part 1(n) of the FOI Act 2014 together provide that An Garda Síochána is a public body for the purposes of the FOI Act 2014 insofar as it relates to “*administrative records relating to human resources, or finance or procurement matters*”. The Respondent decided that the records which were requested on the Appellant’s behalf – in relation to (i) a breakdown of all An Garda Síochána stops and searches from 1<sup>st</sup> January 2022 until 1<sup>st</sup> January 2023 in the Dundalk/Louth district; (ii) the legal provisions (if any) that were utilised to ground the stops and searches;

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<sup>12</sup> While certain provisions of the Policing, Security and Community Safety Act 2024 may provide for further non-textual modifications, that legislation was not commenced at the date of the Respondent’s decisions (nor at the date of this judgment).

and (iii) a breakdown of the stops and searches concerned by age, gender, and ethnicity – did not consist of administrative records relating to human resources, finance or procurement matters and were accordingly “*excluded from the provisions of the FOI Act and no right of access to these records exists*”. Such an approach is consistent with that set out in the judgment of the Supreme Court (Finlay Geoghegan J.) in *Minister for Health v Information Commissioner* [2019] IESC 40; [2020] 2 I.R. 417 which endorsed the approach of the High Court (McKechnie J.) in *Deely v Information Commissioner* [2001] IEHC 91; [2001] 3 I.R. 439 at 451, which in turn applied the well-established requirement of identifying the intention of the Oireachtas from the wording of the provisions in question as established by the Supreme Court in *Howard v Commissioners of Public Works* [1994] 1 I.R. 101.

59. Further, as confirmed by the Supreme Court (Baker J.) in *Minister for Communications v Information Commissioner* [2020] IESC 57; [2022] 1 I.R. 1 at 33, there is *not*, therefore, *an absolute right of access to records* where An Garda Síochána is involved. This is made clear by the language used in Schedule 1, Part 1(n) of the FOI Act 2014 and by the provisions in relation to exempt records (in Part 4 of the FOI Act 2014), the restrictions in the application of the entire of the FOI Act 2014 and in the words used in the Long Title to the FOI Act 2014. The ordinary meaning of the words used in section 6 and Schedule 1, Part 1(n) of the FOI Act 2014 – “[s]ection 6 does not include a reference to... (n) the Garda Síochána, other than insofar as it relates<sup>13</sup> to administrative records<sup>14</sup> relating to human resources,<sup>15</sup> or finance or

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<sup>13</sup> By analogy in *EH v Information Commissioner (No.2)* [2002] 3 I.R. 600, the High Court (O’Neill J.) observed at 604, in the context of the Freedom of Information Act 2014, that the test to be applied to determine whether

*procurement matters*” – envisages back management type records rather than records of stops and searches (sought here from 1<sup>st</sup> January 2022 to 1<sup>st</sup> January 2023) in the Dundalk/Louth district, including the legal provisions (if any) that were utilised to ground the stops and searches and a breakdown of the stops and searches concerned by age, gender, and ethnicity.

## CONCLUSION

60. In summary, by characterising the request for records as that in relation to An Garda Síochána stops and searches from 1<sup>st</sup> January 2022 to 1<sup>st</sup> January 2023 in the Dundalk/Louth district, any legal provisions which were relied upon to ground the

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or not a record “relates to” is “whether there is a sufficiently substantial link between the requester’s personal information (as defined in the Act of 1997) and the record in question”.

<sup>14</sup> In the extracts of definitions referred to on behalf of the Respondent, the following definitions are given: “Administrative” is defined as “Of, relating to, or concerned with administration (In various senses); (in later used esp.) relating to or required for the running of a business, organization, etc.” [Administrative, Adj. & N” Oxford English Dictionary, Oxford UP, September 2023, <https://doi.org/10.1093/OED/9498892130>]. “Administration” is defined as “The action of carrying out or overseeing the tasks necessary to run an organization, bring about a state of affairs, etc.; the process or activity of running a business, organization, etc.” [“Administrative, Adj. & N” Oxford English Dictionary, Oxford UP, September 2023, <https://doi.org/10.1093/OED/6518532514>].

<sup>15</sup> In the extracts of definitions referred to on behalf of the Respondent, the following definitions are given: “1. People (esp. personnel or workers) regarded as an asset of a business or other organization (as contrasted with material or financial resources). In attributive use also occasionally in singular. 2. Originally U.S. The department in an organization dealing with administration, management, training, etc., of staff; the personnel department. In attributive use, occasionally in singular” [“Human Resources, N.” Oxford English Dictionary, Oxford UP, July 2023, <https://doi.org/10.1093/OED/3921209371>].

stops and searches and a breakdown of the stops and searches concerned by age, gender, and ethnicity with the cloak of anonymity,<sup>16</sup> the Appellant seeks, in effect, to approximate and ascribe the initial request made on 21<sup>st</sup> March 2023 with the seeking of “*administrative records*” relating to “*human resources*”, in order for An Garda Síochána to be deemed a public body for the purposes of the FOI Act 2014.

61. For the reasons set out in this judgment, this does not, accord, in my view, with the correct approach to interpreting the provisions of section 6 and Schedule 1, Part 1(n) of the FOI Act 2014.

62. In the circumstances, therefore, I refuse the Appellant’s appeal.

### **PROPOSED ORDER**

63. I shall make an order refusing the appeal.

64. I shall put the matter in for mention on Tuesday 15<sup>th</sup> October 2024 at 10:30 to address the question of costs and any ancillary or consequential matters which arise and, in the event that any party wishes to do so, written submissions to a maximum of 1,500 words can be exchanged and filed on or before 16:30 on Tuesday 7<sup>th</sup> October 2024 to address the question costs and any ancillary or consequential matters.

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<sup>16</sup> For example, it was submitted, on behalf of the Appellant, that he seeks, statistics comprising matters such as the number of individual gardaí, training and development, performance evaluation, accountability oversight and the power relied upon but not information in relation to ‘*core policing*’ such as why things were done by the gardaí or details of the suspicions which led to stop and searches.