THE HIGH COURT

Record No. 2015/394MCA

BETWEEN:

MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES

Appellant

-and-

INFORMATION COMMISSIONER

Respondent

-and-

GAVIN SHERIDAN

First Notice Party

-and-

E-NASC EIREANN TEORANTA

Second Notice Party

OUTLINE LEGAL SUBMISSIONS OF THE FIRST NOTICE PARTY

Introduction

1. The First Notice Party is a journalist and transparency advocate who has devoted his professional career to promoting increased transparency in relation to, *inter alia*, the expenditure of public money and the nature, type and costs associated with contracts entered into between public authorities and private entities.

2. In exercise of his right of access under the Freedom of Information Act 2014 (hereafter the "**FOIA**" or the "**2014 Act**"), the First Notice Party sought the records concerned in these proceedings in order to promote the values of accountability, transparency and value-for-money for taxpayers money that are promoted by

circulation and publication of contracts entered into by the State. The First Notice Party has no direct personal interest in the records sought and does not stand to make any personal gain by virtue of their release. Notwithstanding the very limited resources available to a free-lance journalist and the considerable risk engendered in High Court proceedings the First Notice Party participates in aid of this Honourable Court and in order to assist the Respondent in its response.

3. In the interests of minimising the burden on this Honourable Court the First Notice Party is conscious not to repeat the basic statements of law or provide (another) chronology and, without prejudice to any additional or different argument which may be advanced on his behalf, generally supports the arguments of the Respondent.

Legal Issues

4. It appears from the Appellant's legal submissions that the vast majority of the 31 grounds pleaded in the Grounding Affidavit have now been abandoned. Unfortunately, the Appellant did not take up the request repeatedly made by both the Respondent and the First Notice Party via correspondence to identify those grounds which it was actually relying upon. Equally unfortunately the Appellant refused to co-operate with a sequential exchange of legal submissions leaving the Respondent in the invidious position of having to reply at length to arguments that are not now being pursued – in particular, large swathes of the points initially raised in relation to fair procedures have now been abandoned by the Appellant.

5. The First Notice Party will therefore confine himself to those issues the Appellant is maintaining. These are that the Respondent erred in;

    a) Allegedly incorrectly placing an onus on the Appellant pursuant to section 22(12)(b),
    b) Allegedly misinterpreted section 36 of the FOIA in a manner which the Oireachtas could not have intended.
    c) Allegedly misinterpreted section 35 of the FOIA in a manner which the Oireachtas allegedly could not have intended.

The section 22(12)(b) issue

6. The Appellant makes the argument that the Respondent incorrectly shifted the burden of proof onto the Appellant for the purposes of that sub-section.

7. The Section provides;

> *"(12) In a review under this section—*
>
> *(a) a decision to grant a request to which section 38 applies shall be presumed to have been justified unless the person concerned to whom subsection (2) of that section applies shows to the satisfaction of the Commissioner that the decision was not justified, and,*
>
> *(b) a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified."*

8. The Appellant bases its argument under this heading entirely on a quoted passage of Ms Justice Macken in *Rotunda Hospital v Information Commissioner*[1]. The Appellant unfortunately does not develop the argument beyond the quotation and neglects to explain how it applies in the particular circumstances of this request.

9. In the passage quoted by the Appellant, Ms Justice Macken expressed her doubts as to the applicability of the presumption contained in section 22(12)(b) (or section 34(12) as it then was) to requests for access to exempt records in Part III of the Freedom of Information Acts 1997 to 2003. While she accepted that the presumption applied to requests for personal information she expressed doubts as to whether the presumption would equally apply to access requests for what the Act regards as exempt records (e.g. those records which contain commercially sensitive information).

10. The Appellant unfortunately does not develop the argument beyond the quoted passage but appears to invite this Honourable Court to reason **directly and solely** from that passage to make a finding that the Respondent incorrectly required the

[1] [2013] 1 IR 1

Appellant to discharge the section 22(12)(b) burden. There are a number of obvious difficulties with the Appellant's arguments.

11. Firstly and most obviously, the Act itself includes no such distinction. The shoulder note to section 22 states "*Review by Commissioner of decisions*". Section 22(1) of the section then goes on to specify those decisions to which the generality of section 22 applies and those to which it doesn't. The section states that it applies, *inter alia,* to a decision on a request to which Section 38 of the Act applies (i.e. those decisions where an FOI body decides that but for Section 38 the public interest favours granting a request). The decision the subject matter of these proceedings was one where the Respondent took the preliminary view that notwithstanding that the requested records contained confidential information and commercially sensitive information the public interest favoured release but upon considering submissions from the Second Notice Party it decided to reverse that preliminary view on the basis that the public interest favoured refusing the request.

12. There is therefore nothing in the general structure of section 22 which gives any support to the Appellant's contention – in fact quite the opposite. The section specifies in detail the scope of its application. Having clearly directed its mind to the scope of section 22(12)(b), if the Oireachtas had intended to dis-apply the effect of section 22(12)(b) from exempt records as contended by the Appellant, it presumably would have done so.

13. The point can be put higher still – if the Oireachtas had intended that the presumption contained in section 22(12)(b) would not apply to exempt records it had the perfect opportunity to specify same in the 2014 Act in light of Ms Justice Macken's comments which were made in the context of the 1997 Act. It chose not to do so and instead re-enacted the section *verbatim*. The Oireachtas has therefore **twice** passed Freedom of Information legislation which is absolutely explicit that the presumption of non-justification disputed by the Appellant applies to all decisions of the Respondent including those involving exempt records.

14. Secondly, there is nothing in the structure of section 22(12)(b) which supports the Appellant's arguments. The section states;

"In a review under this section.

...

(b) a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified."

This is **exactly** the test which was recited by the Respondent in the part of its decision entitled "*Preliminary Matters*" and which the Appellant takes issue with. In other-words the Appellant's objection is that the Respondent imposed a statutory burden of justification in the exact terms which the Act obliged it to. The Respondent applied section 22(12)(b) to the Appellant because the Act unambiguously required it to.

15. Thirdly, what is termed the "*decision*" of Ms Justice Macken by the Appellant is in fact entirely *obiter.* This is made clear in both the course of Ms Justice Macken's decision and, helpfully, in the head-note to the decision in the Irish Reports. As a matter of first principles, and without prejudice to the points made above, an *obiter* passage in a Supreme Court decision manifestly does not bind this Honourable Court.

16. Fourthly, not only is the passage relied upon by the Appellant clearly *obiter* the Appellant has overlooked a passage by Mr Justice Fennelly (with whom Mr Justice Hardiman and Chief Justice Murray equally agreed) which both reaches the **opposite** conclusion and which formed part of the **ratio decidendi.** In his decision Mr Justice Fennelly notes (at paragraphs 87 onwards):

"It is important to bear in mind that the appeal to the High Court is taken from a review by the respondent pursuant to s. 34 of the Act. Section 34(12) of the Act provides:-

[the section is then quoted]

The respondent relies, in particular, on para. (b), which places a burden on the body refusing a request to justify its decision. I agree that it is, thereby

necessarily implied that the body will raise before the respondent any point of law which supports its position. Although s. 42(1) does not expressly say so, I think it is an integral part of any appeal process, other than possibly an appeal by complete re-hearing, that any point of law advanced on appeal shall have been advanced, argued and determined at first instance."

17. Although addressing a discreet question which arose in that case Mr Justice Fennelly:

a) specifically identified the fact that section 34(12) was being relied upon by the Respondent and, crucially,
b) **expressly accepted that it applied to cases involving exempt records** (in that case section 28 of the 1997 FOIA which is a section within Part III 'Exempt Records' of that Act)

18. There is nothing to suggest that this passage of Mr Justice Fennelly's is *obiter* and, notwithstanding the admitted interpretative tension caused by Ms Justice Macken's *obiter* comments, it is respectfully suggested that this Honourable Court is bound to follow the interpretation of the Supreme Court as to the applicability of section 22(12)(b).

19. Fifthly, and notwithstanding all of the above, it is simply not correct to say (per para 23 of the Appellant's written submissions) that Ms Justice Macken decided that the presumption did not apply. As is made clear from the passage quoted, Ms Justice Macken accepted that her observations were not supported by the Statute but went on to say only that she had *"a significant difficulty"* with the general applicability of the section to exempt records. Her difficulty is clearly a concern as to how a head could justify a refusal and she cites the example of the exemption provided for Government papers. She goes on to note that all that could be adduced in that situation is a record of those papers being submitted to government and wondered aloud what better evidence could be required under section 34(12). Apart from the fact that it is intuitively precisely such evidence that the burden of justification in section 34(12) requires, Ms Justice Macken continued to express a view (notwithstanding her misgivings) on whether the test had been satisfied (emphasis added):

*"**If** therefore s. 34(12) of the Act does apply, and I do not accept the respondent has established that it does, to Part III records, ..."*

20. It is clear that Ms Justice Macken was expressing nothing more than a reservation as to how heads of FOI bodies could satisfy the evidential burden in the case of class exemptions (such as government papers) but did not express any reservation in respect of harm based exemptions (such as commercial confidentiality) or in respect of mandatory exemptions which are disapplied under certain conditions and/or where the public interest would on balance be better served by granting than by refusing to grant the FOI request concerned. The exemptions at issue in these proceedings fall into the latter category where, in the case of commercially sensitive, a harm must be identified with a certain degree of confidence and in the case of both of the exemptions at issue in these proceedings the decision maker must weigh up the public interest factors in respect of granting or refusing a request.

21. Whatever evidential considerations the arose in the *Rotunda* case or might arise in the government papers example given by Ms Justice Macken they clearly do not arise in the context of the instant case.

22. As detailed in some length in the Respondent's submissions both the Appellant and enet were given ample opportunity to adduce evidence as to why release of the records sought should be refused on the grounds of either commercial sensitivity or confidentiality and both, in fact, exercised that right, however inadequately. In other-words notwithstanding the doubts of Ms Justice Macken as to how the justificatory burden imposed by section 22(12) could apply to class exemptions, no such difficulty arose in the instant case. The Appellant's difficulty **is not** that they could not or should not have had the section 22(12) burden imposed upon them – the Appellant's actual difficulty is that it failed to discharge that burden to the satisfaction of the Respondent. That failure cannot be parsed into an error of law on the part of the Respondent by quoting passages from *Rotunda* or otherwise.

23. Sixthly, since the *Rotunda* judgment, the Respondent continues to apply the section 22(12) burden in his decisions and the First Notice Party is aware of no case where any decision of the Respondent has been appealed to the High Court on the basis that the Respondent has incorrectly applied the law in relation to the burden of

justifying a decision. The First Notice Party is unaware of any case in which the *obiter* comments of Ms Justice Macken have been either cited or followed by any of the Superior Courts. On the contrary in *Westwood Club v The Information Commissioner*[2] the Appellant[3] expressly argued in its oral and written submissions that section 34(12) applied to a refusal on the basis of alleged commercial sensitivity. The Respondent accepted in principle that this was the case and this was ultimately affirmed by Mr Justice Cross;

> *"**[47]** The appellant argued that the burden of proof to justify the non-release of documents always rests on the body which is refusing the request. The respondent in her submissions does not dispute this. I find that throughout the various deliberations of the respondent, it is reasonably clear that at no stage, save for one important exception which will be discussed below, was there any issue of the burden of proof shifting to the appellant....*
>
> ***Burden of proof***
>
> ***[100]** It is accepted by all the parties that the burden of proof lies in favour of disclosure and the notice party at all times carries the burden of demonstrating why the documents should not be released.*
>
> ***[101]** The respondent at all times in its decision, save in one significant matter, clearly accepted that that is the case.*
>
> ....
>
> ***[106]** Section 34(12)(b) of the Act is clear:-*
>
> > *"decision to refuse to grant a request under section 7 shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified"*
>
> ***[107]** I have previously held that the general argument on behalf of the appellant in relation to the burden of proof is not valid. I must conclude,*

[2] [2014] IEHC 375

[3] Counsel for the First Notice Party was also Counsel for Westwood.

however, that a decision resting so clearly upon an erroneous statement of the law as contained in the preliminary decision must, of itself, be contaminated by that error and cannot stand."

24. Although Mr Justice Cross disagreed on the facts with the Appellant's contention that the Respondent had shifted the burden to it generally, for present purposes, the salient point is that the learned High Court judge had no hesitation in deciding that section 34(12) applied to a decision concerning non-release under the commercial sensitivity provisions of the FOIA.

25. For the reasons above it is respectfully submitted that the Appellant's argument on this head is entirely without merit. The Respondent correctly required the Appellant to justify non-disclosure to the First Notice Party pursuant to section 22(12)(b).

The Respondent's interpretation of Section 36 of the FOIA

26. The First Notice Party notes the discursive passages of the Appellant's submissions at paragraphs 26 to 34. With the exception of the observation that the Respondent was absolutely correct to carefully identify that section 36 involved two separate tests with two separate thresholds, the First Notice Party does not raise any particular issue in respect of same.

27. It is common case that the Respondent deemed the requested records as containing commercially sensitive information for the purposes of section 36(1)(b) and therefore engaged this exemption but subject to the remaining provisions of section 36 which either mandate the granting of a request or disapply section 36(1) entirely. The only issue before this Honourable Court therefore is the issue of the Respondent's subsequent decision to decide that the public interest favoured release for the purposes of section 36(3) in which case the mandatory refusal contemplated by section 36(1) does not apply.

28. This section reads;

"(3) Subject to section 38, subsection (1) does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the FOI request."

29. Section 38 is the provision which applies in a limited number of instances where a third party right[4] is at issue. It requires that where the head of an FOI body has determined that the public interest favours granting a request to access commercially sensitive material whose publication would be prejudicial to a third party or information whose disclosure would constitute a breach of a duty of confidence then the head is required to consult with the persons to whom the information relates or who gave the information to the FOI body. The head must consider any submissions made by the relevant third party before making a final decision to grant or refuse the request.

30. Although the substance of the Appellant's submission will be addressed below the structure of section 36 and 38, when read together raises a preliminary point.

31. It is clear from the Appellant's correspondence that it was of the preliminary of the view that on balance the public interest favoured disclosure[5]. The Appellant accepted that there was a (as quoted at para 74 of the Respondent's written submissions) *"public interest in ensuring that state and local government agencies are accountable to the public for the decisions they make and related expenditure"*. Having accepted that there was a public interest in disclosure the Appellant then invoked the section 38 procedure and engaged in further consultations with enet. It was only in the course of that consultation that the Appellant was convinced to change its mind. It is respectfully submitted that this is noteworthy for two reasons.

32. Firstly, that the Appellant is now arguing the precise opposite from its earlier position – that the exemptions and the public interest do not favour disclosure. It is respectfully submitted that the Appellant cannot simply, without any explanation, resile from its earlier view and come before this Honourable Court to argue the exact opposite case.

33. This observation is even more apposite when one considers that it was enet's intervention, upon being consulted pursuant to section 38, which was clearly decisive in persuading the Appellant to change its mind. In particular, it has not pointed to and there appears to be no evidence before this Honourable Court as to

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[4] Namely Confidential Information, Commercially Sensitive Information and Personal Information

[5] E.g. Letter from Appellant to the Second Notice Party dated 14 January 2015 (Tab 3 of book collated exhibits)

what aspects of the Second Notice Party's submission convinced the Appellant to reverse its preliminary view and decide that the public interest favoured refusing the request in its entirely. Despite enet's rights in allegedly confidential and commercially sensitive information being the main issue before this Honourable Court, it has not participated in these proceedings or made any submissions, apart from an Affidavit referring to a fair procedures point that has now been abandoned. This affidavit was sworn by enet but, bizarrely, filed on its behalf by the Appellant. There is no evidence or submission before this Honourable Court which could possibly justify the Appellant's *volte face* in these proceedings. Indeed this Honourable Court finds itself in the curious position where the point is being litigated despite the fact that the Appellant, the Respondent and the First Notice Party all believe that the public interest favours disclosure.

34. Secondly, and perhaps more fundamentally, the contrasting stances adopted by the Appellant betrays, it is respectfully submitted, the true objection of the Appellant to the Respondent's decision. Where the Appellant was of the view that the public interest favoured disclosure and was persuaded otherwise by enet the objection it mounts here is no more than that the Respondent reached a different view on the same facts. **There simply is no point of law in that objection** and the Respondent is eminently entitled to take whatever reasonable view it wishes on the facts before it. This Honourable Court is referred to the authorities identified by the Respondent at paragraphs 76 & 77 of its legal submissions in this regard.

35. In relation to the first point the Appellant submits that the Respondent erred in identifying the test as one of requiring the identification of *"any exceptional circumstances that apply in this case such as to override the need for transparency"*. The Appellant argues that this test is *"...not one provided for by law and is the application of too high a threshold and is an error of law"*[6]. This argument is, with the greatest respect, based on a fundamental misapprehension as to the structure and purpose of the FOIA. Simply put the default presumption contained in the FOIA is one of the greatest possible access to information and one of release being the rule. Refusals to grant access to information are the exception to that rule and, **by definition**, require an exceptional circumstance in order to

[6] paragraph 37 of its submissions

depart from that very clear statutory rule. This is set out clearly in the Long Title to the FOIA:

> *"An Act ... to provide for a* ***right of access to records*** *held by such bodies, [and] for* ***necessary exceptions*** *to that right"* (emphasis added)

It couldn't be clearer, records held by FOI bodies are accessible as a right subject to exceptions. In other words there must be exceptional circumstances for the right of access to be denied this is the only legal test provided for under the FOIA which merits refusing a request.

36. This point has been repeatedly made by the Superior Courts. The presumption of disclosure was referred to by Mr Justice Fennelly in *Sheedy v The Information Commissioner*[7] where he stated[8]:

> *"The passing of the Freedom of Information Act constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers..."*

He then took the unusual step of quoting the entirety of the long title of the Act stating that *"This is deserving of full citation"*[9]*:*

> *"An Act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons*

[7] [2005] IR 272
[8] at page 275
[9] pp 275 to 276

to enable them to exercise it, to provide for the independent review both of decisions of such bodies relating to that right and of the operation of this Act generally (including the proceedings of such bodies pursuant to this Act) and, for those purposes, to provide for the establishment of the office of information commissioner and to define its functions, to provide for the publication by such bodies of certain information about them relevant to the purposes of this act, to amend the Official Secrets Act 1963, and to provide for related matters"

37. He then went on to note that section 6 of the Act gives effect to the general principle of granting access to documents in similar terms – i.e. *"to the greatest extent possible"*. Mr Justice Fennelly also noted with approval the decision of Mr Justice McKechnie in *Deely v. The Information Commissioner*[10], where the learned Judge held:

"As can thus be seen the clear intention is that, subject to certain specific and defined exceptions, the rights so conferred on members of the public and their exercise should be as extensive as possible, this viewed, in the context of and in a way to positively further the aims, principles and policies underpinning this statute, subject and subject only to necessary restrictions.

It is on any view, a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy."

38. The First Notice Party also relies on the judgment of Mr Justice O'Donovan in *Minister for Agriculture and Food v The Information Commissioner*[11] (emphasis and underlying added):

"...in the light of its preamble, it seems to me that there can be no doubt but that it was the intention of the legislature when enacting the provisions of the Freedom of Information Act,1997 , that it was only in ***exceptional cases*** *that members of the public at large should be deprived of access to information in the possession of public bodies and this intention is exemplified by the provision of s. 34 (12)(b) of the Act which provides that a decision to refuse to*

[10] [2001] 3 I.R. 439 at p. 442
[11] [2000] 1 I.R. 309 at p. 319

grant access to information sought shall be presumed not to have been justified until the contrary is shown"

39. The First Notice Party also relies on the decision of Mr Justice Clarke in *P v The Information Commissioner*[12] where the learned judge held:

> *"43. In the light of those decisions it is clear that the intention of the Oireachtas was that the exemptions allowed by Part III of the Act of 1997 are to be interpreted restrictively and applied sparingly. If the exemptions are afforded too wide an interpretation, the refusal of access could become the rule instead of the exception and this would clearly frustrate the primary objectives of the Act of 1997."*

40. It is submitted that not only is the test adopted by the Respondent in these proceedings entirely consistent with the purpose of the FOIA it is squarely and exactly on all fours with the repeated jurisprudence of this Honourable Court. Not only does it use the **exact** terminology used by Mr Justice O'Donovan in *Minister for Agriculture and Food* but more generally is entirely in keeping with legislation which regards **all** refusals as exceptional cases.

41. Having ignored the High Court authority on point the Appellant then criticises the Respondent for referring to and adopting the rationale in its previous decisions in Cases 080232 (*Dublin Bikes*) and 99183 (*McKeever Rowan*). In both cases, as here, contracts had been entered into by state authorities which involved the expenditure of public money. In *Dublin Bikes* the Respondent simply made the unexceptional observation that there is a *"significant interest in openness and transparency in the matter of contracts which public bodies enter into..."* This observation is doubly unremarkable in that it closely resembles remarks made by the Appellant itself prior to its conversion by the submissions made by enet.

42. In relation to *McKeever Rowan* the Respondent made similar statements as to the importance of transparency and went on to record its surprise that a State body could plausibly argue that the transparency requirements contained in the FOIA could be ousted by a confidentiality clause in a contract. This observation is entirely

[12] [2009] IEHC 574

consistent with the purpose and terms of the FOIA. It is particularly pertinent in the context of this case, where the Appellant makes the same argument in respect of section 35 of the FOIA rejected by the Respondent in *McKeever Rowan.* For present purposes however, both cases are consistent with the Respondent's decision in these proceedings, the requirements of the FOIA and *Deely, Sheedy* and *Minister for Agriculture and Food*. The points made by the Appellant in relation to both cases simply don't advance its case in relation to these proceedings.

43. Finally in this regard it is noted that Appellant failed to make any substantive observations as to the alleged commercial sensitivity or the specific public interest favouring refusal at any point in the proceedings before the Respondent. Instead it made submissions on these points in the most bland and generic terms[13]. This failure was specifically highlighted by the Respondent in the course of its decision[14];

> *"Furthermore neither the Department nor enet identified for this Office particularly sensitive information within the contract, the release of which would disclose (for example) enet's internal business methodology. In the High Court case of* Westwood Club v The Information Commissioner, *Cross J held that a public body must do more than repeat the requirements of the exemption. It must engage with the question of why the particular documents, if disclosed, could prejudice the position of the third party"*

44. It is not clear how the Appellant envisaged that the Respondent **could** exercise its discretion in favour of refusal when the Appellant had neglected to make a substantive submission. It is even less clear how the Appellant envisages how this Honourable Court can or should now decide that the balancing exercise carried out by the Respondent, which both attracts a high level of deference (*per Gannon v Information Commissioner*[15]) and which accurately identified the threshold to be

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[13] For example see Tabs 19 and 20 of the book of collated exhibits for the Respondent's request for a submission and the submissions furnished by the Appellant in response.

[14] page 6 of the Respondents decision dated 27 November 2015 at Tab 28 of the book of collated exhibits

[15] [2006] IR 270 at p. 281

applied (*per Ministry of Agriculture and Food* cited above), was in error when the Appellant had itself neglected to make any substantive submission.

45. The Appellant makes a subset of this argument in paragraphs 42-47 of its written submission. The Appellant argues that the Respondent erred in putting weight on the fact that enet "*...was the successful bidder at a tender process for the use of a State owned asset which generates revenue and that there should be transparency around this transaction. In that the Respondent fundamentally erred...*" It is frankly remarkable that the Appellant persists in making the argument that there should not be transparency around the operation and use of a State owned asset. It is even more remarkable that the Appellant persists in this argument when it was previously of the opposite view before a changing its mind after consultation with enet.

46. More to the point the Appellant is incorrect in law – the FOIA recognises a general principle of transparency. While it does recognise limited exemptions to that principle to protect specified public and private interest - **even within the structure of those exemptions** it recognises that there may (as here) be an over-arching public interest in releasing records notwithstanding that those records engage an exemption. The '*prima facie*' presumption of non-disclosure identified by the Appellant at paragraph 47 simply does not exist in either the structure of the Act, or the jurisprudence of this Honourable Court and appropriately formed no part of the Respondent's decision.

47. The second argument made by the Appellant is that the Respondent allegedly erred in law in requiring that[16] *"the Appellant demonstrate that releasing the contract would totally undermine enet's business"*. A number of preliminary observations need to be made in respect of this argument.

48. Firstly, it is important to bear in mind that the Respondent was clearly unhappy with the standard of information provided by the Appellant and enet in relation to commercial sensitivity but reluctantly accepted that they had satisfied the low

[16] paragraph 48 onwards of the written submission

threshold of section 36(1)(b)[17] before moving onto the section 36(3) public interest balancing test.

49. Secondly the Appellant appears to identify this as the threshold applied generally by the Respondent. This is not correct. In fact it was cited with reference to *Eircom* cases as an example of the type of public interest which the exemption sought to protect and was mentioned as but one of five individual considerations which lead the Respondent to take the view that section 36(1) did not apply by reason of the public interest balancing test under section 36(3). The Respondent reasonably concluded that it would not as the records sought related to a particular phase of the operation of the asset, that pricing was published on enet's website and that future tenders would in any event be different. The Respondent then turned to the fact that neither the Appellant nor enet had put **any specific** information before the Respondent which identified **specific** prejudice which would flow from granting the request[18]. More fundamentally, while it was entirely reasonable for the Respondent to identify the **type** of information it required from the Appellant by reference to its previous decisions, the Appellant crucially fails to recognise that the Respondent cited this passage in the context of its discussion of section 36(3) and not section 36(1).

50. As identified at paragraph 69 of the Respondent's written submission that section does not recognise or require the Respondent to counter-balance *any* private counter-vailing interest. Section 36(1) recognises that third parties who engage with public bodies have a <u>private</u> interest in the protection of their information. The section recognises that they are entitled to a degree of protection for their commercial information which is transmitted to a public body via that engagement and therefore comes to be 'held' by the public body for the purposes of FOI. However, once the section 36(1) question has been answered in the affirmative the Respondent is (as here) obliged to proceed to the section 36(3) public interest balancing test which is **exclusively concerned** with whether the public interest is better served by release or by refusal. The private right identified in section 36(1) falls away and the only relevant consideration is the public interest as between

[17] Final two paragraphs of page 5 of the Respondents decision dated 27 November 2015 (Tab 28 of the book of collated exhibits).
[18] page 7, paragraph 3 of the Respondent's decision dated 27 November 2015 cited above.

transparency on the one hand and the public interest in (for example) avoiding the deleterious consequences of discouraging private sector companies from engaging with the State on the other. This is the balance mandated by section 36(3), the balance identified in Case 98114, the balance accurately identified by the Respondent and the balance which the generic submissions made by the Appellant was incapable of persuading the Respondent to exercise in favour of affirming the Appellant's decision. It was therefore entirely appropriate that the Respondent sought cogent and persuasive evidence of prejudice from the Appellant in order to justify non-disclosure for the purposes of section 36(3).

51. The next discreet argument made by the Appellant is based simply on a lengthy passage from Ms Justice Macken in *Rotunda* without further explanation. Insofar as it can be understood the Appellant appears to be inviting this Honourable Court to reason directly from Ms Justice Macken's suggestion that section 26 of the 1997 Act mandates refusal to a similar finding that the Respondent has fallen into error by not ordering refusal once it had determined that the records fell within section 36(1). With the greatest respect to the Appellant, the authority cited provides no support to its position. If anything it supports the position being advanced by the Respondent and the First Notice Party.

52. Ms Justice Macken's difficulty with the decision of the Respondent in *Rotunda* was simply that the Respondent had there incorrectly identified a public interest in access to birth records (para 81);

> *"In such circumstances, any "public interest" would, in my view, require to be a true public interest recognised by means of a well-known and established policy, adopted by the Oireachtas, or by law. In the present case, the Commissioner made a statement of alleged policy as constituting the "public interest". There is no evidence that the Oireachtas has adopted such a policy. I am of the view that, at least on the materials mentioned, no established public interest has been properly identified.*

53. Ms Justice Macken therefore concluded that the public interest identified by the Respondent in access to information about birth records was not, in fact, a public

interest for the purposes of the Act. Having reached that conclusion Ms Justice Macken was of the view that section 26(1) of the Act therefore mandated refusal as there was simply no public interest favouring release. No such objection can arise here as the Appellant itself has identified the public interest requiring disclosure of the records sought by the First Notice Party. The passage quoted is therefore completely irrelevant to the proceedings before this Honourable Court – whatever infirmities the Appellant alleges against the Respondent it cannot plausibly argue that a public interest favouring release which it itself identified is not, in fact, a public interest favouring release.

54. Finally, in this regard, the Appellant reverts to the argument that the Appellant (para 54) *"applied the correct test in deciding to refuse the FOI request"*. The relevance of this observation is not clear. Irrespective of the rosy view the Appellant maintains of its own decision the First Notice Party was entitled to appeal that decision to the Respondent. The Respondent was then obliged to follow the statutory process and make a fresh determination. In passing, it might be observed that the elements which the Appellant identifies as constituting a *'correct test'* are **all** contained in the Respondent's decision. Insofar as it could (given the generic nature of the submissions made by the Appellant and enet) the Respondent expressly took into account the impact on enet's competitive position[19] and the impact on future contracts[20]. It is difficult to identify the point the Appellant is making here but it is certainly not a point which goes to the infirmity of the Respondent's decision.

55. It is respectfully submitted that the Appellant has failed to identify any error of law or fact and that the Appellant's real objection is that the Respondent reached a different conclusion on the same set of facts. This is a conclusion which the Respondent was entirely justified in reaching and which, it is respectfully submitted, should not lightly be disturbed by this Honourable Court.

56. The Appellant makes two distinct further arguments at paragraphs 56-64 entitled **"The public interest generally under s.35 and s. 36".**

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[19] *inter alia* at page 5 paras 5 & 6, page 6 paragraph 4, page 7 paras 3 of the Respondent's decision.
[20] at *inter alia* page 7 paragraph 4 of the Respondent's decision.

57. Firstly, the Appellant correctly identifies that the FOIA requires the Respondent to balance competing interests. The Appellant also correctly cites section 11 of the Act as encapsulating some of the elements in that balance. However, the Appellant then goes on to make what appears to be the novel argument that because it deems its own decision to have struck the correct balance as between enet and the request for access of the First Notice Party it follows that the decision reached by the Respondent is incorrect. This is, with respect, an unstateable proposition. As is clear from the text of the decision and the careful exposition of that decision in the written submissions of the Respondent, the Respondent provided ample opportunity to all sides to make submissions and then provided a carefully written decision justifying why it had decided to release the records sought. The Appellant, it is respectfully suggested, has a considerably higher threshold (as per *Deely*) to satisfy before this Honourable Court than simply argue that its own decision was somehow better than that reached by the Respondent.

58. Secondly, the Appellant identifies a previous decision of the Respondent in Case No. 0600054, *Irish Times v Department of Transport* 27th July 2010) and argues that the Respondent should have followed the approach adopted in that decision.

59. However, where the Appellant itself accepts that previous decisions of the Respondent do not bind the Respondent[21] the argument amounts to little more than simply identifying a previous decision of the Respondent the result and process of which the Appellant prefers over the result and process in the decision before this Honourable Court. Even at its height this does not constitute a legal argument which goes to the legality of the decision the subject matter of these proceedings.

60. For the sake of completeness, however, it is noted that facts before the Respondent in *Irish Times* are in no way analogous to those before the Respondent in this case. In that case the newspaper had sought records relating to tender arrangements in respect of Transport 21 prior to the awarding of a tender or the commencement of construction. The Respondent concluded that the public interest favoured refusal. After discussing the relevant factors favouring release the Respondent noted the factors favouring non-release (including a finding that release would lead to

[21] paragraph 62 of its written submissions

increased costs for the taxpayer, would disrupt and delay a tender process for the provision of public infrastructure which had not been completed and the laying of compensation claims which again would have to be met from the public purse) before finding that the public interest favoured non-release. It is noted that none of the factors identified by the Respondent as justifying non-release in *Irish Times* were pressed by the Appellant in the instant proceedings. In the view of the First Notice Party the *Irish Times* decision was correctly taken on the facts. Frankly however, whether it was or not, it is simply irrelevant to the legality of the decision the subject matter of these proceedings. It is respectfully submitted, however, that observation avails the Appellant in proving its case in these proceedings.

61. The First Notice Party notes the **"Other Issues"** identified by the Appellant in skeleton form at paragraphs 65-70 and does not understand that these arguments are being seriously pressed. In the event that they are advanced in the course of the hearing the First Notice Party will address them in due course.

The Section 35 issue

62. The third substantive argument made by the Appellant relates to section 35 of the FOIA (Information obtained in confidence). In respect of section 35(2) the First Notice Party supports and adopts the submission made by the Respondent at paragraph 80 of its written submissions. The Appellant, with the greatest respect, does not appear to have accurately grasped the legislative structure of section 35. Section 35(1) and section 35(2) are not sequential in the way section 35(1) and (3) are. On the contrary, if section 35(2) is engaged it disapplies section 35(1). As a matter of first principles the Appellant is quite wrong in arguing (at para 84) that the Respondent erred in considering matters *"...under section 35(2) without making a specific finding in respect of section 35(1)"* because section 35(2) describes a class of records which are specifically excluded from the scope of section 35(1).

63. The net question is therefore whether the Respondent was entitled to conclude that section 35(2) applied. Section 35(2) states:

> *"(2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, an FOI body or a service provider) in the course of the performance of his or her functions*

unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than an FOI body or head or a director, or member of the staff of, an FOI body or of such a service provider."

64. The purpose of this section is clear. Neither FOI bodies (such as the Appellant) nor service providers (such as enet) are entitled to oust the operation of the FOIA on the basis of a duty of confidence owed as between themselves. The only way that the right of access can be refused is if disclosure would lead to a breach of a duty of confidence owed to a third party **other than** either the FOI body or the service provider. There is no third party in this case and neither the Appellant nor enet identified any duty of confidence owed to a third party at any point. The Respondent was therefore absolutely correct in both fact and law in its conclusion that section 35(2) applied. If this Honourable Court concurs with that view that is the end of the matter.

65. As it happens the Respondent went on to consider the application of section 35(1)(b) on the basis both that the Appellant had made its decision under its auspices and out of an abundance of caution (*"Therefore even if section 35(2) does not operate to disapply section 35(1), I would find that section 35(1) does not apply"*[22]

66. Section 35(1)(b) requires that a head shall refuse a request if:

"(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) in Part 1 or 2 of Schedule 3 of an enactment specified in that Schedule) or otherwise by law."

67. The Respondent found that there was no breach of a duty of confidence as Clause 32 of the contract expressly subordinated itself to the FOIA and this was recognised by enet in the course of its submissions to the Appellant. Indeed the Respondent observed (page 8) *"Instead, enet submitted that its inclusion indicated a mutual*

[22] page 9, paragraph 2 of the Respondent's decision

understanding of the commercially sensitive nature of the fourth records and the likely potential harm arising as a result of commercially sensitive and/or confidential information". In other words the Respondent reached the absolutely unremarkable conclusion that there was no breach of confidence involved in releasing the records because neither the contract nor the contracting parties expressed any belief that the contract was confidential for the purposes of the FOIA.

68. With the greatest respect to the Appellant therefore it is difficult to identify the actual objection to the decision of the Respondent made in paragraphs 71 -83. Insofar as it can be understood the Appellant appears to be making the arguments that;

a) There is some (unidentified) legal difficulty with the Respondent's approach to the confidentiality clause in the contract signed between the Appellant and enet, and,
b) That the approach of the Respondent somehow *'compels the absurd or impossible'* because public bodies will no longer be able to rely on confidentiality agreements.

69. There is no substance in either objection. The Appellant helpfully itself accepts that a contractual provision between the Appellant and enet cannot oust the jurisdiction of the FOIA[23] *"No contractual provision or other agreement ordinarily can".* We further know that the contract did not oust the operation of the FOIA because, again helpfully, clause 32(2) of contract explicitly makes it clear that the duty of confidentiality contained in the contract is subject to the requirements of the FOIA. Therefore **none** of the colourful consequences of impossibility or absurdity identified by the Appellant can possibly arise in either the abstract or in the decision the subject matter of these proceedings - In simple terms the Appellant signed a contract with enet. That contract recognised that both parties to the contract bore an *inter partes* duty of confidentiality and a duty of confidentiality to the world at large. That contract also recognised and made that duty of confidentiality subject to the requirements of the FOIA. Given the impossibility of ousting the operation of an Act of the Oireachtas in a contract that duty of confidentiality remained subject

[23] paragraph 82 of its written submission

to the FOIA whether clause 32(2) was included or not. The First Notice Party understands that all requests for tenders by public authorities include specific provisions informing applicants that information relating to tenders is accessible under the FOIA because information relating to tenders as a class is not exempt and that each request for such information is treated on a case by case basis.

70. When distilled into its basic elements the Appellant's argument appears to be that an infirmity attaches to the Respondent's decision, because the Respondent did not confine and conclude its section 35 analysis on the basis of clause 31(1) of the contract, **where that clause was itself rendered subject to the requirements of the FOIA.** This is, with the greatest possible respect, at best an absurd argument. At worst, it is respectfully submitted, if accepted it would set the entire operation of the Act at nought as if the Appellant is correct all public authorities and private parties contracting with the State could simply oust the operation of the Act by including a confidentiality clause.

Conclusion

71. It is submitted that the Appellant has identified no error of law or fact in the Respondent's decision. It is respectfully submitted that while the Appellant clearly does not approve of the Respondent's decision that is not a sufficient reason for this Honourable Court to grant the reliefs sought.

72. In relation to the section 22(12)(b) point it is submitted that the Appellant has relied on an *obiter* comment of Ms Justice Macken which has no bearing on the instant case. It is a comment which finds no support in the text of the Act, the jurisprudence of this Honourable Court and is expressly contradicted by the *ratio* of that case.

73. In relation to section 36 it is respectfully submitted that the Respondent reached a decision it was eminently entitled to reach and which was entirely in keeping with the structure and text of the FOIA. The Appellant's arguments in this regard amount no more, it is respectfully submitted, to an identification of its own and previous decisions which it prefers to that before this Honourable Court. It is submitted that the Appellant has identified no legal infirmity in the Respondent's decision.

74. In respect of section 35 it is respectfully submitted that the Appellant has misunderstood the structure of the section. Notwithstanding that misunderstanding the Appellant has, in fact, again failed to identify any point more weighty than the point that it now appears to object to the fact that public contracts in general and this contract in particular are appropriately subject to the FOIA.

John Kenny BL

13th February 2017

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