

THE HIGH COURT

2000 No. 96 MCA

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

THE MINISTER FOR JUSTICE EQUALITY AND LA W REFORM

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

THE HIGH COURT

2000 No. 97 MCA

**IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 1997 AND IN THE
MATTER OF AN APPLICATION BY THE COURTS SERVICE PURSUANT TO
SECTION 42 OF THE FREEDOM OF INFORMATION ACT 1997
BETWEEN**

THE COURTS SERVICE

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

**PATRICK ROGERS, THE MINISTER FOR JUSTICE EQUALITY AND LAW
REFORM**

NOTICE PARTIES

AND BY ORDER OF THE COURT THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Finnegan J. delivered the 14th day of March, 2001.

On the 26th September, 1998 the Notice Party Patrick Rogers applied to the Department of Justice Equality and Law Reform pursuant to Freedom of Information Act, 1997 Section 7 for access to records being the complete transcript and associated materials

relating to proceedings *The People (DPP) -v- Rose Rogers* heard in the Circuit Criminal Court at Dundalk on the 10th June, 1998. The request was refused. Patrick Rogers sought an internal review of the decision to refuse his request pursuant to Section 14 of the Act and on this review the refusal was upheld. On the 22nd December, 1998 Patrick Rogers applied to the Information Commissioner for a review of this decision. At the conclusion of the review the Information Commissioner granted Patrick Rogers access to the following:-

1. A typed transcript of the hearing.
2. Witness statements numbered 14,15,16 and two witness statements numbered 23 and two claims in respect of payment of fees
3. A statement of Rose Rogers subject to the deletion of parts thereof.

The decision of the Information Commissioner was made on the 13th September, 2000. These proceedings are appeals against the said decision. The involvement of the Courts Service arises in that as a result of the Courts Services Act, 1998 the Court Service and not the Minister has custody of the relevant documents.

This appeal turns on the correct construction of the Freedom of Information Act, 1997 Section 46(1) and its application as so construed to the documents to which access was granted by the Information Commissioner's decision under appeal.

Section 46 provides as follows:-

46 (1) This Act does not apply to –

a. a record held by -

(i) the courts

(ii) a Tribunal to which the Tribunals of Inquiry (Evidence) Act, 1921 is applied, or

- (iii) A service tribunal within the meaning of Section 161 of the Defence Act, 1954,

and relating to, or to proceedings in, a court or such a tribunal other than –

- (I) A record that relates to proceedings in a court or such a tribunal held in public but was not created by the court or tribunal and whose disclosure to the general public is not prohibited by the court or the tribunal, or
- (II) A record relating to the general administration of the courts or the offices of the courts or such a Tribunal or any offices of such a Tribunal
- (b) A record held or created by the Attorney General or the Director of Public Prosecutions or the Office of the Attorney General or the Director of Public Prosecution (other than a record concerning the general administration of either of those Offices)

The remaining provisions of Section 46 are not relevant to these proceedings.

Thus the Act does not apply to a record held by the courts relating to a court or to proceedings in a court. An exception to this however arises and the Act will apply where the record

- (a) relates to proceedings in a court and
- (b) relates to proceedings held in public and
- (c) was not created by the court and
- (d) whose disclosure to the general public is not prohibited by the court.

In breaking down the exception into its constituent parts I have taken the view that the phrase "held in public" refers to the word "proceedings" and not to the word "court". I do this because in the present context I am satisfied that the word "proceedings" is not used

in the sense of an action but rather that it means any step in an action. For this step to come within the exception it must be a step taken in public.

As to the meaning of "proceedings" the position is as follows. In the singular - proceeding -the word means an action as opposed to any step in an action: **Pryor -v- City Offices Company** 10 QBD 504. However, there are a number of decided cases where proceeding in the singular was held to mean a step in an action: **Smalley -v- Robey & Company** 1962 1 QB 577. On the basis that proceedings means steps in an action not every proceeding whether in a civil or criminal matter the hearing of which is held in public is itself a proceeding held in public. In **R -v- Westminster London Borough Rent Officer, ex p. Rendall** (1973) 3 ALL ER 119 at 121 Lord Denning MR in relation to the Rent Act, 1968 said-

"The word 'proceedings' is not defined in the Act, but I think it covers any proceedings of a legal nature, even though they do not take place in a court of law."

In **Krextile Holdings PTY Limited -v- Widdows** 1974 VR 689 at 693 it was held that the word "proceedings" in relation to a winding up is not limited merely to applications to the court or to proceedings which must be brought to the court under the Companies Acts but extends to all the matters that flowed directly from or are invoked by the making of an order as part of the process of winding up.

In a New Zealand case **Elliott -v- Auckland City** (1971) NZLR 824 at 828 - McMullin J. said –

"The word 'proceedings' is a word which covers not only those steps taken on an information up to the moment of conviction but also includes steps taken on the information after conviction to the point where sentence is imposed"

Turning then to the documents to which Patrick Rogers was granted access by the decision of the Information Commissioner I deal first of all with the stenographer's shorthand note and transcript.

The statutory requirement for a record and transcript of criminal proceedings arises under the Courts of Justice Act 1924 Section 33 as substituted by the Criminal Justice (Miscellaneous Provisions) Act 1997 Section 7.

The Rules of the Superior Courts Order 86 deals with the Court of Criminal Appeal. Rule 1 defines "official stenographer" –

"Means the person appointed to attend the trial and, where necessary to make a report".

Rule 14 provides as follows –

1. "14(1) The official stenographer shall at the conclusion of the trial, sign the shorthand note taken by him and certify the same to be complete and correct.
2. On request by the Registrar, the official stenographer shall furnish to him a report comprising the original shorthand note and a transcript of the whole of such note or of such part thereof as may be required.
3. Before furnishing his report to the Registrar the official stenographer shall submit the transcript to the Judge of the Court of trial to be certified by him.
4. A party interested in an appeal or application for leave to appeal may obtain from the Registrar a copy of the transcript of the whole or of any part of such shorthand note as relates to the appeal or application upon payment of the proper charges."

Rule 17 provides as follows –

" 17 (2) A transcript of the shorthand notes taken of the proceedings at the trial of the appellant shall be supplied by the Registrar free of charge

(a) to an appellant who has been granted a Legal Aid (Appeal) Certificate, and

(b) to any other appellant by order of the Court."

Order 123 deals with shorthand reporting in civil matters and the provisions thereof are not strictly relevant here other than that Order 123 refers to a shorthand writer appointed by the Judge as opposed to Order 86 which refers to the official stenographer. Order 123 provides for the manner in which the expense of the shorthand writer shall be dealt with as between the parties but also provides that the Judge shall have power to direct that copies of the transcript be furnished to him at the public expense or be furnished to any party applying therefore at the expense of that party. The relationship between the party applying for an Order under Order 123 that the proceedings be reported by a shorthand writer and the shorthand writer so appointed would appear to be a matter of contract between that party and the shorthand writer subject only to the powers conferred upon the Judge under Order 123 Rule 4 to direct the preparation of a transcript at the public expense for himself or at the expense of a party for delivery to that party.

On the other hand the official stenographer is appointed by the court through the agency of the Courts Service. The sole relationship that the stenographer has is with the court. A party interested in an appeal or application for leave to appeal is entitled to a copy of the transcript upon payment of the proper charges, so however that where an appellant has been granted a Legal Aid (Appeal Certificate) or where the court so orders, the transcript shall be supplied free of charge. It seems clear to me that at all times the official stenographer has a relationship exclusively with the court and transcripts are only provided by the Registrar to a party interested in an appeal or application for leave to appeal. In this sense Mr. Rogers is not a party and indeed there is no appeal in being and on both these counts he is not

under the Superior Court Rules entitled to a transcript. Having regard to the relationship which exists between the official stenographer and the court as it appears from the Rules of the Superior Courts I am satisfied that the shorthand note and the transcript which may be produced from the same is created by the court. It therefore falls outside the exception at Section 46 (1) (a) (I). It cannot be material whether the stenographer is employed by or an independent contractor to the Court Service.

I am further satisfied that the shorthand note and transcript fall outside the exception to Section 46 (1) (a) (I) in that it is a record whose disclosure to the general public is prohibited by the court. The Rules of the Superior Courts Order 86 Rule 14 and Rule 17 (2) regulate who is entitled to obtain a transcript from the Registrar and the conditions as to payment which should apply. I read the Rules as prohibiting the issue of a transcript to any other person save and except however that an order may be made in favour of any other person pursuant to the Rules of the Superior Courts Order 31 Rule 29: See *Chambers -v- Times Newspapers Limited and Another* 1999 1 ILRM 504 and *Kelly -v- Ireland* 1986 I.L.R.M. 318 as to the courts power to regulate it's own procedures.

Thus the Information Commissioner was incorrect insofar as he held that Section 46 (1) (a) (I) is concerned with a specific prohibition imposed by the court which has dealt with or is dealing with the matter to which the record relates. I am satisfied that the provision equally applies to the situation here where there is a general prohibition express or implied in the Rules of the Superior Courts with specified exceptions and a discretion in the court where appropriate to relieve from that prohibition. I therefore hold that Patrick Rogers is not entitled to access to the transcripts as their disclosure to the general public is prohibited by the court. While not relevant here I would hold that as the courts are entitled to regulate the conduct of court business a practice not having it's origin in the Rules of the Superior

Courts would likewise amount to a prohibition e.g. The practice of confining access to Central Office files to parties and their representatives.

Insofar as the decision relates to witness statements numbered 14, 15 and 16 and two statements numbered 23 and a statement of Rose Rogers these are all references statements contained in the Book of Evidence with the possible exception of the last mentioned statement. However, a statement other than that included in the Book of Evidence would not be among the court records and I therefore proceed on the assumption that the same is indeed included in the Book of Evidence. If the statement is not in fact included in the Book of Evidence but is nonetheless held by the court then it is subject to the Court Officers Act 1926 Section 65 and is at the disposal of the Judge. I take this section to create a general prohibition on the disposal of documents but from which the Judge can dispense: until there is such a dispensation there is a prohibition in place within the meaning of Section 46 (1) (a) (I) and the record is not within the exception. An accused person is served with a Book of Evidence as a means of complying with the requirements of the Criminal Procedure Act, 1967 Section 6 as amended by Section 12 of the Criminal Evidence Act, 1992 which does not in fact require a Book to be prepared but merely that certain documents be served on an accused. The question that arises is whether the assembling of the documents mentioned in Section 6 aforesaid but in particular statements and the binding the same together constitutes the creation of a record within the meaning of the Freedom of Information Act, 1997 Section 46 (1) (b). If originality is a necessary ingredient before it can be said that a document is created for the purposes of Section 46 then merely to compile in book form documents prepared elsewhere would be insufficient. However, in order to interpret the word "created" in relation to a record it is necessary to look at the statutory definition of "record" contained in Section 2 of the Act –

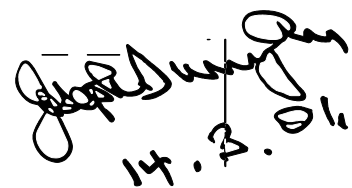
"Record" includes any memorandum, book, plan, map, drawing, diagram, pictorial or graphic work or other document, any photograph, film or recording (whether of sound or images or both), any form in which data (within the meaning of the Data Protection Act, 1998) are held, any other form (including machine readable form) or thing in which information is held or stored manually, mechanically or electronically and anything that is a part or a copy, in any form of any of the foregoing or is a combination of two or more of the foregoing".

Taking a simple example from that definition a copy of a document is a record: clearly originality is not a necessary ingredient in a record. It cannot be said that the person who creates the copy of the document which is by the statutory definition, a record is not the creator of that record. I am satisfied that the compilation of the documents mentioned in the Criminal Procedure Act, 1967 Section 6 as amended by the Criminal Evidence Act, 1992 Section 12 even if the same were to consist solely of the photocopying of documents prepared elsewhere and putting same into a book is the creation of a record having regard to the definition of record contained in the Freedom of Information Act - "record" includes book. This being so Section 46 (1) (b) applies to the Book of Evidence and documents contained therein - they are a record created by the Director of Public Prosecutions or the Office of the Director of Public Prosecutions. Insofar as the Director of Public Prosecutions or his Office has control of the original statements and other documents which were the source of documents compiled into the Book of Evidence then clearly these are documents held by the Director of Public Prosecutions having regard to the definition of "hold" in Section 2 (5) of the Act and are likewise affected by the Provisions of Section 46 (1) (b).

Such documents if also held by another public body subject to other provisions of the Act may be accessible on application to that body.

This leaves only to be considered the documents to which access was granted being two claims in respect of payment of fees. All I know of these is that they relate to medical reports carried out on Mrs. Rogers. These documents are held by the court and I have no information to enable me to determine whether or not they come within the exception in Section 46 (1) (a) (I). On the papers before me it does not seem that the Information Commissioner had any more information on these documents than is available to me. The Act in Section 34 (12) (b) provides that on a review by the Information Commissioner a decision to refuse to grant a request under Section 7 shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified. On the information available to me it had not been shown to the Commissioner that the refusal to grant a request in relation to the two claims for payment of fees in respect of medical reports on Mrs. Rogers was justified. The Commissioner quite properly granted access to the same. It is important however to point out that upon full information in relation to the nature of these documents being available they may well be documents falling within the exemptions in Section 46 (1) (a) or (b) of the Act: for example they may relate to proceedings not held in public in the sense that I have construed "proceedings":

I propose to make an order discharging the decision of the Information Commissioner. I will substitute for the same an order that Patrick Rogers be granted access to two claims in respect of payment of fees in respect of medical reports on Rose Rogers.



Handwritten signature and date: 14.3.06