

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 835 J.R.

BETWEEN

HUGH MCELVANEY

APPLICANT

AND

THE STANDARDS IN PUBLIC OFFICE COMMISSION

RESPONDENT

Judgment of Mr Justice Garrett Simons delivered on 4 September 2019.

Summary

1. These proceedings seek to prohibit the carrying out of a statutory investigation by the Standards in Public Office Commission (*"the Commission"*). The proceedings have been taken by an elected member of Monaghan County Council, Councillor Hugh McElvaneay (*"the Councillor"*). The statutory investigation arises from a complaint made to the Commission that the Councillor had contravened the provisions of Part 15 of the Local Government Act 2001 and the Code of Conduct for Councillors. The complaint was made following the broadcast of a television programme by RTÉ in December 2015. The programme contained video footage of exchanges between the Councillor and an undercover journalist posing as a business investor. This video footage had been recorded unbeknownst to the Councillor. The statutory investigation centres on whether remarks made by the Councillor indicate that he had sought payment in respect of the provision of services, including assistance in obtaining planning permission, in relation to the development of a (fictitious) wind farm project.
2. The Councillor has raised four principal objections to the statutory investigation as follows. First, it is said that the fact that the undercover journalist who appears in the video footage posing as a business investor will not be available for cross-examination renders the procedure unfair. Secondly, it is alleged that RTÉ had engaged in a form of entrapment, and that this taints the subsequent statutory investigation by the Commission. Thirdly, the "preliminary inquiry" conducted on behalf of the Commission by an inquiry officer is criticised as being inadequate. Fourthly, it is alleged that the fact that an employee of the Commission had participated in the RTÉ programme gives rise to an apprehension of objective bias on the part of the Commission. (As discussed presently, this last objection has not been properly pleaded in the Statement of Grounds).
3. For the reasons set out herein, the application for judicial review is dismissed in its entirety. The factual background and procedural history are set out below. The detailed discussion of the grounds of judicial review then commences at page 13, paragraph 40 below.

Factual Background

4. These proceedings have their genesis in a documentary-style programme which was broadcast on television on 7 December 2015 by the national broadcaster, Raidió Teilifís Éireann (*"RTÉ"*). The programme was entitled *"RTÉ Investigates Standards in Public Office"*.

5. The first part of the programme discussed the statutory obligations imposed upon public representatives to make an annual declaration of interests. As explained further at paragraph 105 *et seq.*, this part of the programme included excerpts from an interview with an employee of the Commission who outlined the statutory regime in general terms.
6. The second part of the programme depicted an undercover journalist posing as a representative of an investment company which wished to develop a wind farm. The undercover journalist had approached a number of councillors and had sought their assistance in obtaining planning permission for the (fictitious) wind farm. One of the councillors featured in the programme was Councillor Hugh McElvaney of Monaghan County Council. Video footage which depicted Councillor McElvaney engaged in discussions with the undercover journalist at a meeting in November 2015 was broadcast as part of the programme. The journalist had adopted an assumed identity, and introduced herself to the Councillor as "Nina Carlson". The full unedited version of the transcript of the meeting in November 2015 has been exhibited as part of the judicial review proceedings.
7. The journalist stated that the investment company had been warned that the planning process might be a problem, and sought assistance from the Councillor. In brief outline, the Councillor stated that he would be the conduit between the investment company and the County Council; that he would assist in identifying suitable sites for the proposed wind farm; and that when the investment company applied to the County Council for planning permission, he would "operate there for" the investment company as well. The Councillor stated that whereas he had previously suggested a fee of ten thousand pounds sterling in an initial telephone conversation, he would not seek to agree a figure in advance, and that he would only seek payment if the investment company was successful in obtaining planning permission. The Councillor stated that the meeting was "utterly confidential", and that if the investment company let him down "there'll be war".
8. Following on from the broadcast of the television programme, the Ethics Registrar of Monaghan County Council wrote to the Cathaoirleach and Chief Executive of the Local Authority and brought to their attention a possible contravention by Councillor McElvaney of Part 15 of the Local Government Act 2001 and the Code of Conduct for Councillors. Having considered the matter further, and having taken legal advice from Wells O'Carroll Solicitors, the Cathaoirleach and the Chief Executive then wrote to the Standards in Public Office Commission ("*the Commission*") on 4 March 2016, and requested that the matter be considered in accordance with section 174(8)(a)(iii) of the Local Government Act 2001.
9. The legislative scheme governing the examination of complaints will be discussed in more detail at paragraph 78 below. For present purposes, it is sufficient to note that the legislative scheme provides for the carrying out of a "preliminary inquiry" by an inquiry officer into a complaint. It is only if there is sufficient evidence to establish a *prima facie* case that the matter proceeds to a statutory investigation. See section 23(1A) of the Ethics in Public Office Act 1995.

10. The Commission appointed Elaine Laird as inquiry officer ("*the inquiry officer*") to conduct a preliminary inquiry into the complaint made by the officials of Monaghan County Council, and to furnish a report expressing an opinion as to whether there was *prima facie* evidence to sustain the complaint.
11. The formal appointment of the inquiry officer is dated 2 September 2016, and is signed on behalf of the Commission by the then Chairperson, Mr Justice Daniel O'Keeffe. (See page 193 of the book of pleadings).
12. As discussed at paragraph 78 below, one of the principal criticisms made by the Councillor of the preliminary inquiry involves an allegation that the inquiry officer failed to retrieve relevant documents from RTÉ relating to its planning, organisation and preparation for the making of the television programme. See paragraph (e) 13 of the Statement of Grounds. In order to put this complaint into context, it is necessary to refer to the following exchange of correspondence between the inquiry officer and RTÉ.
13. By letter dated 29 September 2016, the inquiry officer had sought certain information and/or documentation from RTÉ. The documentation included the unedited recording of the television programme and full unedited transcripts of the meetings that took place with the three named councillors. This material was duly provided by RTÉ.
14. The following records had also been sought by the inquiry officer in her letter of 29 September 2016.

"All records relating to the preparation and research for the RTE programme broadcast on 7 December 2015, including, but not limited to, details of the following:

- When did the research begin/how long did it take to prepare for the programme?
- How many Councillors were selected and contacted at the initial stage?
- On what basis were these Councillors selected?
- The basis for selecting the three Councillors who appeared on the programme?
- Meetings with any other Councillors who did not appear on the programme?
- How did 'Nina' prepare for the meetings? Were questions agreed in advance? What was her brief, i.e. the purpose of the meetings?"

15. RTÉ responded to this aspect of the request as follows by letter dated 26 October 2016.

"You will appreciate that this is a very broad and overarching request and the relevance of the information requested is not immediately apparent to RTÉ. As previously outlined, RTÉ is willing to assist the Standards Commission, however, this request gives rise to significant issues concerning privilege and it encroaches upon significant areas of journalistic research and preparation and the manner in which investigations are conducted by the RTÉ Investigations Unit. Without prejudice to this, and in order to assist your office, RTÉ can confirm that the basis upon which the Councillors Queenan, O'Donnell and McElvanney (*sic*) were selected to meet

with 'Nina' is clearly articulated in the programme as broadcast on the 7th December, 2015. Furthermore, Nina's brief is clearly articulated in the transcripts of the telephone calls and the meetings with the respective councillors themselves."

16. Returning to the narrative, the inquiry officer had also written to Councillor McElvaney on 29 September 2016, and explained that she had been appointed as an inquiry officer to carry out a preliminary inquiry under section 6(2) of the Standards in Public Office Act 2001.
17. The inquiry officer wrote again to Councillor McElvaney on 14 March 2017 and invited him to provide a statement on the matter in general, and to respond to specific items set out in her letter. In the event, the Councillor did not provide a formal statement of the type envisaged by the legislation. (See section 16 of the Standards in Public Office Act 2001. See also page 20 of the transcript of the hearing before the Commission on 17 September 2018). Instead, the Councillor instructed his solicitors, A. B. O'Reilly Doolan & Co., to set out the gist of his response in a letter to the Commission dated 4 May 2017.
18. The key paragraphs of the solicitors' letter read as follows.

"Obviously the spin that was put on this matter by R.T.E. was that he was seeking payment in return for Planning Permission and this could not be further from the truth. When you read the transcripts in whole you can see that his involvement was to identify sites, arrange compensation, talk to the local people and try to defuse any objections before planning would be applied for. Obviously he advised that the sites should be bought subject to Planning Permission and he confirmed that he would be a conduit between the company and the Council and also between the company and the people where they intended to build.

At no stage did he seek any money in order to obtain them Planning Permission and indeed to the contrary advised them that if Planning Permission was not obtained that there would be no purchase of the lands and no payment to him. It was our client's clear intention at all times to try to facilitate an investment within his County which would be of benefit to his County and to the local population as any public representative would seek to do. Any payment sought was in relation to works which he intended to carry out but were not remunerations or reward for something to be done by virtue of his office."

19. The inquiry officer duly completed her report in June 2017. The relevant extracts from the report are set out as an Appendix to this judgment.
20. The inquiry officer stated her opinion as follows (at page 19 of the report).

"10. Opinion

10.1 In my opinion, there is *prima facie* evidence to sustain the complaint received by the Standards in Public Office Commission from the Cathaoirleach, as Mr Noel Keelan, and the Chief Executive, Mr Eamonn O'Sullivan, Monaghan County Council

that Councillor Hugh McElvaney contravened Part 15 of the Local Government Act 2001 and was in breach of the Code of Conduct for Councillors.

10.2 I hereby submit my report, prepared in accordance with section 6 of the Standards in Public Office Act 2001, to the Standards in Public Office Commission."

21. The Commission is required, pursuant to section 23(1A) of the Ethics in Public Office Act 1995, to consider the report of the inquiry officer and any statements or documents accompanying the report. The Commission must then form an "opinion" on whether there is sufficient evidence to establish a *prima facie* case in relation to the alleged complaint. If so, the Commission shall carry out a statutory investigation. The Commission made a decision to pursue a statutory investigation at its meeting on 10 July 2017.

22. During the period February 2018 to September 2018, the Commission sent a series of letters to the solicitors acting on behalf of the Councillor. In particular, by letter dated 26 February 2018, the Commission notified the Councillor's solicitors that it was proposed that the investigation hearing would commence on 11 April 2018. The letter enclosed a number of documents, including the inquiry officer's report. The letter then stated as follows.

"You are being provided with these for the purpose of preparing for the investigation hearing and your attention is drawn to section 35 of the Ethics Acts which prohibits the disclosure of information. If you wish to challenge the integrity of these documents you are required to do so no later than *12 March 2018* by specifying in writing to the Commission the nature of the challenge. For the avoidance of doubt it is intended that this evidence will be presented at the investigation hearing without further proof."

23. In the event, the Commission was unable to sit for the purposes of an investigation hearing on 11 April 2018. This was notified to the Councillor's solicitors by letter dated 16 March 2018. Relevantly, the letter also stated as follows.

"In the interim, please continue to engage with this office in relation to any procedural matters or preliminary applications that you may wish to make. In the event that it is not possible to resolve or determine any of the issues by way of correspondence or written submission, it is envisaged that the Commission will sit briefly on the morning of 9 April 2018, if necessary, to hear any preliminary applications.

Any applications which you wish the Commission to consider must be made in writing, by no later than Thursday 29 March, setting out the factual and legal basis of the application and the Direction you are asking the Commission to make."

24. In circumstances where the above letter was not responded to on behalf of the Councillor, the Commission indicated by subsequent letter dated 4 April 2018 that there would be no sitting on 9 April 2018 as no application or communication had been received.

25. A date for the hearing of evidence was fixed for 17 September 2018. This was notified to the Councillor's solicitors by letter dated 23 April 2018. It is necessary to set out the operative part of this letter in full given the issue that has since arisen in relation to alleged delay on the part of the Councillor.

"I am writing to advise you that the Standards Commission will now be sitting for the purposes of an Investigation Hearing into the above matter on 17 September 2018.

This sitting will be for the hearing of evidence. Any preliminary matters must now be raised by way of written submission only, and at the earliest opportunity, as you were previously offered the opportunity to have any such matters dealt with by way of preliminary hearing but elected not to do so."

26. There was further correspondence during the first half of September 2018 wherein documents, including a legislation book and hearing book (which contained witness statements), were furnished to the Councillor's solicitors. No substantive response to this correspondence was ever received from the Councillor or his solicitors.

Hearing before Commission on 17 September 2018

27. As explained above, the first substantive hearing of the statutory investigation was to have taken place on Monday 17 September 2018. It had been intended that on that occasion oral evidence would be taken from a number of witnesses. Copies of witness statements had been furnished in advance to the Councillor's solicitors.
28. However, at the outset of the hearing, counsel on behalf of the Councillor made a number of procedural objections. This was the first time that these objections had been raised. This was so notwithstanding that the Councillor had been invited, through his solicitors, as long ago as March 2018 to raise any preliminary matters in writing in the first instance, with a provisional hearing date fixed for 9 April 2018 for the hearing of any preliminary applications. See paragraph 23 above. No substantive response was ever received to any of this correspondence, and it was only for the first time at the hearing on 17 September 2018 that the Councillor sought to raise objections to the proposed form of proceedings.
29. The three principal objections made on that occasion were as follows. First, that the undercover journalist who had posed as the business investor would not be available for cross-examination. Secondly, that RTÉ had engaged in entrapment. Thirdly, that an employee of the Standards in Public Office Commission, Mr Brian McKeivitt, had participated in the RTÉ programme.
30. Having heard detailed submissions from both sides, the Commission issued a ruling on the preliminary application that afternoon. Thereafter, the hearing was adjourned for four weeks to afford the Councillor an opportunity to make an application for judicial review to the High Court.

Ruling of 17 September 2018

31. The Commission delivered a detailed ruling on the procedural objections raised on behalf of the Councillor on the afternoon of 17 September 2018. The ruling addressed the principal objections raised as follows.
32. First, it was held that the fact that a member of the staff of the Commission (Mr Brian McKeivitt) had appeared in the RTÉ programme to provide information in general terms about the obligations of councillors under the ethics legislation did not provide any basis for not proceeding with the hearing of the investigation. It was noted that the member of staff had expressed no view in relation to Councillor McElvaney or any other individual. The Commission was also satisfied that the member of staff had no role whatsoever in the statutory investigation in respect of Councillor McElvaney.
33. Secondly, the ruling noted that “misgivings” about the provision of a particular piece of correspondence had been resolved in that a copy of the letter had since been provided to Councillor McElvaney’s representatives.
34. Thirdly, it was held that there was no prejudice to Councillor McElvaney in the undercover reporter not being called as a witness. The rationale for this finding is set out as follows.
 - “21. The evidence to be put before the Commission is in large part the video footage of the meeting between Councillor McElvaney and the reporter and the audio recordings of telephone conversations. These recordings have been made available to Councillor McElvaney for some time. The Commission notes that, in his submissions, [counsel on behalf of Councillor McElvaney] indicated that he did not intend to cross-examine the RTE cameraman, who has confirmed in a statement to the Commission the completeness and accuracy of the video recording.
 22. The Commission further notes the fact – recorded at paragraph 7.7.1 of the Inquiry Report – that, in a public statement following the broadcast of the RTE documentary, Councillor McElvaney claimed that he knew he was being set up and had played along because he wanted an opportunity of showing up RTE.
 23. The undercover reporter is not Councillor McElvaney’s accuser in the context of this investigation. Neither the undercover reporter nor RTE is a party to the investigation. As noted above, the ‘accuser(s)’ in this case are the Chief Executive and Cathaoirleach of Monaghan County Council. The Commission notes in this regard that Councillor McElvaney’s representatives have indicated that it is not necessary for the Chief Executive of the Council to attend today to give evidence.
 24. Councillor McElvaney will be afforded an opportunity to give evidence and to call any witnesses on his behalf if he so chooses.
 25. The mere fact that the undercover reporter is not being called to give evidence does not provide a sufficient basis for not proceeding with the Commission’s investigation at this stage.

26. Once again, it must be emphasized that it will be a matter for the Commission in due course to consider the weight to be afforded to the evidence and ultimately whether the evidence to be adduced is sufficient to sustain any findings of contravention of the relevant legislation or code of conduct.
27. In those circumstances, the Commission considers that there is no prejudice to Councillor McElvaney in the undercover reporter not being called as a witness and that this is in no way inconsistent with fair procedures."
35. Finally, in relation to the allegations (i) that RTÉ had engaged in a form of entrapment, and (ii) that it would be an abuse of process to allow the audio recordings and video footage to be relied upon before the Commission, the ruling stated that the Commission would afford the parties an opportunity to make any legal submissions they may wish to make in due course on the issue of entrapment. (See paragraph 19 and 26 of the ruling).

Judicial Review Proceedings

36. The within judicial review proceedings were instituted on 15 October 2018. In accordance with the request made by the Commission in its ruling of 17 September 2018, the application for leave to apply for judicial review was made on notice to the Commission. Thereafter, the parties adopted the pragmatic approach of agreeing to a rolled-up hearing of the leave application and the substantive application. The intent being that the judge hearing the proceedings would, if satisfied that leave should be granted, then proceed to determine the substantive application for judicial review. To this end, the pleadings and exchange of affidavits were closed notwithstanding that leave to apply for judicial review has not yet been granted. The Commission also made disclosure of certain documentation following a request for voluntary discovery.
37. The rolled-up hearing took place before me over two days, commencing on 4 July 2019.

Local Government Act 2001

38. Part 15 of the Local Government Act 2001 prescribes an ethical framework for the Local Government Service. This ethical framework applies inter alia to the elected members of a local authority. See section 167. Section 168 provides that, in carrying out their functions, it is the duty of every member of a local authority to maintain proper standards of integrity, conduct and concern for the public interest. Section 169 provides for the issuing of codes of conduct for the guidance of members of local authorities by the Minister for Housing, Planning and Local Government. Section 170 prohibits a member of a local authority from seeking, exacting or accepting from any person, other than from the local authority concerned, any remuneration, fee, reward or other favour for anything done or not done by virtue of his or her office.
39. Section 180 of the Local Government Act 2001 applies the Ethics in Public Office Act 1995 to a local authority. Relevantly, section 180(2) provides that the powers of investigation and report conferred on the Commission apply in relation to inter alia the elected members of a local authority. Where a report prepared by the Commission relates to a member of the local authority, it shall be furnished to the Cathaoirleach of the local authority and to its Chief Executive.

Detailed Discussion

(1). Right to Cross-Examine One's Accusers

40. For the reasons set out below, I have concluded that the fact that the undercover journalist is unavailable for cross-examination does *not* render the procedure before the Commission unfair. The objective of cross-examination is to allow the *truthfulness* of a witness's evidence to be tested and challenged. Cross-examination of the undercover journalist is unnecessary in the present case precisely because it is common case that anything of substance said by the journalist was *untrue*. The proposed wind farm and the investment company were fictitious.
41. I elaborate upon this point at paragraph 45 below. It may be helpful, however, to make some preliminary observations in respect of the nature of the function being carried out by the Commission.
42. The Commission is not engaged in the administration of justice, and is not exercising a disciplinary function. The result of its investigation *per se* does not have legal effect in the case of an elected member, although it might trigger action on the part of the local authority. The position of a person subject to a statutory investigation is more analogous to a person who is the subject of a Tribunal of Inquiry, than to a person subject to disciplinary proceedings under, for example, the legislation governing medical practitioners or solicitors.
43. Notwithstanding that the Commission itself does not have statutory power to discipline or sanction an elected member of a local authority, the publication of the Commission's report of the result of its investigation has the potential to affect the good name of the person subject to the investigation. It is self-evident that a finding by the Commission to the effect that an elected member had acted in breach of his or her statutory obligations under the Local Government Act 2001 would be damaging to their good name. A statutory investigation pursuant to section 23 of the Ethics in Public Office Act 1995 (as amended) must, accordingly, be carried out in accordance with the requirements of natural and constitutional justice.
44. The general position, therefore, is that a person who is subject to a statutory investigation will normally be entitled to confront his or her accusers by way of cross-examination. (See, by analogy, *Borges v. Fitness to Practise Committee* [2004] IESC 9; [2004] 1 I.R. 103, [25] and [26]). This general position is, however, subject to exceptions. These exceptions will be more extensive than would apply in the context of a criminal trial. The Commission has some discretion as to the procedure it adopts, and, on occasion, it may have to seek to balance the rights of the subject of an inquiry against those of vulnerable witnesses, such as, for example, child witnesses or persons making disclosures from within an organisation, i.e. so-called whistle-blowers.
45. It is unnecessary for the purposes of this judgment to attempt to define the categories of exceptions which apply. This is because the rationale for concluding that Councillor McElvaney does not enjoy an entitlement to cross-examine the undercover journalist is not predicated upon considerations of confidentiality or journalistic privilege, but rather

upon considerations of relevance and necessity. An entitlement to cross-examine does not exist in a vacuum. It only arises where essential facts are in controversy. (See *Kiely v. Minister for Social Welfare* [1977] I.R. 267 at 281).

46. There is no such controversy in the present case. The essential facts are agreed. Councillor McElvaney accepts that he spoke with the undercover journalist by telephone on a number of occasions, and that he met with her in person on one occasion. These exchanges were recorded, and Councillor McElvaney has been furnished with the unedited audio recordings and video footage, respectively. Councillor McElvaney accepts that same accurately depict the exchanges. His counsel has expressly stated that he does not require to question the cameraman, who has been made available for cross-examination.
47. The dispute centres on the separate issue of what *inferences* are to be drawn from the content of the recorded exchanges between Councillor McElvaney and the undercover journalist. The Councillor has, through his solicitors' letter of 4 May 2017, set out his analysis of the recorded exchanges. On this analysis, it is said that it is "clear" that it was Councillor McElvaney's intention, as a public representative, to try to facilitate an investment in County Monaghan which would be of benefit to the county and the local population. Any payment sought was said to be in relation to work which the Councillor intended to carry out. The payment would not be remuneration or reward for something to be done by virtue of his office as an elected member.
48. The Commission's ruling of 17 September 2018 makes it clear that the Councillor will be afforded a further opportunity to make submissions and to call witnesses in this regard.
49. Cross-examination of the undercover journalist is neither necessary nor relevant to this issue. No one is relying on the audio recordings or video footage as evidence of the *truth* of what the undercover journalist was saying. All sides accept that the undercover journalist was posing as a fictitious business investor, "Nina Carlsson". It is common case that the wind farm project described at the meeting was also fictitious.
50. The objective of cross-examination is to allow the veracity of a witness's evidence to be tested and challenged. This objective can have no application to circumstances where it is accepted on all sides that what was said is fictitious. This is the crucial point of distinction between the circumstances of the present case, and those discussed in the case law relied upon by the Councillor.
51. Counsel on behalf of the Councillor had placed particular emphasis on the judgment of the Supreme Court in *Borges v. Fitness to Practise Committee* [2004] IESC 9; [2004] 1 I.R. 103. The applicant in that case was a medical doctor who was subject to disciplinary proceedings before the Fitness to Practise Committee of the Medical Council arising out of his conduct of medical examinations in respect of a number of female patients. His conduct was said to have been inappropriate and indecent. The alleged incidents had previously been the subject of an adverse finding by the professional conduct committee in the United Kingdom. The (Irish) Fitness to Practise Committee proposed to admit into evidence (i) the transcript of the hearing before the professional conduct committee in the

United Kingdom, together with (ii) the decision of the professional conduct committee and of the Privy Council dismissing the applicant's appeal. The applicant challenged the admission of the evidence by way of an application for judicial review.

52. Much of the debate before the Supreme Court centred on whether the transcripts and findings should be admissible in circumstances where the precise allegations had been the subject of an inquiry by a competent disciplinary body in another jurisdiction at which the doctor was professionally represented, and could and did avail of his right to cross-examine his accusers.
53. The Supreme Court, having noted that the argument in favour of admissibility was "not without its attractions", ultimately concluded that if the transcripts and findings were admitted in evidence, then the capacity of the Fitness to Practise Committee in this jurisdiction to arrive at a different conclusion from that of its UK counterpart would be drastically limited. The applicant would, in short, be subjected to an inquiry of a wholly different nature from that which is normally mandated in the case of a registered medical practitioner accused of professional misconduct.
54. For the purposes of the present case, the following statement of principle in *Borges* as to the rationale for requiring cross-examination is the most immediately relevant.

"33. In considering whether the approach which found favour with the House of Lords and the Court of Appeal in those cases should be adopted in this jurisdiction, one must bear in mind the reasons which have led the courts in this jurisdiction to hold that, in some cases at least, the right of a person to have the evidence against him given orally and tested by cross-examination before the tribunal in question may be of such importance in a particular case that to deprive the person concerned of that right would amount to a breach of the basic fairness of procedures to which he is entitled by virtue of Article 40.3 of the Constitution. It is not simply because the tribunal is in greater danger of arriving at an unfair conclusion, absent the safeguard of material evidence being given orally and tested by cross-examination. Such a departure from the normal rules of evidence might well be justifiable, as I have already noted, in the case of a tribunal of this nature. It is because, depending on the nature of the evidence, its admission in that form may offend against fundamental concepts of fairness, which are not simply rooted in the law of evidence, either in its statutory or common law vesture. As Henchy J. put it in *Kiely v. Minister for Social Welfare* [1977] I.R. 267 at p. 281: -

'Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice.'

34. In that case, the evidence in question was the opinion of an independent medical expert as to whether the death of a person was the result of an accident which he

had sustained at work, thereby entitling his widow to certain social welfare benefits. The considerations adverted to by Henchy J. must surely apply with even greater force where, as here, the evidence in question is that of persons accusing a doctor of particular acts alleged to amount to unprofessional conduct and exposing him to the possibility of being precluded indefinitely from practicing as a doctor. The seeming injustice of such a procedure is inevitably seriously enhanced where, as here, the hearing is being conducted in that form solely because the complainants are unwilling to travel to Dublin or, indeed, to give their evidence by way of video link or attend a hearing of the first respondent in the United Kingdom.”

55. As appears, cross-examination is required in respect of “material evidence” and where “essential facts” are in controversy. At the risk of belabouring the point, the audio recordings and video footage are *not* being relied upon as proof of the truth of anything that the undercover journalist said. Rather, what is in issue is the *response* of the Councillor to what was said. The Commission will have to consider, for example, whether the Councillor’s response amounted to a request for remuneration or reward for anything to be done by virtue of his office as an elected member.
56. In this regard, an analogy might be drawn with the law in relation to hearsay. The rule against hearsay does not apply where a statement is sought to be adduced—not to prove the truth of its contents—but to prove the fact that the statement had been made. Similarly, the purpose of adducing evidence of the exchanges between Councillor McElvaney and the undercover journalist is to prove the response of the Councillor to the offer of payment for the provision of services in respect of the development of the (fictitious) wind farm. The audio recordings and video footage represent the “best evidence” of the exchanges between the undercover journalist and Councillor McElvaney. Thereafter, the inferences to be drawn from the Councillor’s responses—and in particular the determination of whether same involves a breach of the ethical framework—is a matter for legal submission.
57. Counsel on behalf of Councillor McElvaney argued that it is normal in the case of undercover police operations for the gardaí involved to give evidence at the subsequent criminal trial and to be subject to cross-examination. Counsel also referred to certain passages in the judgment of the High Court of England and Wales in *Council for the Regulation of Health Care Professionals v. General Medical Council* [2007] 1 W.L.R. 3094 (“Saluja”) which indicated that the undercover journalist in that case had subsequently given oral evidence at a disciplinary hearing.
58. With respect, reference to neither line of case law advances the Councillor’s claim. The position of undercover police operations is readily distinguishable. First, the rules of evidence applicable to a criminal trial are much stricter than those applying to a statutory tribunal such as the Commission. Secondly, for all of the reasons explained in Saluja (discussed at paragraphs 65 to 69 below), special considerations apply where agents of the State, such as police officers, are engaged in undercover operations. The courts will be anxious to avoid any abuse of process by agents of the State. These considerations do

not apply to journalists. Thirdly, part of the reason that it is necessary for individual gardaí to give evidence in criminal proceedings is that the recording, whether audio or video, of the exchanges between an undercover police officer and a potential offender is unlikely to be of as high a quality as the recordings and footage in the present case. These were prepared by a professional cameraman. As noted previously, counsel on behalf of the Councillor has at no stage challenged the accuracy of the recordings or the footage, and has expressly disavowed any requirement to cross-examine the cameraman responsible for same.

59. Turning now to the judgment in *Saluja*, whereas it is correct to say that it appears that the undercover journalist in that case did give evidence at the subsequent disciplinary hearing, the question of whether it was necessary for her to do so or whether the doctor had a “right” or “entitlement” to cross-examine the journalist is not addressed in the judgment. Moreover, it seems that there was no video footage of the exchange between the undercover journalist and the doctor. Thus, unlike the present case, the oral testimony of the journalist appears to have been the “best evidence”. (The judgment in *Saluja* is discussed in more detail at paragraphs 65 to 69 below).
60. During the course of his submission to the High Court, counsel on behalf of the Councillor suggested that cross-examination of the undercover journalist would be necessary to test the methodology deployed by RTÉ and their *bona fides*. With respect, it is far from clear that these issues have any relevance for the statutory investigation, especially in circumstances where the principal defence being mounted by the Councillor is that there was nothing in his exchanges with the undercover journalist which indicated an intention on his part to seek payment for assistance in obtaining planning permission. (See the letter from the Councillor’s solicitors set out at paragraph 18 above). Again, in circumstances where the Councillor has been provided with the entire of the unedited audio recordings and video footage, his opportunity to present this line of defence is in no way impeded by the unavailability of the undercover journalist.
61. At all events, if and insofar as the methodology deployed by RTÉ and their *bona fides* has any possible relevance to the issues, it is to be noted that the lead journalist on the documentary, Mr Conor Ryan, will be available for cross-examination and thus these issues can be explored with him. It appears that, if anything, his knowledge of the background circumstances leading up to the programme would be greater than that of the undercover journalist, “Nina Carlson”.
62. In summary, therefore, I am satisfied that the ability of the Councillor to respond to the statutory investigation is not prejudiced by the absence of the undercover journalist as a witness before the Commission. The ruling by the Commission on 17 September 2018 to the effect that the hearing could proceed in her absence was reasonable and lawful.

(2). Entrapment

63. It is contended on behalf of the Councillor that RTÉ’s conduct represented a form of entrapment. More specifically, it is alleged that the undercover reporter promoted or instigated the commission of an offence and/or the commission of alleged contraventions

in circumstances where no such offence or contravention would otherwise have taken place. See, in particular, paragraphs (e) 21, (e) 22, (e) 25 and (e) 27 of the Statement of Grounds.

64. In the course of his submissions on behalf of the Councillor, Mr Breffni Gordon, BL, appeared to suggest that entrapment invariably involves illegality and that entrapment is never condoned by a court of law. The implication being that such evidence is subject to an automatic exclusionary rule. With respect, the legal position would appear to be more nuanced. First, the case law which was relied upon on behalf of the Councillor indicates that there is a distinction in principle between actions on the part of agents of the State, especially police officers, and on the part of journalists. This distinction goes to the core of the judgment in *Saluja* cited by counsel for the Councillor. Secondly, even in the context of criminal proceedings and the conduct of police officers, the case law indicates that entrapment will be acceptable in certain circumstances. The litmus test appears to be whether the actions of the police officers did no more than present an “unexceptional opportunity” to commit a crime. Each of these two points is elaborated upon briefly below.
65. Counsel very helpfully drew my attention to the judgment of the High Court of England and Wales in *Council for the Regulation of Health Care Professionals v. General Medical Council* [2007] 1 W.L.R. 3094 (“*Saluja*”). On the facts, an undercover journalist had attended at a doctor’s surgery posing as a patient and had asked to be provided with a sickness certificate in circumstances where she wanted to take time off work and have a holiday. It was alleged that the doctor had indicated that he would provide a sickness certificate for a fee notwithstanding that the “patient” was in good health.
66. Disciplinary proceedings were subsequently taken against the doctor arising out of this alleged incident. It seems that the journalist had surreptitiously recorded what was said between her and the doctor but that the recordings were not very clear.
67. The Fitness to Practise Panel of the General Medical Council (“*the Panel*”) decided to stay the disciplinary proceedings as an abuse of process on the basis of entrapment. The Panel relied on case law in relation to criminal proceedings. The decision to stay the disciplinary proceedings was then appealed to the High Court. The High Court set aside the stay. Relevantly, the High Court held that the Panel had erred in not distinguishing between criminal proceedings and civil proceedings.
68. The High Court judgment very helpfully enumerates a set of principles governing the admissibility of evidence obtained by way of entrapment. The distinction between criminal and civil proceedings is addressed as follows.
 - “81. Third, as both domestic and European authority make plain, the position as far as misconduct of non-state agents is concerned, is wholly different. By definition no question arises in such a case of the state seeking to rely upon evidence which by its own misuse of power it has effectively created. The rationale of the doctrine of abuse of process is therefore absent. However, the authorities leave open the

possibility of a successful application of a stay on the basis of entrapment by non-state agents. The reasoning I take to be this: given sufficiently gross misconduct by the non-state agent, it would be an abuse of the court's process (and a breach of article 6) for the state to seek to rely on the resulting evidence. In other words, so serious would the conduct of the non-state agent have to be that reliance upon it in the court's proceedings would compromise the court's integrity. There has been no reported case of the higher courts, domestic or European, in which such 'commercial lawlessness' has founded a successful application for a stay. That is not surprising. The situations in which that might arise must be very rare indeed.

82. As will become apparent, I do not accept that for a journalist to go into a doctor's surgery and pretend to be a patient in circumstances such as the present is similar to abuse of power by an agent of the state.
83. Fourth, in the present disciplinary hearing there is no state involvement in the proceedings being brought. These are proceedings brought against a doctor by his regulator in order to protect the public, uphold professional standards and maintain confidence in the profession. These are to a significant degree different considerations from those that apply to a criminal prosecution and misuse of executive powers by the state's agents.
84. Fifth, it would be an error of law in considering any application for abuse of process for the tribunal not to have well in mind the differences to which I have referred. It would not be appropriate for [a Fitness to Practice Panel] to approach the conduct of journalists as though they were agents of the state."
69. The judgment in *Saluja* is a judgment of the High Court of England and Wales and, consequently, is not binding on this court nor on the Commission. If, however, the same principles were to be subsequently adopted in this jurisdiction, it would follow that there would be no *automatic* prohibition on a public authority, such as the Commission, relying on evidence obtained by an undercover journalist. Far from supporting the Councillor's position, therefore, the judgment in *Saluja* actually undermines his case.
70. Counsel for Councillor McElvaney also referred me to the judgment of the Court of Appeal in *People (Director of Public Prosecutions) v. Mills* [2015] IECA 305. This judgment was given in the context of an appeal against a conviction in criminal proceedings. The central issue in the appeal had been whether the trial judge had erred in allowing evidence to be given by a number of gardai who had been engaged in undercover operations involving the purchase of controlled drugs. The trial judge had ruled that the evidence was admissible in circumstances where the gardai had merely provided an "unexceptional opportunity" for the accused to commit the crime, and had confined themselves to investigating the criminal activity in an "essentially passive manner".
71. It was argued, on appeal, by the accused that the gardai were involved in initiating or instigating the commission of a criminal offence, and that they did so without any independent authorisation. This argument was rejected by the Court of Appeal on the

basis that the accused had been provided with no more than an “unexceptional opportunity” to commit a crime. The accused had freely taken advantage of this opportunity in circumstances where it appeared that he would have behaved in the same way if the same opportunity had been offered by anyone else.

- “64. Certain crimes, such as, for example, selling drugs or weapons, do not, as a general rule, produce immediate victims who might be expected to seek garda assistance or otherwise prompt an investigation and prosecution. Yet the commission of such crimes are enormously damaging to the fabric and well being of society, and, especially in the case of drugs, often severely damaging the lives of many young people. There is therefore a clear public interest that such criminality be amenable to effective professional police work, and in that respect undercover operations of the type evident in this case are both necessary and effective. What is wrong with providing a person with the opportunity to commit a crime which he is in the practice of committing anyway? The key is to ensure that such operations are appropriately authorised, controlled and supervised and that undercover operatives do not themselves precipitate criminal conduct that would not otherwise occur.
65. In Ireland, the existence of a formal system for the authorisation and supervision of this type of undercover operation does not appear to exist. Such operations appear to be undertaken with a degree of informality which might reasonably be described as unsatisfactory. That is not to say however that such undercover operations are inappropriate, or that they are not undertaken in a manner which would, in general terms, satisfy the principles enunciated in the various European and other decisions, and more particularly in a manner which contravenes the relevant provisions of the European Convention on Human Rights or Article 38 of the Constitution. However it would be preferable if in this jurisdiction the authorisation and performance of such undercover operations were approached with a greater degree of formality and record keeping than currently appears to be the case, and that a Code of Practice be established, possibly based on the U.K.’s Code of Practice, (in this case Det. Sgt. Roberts stated that there was no Code of Practice in relation to undercover Garda operations for test purchasing illegal drugs, but that Gardaí operated under a “protocol... in Ireland and the U.K.”, and that the particular operation had been sanctioned at ‘Commissioner level’). It is also desirable that the details of such operations be recorded in a dedicated manner. Dedicated recording of such information would undoubtedly assist a court when called upon to make a determination as to the lawfulness of prosecutions or the admissibility of evidence arising from such undercover operations.
66. The evidence in the case under appeal established the following: -
- (i) the undercover operation was sanctioned at ‘Commissioner level’.

- (ii) the undercover gardai who participated in the purchase of illicit drugs from the appellant were adequately trained and advised as to their conduct and the need to avoid entrapment or enticement to commit crime.
- (iii) the purpose of the undercover garda operation was clear; namely the investigation of drug dealing and the identification of individuals selling drugs within a specific area.
- (iv) the sixteen year old individual initially approached by the undercover gardai and who then apparently made contact with the appellant was not himself the subject of a prosecution.
- (v) The inquiry made by the undercover gardai to the sixteen year old (and his companion) was a general inquiry as to the availability of 'weed'. The words used by Garda Reddy were 'any weed around'. Equally, words uttered by him in the first confrontation with the appellant, namely 'a 25g of weed', were in response to the appellant asking 'what are you looking for?'
- (vi) the appellant was provided with no more than an unexceptional opportunity to commit a crime, an opportunity which he freely took advantage of in circumstances and where it appears that he would have behaved in the same way if the same opportunity had been offered by anyone else.
- (vii) the appellant was not incited, instigated, persuaded, pressured or wheedled into committing a crime."

72. The Supreme Court subsequently refused leave to appeal: *Director of Public Prosecutions v. Mills* [2016] IESCDET 45.

"34. It must be noted that the phrase from *Ramanauskas*, in relation to police officers confining themselves to investigating criminal activity 'in an essentially passive manner', is part of a sentence in which the contrast drawn is with behaviour which 'exert[s] such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed'. In *Bannikova v. Russia*, App. No. 18757/06, 4th November, 2010, the phrase was used in contrast with, in particular, 'any conduct that may be interpreted as pressure being put on the applicant to commit the offence, such as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms.' As noted in paragraph 20 above, the Court of Appeal found that on the evidence the applicant had not been 'incited, instigated, persuaded, pressured or wheedled' into committing a crime.

35. This Court does not, therefore, consider it to be arguable that the Court of Appeal applied an incorrect test, by reference to the ECHR authorities, to the behaviour of the gardai in this case.

36. No evidential foundation appears to have been laid, and no argument put forward, as to how this applicant's rights could be said to have been violated by the absence of a written code of practice or protocol. No dispute of fact, or interpretation of the facts, arose in the course of the *voir dire* which could have been resolved by

reference to such a code or protocol. No link has been demonstrated or postulated between the lack of a formal system of authorisation and record-keeping and the actions of the applicant on the occasions in question.”

73. It cannot be said on the basis of this case law—which it will be recalled was cited on behalf of the Councillor—that there is a “bright line” rule to the effect that a public authority is never entitled to rely on evidence which has been obtained by an undercover journalist who has assumed a false identity. Even in the case of *criminal proceedings*, a fact-specific inquiry is necessary in order to determine whether an accused person has been put under pressure to commit an offence.
74. Leading counsel on behalf of the Commission, Mr James Doherty, SC, emphasised that the Commission in its ruling of 17 September 2018 had not reached a final conclusion on entrapment. Rather, the Commission had reserved its position, and the ruling indicated that the Councillor could revisit the complaint of entrapment once the evidence had been heard. See, in particular, paragraphs 19 and 26 of the ruling.
75. Counsel further submitted that it is clear from the case law that—before any decision can be reached on whether entrapment amounting to an abuse of process has been engaged in—it is necessary to ask whether the accused has been presented with something more than an “unexceptional opportunity” to commit a crime. In practical terms, this requires that a court in criminal proceedings must first hear some evidence as to what the circumstances were which gave rise to the alleged entrapment. Even if one assumes for the purpose of argument that an exclusionary rule based on entrapment applies to non-criminal proceedings, the Commission would be entitled to review the evidence before making any ruling on the objection that RTÉ had engaged in entrapment. The Commission was to have embarked upon this exercise on 17 September 2018, but this process was interrupted by the Councillor’s application for judicial review.
76. These submissions are well made. Taking the Councillor’s case at its height, it amounts at most to a claim that the Commission is required to consider whether the representations made by the undercover journalist provided the Councillor with more than an “unexceptional opportunity” to engage in conduct in breach of the Local Government Act 2001 and/or the Code of Conduct for Councillors. By definition, this necessitates the Commission reviewing the audio recordings and video footage. It is only when this has been done that the Commission could begin to make any meaningful assessment of whether the Councillor had been, to adopt the language of the Court of Appeal in *Mills*, incited, instigated, persuaded, pressured or wheedled into committing a breach. The application for judicial review is, therefore, *premature* insofar as it is predicated upon an allegation that the Commission erred in its approach to the objection made by the Councillor that the evidence is inadmissible on the basis that RTÉ engaged in entrapment such as to constitute an abuse of process. Not only is it clear from the terms of the ruling of 17 September 2018 that the Commission has not, as a matter of fact, made a determination in respect of the entrapment objection; the Commission could not, as a matter of law, have reached a conclusion without first reviewing the audio recordings and

video footage. It will be recalled that Councillor McElvaney has been provided with all of the material, not just that which was broadcast as part of the programme in December 2015. Councillor McElvaney can rely on this to put what he says is the correct analysis of the exchanges before the Commission.

77. Finally, for the avoidance of any doubt, I should emphasise that this judgment does not purport to reach any conclusion on whether the concept of entrapment as an abuse of process applies to non-criminal proceedings. Rather, this judgment is confined to a finding that the application for judicial review is premature in circumstances where—as a consequence of the institution of these proceedings by the Councillor—the Commission has not yet had an opportunity to address the entrapment objection.

(3). Allegation that Preliminary Inquiry Inadequate

78. It is contended on behalf of the Councillor that the preliminary inquiry conducted by the inquiry officer was inadequate. In particular, complaint is made of the fact that the inquiry officer did not require RTÉ to produce documentation which she (the inquiry officer) had sought by letter dated 29 September 2016. RTÉ had responded to this request by a letter dated 26 October 2016 and had declined to provide the documentation, citing journalistic privilege. The relevant extracts from the correspondence have been set out at paragraphs 14 and 15 above.

79. With respect, the criticism of the preliminary inquiry appears to be based on a misunderstanding of the purpose of same. It is evident from the structure of the legislation that the sole function of an inquiry officer is to carry out a preliminary inquiry with a view to forming an opinion, if requested, as to whether there is *prima facie* evidence to sustain the complaint. See section 6(3) of the Standards in Public Office Act 2001.

“(3) Following an inquiry pursuant to subsection (2), the inquiry officer concerned shall prepare a report in writing of the results of the inquiry and shall furnish the report and the statement or statements under subsection (2) and any relevant documents to the Commission; and the report shall not contain any determinations or findings, but shall, if the Commission so requests, include an expression of the opinion of the officer as to whether there is *prima facie* evidence to sustain the complaint concerned.”

80. The preliminary inquiry is not intended to be exhaustive. This is evident from both (i) the statutory language used, i.e. the inquiry is expressly described as a “preliminary inquiry”, and (ii) the limited purpose of the inquiry, i.e. to allow the Commission itself to form an “opinion” on whether a *prima facie* case has been made out.

81. The Commission is not bound by the report of the inquiry officer. See section 23(1A) of the Ethics in Public Office Act 1995.

“(1A) The Commission shall not carry out an investigation under subsection (1) into a complaint under subsection (1) of section 4 of the Act of 2001 in relation to a matter referred to in paragraph (a) of that subsection unless —

- (a) the complaint was made or referred to it by a Committee, or
- (b) the Commission becomes of opinion, after consideration by it of any report of an inquiry officer in relation to the matter and any statements or documents accompanying the report, that there is sufficient evidence to establish a *prima facie* case in relation to the alleged specified act concerned and that, if it was in fact done, it is an act falling within the said paragraph (a).”

82. Crucially, whereas the inquiry officer shall, if requested, include an expression of opinion on whether there is *prima facie* evidence, the ultimate decision as to whether there is a *prima facie* case is entrusted to the Commission itself.

83. Moreover, in the event that the Commission decides to commence a statutory investigation, this represents a separate and distinct procedure. The inquiry officer has no further role in this regard.

84. Insofar as the Councillor seeks to criticise the inquiry officer for not obtaining further disclosure from RTÉ, this is to misunderstand both the purpose of the preliminary inquiry (discussed above) and the limited statutory powers of the inquiry officer. The inquiry officer does not have power to compel the disclosure of documentation. See subsections 6 (5) to (7) of the Standards in Public Office Act 2001 as follows.

“(5) An inquiry officer may request the production by a person of any document in the possession or control of the person that the officer considers relevant to his or her inquiry.

(6) Where a document is produced by a person to an inquiry officer pursuant to a request under *subsection (5)*, the officer may, with the consent of the person, retain the document in his or her possession for a reasonable period for the purpose of examining and copying it.

(7) A person being interviewed pursuant to *subsection (2)* may decline to answer any question asked, or refuse a request to produce a document made, by the inquiry officer concerned and may terminate the interview at any time and a person to whom a request is made under *subsection (2)* or *(5)* may refuse to comply with the request.”

85. The inquiry officer can scarcely be said to have failed to carry out an adequate inquiry in accordance with section 6 in circumstances where the instance of alleged inadequacy relied upon, i.e. the failure to direct RTÉ to produce documents, is, in truth, caused by a limitation which is *inherent* in the very section itself.

86. More generally, the criticism made of the inquiry officer is bedevilled by the same misconception which underlies the contention that the undercover reporter should be

available for cross-examination. The Councillor seeks to turn the tables on RTÉ and to have the Commission carry out an investigation into RTÉ and its making of the television programme. With respect, this is not the function of a statutory investigation into a public representative. The task of the Commission is to determine, on the basis of the audio recordings and video footage, whether the Councillor is in breach of the Local Government Act 2001 and/or the Code of Conduct for Councillors. This determination will be informed principally by the content of the exchanges between the Councillor and the undercover reporter, as depicted in the audio recordings and video footage. If and insofar as the Councillor can persuade the Commission that the conduct of RTÉ in producing the programme is in any way relevant to this exercise, then he will have an opportunity through his counsel to cross-examine the principal journalist, Mr Conor Ryan. The Councillor does not require to cross-examine the undercover reporter nor to obtain the documentation now sought from RTÉ.

(4). Apprehension of Bias not Properly Pleaded

87. At the hearing before the High Court in July 2019, counsel on behalf of the Councillor pursued a line of argument to the effect that the proceedings before the Commission gave rise to a reasonable apprehension of bias.
88. As discussed in more detail under the next heading below, this argument was predicated upon the fact that an employee of the Commission, Mr Brian McKeivitt, had provided an interview to RTÉ in which he addressed, in general terms, the legal obligations imposed upon public representatives to make declarations of interest. Excerpts from a recording of this interview had been included as part of the television programme broadcast on 7 December 2015.
89. It is regrettable that this argument was pursued in circumstances where an allegation of bias does *not* form part of the grounds pleaded in the Statement of Grounds filed in this case. An applicant for judicial review is required to file a Statement of Grounds in the form prescribed at Form 13 of Appendix T of the Rules of the Superior Courts. This requires an applicant to state the grounds upon which relief is sought at Part (e) of the Statement of Grounds. Order 84, rule 20(3) provides that it shall not be sufficient for an applicant to give as any of his grounds an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.
90. These requirements were not complied with in the present case. The only reference to the involvement of an employee of the Commission in the television programme at Part (e) of the Statement of Grounds is in the context of a complaint that the Commission failed or declined to disclose relevant information. The following category of documents is identified at paragraph (e) 14(f).
- “(f) All documents and records as they related to the involvement of Brian McKeivitt in the RTE investigation and documentary, the said Brian McKeivitt being a Principle (sic) Officer in the Standards in Public Office Commission.”

91. There is an express reference to “bias” at Part (d) of the Statement of Grounds. The following declarations had been sought at sub-paragraphs (viii) and (ix).
- “viii. A Declaration that the practices and procedures offend the rule against bias and are lacking in transparency, by reason of the fact that the Respondent, it’s servants or agents participated in the RTE documentary and investigation, the Respondent having assisted the RTE investigators and the programme maker, but has failed to reveal in clear and unequivocal terms, the precise nature of that relationship, the precise nature of and extent of communication and co-operation, the documents or records generated as a result, and in these circumstances the relationship between the programme maker and the respondent remains unexplained, unclear and/or it is tainted, such that no hearing or enquiry can now take place.
- ix. A Declaration that the practices and procedures on the part of the respondent are manifestly irregular, they are heavily tainted and are lacking in the requisite independence by reason of the fact the respondent assisted in and about the making of the RTE documentary and then purported to exercise it’s statutory function in and about the investigation of the documentary.”
92. However, there is nothing in Part (e) of the Statement of Grounds which provides a basis for the granting of either of these declarations. The Rules of the Superior Courts require that the grounds be particularised, and the failure to do so means that these declaratory reliefs are inadmissible.
93. Perhaps more importantly, the argument as advanced at the hearing before the High Court in July 2019 differed considerably from anything which might have been *inferred* from the terms of the declarations sought. The declarations allege that the relationship between RTÉ, as the programme maker, and the Commission remains “unexplained” and “unclear”. However, by the time the proceedings came on for hearing in July 2019, the Councillor and his legal team were aware of the precise relationship. This is because, subsequent to the filing of the Statement of Grounds on 15 October 2018, the Councillor’s solicitors sought and obtained voluntary discovery of documents from the Commission. The nature of the discovery sought and obtained is summarised below.
94. One of the categories of documents sought, by letter dated 7 December 2018, was as follows.
- “(f) All documents and records as they relate to the involvement of Brian McKeivitt in the RTE investigation and documentary, the said Brian McKeivitt being a Principle (sic) Officer in the Standards in Public Office Commission.”
95. As appears, this category replicates that which had been referred to at paragraph (e) 14 of the Statement of Claim (set out earlier).
96. Two affidavits of discovery were sworn on behalf of the Commission. The principal affidavit is dated 17 December 2018. A supplemental affidavit of discovery was filed on 4

April 2019. In addition, Brian McKeivitt swore a substantive affidavit in the proceedings on 4 April 2019. As part of this affidavit, Mr McKeivitt exhibited a briefing note which he had prepared for the Commission in April 2016 in which he recommended that an inquiry officer be appointed to conduct a preliminary inquiry into the complaint made against Councillor McElvaney.

97. Thus, by the start of April 2019, the Councillor's solicitors had been provided with affidavit evidence and documentation which indicated (i) that Mr McKeivitt had prepared a briefing note for the Commission in respect of the complaint, and (ii) that there had been an exchange of emails during November 2016 between Mr McKeivitt and Conor Ryan of RTÉ.
98. Had the Councillor wished to advance an argument to the effect that these matters gave rise to a reasonable apprehension of bias on the part of the Commission, then an application to amend the Statement of Grounds should have been made to the High Court. The disclosure, by way of replying affidavit, of new material which could not reasonably have been known to an applicant previously can, in principle, provide a proper basis for allowing an application to amend. See, for example, the judgment of the Supreme Court in *Aquatechnologie Ltd v. National Standards Authority of Ireland* [2000] IESC 64. Similarly, if new material turns up on discovery, this too can be relied upon to apply to amend.
99. In the event, however, no application to amend was ever made. This is so notwithstanding that the Councillor's solicitors had expressly signalled the possibility of making an application to amend as early as 17 January 2019 in a letter to the Commission's solicitor.

"Counsel is at present going through all the documents which have been discovered and will then be in a position to make submissions and indeed has advised that from what he has seen so far he may wish to amend the grounds of our Application due to documents which have now been discovered which previously were not provided."

100. The mooted application to amend was never followed through on. The Councillor is, therefore, confined to the Statement of Grounds as originally filed on 15 October 2018. It is well established that the Statement of Grounds delimits this court's jurisdiction on an application for judicial review. This has been emphasised by the Supreme Court in its judgments in *A.P. v. Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729, and *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29; [2012] 2 I.R. 570. The Statement of Grounds in this case does not, as explained earlier, permit an argument of the type advanced by counsel at the hearing before the High Court in July 2019.
101. Finally, it is necessary to say something about the affidavit filed on behalf of the Councillor by his solicitor, Mr Martin Cosgrove, on 1 February 2019. During the course of his affidavit, Mr Cosgrove avers as follows.

"16. In somewhat conspicuous terms, I say and believe that the applicant in the Statement of Grounds has made a case of bias. Despite the significances (*sic*) of this case, I say and believe that the Affidavit sworn by Madeline Delaney makes no reference whatsoever to the Applicant's claims in that regard and comprehensively fails to address this subject matter. In that regard I say and believe that the Applicant is entitled to apprehend unfairness and to make a case of apparent bias having regard to the fact that the Respondent proposed to sit in judgement of a purported investigation, conducted by or participated in by itself. Furthermore I say that the facts and circumstances as they arise in this matter amount to a most extreme example. Whilst there is in existence apparent bias, I say and believe the facts and circumstances may amount to actual bias."

102. This averment should not have been made. There is nothing in the Statement of Grounds which is capable of supporting an argument of actual bias. It is regrettable that a solicitor should use the occasion of filing an affidavit to make unsubstantiated allegations against a public authority. The making of a claim of actual bias against a public authority, especially one made up of the holders of a number of constitutional offices, is a very serious matter, and should only be done where the basis for same has been properly pleaded.

103. The form of the solicitor's affidavit is also irregular in that it consists almost entirely of legal submission, to the extent even of quoting lengthy extracts from judgments. Legal submission has no place in an affidavit, which should instead be confined to factual matters.

104. See, by analogy, the recent judgment of the Supreme Court in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4 as follows.

"7.9 However, there is a strong case to be made that, in many cases, the current style of drafting affidavits has gone far beyond what is appropriate even allowing for some leeway of the type which I have described. The place to make argument is either in written submissions filed in the court or in oral argument before the judge. It is not the function of affidavits to be argumentative about the issues in the case including issues of fact. It is one thing to swear a replying affidavit which gives a different account of events and points to what is said to be objective evidence which might suggest that the account being given should be regarded as credible and reliable in distinction to an account given by an opponent. It is another thing altogether to include in affidavits the sort of argumentative material which more properly forms the basis of submissions, whether written or oral."

Participation of Employee in Television Programme

105. For the reasons set out under the previous heading, I have concluded that the argument advanced by counsel to the effect that the participation of an employee of the Commission in the television programme gave rise to a reasonable apprehension of bias goes beyond the scope of the grounds pleaded in the Statement of Grounds. Lest I be incorrect in this conclusion, I propose to consider the argument *de bene esse*.

Affidavit of Mr Brian McKeivitt

106. The factual background has been stated as follows by Mr McKeivitt in his affidavit of 4 April 2019. Mr McKeivitt is an Assistant Principal Officer in the Secretariat to the Commission. He has occupied this role since September 2004.

107. Mr McKeivitt, and his line manager, Mr Paddy Walsh, received an email from Mr Conor Ryan, a journalist with RTÉ, on 18 November 2015. It seems that this email had been preceded by a telephone call from Mr Ryan the previous evening, and that Mr Ryan had been asked to submit his request for an interview in writing.

108. The nature of the proposed interview is described as follows by Mr Ryan in his email.

“I was hoping to interview somebody from SIPO to explain the law in very straight terms and the requirements for politicians. While we have case studies for later in the programme, we would not be asking SIPO to comment or reference any individual person. What we are hoping for is a straightforward public information interview where we could get an explanation for who has to make declarations; what declarations they have to make; what they have to declare; what exemptions are present and what is the procedure if there is non-disclosure. When Prime Time Investigates broadcast a programme on planning in 2007 David Waddell took part in the programme and explained to viewers what the rules were, It (sic) worked very well.

Would it be possible to do something similar with SIPO on this occasion? I know SIPO has been going to councils briefing public meetings on the Lobbying Act and we would love to be able to get something similar on camera.”

109. The email then sought clarification of two issues in respect of the declarations which the elected members of a local authority are required to make pursuant to the Local Government Act 2001.

110. Further details of the nature of the questions to be asked at the interview were then set out in an email dated 19 November 2015 from Mr Ryan to Mr McKeivitt.

111. It seems that an interview was subsequently recorded with Mr McKeivitt at the offices of the Commission on 25 November 2015. Mr McKeivitt had been authorised to participate in the interview by Mr Walsh, and it seems that Mr Walsh was in attendance while the interview was being recorded but did not actually participate in same. An excerpt from the interview was subsequently included in the television programme broadcast on 7 December 2015.

112. It is not at all clear what complaint is being made in respect of the content of the interview. There does not appear to be a transcript of the interview exhibited in these judicial review proceedings. There is no evidence before the court that the content of the interview went beyond that described in the email exchange described above. The onus of proof, of course, lies with the Councillor as applicant for judicial review.

113. It seems, therefore, that Mr McKeivitt merely provided an interview which addressed in general terms the statutory obligations imposed upon public representatives to complete declarations of interest. There is no suggestion that Mr McKeivitt had been asked to address the separate question of whether the making of a request by an elected member for payment in respect of the provision of assistance with a proposed development project would represent a breach of the Local Government Act 2001 and/or the Code of Conduct for Councillors.
114. Mr McKeivitt's affidavit then moves on to explain his involvement in the complaint made against Councillor McElvaney. Mr McKeivitt states that he had been requested to prepare a briefing note for the Commission in respect of the complaint.
- "11. I say that on 4 March 2016 a complaint was received under the Ethics Act in respect of the Applicant. In my role, as outlined at paragraph 3, I prepared a briefing note setting out the facts of the complaint and an assessment of its validity having regard to the relevant statutory provisions, for consideration by the members of the Respondent at its meeting on 11 April 2016. I beg to refer to the said briefing note upon which marked with the letters "BMK4" I have signed my name prior to the swearing hereof.
12. I say that, other than the preparation of the briefing note at BMK4, I had no role in the appointment of the Inquiry Officer, Ms Elaine Laird. Ms Laird was appointed by the Chair to the Commission. Further, I had no role whatsoever in the preliminary inquiry or the investigation hearing conducted thereafter in respect of the Applicant.
13. I beg to refer to paragraph 29 and 30 of the Replying Affidavit of Martin Cosgrove in which it is alleged that I was '*significantly involved in the process*', that being the preliminary inquiry process and investigation hearing process. I say that the Secretariat of the Respondent often attend meetings of the Respondent to report on their area of operational responsibility. I say that I and other members of the Secretariat of the Respondent do not have a decision-making role at such meetings. The decision making function lies solely with the Respondent.
14. I say that on 13 March 2017, the Respondent made the decision that the Secretariat would attend the Respondent's meetings only for the items that were directly relevant to their operational responsibility. Therefore, from 13 March 2017 onwards I was not in attendance for any item of the Respondents meeting agenda which included the Applicant."

No ground of challenge disclosed

115. In the absence of proper pleading, it is difficult to identify the precise complaint which is made on the part of the Councillor. The gist of the argument advanced by counsel appears to be to the effect that Mr McKeivitt provided "very comprehensive information and advice" to Mr Ryan, and that he had provided "invaluable assistance" to the journalist. (See written submissions at page 7). Complaint is also made of the fact that

Mr McKeivitt prepared the briefing memo (above), and had attended at a number of meetings of the Commission.

116. Counsel cites the test for objective bias as stated by the Supreme Court in *O'Callaghan v. Mahon* [2007] IESC 17; [2008] 2 I.R. 514.

“Objective bias is established, if a reasonable and fair-minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision-maker will not be fair and impartial.”

117. With respect, the sequence of events relied upon by the Councillor could not possibly give rise to a reasonable apprehension of bias for the following reasons.

118. First, the affidavit evidence before the court indicates that Mr McKeivitt's role in the television programme was a very limited one. It was confined to preparation for and the giving of an interview which addressed, in general terms, the legislative requirements imposed on public representatives to make declarations of interest. It is evident both from the email exchange prior to the interview on 25 November 2015, and from Mr McKeivitt's own affidavit, that he was unaware of the identity of the individual councillors who were the subject of the undercover reportage.

119. Secondly, Mr McKeivitt's role in relation to the initial processing of the complaint was also limited. It appears from the briefing note that his role was confined to identifying the legal basis for the complaint. He did not engage in any assessment of the underlying merits of the complaint. Crucially, Mr McKeivitt had no role either in the appointment of the inquiry officer nor in the carrying out of the preliminary inquiry by the inquiry officer.

120. Thirdly, and most importantly, the carrying out of a statutory investigation by the Commission represents a separate and distinct procedure. It is clear from the terms of the legislation that the ultimate decision as to the findings to be made in respect of a complaint is one which resides with the members of the Commission alone. The Commission is chaired by a former Judge of the High Court and its membership includes the Ombudsman, the Comptroller and Auditor General, the Clerk of Dáil Éireann and the Clerk of Seanad Éireann. I respectfully agree with the description of the Commission by Hedigan J. in *Dublin City Council v. Standards in Public Office Commission* [2014] IEHC 89, [12].

“In determining what might or might not be reasonably regarded as an interest too remote or insignificant, it is hard to imagine a body more qualified than the Commission. It is an ideal composition of experience, both legal, popular and political.* It is likely to be a very rare case where this court in judicial review would find its conclusions irrational or unreasonable.”

*Emphasis added.

121. There is no reasonable basis for suggesting that the limited involvement of Mr McKeivitt at a much earlier stage could have undermined the independence of the Commission. Indeed, Counsel for that Councillor agreed in his closing submission to the High Court that the Commission is, of course, independent, and that “there is no question about that”. Counsel does not suggest that any difficulty could ever arise in that regard. (5 July 2019, 12.15pm).

Discretionary Factors

122. For the reasons set out in detail above, I have concluded that the application for judicial review should be dismissed in its entirety on the basis that no grounds have been established for challenging the procedures adopted by the Commission. For the sake of completeness, however, I should indicate that even if good grounds had been established, relief would have been refused as a matter of discretion for the following reasons.
123. The supervisory jurisdiction which the High Court exercises over public authorities by way of judicial review represents an important safeguard for individual rights and ensures respect for the rule of law. The remedy remains, however, a discretionary remedy. One of the principal factors which a court will consider in the exercise of its discretion is whether an applicant has exhausted his or her rights before the public authority. Recourse to the courts should be a matter of last resort.
124. On the facts of the present case, the Councillor failed to engage properly with the Commission. In particular, the Councillor’s solicitors failed to respond to the correspondence issued by the Commission. The content of this correspondence has been set out in detail at paragraphs 17 et seq. above. As appears, the Commission had requested on a number of occasions that any preliminary objections be raised in advance, and had even gone so far as to set a provisional date for the hearing of any such preliminary objections. The Councillor and his solicitors failed to comply with these requests, and, instead, only raised concerns for the first time at the hearing on 17 September 2018.
125. Following on from the ruling of the Commission on that date, the Councillor, through his counsel, immediately indicated an intention to apply to the High Court for judicial review and sought to have the statutory investigation adjourned. Such eleventh-hour applications to the courts are to be deprecated. This is especially so where, as in this case, they have been preceded by a period of non-engagement. It is contrary to good administration for applicants to ignore the procedures proposed by a public authority, and to wait instead until the very last moment to make an application to the High Court. The correct course is to engage with the public authority and only to have recourse to the High Court in the event that it becomes clear that the procedure has gone irremediably wrong. See, by analogy, *Rowland v. An Post* [2017] IESC 20; [2017] 1 I.R. 355 where the Supreme Court, per Clarke J., indicated that a court should only intervene in an ongoing disciplinary process where it was clear that the process had gone irremediably wrong and that it was more or less inevitable that any adverse conclusion reached would be bound to be unsustainable in law.

126. The inappropriateness of the course of action adopted by the Councillor in the present case can be illustrated by reference to the example of his objection based on entrapment. The Councillor objects that the evidence, in the form of audio recordings and video footage, obtained by RTÉ should be excluded on the basis that it represents the fruits of an exercise in entrapment. The determination of whether or not this objection is well-founded will require consideration by the Commission of the case law in relation to entrapment. In particular, the Commission will have to consider whether an exclusionary rule applies to non-criminal proceedings involving journalists, and, if so, whether the events of November 2015 gave rise to more than an “unexceptional opportunity” to breach the ethical framework for elected members. None of this can be done without the Commission undertaking a review of the audio recordings and video footage. The approach of the Councillor in instituting the judicial review proceedings has disrupted this process. The consequence of this is that an unnecessary delay of one year has been incurred in the statutory investigation, which has been put on hold pending the hearing and determination of these judicial review proceedings.
127. Put shortly, even if grounds of challenge had been made out—and I reiterate that they have not for the reasons set out earlier—judicial review would have been refused as a matter of discretion.

Conclusion

128. The ability of the Councillor to respond to the statutory investigation is not prejudiced by the absence of the undercover journalist as a witness before the Commission. The objective of cross-examination is to allow the veracity of a witness’s evidence to be tested and challenged. This objective can have no application to circumstances where it is accepted on all sides that what was said is fictitious. No one is relying on the audio recordings or video footage as evidence of the *truth* of what the undercover journalist was saying. Rather, what is in issue is the *response* of the Councillor to what was said. The Commission will have to consider, for example, whether the Councillor’s response amounted to a request for remuneration or reward for anything to be done by virtue of his office as an elected member.
129. The objection that RTÉ had engaged in an impermissible exercise of entrapment is premature. Not only is it clear from the terms of the ruling of 17 September 2018 that the Commission has not, as a matter of fact, made a determination in respect of the entrapment objection, the Commission could not, as a matter of law, have reached a conclusion without first reviewing the audio recordings and video footage.
130. The criticism of the preliminary inquiry appears to be based on a misunderstanding of the purpose of same. A “preliminary inquiry” is not intended to be exhaustive. The criticism is also based on a misunderstanding of the limitations which the legislation itself imposes on the carrying out of the preliminary inquiry, and, in particular, absence of a power to compel the production of documents.
131. No case of objective bias has been pleaded, still less made out on the facts.

132. The application for judicial review is, accordingly, dismissed in its entirety.

Appearances

Breffi Gordon for the Applicant instructed by A. B. O'Reilly Doolan & Co. Solicitors.

James Doherty, SC and Kate McCormack for the Respondent instructed by Madeline Delaney.

APPENDIX: EXTRACT FROM INQUIRY OFFICER'S REPORT

"9. Analysis of the Complaint

- 9.1 The complaint against Councillor McElvaney alleged he had contravened Part 15 of the Local Government Act 2001 and breached the Code of Conduct for Councillors in relation to his appearance in the RTE Investigates programme broadcast on 7 December 2015.
- 9.2 The main evidence to be considered in this case relates to the full written transcripts of the verbal exchanges between Councillor McElvaney and 'Nina' during the phone calls and the meeting, the unedited visual recording of the meeting taken by RTE, the information provided by Councillor McElvaney in his Annual Declarations, and Councillor McElvaney's statement to the Inquiry Officer.
- 9.3 Part 15 of the Local Government Act, and the Code of Conduct for Councillors, set out the ethical framework that applies to members of local authorities in carrying out their functions. This framework refers to the standards of integrity and conduct expected of Councillors to help uphold public confidence in the discharge of local authority functions.
- 9.4 Of particular relevance in this case is section 170 of the Local Government Act which states that *Councillors shall not seek, exact or accept any remuneration, fee or reward for anything done by virtue of his or her office*. This is reinforced in section 3 of the Code of Conduct for Councillors by reference to a conflict of personal and public interest, which states that *Councillors must not seek to use their official position so as to benefit improperly themselves*.
- 9.5 During the initial phone call on 21 October 2015 with Councillor McElvaney he asked, *'what's in it for me?... 'What are you putting on the table for me?... 'Are you going to pay me by the hour or by the job?'*. Having agreed to meet to discuss the matter in more detail the Councillor asked 'Nina' to have *'plenty of sterling'* with her *'to sweeten a man up'*. When asked how much he wanted the Councillor said *'ten grand would be a start'*. He went on to say that *'the more that's in the bag the keener I will be'* and finished by asking 'Nina' not to *'tell anybody else about our terms and conditions'*.
- 9.6 In my opinion the language used by Councillor McElvaney in this exchange strongly suggests he is seeking a personal gain or reward for his efforts in providing assistance to the investment company, which he does not want disclosed.
- 9.7 Towards the end of the meeting on 7 November 2015 'Nina' asks Councillor McElvaney what he would require to act for the investment company, to which he responds that *'it'll be money...sterling'*. He then says he doesn't want money unless it is successful for

'Nina's' company...*'But if it is successful for you....'* (Hand actions pretend to draw in money and place it in different pockets as seen in the video recording *'...I want loads of money'*).

- 9.8 Once again it is my view that Councillor McElvaney appears to be seeking a monetary reward for providing his assistance to the investment company. His words and actions (as seen on the programme) demonstrate a desire to receive money in return for his involvement in a successful outcome for the company.
- 9.9 On a number of occasions during the conversations with 'Nina', Councillor McElvaney confirmed his wish to keep the matter *'private'* and *'strictly confidential'*. He asked 'Nina' *'not to tell anybody else about our terms and conditions'* and stated *'everything we do from here on in is utterly confidential...because if you let me down there'll be war'*.
- 9.10 The Code of Conduct for Councillors refers specifically to planning matters and ensuring that conflicts between personal and public interests are resolved in favour of the public interest. With regard to the planning process Councillor McElvaney confirms to 'Nina' that he will help *'so long as there are no objections...but if people are objecting I don't want to know ya...I'm not going to put myself out on a limb for an outfit from London'*.
- 9.11 The comments by Councillor McElvaney appear to indicate a willingness to act in a way that is contrary to the principles of fairness and impartiality set out in the Code of Conduct.
- 9.12 In the response provided by his Solicitors to the Inquiry Officer Councillor McElvaney states, when he was contacted by 'Nina' about the proposed wind energy development, as a local Councillor and a local businessman, he was anxious to ensure any possible investment in the Monaghan area for the benefit of the County and the local economy. He also states it was his understanding that he would be employed in a consultative role to assist the company in identifying suitable sites and to engage with the local community to advise them of the plans, thus ensuring there would be no objections to any planning application. Councillor McElvaney claims that he sought payment for his time and for his assistance and expertise in evaluating the sites for development, and to deal with planning concerns of locals. He states *'any payment sought was in relation to works which he intended to carry out but were not remunerations or reward for something to be done by virtue of his office'*.
- 9.13 Whilst I note Councillor McElvaney's understanding of his role in the process I am of the view that he did not appear to show any concern for the public interest that one would expect of a local authority member in carrying out its functions, e.g. by enquiring about the benefits of the development for the County or investment in the local economy. I note during the phone call Councillor McElvaney used a number of phrases such as *'what is there for the darkie'*, *'you need to sweeten a man up'*, and *'putting sterling on the table'*. I also note that Councillor McElvaney states at the meeting *'so then we go to the Council for permission and I operate there for you as well'*. In my opinion this seems to suggest that Councillor McElvaney was seeking some reward for his intervention Council level.

- 9.14 In summary it would appear that the language and actions of Councillor McElvaney during his conversations with 'Nina' do not reflect the highest ethical standards required of a local authority member in exercising their functions. By his own admission in his statement to the Inquiry Officer Councillor McElvaney confirms he attended the meeting in his role as a local Councillor, as well as a local business man. In accordance with Part 15 of the Local Government Act, he was required to maintain proper standards of integrity, conduct and concern for the public interest at all times.
- 9.15 Furthermore, it is my view that Councillor McElvaney's general conduct and behavior provides evidence to suggest he may have contravened the standards of integrity expected of a public representative and seriously undermined the integrity of his position as a Councillor. In particular, I consider that his conduct during the programme, as well as the phone call, support the idea that he was willing to act in a manner that is contrary to the Code of Conduct for Councillors. There is also an argument that Councillor McElvaney's appearance on the programme may bring the integrity of the local authority, in this case Monaghan County Council, into disrepute.
- 9.16 Councillor McElvaney submitted his Annual Declaration on 12 February 2015, in accordance with section 171 of Part 15 of the Local Government Act 2001. Following receipt of a letter from RTE, that formed part of their investigation for the programme, Councillor McElvaney submitted an amended Annual Declaration to the Council on 18 November 2015. This declaration included some additional information that did not appear on his declaration submitted in February 2015.
- 9.17 In submitting a revised declaration, it would appear that Councillor McElvaney acknowledged his failure to fully complete his previous Annual Declaration in respect of 2014. Furthermore, in Councillor McElvaney's statement responding to the alleged contraventions, received via his Solicitors, it would appear that he has confirmed ownership of land/properties that had not been declared previously. Councillor McElvaney's statement also refers to directorship of a company that was not included in his Annual Declaration. Preliminary research of records with the Companies Registration Office may indicate that other interests of Councillor McElvaney have not been declared.
- 9.18 Given these discrepancies, Councillor McElvaney may have breached his obligations under section 171, Part 15 of the Local Government Act 2001."