AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2019:000101

Clarke C.J.
O'Donnell J.
MacMenamin J.
O'Malley J.
Baker J.

In the Matter of the Freedom of Information Act 2014

Between/

The Minister for Communications, Energy and Natural Resources

Appellant/Respondent

And

The Information Commissioner

Respondent/Appellant

And

Gavin Sheridan

And

E-Nasc Éireann Teoranta (t/a "enet")

Notice Parties

Judgment of Ms Justice Marie Baker delivered the 25th day of September, 2020

1. The Freedom of Information Act 2014 ("the Act") consolidated and modernised the law relating to access by members of the public to records of public bodies and non-public bodies in receipt of State funding. These appeals concern the means by which public interest considerations are to be engaged when records are commercially sensitive or confidential.

2. The Information Commissioner ("the Commissioner") appeals the order of the Court of Appeal made on 10 April 2019 reversing the decision of Noonan J.: *Minister for Communications, Energy and Natural Resources v. Information Commissioner* [2017] IEHC 222.

3. The judgment of Birmingham P., with whom Irvine J. (as she then was) and McGovern J. agreed, found that the Commissioner erred in his approach to records in respect of which an exemption was claimed by the requested body, the Minister for Communications, Energy and Natural Resources ("the Minister"): *Minister for Communications, Energy and Natural Resources v. Information Commissioner* [2019] IECA 68.

4. The Minister has cross-appealed the findings as to the interpretation and application of s. 35(2) of the Act.

5. This Court granted leave to appeal and to cross-appeal in its determination of 31 July 2019, *Minister for Communications, Energy and Natural Resources v. Information Commissioner* [2019] IESCDET 179, on the ground that the issues raised may be of systemic importance to the operation of the legislation, and granted leave on the same day in *University College Cork v. Information Commissioner* [2019] IESCDET 180. The appeals were heard together. This judgment mostly concerns the provisions of s. 22(12)(b) of the Act as they apply to an exempt record and in the context of the public interest balancing test in s. 36(3).

6. It is useful to first discuss the terminology and general procedures for the disclosure of records under the Act.

General terminology and FOI request procedure

7. By s. 11, the Act creates the right of "every person" to seek disclosure of a record held by a public body or a body which receives amounts of public funding (an "FOI body"). A request to access records is made under s. 12 of the Act and is termed an "FOI request" under s. 2(1).

8. The definition of a public body for the purposes of the Act gives rise to no difficulty in the present appeal, as any department of State is expressly included in the definition of "public body" in

s. 6(1)(a). Also of note, for the purposes of the related appeal, is the inclusion within such definition, in s. 6(1)(g), of a higher education institution in receipt of public funding.

9. The records to which access may be requested include a book or other written or printed material in any form, including electronic form, and also documents such as maps, plans, drawings, discs, films, or a copy of any one of those documents. Records amenable to a request for access are those created after the date of coming into operation of the Act, *i.e.* 14 October 2014, or those otherwise prescribed by the Minister.

10. The person who makes an FOI request is somewhat inelegantly called a "requester". The requester makes a request in writing, or by such other form as may be determined, addressed directly to the FOI body in question, saying that the request is made under the Act, and providing sufficient information to identify the records concerned.

11. The FOI request is directed to the "head" of the relevant FOI body listed in s. 2(1) of the Act to include, *inter alia*, the Attorney General in relation to the Office of the Attorney General, the Director of Public Prosecutions in relation to the Office of the Director of Public Prosecutions and in the case of a Department of State, the relevant Minister, and, in the case of any other FOI body not expressly referred to in the section, the person who holds or performs the function of the office of chief executive officer, irrespective of the name by which that person is known. Most public bodies operate a system by which the request for disclosure of records is dealt with by a designated office.

12. Provision is made in s. 20 for the delegation to a member of staff of the FOI body of any functions under the Act and, in s. 21, for a full "internal review" by the head of the FOI body of any decision made by a delegate. The review may result in an affirmation, variation, or annulment of the initial decision, and the making of a fresh decision, and therefore, is not constrained by any principles of deference, or limited only in a review of the legality or procedural correctness of the decision already made.

13. An FOI request must contain "sufficient particulars in relation to the information concerned to enable the record to be identified by the taking of reasonable steps" under s. 12(1)(b) of the Act. Non-

compliance with that provision by a requester is an administrative ground for the refusal to grant the request, but only if the FOI body assisted or offered to assist the requester in meeting the requirement, pursuant to section 15(1)(b), as modified by s. 15(4).

14. Section 11(2) places the FOI body under the general duty to give reasonable assistance to a requester. Moreover, an FOI body is specifically required to publish rules, procedures, guidelines, practices, interpretations used, and any precedent kept by it regarding its decisions, determinations and recommendations. It must publish the names and designations of the members of staff responsible for providing services to the public, and provide information as to the right of review or appeal from its decisions and the procedures governing the exercise of those rights of review or appeal.

15. An overriding supervisory jurisdiction of compliance with these requirements of publication is given to the Commissioner by Part 6 of the Act.

16. The head of the FOI body has an obligation to ensure that the request is transmitted to such other body which he or she considers holds or might hold the relevant records, and to inform the requester of that.

17. Provision is made for the charging of a fee for access in certain cases.

18. Section 13(4) provides that in coming to a decision whether to grant or refuse access, the head of the FOI body is to disregard the reason the requester gives for the request, or any belief or opinion of the head as to the real reason for the request. This safeguard imports an objective mechanism by which the request is to be considered, and prevents the head of the FOI body coming to a decision to refuse or grant the request merely on account of the identity of the person making the request, *e.g.* to grant in all cases to certain classes of persons such as journalists, or the refusal to certain classes of persons such as persons believed to have a political motivation for wanting a record.

19. Section 14 of the Act provides for an extension of the period for consideration of the request by a further maximum of four weeks.

20. The head of an FOI body may refuse a request under s. 15(1) of the Act, *inter alia*, if the record concerned "does not exist or cannot be found" after all reasonable steps have been taken (sub-s. (1)(a)), if "the information is already in the public domain" (sub-s. (1)(d)), if the retrieval or examination of the record would cause "a substantial and unreasonable interference with or disruption of work" of the FOI body (sub-s. (1)(c)), if the information is intended to be put in the public domain by the FOI body within six weeks from receipt of the FOI request (sub-s. (1)(f)), if the request is in the opinion of the head of the FOI body "frivolous or vexatious" or is "part of a pattern of manifestly unreasonable requests" (sub-s. (1)(g)).

21. The offering of access to the record may be deferred pursuant to the provisions of s. 16.

22. The manner of access to records is provided in s. 17 and includes an opportunity to copy, inspect, hear, or view the record, or a combination of these.

23. Express provision is made in s. 18 for the provision of access to part only of records, if this is practicable, and where the record would otherwise fall to be granted but for the fact that it contained an exempt record.

Review by the Commissioner: procedure

24. The Commissioner is an independent expert with power to review any refusal, whether full or partial, of a request. Application for a review may be made by a "relevant person" as defined in s. 22(2) of the Act to include a requester, or a person who has a "material interest" under s. 10. The Commissioner may annul, vary, or affirm the decision, and substitute a new decision.

25. Provision is made in the Act for the procedural steps to be taken by the Commissioner on receipt of an application for review. A copy is to be sent to the head of the FOI body concerned, or any other relevant person, and the head of the FOI body is required thereafter to give to the Commissioner particulars of any person who might have been notified where a decision as to exemption is under consideration. Notification is to any third party who might be impacted by the decision. Thereafter, the head of the FOI body, or any other relevant person, may make submissions and the Commissioner is to "take any such submissions into account for the purposes of the review": s. 22(8).

26. Following the decision-making process, the Commissioner notifies the decision to the head of the FOI body, the relevant person concerned, and any other person to whom notice should be given, and gives reasons for his or her decision: s. 22(10).

27. Under s. 22(14) of the Act, a decision of the Commissioner on such review is binding and shall, insofar as it is inconsistent with the decision under review, have effect in lieu thereof.

28. An appeal lies to the High Court on a point of law or, if it is contended that the release of a record would contravene EU law, an appeal lies against a finding of fact set out or inherent in the decision. No point of EU law arises in the present case.

Exempt records: confidential and commercially sensitive information

29. The Act provides that certain classes of records are exempt from access, as provided in s. 2(1)(a):

> "a record in relation to which the grant of an FOI request would be refused pursuant to Part 4 or by virtue of Part 5 […]".

30. This appeal concerns exempt records under Part 4, where refusal to grant an FOI request is mandated by ss. 35(1)(b) and 36(1)(b), but where the legislation contains a balancing exercise in the public interest: the public interest override.

31. Section 35(1)(b) provides for the refusal of disclosure of information obtained in confidence and, in its material part, reads as follows:

> "Subject to this section, a head shall refuse to grant an FOI request if—
>
> (a) […],
>
> (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 […] or otherwise by law."

32. Section 35(2), provides that the Act does not apply to confidential records in certain circumstances:

"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."

33. That subsection is the subject of the cross-appeal.

34. Section 36(1)(b) of the Act makes broadly similar provision for the refusal of an application to disclose commercially sensitive information and the material part reads as follows:

"Subject to subsection (2), a head shall refuse to grant an FOI request if the record concerned contains—

(a) [….],

(b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation,

(c) […]."

Public interest override

35. Both s. 35 and s. 36 contain provision in broadly identical terms for a public interest consideration which may result in disclosure of records which would otherwise be exempt on account of containing confidential or commercially sensitive information.

36. Section 36(3) is as follows:

"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."

37. The override operates somewhat differently in regard to information obtained in confidence and s. 35(3) limits the public interest consideration to records to which s. 35(1)(a) apply:

> "Subject to section 38, subsection (1) (a) shall 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 concerned."

38. Section 35(1)(a) exempts records containing:

> "information given to an FOI body, in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body".

39. The override does not apply, with some exceptions, to information the disclosure of which would breach a duty of confidence in an agreement, an enactment, or otherwise by law.

40. The operation of these two subsections which created, in the words of Fennelly J. in *Rotunda Hospital v. Information Commissioner* [2011] IESC 26, [2013] 1 IR 1, at p. 34, the "exception to the exemption from disclosure" is the main focus of the appeal.

41. The present appeal concerns primarily the public interest override contained in s. 36(3).

Procedure to be followed by FOI bodies when considering public interest: s. 38

42. Section 38 of the Act sets out the procedure for notification and consultation with third parties to be followed by an FOI body when consideration is given to the release of records on account of public interest.

43. When the FOI body is of the opinion that public interest would, on balance, be better served by granting the FOI request to access records of commercially sensitive information or confidential records, it must notify in writing or in such other form as may be determined the person to whom the information relates or the person who gave the information to the FOI body, who may thereafter make

submissions within three weeks, which the FOI body must take into consideration "before deciding to grant the request": s. 38(4)(a).

44. Time limits for the stages of this procedure are provided in the balance of s. 38. No procedure is provided for any input from the requester to make representations at this stage.

45. The s. 38 consultation procedure applies in relation to information obtained in confidence within the meaning of s. 35(1)(a), pursuant to s. 35(3), to personal information under s. 37 when the public interest favours the granting of an FOI request, and in relation to information which is commercially sensitive, pursuant to s. 36(3), whereas it does not apply to information obtained in confidence so qualified under s. 35(1)(b) of the Act. This is clear from the definition of "request" for the purposes of s. 38 in the first sub-s.:

> "In this section 'request to which this section applies' means an FOI request to which section 35(3), section 36(3) or section 37(5)(a) applies and which, apart from this section, would fall to be granted."

The statutory presumption: principles to be adopted to exemptions

46. Section 22(12) of the Act creates a statutory presumption in favour of disclosure on a review:

> "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."

47. The interplay between the mandatory exclusion of access in ss. 35(1)(b) and 36(1)(b) and the presumption which favours release read in the light of s. 11(7) is at the centre of this appeal.

48. The Commissioner argues that s. 22(12)(b) means that any refusal to grant access under an FOI request is presumed not to be justified unless proven justified, and that the presumption applies even

to records classed under the Act as "exempt". The Commissioner essentially says that notwithstanding that the head of the FOI body is mandated by the clear language of ss. 35(1) and 36(1) to refuse a request for access, he or she must still justify a refusal to release and this will often involve a consideration of the public interest override in ss. 35(3) and 36(3) and how the head addressed the public interest in his or her decision.

49. This argument was made in the light of the broad purpose and philosophy of the Act that the public be afforded a right of access to certain records, but also from the fact that the Act could readily be circumvented were the head of the FOI body to himself or herself make a determination that a record was commercially sensitive or confidential and thereby avoid the obligation to justify that decision to the requester and, on review, to the Commissioner.

50. The Commissioner argues that there is nothing opaque or unclear about the provisions of s. 22(12)(b), which provide that a "decision to refuse to grant" access to a record is presumed not to be justified. In *Rotunda Hospital v. Information Commissioner*, at p. 78, Macken J. described that as a "very clear statement which, on its face, appears to apply to all decisions", but went on to cast some doubt on the literal meaning of the phrase and how it might work in practice.

51. The question may be put thus: if a record is correctly identified as "exempt" following the process in the Act, does s. 11(7) mean that it may not be disclosed? Or does s. 22(12) require on a review by the Commissioner that the head of the FOI body must justify the refusal by doing more than simply saying that the records are exempt? This engages considerations on the interplay between s. 11(7), the provisions making it mandatory for the head of the FOI body to refuse access to a record exempt by reason of confidentiality (s. 35) or because it is commercially sensitive (s. 36), and the public interest override found in ss. 35(3) and 36(3), when read in the light of the presumption created by s. 22(12).

52. It also engages the question of the practical effect of the presumption and the consequence of a failure to justify refusal.

53. The difference between the parties may essentially be boiled down to one proposition. The Commissioner argues that the presumption contained in s. 22(12)(b) by which a refusal of an FOI request is presumed not to have been justified means that the head of the FOI body must still justify refusal to disclose exempt records. The decision of the Court of Appeal, reversing that of Noonan J. in the High Court, is that once a record falls within the exempt categories identified in ss. 35 and 36, the presumption that disclosure is not justified plays no part. That is the proposition for which the respondent Minister contends.

Background facts

54. The judgment of Noonan J. set out the factual background in which this dispute arises. The State is the owner of the fibre optic cable infrastructure known as "Metropolitan Area Networks" or "MANs" developed under the Regional Broadband Programme of the Department of Communications, Energy and Natural Resources ("the Department"), which constitutes an important State-owned asset. Telecom operators utilise MANs to provide telephone and broadband services to their customers on commercial terms.

55. In 2009, following a tendering process, E-Nasc Éireann Teoranta, the second notice party (known as "enet") entered into an agreement with the Department to operate the wholesale business of providing access to MANs to retail telecoms operators.

56. On 2 January 2015 Gavin Sheridan, the first notice party, made an FOI request to the Department in respect of four numbered categories of records, one of which pertains to the contracts between the Department and enet. The other three categories were agreed to be disclosed, and this appeal concerns only the fourth ("the Concession Agreement"), set out in the FOI request as follows:

> "any contracts from 2009 between the Department and enet in relation to the provision of broadband services via [MANs]".

57. The request of Mr Sheridan came to be dealt with by the FOI unit of the Department and in its first communication with Mr Sheridan two persons nominated to handle his request were identified and their contact details provided.

58. A response was received from the information officer of the Department on 4 January 2015 advising Mr Sheridan that some of the records requested might affect the interests of third parties and that the writer was considering whether the material would be required to be disclosed in the public interest. Mr Sheridan was advised that enet had been requested to make submissions under s. 38 of the Act and that were submissions to be received, they would be considered within the timeframe set out.

59. By a long letter of 3 February 2015, enet responded to the request for observations made by the decision-maker. It submitted that the Concession Agreement was "particularly commercially sensitive" and fell therefore within s. 36 of the Act, and did not fall for release. The factual basis for this assertion was that the release of those records "could prejudice" enet, and "might result in a material financial loss" to it. The letter relied on previous decisions of the Commissioner in which it was held that if disclosure "could prejudice the competitive position" of the requested body, disclosure should not be directed. It was argued, also in reliance on a previous decision of the Commissioner, that the standard of proof to meet the exemption is "relatively low" and that the test was not whether harm is certain to materialise but whether it "might do so".

60. The letter then went on to submit that the public interest was not better served by granting the request, and that no public interest had been identified which served to override the exemption. Reliance was placed on the decision of the Commissioner in *Henry Ford & Son Ltd and the Office of Public Works (Case No. 030897)*, 2 December 2003, which reasoned that there was a legitimate public interest in persons being in a position to conduct commercial transactions without fear of suffering commercially.

61. It was argued also that disclosure of the records sought would provide an "incomplete picture in respect of the obligations of enet" to the Department as disclosure of the Concession Agreement alone would give an "unbalanced picture" of the relationship between enet and the Department as certain less obvious, but still materially relevant, benefits accrued to the Department under its terms.

Finally, it was argued that any advantage in disclosure in the public interest would be outweighed by the "real risk of commercial harm".

62. That response was sent to Mr Sheridan for comment, but no record of any response is shown in the exhibits.

63. Thereafter, by email of 16 February 2015, the Department refused the request for two reasons. First, that a "duty of confidence" between the parties to the Concession Agreement would be breached by releasing the documents: s. 35(1); and second, that the release of the Concession Agreement "could have a negative impact on the ability of enet to continue the business of managing [MANs] on behalf of the State in a competitive environment and could result in a material financial loss to the company": s. 36(1) and (2).

64. Mr Sheridan was told that an appeal lay to the Commissioner within ten days (but see s. 22(4)(a) of the Act: "not later than 2 weeks after the notification of the decision") of the date of the notice.

65. Mr Sheridan replied asking whether the decision-maker had "carried out a public interest test in relation to the exemption". He argued that there exists a clear public interest in knowing how much had been spent on the contracts. He also queried whether the correct next step was an internal review rather than an appeal to the Commissioner but after correspondence both with the Department and the Commissioner it became apparent that a direct appeal to the Commissioner without exhausting internal remedies was available.

66. The review of the decision of the Department then proceeded before the Commissioner under s. 22(2) of the Act and all the correspondence up to the date of the decision to refuse was furnished to him.

Process engaged by the Commissioner

67. In his letter inviting submissions, the Commissioner pointed to the provisions of s. 22(12)(b) of the Act which, he said, placed an onus on the FOI body to satisfy the Commissioner that its decision to refuse to grant a request was justified, and that, as a consequence, failure to justify a claim for exemption may lead to a decision by the Commissioner to release the records. The Department was

also invited to make any submission regarding any duty of confidence either embodied in an agreement, derived from statute, or otherwise by law (the cross-appeal).

68. The Commissioner made direct contact with enet, which confirmed that it opposed any disclosure, on the argued grounds that the contracts were "commercially sensitive and disclosed both operational and commercial arrangements which were awarded after an invitation to negotiate". The reasons were stated to be those already submitted to the Department on 3 February 2015.

69. The Commissioner sought copies of the Concession Agreement for the purposes of assessing whether the decision to refuse access was justified.

Response from the Department

70. Submissions from the Department received on 25 May 2015 said that following an open tender process, enet had secured two contracts, in July 2004 and in July 2009, to manage, market, and maintain MANs on behalf of the State, and that under s. 35(1)(b) of the Act, disclosure would constitute a breach of the provisions of Clause 32 of the Concession Agreement that the parties should "keep confidential this Agreement and all matters relating to this Agreement". It argued, therefore, that s. 35(1)(b) had the effect that the Department was obliged to refuse access.

71. As regards the commercial sensitivity exception, it was submitted that, by virtue of s. 36(1)(a) of the Act, the disclosure of the documents would have the effect of "penalising" enet for transacting business of the State, and could act as a disincentive to any future potential bidders for the contract if a potential bidder was aware that commercial dealings could "end up in the public domain".

72. The letter said that public interest factors had been taken into account and the competing interests identified for the purposes of s. 36(3) of the Act. The interests said to support release were the public interest in enhancing accountability of Government, of the State generally, and of local government agencies, and that of ensuring accountability in regard to expenditure. Against release, it was argued that no overriding public interest existed, that the release of any contractual or financial information of enet "could prejudice its competitive position", and that the State's "position" in future competitions could be undermined if potential bidders knew that the public could become aware of

sensitive information contained in a contract of the State, and that this, in turn, "could cause serious harm" to the State's ability to attract bidders for infrastructure projects. It was also argued that enet had itself made a "strong case" that the information should not be released.

73. Without prejudice to its general assertion that the entire Concession Agreement was commercially sensitive and had been entered into on the basis that confidentiality was assured and was expressly provided for in the Concession Agreement, redactions to the contracts were proposed by enet so that the most commercially sensitive information would not be disclosed. As it operated in the very competitive wholesale market, and because other operators in the market offered similar services over the networks they own, enet argued that the competitors could, as a result of any disclosure of the information, gain an advantage in a future competition or that disclosure could result in customers requesting price reductions.

The decision of the Commissioner

74. In a lengthy decision of 30 November 2015, the Commissioner varied the decision of the Department. He directed the release of the Concession Agreement, except for those parts he found to be exempt (Schedule 4, Schedule 16, and Schedule 21), which the requester accepted, and which do not give rise to any conflict at this point in time.

75. The Commissioner analysed the request primarily under the provisions of ss. 35 and 36 of the Act. He noted that there was a significant overlap between the confidentiality and commercial sensitivity provisions in the two sections.

76. With regard to the confidentiality exemption, his analysis is relatively short. He was satisfied that the release would not breach any duty of confidence. The primary reason given was that the parties could not have had a mutual expectation of confidentiality in the light of s. 35(2) of the Act which "disapplies section 35(1) in the case of agreements between public bodies and service providers", and because Clause 32(2) of the Concession Agreement expressly disapplies the confidentiality expectation where an obligation to disclose is required under the Act, albeit that the Department is required, under that clause, to use reasonable endeavours to prevent disclosure should

a request be made under the Act. The Commissioner, in essence, took the view that the parties could not have reasonably expected that the terms and conditions of the Concession Agreement would have remained confidential. He also noted that the initial view of the Department was that the record would be released, and that this undermined "any assertion that the parties could have felt bound by a mutual expectation of confidentiality".

77. The Commissioner considered nonetheless that, on the facts, s. 35(1) did not apply and the records could not be properly described as confidential. His conclusion, therefore, was that the Department was not justified in refusing access under the confidentiality exemption. That approach is the subject of the cross-appeal.

78. With regard to the commercial sensitivity exemption, the Commissioner approached the analysis by reference to the interests of each party. He held that the first limb of s. 36(1)(b) required only a "reasonable" expectation of harm, a standard he regarded as "not a particularly onerous one" as "[a]ll that is required is the possibility of prejudice". He was not satisfied that there was a "reasonable expectation of material loss accruing to the third party". He accepted nonetheless "in broad terms" that the possibility of prejudice test was met as customers could seek to use the information in the contract to their advantage, thereby "prejudicing enet's competitive position". He therefore went on to consider whether the public interest might still justify disclosure by reason of s. 36(3) of the Act.

79. His conclusion was that it was in the public interest that the information be disclosed because MANs are a valuable State asset, and that there is a significant public interest in openness and transparency in contracts entered into by public bodies. He said that the parties had not pointed to "any exceptional circumstances" which would override the need for transparency, and that the information did not appear on the facts to "automatically benefit" future tenderers, as it was a contract for one phase of MANs, and future phases or requirements might differ. His third finding was that releasing the documentation was not likely to "totally undermine" enet's business, and, in this, he

followed the approach in *Eircom Plc., And Department of Agriculture and Food (Case No. 98114)*, 13 January 2000.

80. He found, therefore, that the Department had not shown justification to refuse disclosure in the light of the overall statutory purpose of achieving "greater openness" in the activities of State bodies, so as to "inform scrutiny, discussion, comment and review by the public of their activities". He adopted a phrase used by Macken J. in *Rotunda Hospital v. Information Commissioner*, at p. 76, that the public interest is a "true public interest recognised by means of a well-known and established policy, adopted by the Oireachtas, or by law."

81. I will return later to deal in detail with the decision of the Supreme Court in *Rotunda Hospital v. Information Commissioner*.

The statutory appeal to the High Court

82. The Minister appealed to the High Court pursuant to s. 24(1)(a) of the Act, by originating notice of motion of 23 December 2015, seeking an order setting aside the decision of the Commissioner or, in the alternative, affirming the decision of the Minister to refuse disclosure. The Commissioner opposed the appeal, and enet and Mr Sheridan were named as notice parties.

83. Noonan J. identified two core propositions, the first being the applicability of the presumption under s. 22(12)(b) to "exempted" records and the second whether the Commissioner was correct that exceptional circumstances must exist to justify a refusal to disclose, which is argued to set too high a bar for any justifying reasons or explanations, at para. 25.

84. On the first point, Noonan J. held that the provisions of s. 22(12)(b) meant that records which are exempt under Part 4 of the Act do fall to be considered in the light of the presumption that refusal was not justified, and that the presumption meant that the head of the FOI body had to justify the refusal to disclose even records identified as exempt under Part 4.

85. The parties had agreed that the information was commercially sensitive such that s. 36(1)(b) had the effect that the Minister was mandated to refuse the request. That being so, the request came to be considered in the context of s. 36(3), the public interest override. Noonan J. agreed with the

test applied by the Commissioner, *i.e.* that he required the Minister to justify the refusal by showing exceptional circumstances sufficient to justify the refusal, and relied on the decision of McGovern J. in *Minister for Education v. Information Commissioner* [2008] IEHC 279, [2009] IR 588, and of O'Donovan J. in *Minister for Agriculture v. Information Commissioner* [2000] 1 IR 309. Both judgments concluded that it was only in exceptional cases that access should be denied, and Noonan J. considered that this case law established that the onus was on the Minister to demonstrate exceptional circumstances to justify the refusal, even of commercially sensitive information.

86. I agree with the argument made by counsel for the Minister that, insofar as the High Court regarded the Commissioner as correct to apply the test of "exceptional circumstance" in reliance on the judgment of McGovern J. in *Minister for Education v. Information Commissioner* or of O'Donovan J. in *Minister for Agriculture v. Information Commissioner*, the reference was to "exceptional cases" not "exceptional circumstances". These decisions do not offer any assistance in the instant case, and the language used in both judgments reflects the end result of the application of the test and not that a high bar is required.

87. Noonan J., having analysed the judgment in *Rotunda Hospital v. Information Commissioner* and the judgment in *Westwood Club v. Information Commissioner* [2014] IEHC 375, [2015] 1 IR 489, where Cross J. held that the presumption applied to all records including those exempt under Part 4, came himself to the conclusion that the Commissioner had adopted the correct approach to the record.

88. The Minister appealed, and the Court of Appeal delivered its judgment reversing the decision of Noonan J.

The *dicta* of Macken J. in *Rotunda Hospital v. Information Commissioner*

89. The Court of Appeal considered that Noonan J. had erred in his conclusion that refusal to disclose exempt records required to be justified. The difference between the parties on the interpretation and application of the presumption under s. 22(12)(b) of the Act stems in part from the

decision of the Supreme Court in *Rotunda Hospital v. Information Commissioner*, and in particular from the judgment of Macken J., where she said:

> "[258] A separate argument of a more general nature is made by the respondent that she was entitled, in considering the application of s. 26(3) [now s. 35(3)], to have regard to the provisions of s. 34(12)(b) of the Act [now s. 22(12)(b)]. It provides:
>
> > '[A] decision to refuse to grant a request under section 7 shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified.'
>
> [259] This is a very clear statement which, on its face, appears to apply to all decisions. I have no difficulty in its application to all circumstances covered by the right of access in s. 6(1) [now s. 11]. I have a significant difficulty in its application to requests made in respect of information exempt from disclosure under Part III of the Act, which by statute mandates a refusal, and to which no right of access exists" (emphasis added), at p. 78.

90. Some time was taken up in the course of this hearing, and, it seems, also in the hearing before the High Court and the Court of Appeal, as to whether this observation of Macken J. was *obiter*, although Macken J. prefaces her observations by describing them in para. 250 as "wholly *obiter"*. As Noonan J. said, her comment is also at odds with the views of Fennelly J. at p. 29 *et seq*. of the report, where he accepted that the presumption applied to the facts of that case.

91. Birmingham P. was not prepared to dismiss the observation of Macken J. as a mere *obiter* comment and was of the view that there was no material divergence between her approach and that of Fennelly J. in the decision. He noted for that purpose, at para. 22, that Murray C.J. and Hardiman J. agreed with both judgments:

> "If there was, in fact, the divergence between Fennelly and Macken J. that the Commissioner suggests, I think it would have been inconceivable that Murray CJ and Hardiman J. would have agreed in both judgments."

92. Having taken that view, Birmingham P. held that the Commissioner was wrong to formulate his conclusions on the basis that the presumption in s. 22(12) meant that the head of the FOI body had to justify refusal and his or her reasoning on the public interest override. He also considered as a separate finding that the test proposed by the Commissioner set too high a bar when he required that the justifying reason had to demonstrate that the release of the record would "totally undermine" the business of enet, at para. 33.

93. I would not be prepared to formulate a view as to the cogency or binding nature of the observations of Macken J. merely on account of the fact that two other judges of the Supreme Court agreed with her conclusions, as their agreement could properly be said to be an agreement with the result rather than all or any specific part of her reasoning. In my view, it must be relevant that Macken J. herself described her comment as *obiter*.

94. The concern she expressed was not part of the *ratio* of the case, and there was no further analysis of her observations or of the interplay between the provisions of the equivalent of s. 22(12) and the provisions that mandated refusal of disclosure of records classed as exempt, and the public interest override.

95. But further comment is warranted. The proposition that the statutory provisions requiring justification and placing the onus on the FOI body excluded exempt records is difficult to reconcile with the plain words of the statute, and Macken J. said as much where she described the subsection as "a very clear statement which, on its face, appears to apply to all decisions". No ambiguity in the language was identified, nor am I able to discern an ambiguity that might justify a departure from the plane express language of the section. I agree therefore with the Commissioner that the Court of Appeal was wrong to endorse the comments of Macken J. without reference to the provisions of s. 5 of the Interpretation Act 2005 and that a court should not lightly depart from the literal words in a statute: see, for example, the recent judgment of this Court in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, [2012] 2 ILRM 392.

96. It could also be said that the discussion of Macken J. was more concerned with how the presumption would work in practice, and her concern was with how the head of the FOI body might go about furnishing a justification to refuse disclosure of a record. Her example concerned a class-based exemption in s. 19(1)(a) of the 1997 Act, records of Government meetings, and the evidential difficulty that might raise. These records are now excluded from the Act in Part 5. The test in the Act regarding records exempt under Part 4 and those excluded under Part 5 must, in my view, be different, and no evidential difficulty is apparent in the harm-based exemptions where the assessment by the head of the FOI body must test the degree of harm likely to be caused by disclosure, and assess whether prejudice could be caused to the competitive position of the person to whom the information relates.

97. The interpretation that Macken J. somewhat tentatively, therefore, posed was not adopted by Fennelly J., with whom Hardiman J. and Murray C.J. agreed, although it is to be noted that Murray C. J. also agreed with that of Macken J., where he said in express terms at paras. 87 *et seq.* that a burden lays on an FOI body refusing a request to justify its decision:

> "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 that supports its position."

98. It is true that Fennelly J. was there considering the question of whether a new point of law could be advanced on scene, but his approach to the applicability of the presumption is clear too from para. 96 where, having identified the principal object of the Act as "open access", he went on to say that it "proceeds on a presumption of disclosure", and:

> "This is best exemplified by s. 34(12)(b) [now s. 22(12)(b)] which provides that, where a decision by the public body to refuse access is being reviewed by the respondent, 'a decision to refuse to grant a request under section 7 [now s. 12] shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified'."

99. The Court of Appeal did not analyse the approach to the presumption in other authorities, including that of Cross J. in *Westwood Club v. Information Commissioner* which contains a detailed analysis of the relevant authorities and where he said, by reference to the statutory presumption, that the burden of establishing why documents should not be released lay on the public body, although this seems to have been conceded at para. 41 (but see para. 107). More significant is the failure to have regard to the decision of this Court in *Sheedy v. Information Commissioner* [2005] IESC 35, [2005] 2 IR 272, which approached the matter of disclosure by requiring the public body to justify refusal to disclose, again by reference to the statutory test.

100. At para. 78, Kearns J., with whom the majority of the Court agreed, (Fennelly J. dissenting on another point) said:

> "The onus to produce evidence of prejudice fell on the first notice party and in the absence of same the respondent was entitled, under s. 34 of the Act of 1997, to hold against the first notice party. A mere assertion of an expectation of non-co-operation from teaching staff could never constitute sufficient evidence in this regard, particularly in the circumstances shown to apply, namely, that as a consequence of both circular no. 12/83 and s. 13 of the Act of 1998, there was no choice left to schools or their staff as to whether or not to co-operate with the first notice party's inspectors in terms of furnishing the information sought."

101. A similar approach was taken by Quirke J. in *Gannon v. Information Commissioner* [2006] IEHC 17, [2006] 1 IR 270, where he held, at p. 278, that the Commissioner had "correctly applied a presumption of non-justification to the decision of the Board [the relevant FOI body] not to grant access to the documents sought."

102. Finally, Finlay Geoghegan J., with whom the other members of the Supreme Court agreed, in *Minister for Health v. Information Commissioner* [2019] IESC 40, at para. 66, said the following:

> "The Commissioner in his submissions is correct that there is an onus on a head of department to satisfy the Commissioner that the decision to refuse was justified. In this instance, the decision was that the transcript requested was not a record held by the Department within the

meaning of s. 6(1). This was sought to be justified, *inter alia*, by reason of the fact that the Department had been advised (and by implication accepted that advice) that 'the records are not in the control of this Department and cannot be accessed or released by the Department under FOI legislation.' The factual basis for that purported justification was the status of the Reviewer having conducted an independent review and the matters stipulated by him when furnishing sealed boxes of documents, which included the transcript sought by the first named notice party."

103. That judgment concerned an entirely different question from the one at issue in the present appeal, namely whether a record was "held" by a public body, but Finlay Geoghegan J.'s *obiter* comments are of note.

104. Taking all of these considerations into account, and noting that support is given by the judgements above mentioned for an approach to the Act that treats the presumption in favour of disclosure and against refusal as applying to all records, save those excluded from the Act under Part Five, and that this approach to the presumption is consistent with the general philosophy of the Act which favours openness and transparency in public bodies and fosters this by means of enabling members of the public to access records, I must conclude that the comments of Macken J. are *obiter* and that they do not provide a useful basis on which to resolve the role of the presumption in a review by the Commissioner of the decision to refuse access. The approach of the Court of Appeal which took her *obiter* comments as a starting point must, therefore, be incorrect.

105. For the reasons which will later appear in this judgment I also do not consider that her comments represent the law.

106. Before dealing with the arguments in the appeal, I will first consider the standard of review in a statutory appeal such as the one under s. 24 of the Act.

The nature of the appeal under s. 24

107. While this point seemed to have played some part in the appeal before the Court of Appeal, where it was argued that the trial judge had fallen into error by affording deference to the decision of

the Commissioner and by applying judicial review standards, it did not engage much time in the oral submissions on the appeal to this Court, primarily, it would seem, because the question is well settled and there was no dispute between the parties as to the relevant test.

108. It is well settled in recent and authoritative decisions of this Court that a test which differs from classic judicial review may apply in a statutory appeal on a point of law, and Clarke J., as he then was, in *FitzGibbon v. Law Society of Ireland* [2014] IESC 48, [2015] 1 IR 516, at p. 560, suggested that "there must be some difference between even the most restrictive form of appeal (being an appeal on a point of law only) and a judicial review". The present case does not concern any argument that the Commissioner might have fallen into a so called "error within jurisdiction", and the question for consideration is whether his interpretation of the legislative presumption and its role in a decision to refuse to release records to which ss. 35 and 36 apply was correct, as a matter of law.

109. The principles applicable to an appeal on a point of law from the Commissioner were set out by McKecknie J. in *Deely v. Information Commissioner* [2001] 3 IR 439, at p. 452, a case which concerned an appeal under the equivalent provision of s. 24 in the old legislation:

> "There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or *via* a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-
>
> (a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;
>
> (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
>
> (c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;
>
> (d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision […]."

110. The point made at (d) is most material to the present appeal.

111. This passage was later cited in the Supreme Court judgments of both Fennelly and Kearns JJ. in *Sheedy v. Information Commissioner*, and most recently, by Clarke J. at para. 7.3 of his judgment in *Fitzgibbon v. Law Society of Ireland* where, at p. 559, para. 128, he went on to say:

> "In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. First, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decisionmaker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)."

112. The present appeal concerns a question of statutory interpretation. There is therefore no room for deference to the decision-maker, and the focus is not whether there was evidence to support the decision of the Commissioner, or whether he exercised a discretionary power lawfully. The question is solely whether the Commissioner was right in his approach to the legal effect of the presumption on his review of the decision to refuse disclosure, the approach described by O'Donnell J. in *Revenue Commissioners v. O'Flynn Construction Company* [2011] IESC 47, [2013] 3 IR 533, at p. 562.

113. McKechnie J. considered the issue at some length in *Attorney General v. Davis* [2018] IESC 27, [2018] 2 IR 357, and his discussion points to the distinction between errors of law and errors that would give rise to judicial review, including "illegality, irrationality, defective or no reasoning, procedural errors of some significance, *etc.*", at p. 385. The present appeal falls within the first category.

114. In summary it may be said that an appeal from the decision of the Commissioner under the Act invokes the following propositions:

(a) no deference is due to the Commissioner insofar as an appeal raises a matter of statutory interpretation or otherwise an issue of pure law;

(b) as with any appeal on a point of law, deference would be shown to a decision of the Commissioner in the exercise of discretion, or where what is in issue is the application of his or her expertise. These types of decisions are more akin to decisions on facts;

(c) the hearing is not a *de novo* hearing, but an appeal on a point of law where there are many of the characteristics of judicial review, see White J. in *Irish Life And Permanent Plc v. Financial Services Ombudsman* [2011] IEHC 439, at p. 2;

(d) sometimes therefore the test will be akin to the one laid down in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39, but not when what is in issue is a matter of law, including statutory interpretation (see, for example, the *dicta* of Kearns J. in *Sheedy v. Information Commissioner***,** at para. 79: "Once there was some evidence before [the Commissioner] as to the circumstances in which these reports are compiled, as undoubtedly was the case here, the well-established principles of *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 make it clear that his decision is not to be interfered with").

115. The trial judge did not afford unwarranted deference to the decision of the Commissioner and he seems to me to have applied the correct approach to an appeal on a point of law as herein identified. I do not, in fact, interpret the judgment of Birmingham P., at para. 12, as making a finding that the trial judge was "over-influenced by judicial review concepts" and the conclusion drawn was that the trial judge did not defer to the Commissioner and did not apply judicial review principles. At its height, the Court of Appeal expressed "concerns" as to the approach taken. I have addressed the general point regarding the correct approach, as the comment made by the President of the Court of Appeal is capable, in principle at least, of casting some doubt on the matter.

Was a new point of law argued?

116. The Commissioner's sixth ground of appeal is that the Court of Appeal was wrong in permitting the Minister to "make and rely on arguments it had not made before the Commissioner".

117. That arguments relied on in a statutory appeal pursuant to s. 24 of the Act must have been before the Commissioner during the decision-making process is established in a number of decisions of the Superior Courts: see the judgment of Fennelly J. in *Rotunda Hospital v. Information Commissioner*, at p. 29, where he stated:

> "Although s. 42(1) [now s. 24(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."

118. Section 24 of the Act provides for an appeal on a point of law "from the decision". This suggests in plain terms that no new point of law shall be raised before the High Court. The authorities show, however, that "point of law" has a broad meaning so that any legal principle expressly or implicitly relied on by the Commissioner in his decision is not to be treated as "new". The *dicta* of both Macken and Fennelly JJ. in *Rotunda Hospital v. Information Commissioner* respectively refer to a point of law "involved in the decision" and "arising out of the decision". In particular, I would quote from Macken J., at p. 79:

> "Under s. 42 [now s. 24] a party may appeal from the [Commissioner's] decision to the High Court on a point of law. Quite clearly, this should be confined to points of law *arising out of her 'decision'* and not from something outside its boundaries, upon which she naturally has made no decision at all. Apart from the implied meaning arising from s. 42 [now s. 24], in any event, the general law requires that a party will bring forward, at least in the context of legal proceedings, his entire case, so that there is no incremental decision making process, and by analogy it seems to me appropriate to find that, save in some exceptional circumstance, which does not appear to arise here, the appellant was obliged to bring forward before the respondent, all points of law upon which it wished to rely, including any point concerning the applicability

or otherwise, of the provisions of the Act to a record created in 1922, and therefore before its commencement" (emphasis added).

119. Counsel for the Minister put some reliance on the fact that the Department was not legally advised in the review by the Commissioner and argues that if the requirement were to be strictly interpreted, any prudent party would engage lawyers before making any submission to the Commissioner because any point of law not previously raised before him would not be amenable to review in the High Court. It is argued this would add a layer of expense and complexity not always justified on the facts.

120. An approach that permits an appeal on a point of law *arising from* a decision, rather than a strict approach that requires the point to have been expressly mentioned, is sensible and reflects the fact that the parties at the stage of the first instance decision may not often engage lawyers to act on their behalf and the language used in a request, in submissions, or in a decision may not always bear scrutiny as if it were drafted by a lawyer. Some flexibility in the analysis of the meaning of what was decided, and whether that involved a point of law involved in or stemming from the decision seems to be warranted in those circumstances.

121. In his decision in the present case, the Commissioner did rely on the presumption under s. 22(12)(b) of the Act and its effect, and accordingly, the point concerning the operation of the presumption was validly before the High Court and the Court of Appeal, and is now properly before this Court, notwithstanding that the presumption was not contested or even relied upon by the Minister in argument before the Commissioner.

122. I can discern no error in the approach to this question of the Court of Appeal.

Three main issues in the appeal

123. The first substantive issue in the appeal relates to the interpretation and application of the s. 22(12)(b) presumption and requires an analysis of the right of access created by the Act (grounds of appeal no. 1, 2, 3, 4, and 5).

124. A second issue (grounds of appeal no. 8, 9, and 10) is whether, in justifying a refusal, the head of an FOI body must show that exceptional circumstances exist to displace the public interest in disclosure. In other words, the test for the application of s. 36(3).

125. The third issue is the interpretation of s. 35(2), which is the subject matter of the cross-appeal brought by the Minister.

126. It is convenient to recite here the provisions of the Act which create the right of access, namely those contained in s. 11(1):

> "Subject to this Act, every person has a right to and shall, on request therefore, be offered access to any record held by an FOI body and the right so conferred is referred to in this Act as the right of access".

127. Having created the right of access to certain records, s. 11(3) of the Act sets out the broad principles which are to operate in a response to a request.

128. The FOI body shall, in considering a request for disclosure of records, have regard to the need to "achieve greater openness" in its activities to "strengthen the accountability and improve the quality of decision-making" of the body, and "the need to inform scrutiny, discussion, comment and review by the public of the activities" of the body, and facilitate "more effective participation by the public in consultations relating to the role, responsibilities and performance of FOI bodies".

129. These principles reflect the philosophy and broad purposes of the Act, considered in a number of recent judgments of the Superior Courts (see the judgment of McKechnie J. in *Sheedy v. Information Commissioner*), the perceived desirability of creating openness and transparency in public bodies and to provide the tools by which members of the public may engage in informed scrutiny.

130. But the right of access is not absolute, and s. 11(7) provides that the right of access created by s. 11(1) does not apply to an exempt record, *inter alia*, when the exemption is mandatory.

131. Section 11(7) serves to clarify that the right is not absolute and makes general provision for the mandatory exemptions of certain records and the discretionary power to refuse. It reads as follows:

"Nothing in this section shall be construed as applying the right of access to an exempt record—

(a) where the exemption is mandatory, or

(b) where the exemption operates by virtue of the exercise of a discretion that requires the weighing of the public interest, if the factors in favour of refusal outweigh those in favour of release."

132. Provision is also made in s. 11(11) for the redaction of certain parts of a record prior to release.

The role of the presumption in the statutory scheme

133. While s. 11 declares that every person has a right to be offered access to records, that section does not operate as an absolute right to access, and exempted records are to be treated as exempt. Part 5 of the Act provides a category of documents which are always exempt, in respect of which, for example, there is no public interest override. The operation of the Act is restricted with regard to those documents. Records "exempt" under Part 5 are outside the scope of the Act. In *Deely v. Information Commissioner*, at p. 458, McKechnie J. observed that "[…] the provisions of the Act […] have no application to the documents listed therein save only as to the qualification contained within such listing." The decision to refuse comes once an FOI body qualifies a record as falling under Part 5.

134. Sections 35 and 36 are contained in Part 4 which provides an exemption but where disclosure may still be made in the public interest. While it can be said that the head of the FOI body is mandated to refuse to grant a request to the records described in s. 36 (commercially sensitive) and s. 35 (confidential), a reading of the sections shows that the language by which the records are described involves some assessment and evaluation of not just their contents but also of the likely impact of their disclosure.

135. In the case of commercially sensitive information for which s. 36(1)(b) provides, the exemption from disclosure is mandatory only if disclosure could reasonably be expected to result in material financial loss or gain, or, in the circumstances which the Commissioner decided prevailed in the present case, could prejudice the competitive position of the person to whom the information relates.

Therefore, the exemption is not self-executing, the exercise does not involve the head of the FOI body identifying commercially sensitive documentation and automatically excluding that documentation from disclosure, but rather, after the records have been identified, coming to a view regarding the threshold requirements. Prejudice must be not merely to the competitive position of that person or body, but to the competitive position of that person in his or her professional business or otherwise in his or her occupation. The expectation of financial loss must be reasonably likely to result. There must be a link between disclosure, prejudice, and loss or gain to the relevant business interests. This is clear from a plain reading of s. 36(1)(b).

136. At that point a further step is engaged, the balance of the public interest against a decision to refuse: 36(3).

137. The Minister argues, and the Court of Appeal agreed, that s. 11(7) means that once records are assessed as being exempt under the Act, disclosure is not permitted, even where the public interest override might apply.

138. Section 11(7) does no more than provide for the treatment of records once they have been assessed following the process in the Act (s. 35 or s. 36) as exempt. It avoids a conclusion that the right of access will always defeat a decision to refuse disclosure. Although it does not seem to have been considered by the parties in their submissions, the equivalent section of the 1997 Act, s. 6(7) was simply as follows:

> "Nothing in this section shall be construed as applying the right of access to an exempt record."

139. It is noteworthy that s. 11(7) refers only to records that are *exempt* by reason of a mandatory exemption or to those where the decision is discretionary, which must mean "exempt" by reference to ss. 35(1) and 36(1). The treatment of records which are exempt in that sense is different to that applicable to those records which are more properly to be regarded as excluded because of the operation of the Act to such records: Part 5, s. 42.

140. The old s. 6(7) was less clear in its application. Section 11(7), in its plain terms, means that once a record is assessed to be exempt the broad principles of the Act which favour disclosure are

displaced and cannot be availed of to make an argument that openness and transparency might still lead to disclosure. In her *Freedom of Information Law* (3rd ed., Round Hall, 2015), at pp. 207 and 208, McDonagh states:

> "The Explanatory Memorandum to the 2013 FOI Bill states that the introduction of s. 11(7) was considered necessary on foot of the judgment in *Rotunda* and that it was designed "to clarify that there is a general right of access to records and they should be released unless they are found to be exempt, and in applying these exemptions the right of access was only to be set aside where the exemptions very clearly supported a refusal of access". The introduction of s. 11(7) therefore makes it clear that the Oireachtas supports a restrictive approach to the interpretation of the exemption provisions".

141. But it cannot be said that a record is exempt whether under s. 35 or 36 unless both limbs of the test for exemption in those sections are met: the records are commercially sensitive or confidential and the public interest does not, nonetheless, warrant disclosure.

142. Therefore, I am not able to read s. 11(7) of the Act, when read in conjunction with s. 35 or s. 36, as meaning that any record which is assessed as being commercially sensitive or confidential is automatically exempt, and that the assessment may not be scrutinised by the Commissioner on a statutory review. This has the consequence that the Commissioner, in reviewing the result of the conclusion of the evaluative process, is entitled to, and indeed must, approach the review on the basis that he must be satisfied that the conclusion reached by the head of the FOI body is properly reasoned and justifies the refusal.

The presumption in operation

143. Section 11(7) then precludes an argument that the general right of access can still lead to a decision to disclose exempt records. I do not consider that it does any more than clarify that the right of disclosure is not absolute. However, in the assessment of whether the exemption operates, s. 22(12) affords the Commissioner with an important tool by placing the onus on the FOI body to justify an assessment that records are exempt.

144. Fennelly J. in *Rotunda Hospital v. Information Commissioner*, at p. 31, said that an application under the Act "proceeds on a presumption of disclosure". He regarded the statutory presumption as exemplifying that approach.

145. Counsel for the Commissioner argues that the presumption is "the principal engine" of the Act, and that by requiring the head of the FOI body to justify a refusal to disclose, the public interest in the disclosure of information is protected and the requester is not put through a process of having to challenge a refusal when, in all cases, he or she is unlikely to have sufficient information about the records (and usually no information at all about their contents) to formulate an argument in favour of disclosure.

146. It might be said that the presumption was a necessary corollary to s. 11(7) in that, by reason of s. 11(7), the general principles underlying the Act cannot in themselves compel disclosure, but the presumption creates a means by which the applicability of the exemption in a given case is to be assessed. Without some tool such as that created by s. 22(12), the Commissioner might be said to lack the means to adjudicate whether a refusal to disclose meets the broad principles of the Act. Section 22(12) sets the framework within which the decision to refuse access is to be tested.

147. The Oireachtas chose to place an onus to justify a decision to refuse. It could have placed the onus on the requester or, indeed, on the Commissioner on review, but that option may not have met the philosophy of the legislation and the clear choice was to support the right of access by requiring justification of a refusal of access whilst at the same time presuming justified a decision to disclose. The consequence of this legislative choice is that a decision to refuse access must be made for justifying reasons.

148. With regard to s. 35(1)(b) the position is no different. That section makes exempt records the disclosure of which would constitute a breach of duty of confidence, whether contained in an agreement or arising from legislative provisions or otherwise by law. Again, the sub-section does not exclude all records obtained in confidence, but rather those records obtained in confidence where

disclosure would breach that duty of confidence. The evaluation must consider the meaning and import of the duty of confidence howsoever it arises.

149. An analysis of both ss. 35 and 36, therefore, leads me to the conclusion that s. 11(7) does not directly mandate a refusal but requires, in each case, that the decision-maker form a reasoned view as to whether the exemption applies to a particular document for a reason relevant to that document. The exemption, therefore, is not general, but should be considered in the light of the contents of each document and the impact of disclosure.

150. There will be cases when the analysis conducted by the head of the FOI body before he or she forms a decision that a record is confidential or commercially sensitive will lead to a reasoned conclusion which itself is a sufficient justifying reason to refuse a request. But there will be cases when the approach that the head takes to the records might differ depending on whether he or she approaches the question on the basis that a refusal is presumed to be unjustified on the one hand, or, on the other, on the basis that he or she assesses whether the record can properly be characterised as commercially sensitive or confidential.

151. Kearns J., delivering the majority judgement of the Supreme Court in *Sheedy v. Information Commissioner*, said the following, at p. 299:

> "The onus to produce evidence of prejudice fell on the first notice party and in the absence of same the respondent was entitled, under s. 34 of the Act of 1997, to hold against the first notice party. A mere assertion of an expectation of non-co-operation from teaching staff could never constitute sufficient evidence in this regard, particularly in the circumstances shown to apply, namely, that as a consequence of both circular no. 12/83 and s. 13 of the Act of 1998, there was no choice left to schools or their staff as to whether or not to co-operate with the first notice party's inspectors in terms of furnishing the information sought."

152. However, the real difference in approach between the Commissioner and the Minister for the purposes of this appeal is that the Minister argues that in cases where records can reasonably be identified or characterised as commercially sensitive or confidential, no further justifying reasons are

required to show how the head of the FOI body has engaged the public interest override in ss. 35(3) and 36(3) of the Act.

153. There may also be cases where the head of the FOI body will establish that the exemption applies on the facts of the case or that the public interest override does not apply, but the position adopted by the Court of Appeal was that the sole question for consideration by the head of the FOI body is how to characterise the information in the record. The proposition advanced by the Commissioner is that even if a record is exempt under the Act, a refusal to disclose such a record is still presumed to be unjustified and refusal is to be justified by reason and analysis which asks whether the public interest could still result in disclosure.

154. The requirement that the head of the FOI body come to a conclusion that records are exempt is, in a sense, no more than a recognition that the decision or adjudication process of human reasoning rarely admits of an answer without some degree of understanding, analysis, and the formation of a conclusion. Very few, if any, decisions will flow automatically from a premise such that no reasoning is required. The presumption, therefore, has and plays an important part in the entire process by which a request for records is assessed because it recognises and makes express provision for the approach to the interrogation or review of that decision-making process, and provides the starting point that a decision to refuse is not justified unless justifying reasons are provided.

155. Some assistance comes too from the decision of Clarke J., as he then was, in *F. P. v. Information Commissioner* [2009] IEHC 574, at para. 43, where he pointed out that the exemptions are "to be interpreted restrictively and applied sparingly" as otherwise refusal might become the rule rather than the exception and could frustrate the primary objective of the Act.

156. The presumption, therefore, places an onus on the head of the FOI body to justify refusal, but that does not mean that the conclusion is always that disclosure is to be ordered, for reasons I will more fully explain below.

157. With that in mind, therefore, and while it might sound artificial, the head of the FOI body dealing with the request must identify the documents and characterise or classify them within one of

the sections of the Act, and thereafter make a determination whether they are to be released or not in the public interest, and in doing so must be conscious at all stages of the process that the overriding presumption is one of disclosure, with the result that any refusal to disclose must be fully reasoned and sufficiently coherent, fact specific, and logically connected to the document or record such that the justification is sufficient.

158. Further, an interpretation of the Act that relied solely on s. 11(7) to describe the manner of treating exempt records fails to have regard to s. 22(12). Section 22(12)(a) expressly makes reference to s. 38, which provides for the procedures to be engaged by the head of the FOI body in considering a request under ss. 35(3), 36(3), or 37(5)(a) of the Act. In plain terms, s. 38 provides the procedure when the head of the FOI body enters a consideration of whether the public interest would, on balance, be best served by disclosure, provides for notification to any person concerned, and sets out time limits for notification, the making of submissions, and the making of the decision whether to grant or refuse.

159. Thus, the structure of the Act tends towards disclosure, such that a decision to refuse is *prima facie* not justified, and the decision to grant it in the public interest is *prima facie* justified. I consider, therefore, that the two presumptions at play both favour, on a *prima facie* basis, the release of records, and those presumptions operate by the express language of s. 22(12)(a) to records "exempt" under Part 4, and in the case of a decision to refuse, to all decisions to refuse in respect of records within the scope of the Act, and therefore, *prima facie*, favour the request.

160. Read that way, the legislation clearly envisages the presumption operating in the case of a decision to grant, and equally in a decision to refuse, but almost as corollaries of one another, such that the right of access is supported.

What type of presumption?

161. It is useful to examine in more detail the effect the presumption has in the process. It cannot be said that the language of the Act provides for an inevitable or statutorily mandated outcome should the head of the FOI body fail to justify the refusal to disclose.

162. The legislation also cannot be said to create a legal burden where it is presumed, unless the contrary is proved or established, that certain consequences will flow, and it might also be noted that the Commissioner's statutory powers are wide and permit the annulment, variation, or affirming of the decision of the head of the FOI body. This means, in turn, that the Commissioner may not approach the review by the application of a formula and must himself or herself adjudicate the merits of the decision to refuse by reason of an analysis of the records and the interests engaged which might suggest either disclosure or refusal.

163. The presumption in s. 22(12) does not identify the means by which the burden is to be met, or any consequence from a failure to do so, and is concerned with the creation of an onus, and a starting point for the review. The express statutory provisions can best be understood in the context of the inquisitorial nature of the statutory role of the Commissioner.

164. That the presumption is to be read this way may also be seen from the position of the requester in the process before the Commissioner. Section 22(6)(a) provides for the engagement of the requester, the head of the FOI body, and any other "relevant person" with the review process, and s. 22(8) provides for the making of submissions to the Commissioner in relation to any matter relevant to the review and that the Commissioner "shall take any such submissions into account for the purposes of the review".

165. The requester will not have the record, and if the requester has any onus to establish that the records are not exempt, it would be difficult if not impossible to achieve. How, *e.g.*, is a requester to demonstrate that the documents should be released in the public interest when he or she does not know of the content, particularly as, in the light of my observations above, the request for disclosure of records is to be made in the light of a particular request, and because there are no blanket or general categories of documents which are self-evidently exempt?

166. It may be useful to pause here and note that Simons J., in *University College Cork v. Information Commissioner* [2019] IEHC 195, did make an observation that some of the records in question were "self-evidently" commercially sensitive, at para. 72:

> "It is self-evident that the redacted material was commercially sensitive information. It refers to matters such as the interest rate, and details of existing borrowings and the precise nature of the financial covenants. This clearly could impact on the competitive position of UCC for the reasons which it had set out in its submission. In particular, it is to be recalled that UCC had expressly stated that disclosure of the information would compromise the University's ability to attract the EIB and other such institutions to engage with the University in the future."

167. I consider his reasoning more fully in the judgment on the appeal from his decision, and I do not consider that he posited a test in those terms, but I will here observe that in the light of the provisions of s. 36(1)(b), where information in a record may be readily and non-controversially commercially sensitive, other information may be obviously not sensitive, or may already be in the public domain, and still other information may be less easily treated as sensitive. No information can be said to be self-evidently exempt, as treating the contents of a record as exempt can only be done if disclosure is capable of giving rise to one of the two limbs of the subsection: whether there is a reasonable expectation of material financial loss or gain, or disclosure could prejudice the competitive position of the person to whom the information relates.

168. The establishment of an exemption may therefore be more or less difficult depending on the circumstances, but s. 22(12) makes it necessary that the head of the FOI body come to a reasoned decision and provide, if necessary on a review by the Commissioner, sufficient justifying reasons and explanations by reference to the contents of the records to establish the exemption.

169. The asymmetry of knowledge too makes it logically difficult or even, in many cases, impossible for the requester to discharge an onus of establishing that records are not exempt, and it is only the head of the FOI body or the person to whom the records relate who would be in that position.

170. I am fortified in my view by the observation of Cross J. in *Westwood Club v. Information Commissioner*, at para. 104, who regarded the preliminary view of the Commissioner that the burden of establishing that a request should be granted had shifted to the requester as a "significant error" in the light of s. 34(12)(b) of the old legislation, the equivalent of s. 22(12)(b) of the Act.

171. Of interest too is the Supreme Court decision in *N. McK. v. Information Commissioner* [2006] IESC 2, [2006] 1 IR 260, where the Supreme Court held that the Commissioner could not require that a requester give evidence.

172. From a practical point of view then, and in the light of the procedures for which the Act provides, it is the FOI body that must explain and justify a conclusion that the records are exempt by reference to the relevant provisions of the Act, and equally, it is the FOI body that must explain why the public interest does not justify release in the public interest. The presumption supports this approach to the overall assessment of the disclosure refusal.

173. The purpose of the presumption is not to change the scheme by which certain records are exempted, but rather to identify where the onus lies in satisfying the Commissioner on a review, either if the exemption applies, or if the public interest does not otherwise warrant relief.

174. Thus, when the head of the FOI body comes to approach a particular document in the light of s. 36(3), the starting point is that he or she will have to justify whatever result emerges from an analysis of the balancing of the interests involved, and again the onus is to show that the exception to the exemption applies, there being no presumption that the justifying reasons cannot be interrogated. I consider that the provisions of s. 22(12) must be seen in the context of their position in the Act. Section 22(12) assists in formulating and identifying where the burden lies. In each case the burden is on the head of the FOI body, and in each case the burden is to justify a refusal to release the records. The presumption is stated differently, of course, in s. 22(12)(a) and (b) because s. 36(1) and (3) perform different functions. Sub-section (1) performs the function of creating an exemption, and sub-s. (3) of creating an exception to that exemption. In each case, the purpose of the presumption is to show that the head of the FOI body must offer sufficient information about the records and an analysis which justifies and explains its conclusion that the records should not be released.

Test to justify refusal: section 36

175. The Commissioner argues that the Court of Appeal was wrong in its conclusions, at paras. 32 to 33, that the Commissioner had imposed an overly strict test on the Minister to justify not releasing

the documentation in the public interest. That point arises from the findings of the Commissioner that neither the Department nor enet had demonstrated that releasing the Concession Agreement would "totally undermine" enet's business. Birmingham P. described that approach as "a clear and fundamental error". He noted how difficult it would be to identify what precisely would be meant by such a test and whether undermining "significantly" could be the same as undermining "seriously". In his view, it was "inescapable" that the Commissioner had erroneously introduced a bar that was too high.

176. This criticism is allied to the observation of the Commissioner later in his decision, where he set out his view that the parties had "not pointed to any exceptional circumstances that applied in this case such as to override the need for transparency". That test of "exceptionality" was also considered by the Court of Appeal to be wrong for the same reason, even though Birmingham P. was not prepared to condemn the decision on that ground alone. He correctly, in my view, took a general approach to the test and whether the standard was one of exceptionality or required a business to be totally undermined could be said to, broadly speaking, reflect a similar approach, *i.e.* a high bar to be met.

177. The Minister argues that there is no test to be found in the Act or from the authorities which requires the head of the FOI body to justify a refusal to release records unless the release would totally undermine the interests of a third party.

178. The Commissioner argues that he did not apply a legal test of exceptionality or require the high bar of a total undermining of business. That points to the result of the analysis but does not deal, in my view, with the logically prior question, namely what is the standard or test to be applied when assessing whether the head of the FOI body has justified a refusal. It does not seem to me that, in his analysis, the Commissioner actually identified any factors which were unusual or exceptional, and his approach was to assess the request in the light of the fact that MANs is a significant public asset and a "unique infrastructure". However, insofar as the Commissioner was applying a test of exceptionality or did require the justification to show that a business would be totally undermined, it seems to me that his approach is incorrect and does not find any support in the Act or in the authorities.

179. The standard is, without doubt, a civil standard, and it is not helpful to ask whether the standard is one of exceptionality, as it seems to me that it clearly is not, and what is required is evidence that is sufficient in all of the circumstances to establish justifying reasons for a refusal or a decision to grant. I would not wholly condemn the Commissioner for the use of language which lacks precision on refinement, and while his decision is one of legal import and requires for that reason to be clear, and while vague or loose language can lead to difficulties, such as the one that is raised in the present case, the Commissioner is not to be treated as creating a new test merely on account of the use of this language, albeit it is somewhat unfortunate and unhelpful.

What public interest is engaged

180. The starting point is s. 36(3) which provides that s. 36(1), *i.e.* the exemption, "does not apply" in relation to a case in which "the public interest would, on balance, be *better served* by granting than by refusing to grant the FOI request" (emphasis added). The "disapplication" provided for in that subsection happens at a stage of the decision-making process, or the review before the Commissioner, where the FOI body, or the Commissioner in a review, has established that the records the subject matter of the FOI request are commercially sensitive or confidential. Thus the analysis of the public interest is carried out in the light of the contents of the records.

181. The Act does not contain any guidance as to how the public interest is to be ascertained and what factors are to be weighed or whether any weight is to be given in particular to one factor over another. The public interest engaged therefore cannot be the general public interest in disclosure and transparency in public undertakings. If so, the test could lead to a form of circularity, and could mean that access might always, or nearly always, be granted.

182. The exemption of certain records under s. 36(1) is established to protect commercially sensitive information and that must be seen as a protection of the commercial interests of public bodies. The sub-section recognises that there is a public interest in the protection of commercial sensitivity and this may be *normally served* by the operation of the exemption itself, which provides for the refusal of an FOI request.

183. That reflects the fact that the right of access is not absolute, and that the reasons for creating a class of records in Part 4 that may be exempt itself reflects an aspect of the public interest. For example, the public interest of having enterprises involved in the tendering process of a public contract is normally served by the guarantee that the commercially sensitive clauses of the contract will be kept confidential. Sub-section (3) considers that there may be situations in which the public interest may be *better served* by the granting of an FOI request. One might ask: better served than by doing what? There seems therefore to be a recognition that the public interest in protection of the exempt records may not outweigh other aspects of the public interest. But s. 35(3) requires an analysis of whether the public interest may be better served by the disclosure of those sensitive records if that is done, for example, to reveal that there was corruption in the process: the public interest would be better served by a scrutiny which discloses corruption and briberies.

184. That example lies at one end of a spectrum where it may seem clear that there is a public interest in disclosing otherwise commercially sensitive information. But the reason for disclosure does not have to be as narrow or extreme as this, and the point is that the public interest engaged at this stage of the process must be something more than the general public interest in disclosure and the reason must be found from the scrutiny of the contents of the record, and the balancing of the interests of commercial sensitivity or confidentiality against the public interest in the disclosure of that content.

185. The Commissioner, in the present case, took the view that the size of the contract for the support of an important State-owned asset could, of itself, justify disclosure. This may reflect a view that it is desirable in the public interest to require disclosure of information regarding large public expenditure in strategically important State assets and infrastructure. If that is the basis of the decision, it seems to me to improperly rely on the general principle of openness as the decision to order release must be one that emerges from a consideration of the particular records and not from a general policy. The size of a contract was not identified in the Act as a basis for disclosure. There must be a sufficiently specific, cogent and fact-based reason to tip the balance in favour of disclosure.

186. The provisions of s. 36(3) do not mean that the public interest always prevails. It cannot have this meaning as to read it in this way would make the exemption meaningless in practice. The sub-section however does add an element of scrutiny to the approach to justifying reasons and requires a separate weighing of the respective private and public interests in the analysis of the records in issue. The Commissioner took the step of asking the Minister to identify the factors that might be engaged in the public interest balancing test and the Minister did not proffer a response.

187. The public interest in a general sense, and as stated in the long title to the Act, favours disclosure, but a refusal to disclose may equally be in the public interest in certain instances where commercial sensitivity and confidentiality would be impaired. If one is to ask whether, notwithstanding commercial sensitivity or confidentiality the public interest favours disclosure, it makes no logical sense to ask again the question from the perspective of the general public interest in disclosure or the specific public interest in the protection of commercial sensitivity and confidentiality. It must be a different aspect of the public interest if ss. 35(3) and 36(3) are to offer anything meaningful.

188. It seems, from the decision of the Commissioner, that different aspects of the public interest have been considered depending on the particular commercially sensitive information at issue but that "ensuring maximum openness in the expenditure of public funds and in public bodies obtaining value for money" is the one which is most often relied on and was relied on in the present case. This is not a correct interpretation of "public interest" in s. 36 as it focuses on a general public interest which is akin to that underpinning the right to access to records of FOI bodies under the Act.

189. It may be that his approach derived from the overall purpose of the Act of fostering transparency and scrutiny of public bodies, and from a view that the release of records is desirable in itself. That approach seems to me not to properly reflect what is intended by s. 36(3) of the Act. The public interest override contained in that section does not seem to me to be a simple restatement of the overall statutory aim of fostering transparency. The public interest engaged by s. 36(3) requires a different analysis. In the first place, the context in which s. 36(3) comes to be engaged is not at a

general level or a level of principle, but rather at the point at which the head of the FOI body is assessing identified records. The language of s. 36(3), also in its plain terms, requires the head to engage a balancing of interest and rights. The head of the FOI body must form an opinion whether the public interest, on balance, would be better served by granting, rather than by refusing, the request. Thus, the engagement is with specific documents for the purposes of analysing whether release or refusal would better serve the public interest. The public interest cannot, therefore, be the same public interest as that broadly stated in the Act.

190. That approach to the public interest was one favoured by the former Commissioner in *Irish Times and Department of Transport (Case No. 0600054)*, 27 July 2010, where records relating to a State public transportation investment programme were sought. He accepted that disclosure would enable public debate, ensure value for taxpayers' money, and accountability for decisions to select particular projects. Having analysed the records, he took a view that the risks to subsequent competitions and to the ability of the Road Procurement Agency to negotiate the best possible terms for funding and securing packages for other transport projects meant that the public interest that supported release were outweighed by that favouring refusal.

191. The *Irish Times and Department of Transport* decision does not offer any support for a broader proposition, namely that the presumption does not apply at all to the exercise engaged by the head of an FOI body under s. 36(3) when he or she comes to consider the public interest in either the grant or refusal of release.

192. I cannot read s. 36(3), therefore, as requiring a balancing of the general interest in disclosure against the interest which suggest refusal. By way of example, the head of the FOI body could take the view that the public interest would be best served by the protection of either confidentiality or commercially sensitive records if he or she was satisfied in the particular circumstances that disclosure would prejudice future competitions in the same field, or make it more difficult for Government to run a competitive tender process *etc.* The public interest at play in that example are the commercial interests of State bodies, the public interest in orderly management of public

contracts, the public interest in genuinely confidential information not being released into the public arena when to do so would damage a specific identified business or element of a business which might, for example, have strategic importance in the State.

193. It seems to me that the balancing is not between a choice to release or to refuse, that is the end result of the process, and the balancing must be between identified competing interests and the balancing of those rights to ascertain where the public interest genuinely lies.

194. I consider that the Commissioner did fall into error in requiring that the parties show exceptional circumstances "that apply in this case such as to override the need for transparency", at p. 7 of his decision, in that his decision was guided by the objective of transparency which seems to have lead him towards the positing of an exceptional circumstances test, when the sub-section required a weighing of the interests engaged.

195. The Commissioner's approach to s. 36 wrongly placed emphasis on the broad goals of the Act without having regard to the fact that the Act does not create an absolute right to release, but tempers it by the creation of certain exemptions, and requires the balancing of competing interests.

196. The Commissioner, in my view, fell into an error of approach by stating the test in s. 36(3) of the Act as a requirement to "override the need for transparency". It is true that transparency is a fundamental principle by the Act but s. 36 provides a number of bases on which the transparency requirement is to be abrogated, unless the public interest would best be served by disapplying that exemption. Thus, the scheme of the Act is to make the refusal of certain records mandatory, unless the public interest could, following an analysis of the contents, rationally be said to lead to the conclusion that disclosure of the records is in the public interest by reason of their contents.

Application to the facts and conclusion

197. In the case of the Concession Agreement, it is common case that the records were commercially sensitive. The difference between the parties is that the Commissioner argues that in the light of the requirement in s. 36(3), the head of the FOI body must engage the public interest considerations, and

the question becomes whether, in that engagement, the decision of the head of the FOI body is open to scrutiny, in the light of the presumption in s. 22(12)(b).

198. I do not agree with the arguments made by the Minister that the effect of the decision of the Commissioner was to require the Minister to satisfy the onus twice, and that this is a wrong interpretation of the Act. The presumption applies in any case where, on review, the Commissioner is adjudicating on the decision of the head of an FOI body to refuse or, as the case may be, grant the release of the records. The Commissioner is aided in his approach to the exercise of review by the existence of the statutory presumption. The statutory presumption means that, in the case of s. 36(3), as a matter of statute, the head of the FOI body must ask the public interest question, the head's approach to that question is open to scrutiny, and the starting point is that the onus lies on him or her to justify so that the reasons given must be sufficiently cogent to explain and justify the approach taken.

199. Having done that, the Commissioner considered the public interests (and he used the word in the plural) in favour of and against release of the details and found that the public interests in favour of withholding the details outweighed the public interests in their release. That approach to public interest questions did not focus on the general public interest in disclosure, but rather on other kinds of interests that might have benefit or inure to the public.

200. That illustration from the decision of the former Commissioner in *Irish Times and Department of Transport* mentioned above does not offer support for the proposition advanced by the Minister, in the present case, that the release of commercially sensitive information would always be detrimental to tender processes. This misses the point, as the process to be engaged in considering an FOI request involves an analysis of the documents, the harm that might be done by the release of those documents, whether the documents are, in a true sense, to be characterised as commercially sensitive and, thus, exempt from release, and whether, following that analysis, the records should be released once the public interests relevant to those documents and the information in those documents have been analysed.

201. For that reason it does seem to me that the Commissioner did fall into an error of law in that he came to consider the exercise under s. 36(3) as requiring the decision-maker to consider whether the public interest in transparency generally favoured release. The test is whether the public interest that might be gained or lost by the release of the specified documents having regard to their content, might for reasons relevant to the document and the record and their contents be better served by either release or refusal. Thus, to take an example at one end of the spectrum, the Commissioner is entitled to require the head of the FOI body to consider whether the public interest would be better served by the disclosure of documentation showing a fundamental error in a tendering process, not because transparency in a general sense is important or mandated by statute, but rather the public interest in knowing about such a failure of process might outweigh the commercial sensitivity of the information. Another example, again at one end of the spectrum, would be where the documentation revealed a fraud or some other form of unsavoury input into the decision-making process. That particular example was canvassed at the hearing of the appeal, and while it might not often be found, does illustrate the type of matter which might lead to release, as the public interest in preventing corruption in public office, a separate value from the interests of transparency and scrutiny, might best be served by the release of the records even if they contain commercially sensitive or confidential information: the public interest in having tenderers engaging with public bodies tenders is better served by the prevention of corruption in public office (through disclosure of the records) rather than keeping the confidentiality obligation.

202. I disagree therefore with the submission of the Minister that the mere fact that documents are characterised as exempt in the exercise of an analysis of s. 36(1) means that the records are excluded from disclosure and that the public interest cannot be read as imposing a class of statutory presumption that the public interest requires disclosure of a commercially sensitive record. To put it that way seems to me to miss the point, and the provisions of s. 36(1) and (3) taken together have the effect that certain documents are exempt unless the public interest is better served by their release notwithstanding that they have an exempt status. The public interest at play is not the broad public

interest in transparency, but an interest in content, and if that public interest is to warrant disclosure, it does so because the public interest is better served by release than by refusal.

203. The argument of the Minister means that once documents are properly characterised as "commercially sensitive" for the purpose of s. 36(1), and once the Commissioner is satisfied that the reason for so characterising them is justified, the records are automatically exempt from release. The Act expressly provides within the section for the carrying out of the second exercise, the balancing of interests, and that may have the effect in certain cases that the exemption does not operate in respect of particular documents having regard to their content and having regard to the degree of damage that might be caused to the public interest generally should release be refused.

204. In summary, the Act did not create an absolute right of access to records. The right does not apply to exempt records. To say then that there is a "right of access" misrepresents the position: the right exists but is one tempered by the existence of exemptions.

205. Section 11(7) provides how and to what extent the right created by the legislation is not to be treated as absolute. But disclosure remains the starting point and a departure from that must be justified by reason of the plain terms of ss. 36(1)(b) and 22(12).

206. In conclusion, I consider that the Commissioner:

1. is correct that ss. 35(3) and 36(3) of the Act require the FOI body to justify refusal;
2. imposed an unduly high bar by requiring evidence of justifying reasons amounting to "exceptional circumstances" to establish a lawful refusal to disclose.

Section 35(2) duty of confidence: the cross-appeal

207. The interpretation of s. 35(2) of the Act by the Commissioner was accepted by the High Court and upheld by the Court of Appeal, and is the subject matter of the cross-appeal of the Minister.

208. The Minister refused access on the basis that a duty of confidence existed between the parties to the Concession Agreement. The Commissioner was not satisfied that the release of the record would breach the duty of confidence for the purposes of section 35(1)(b), but went on to hold that the records could also properly be considered to fall within section 35(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."

209. The Minister argues that s. 35(2) was not applicable as the record at issue was prepared in the course of commerce and could not be said to have been prepared solely by the head of an FOI body nor did it relate solely to the performance of functions relevant to the Act. It is accepted that enet is to be qualified as a "service provider" but the Minister argues that s. 35(2) applies to a record prepared by a head of an FOI body in the performance of a function *qua* head, and that enet therefore is not to be treated as performing a function on behalf of the head of an FOI body. It was therefore to be treated as a third-party contactor and is owed a duty of confidence by the express terms of its contract.

210. It is argued that an alternative reading would mean that there could never be a duty of confidence in a contractual relationship between a public body and a service provider, and that the subsection is rather concerned with service providers who step into the shoes of the FOI body and assume its statutory functions under the Act.

211. The Minister argues therefore that s. 35(2) is an anti-avoidance measure which prevents the service provider from refusing to release records that are properly those of the head. The wording, it is argued, is primarily aimed at the head of an FOI body, and the exclusion of the service providers is done in the context. It is argued by the Commissioner that section 11(9) deems records in the possession of the service provider to be held by an FOI body, and thereby to mandate disclosure by a service provider of documents relating to the service which provides for the FOI body. No further anti-avoidance measure is therefore required. The notice party supports this argument.

212. In the High Court, Noonan J. found section 35(2) to be unambiguous (at para. 44) and the Court of Appeal held that the interpretation of the Commissioner "more closely reflects the ordinary

language of the subsection" (at para. 41). Both Courts accepted the interpretation adopted by the Commissioner that only confidentiality agreements between public bodies and third parties may come within section 35(1). A contract between an FOI body and a service provider can protect the confidentiality of third parties but an FOI body cannot, as part of an agreement with the service provider, contract out of the Act.

213. It might be useful to again set out the various types of information for which s. 35 provides.

214. First, there is information given to a public body or prescribed body in confidence and on the understanding that it would be treated as confidential. An example of such could be information given by a person or body with whom the public body is in discussion regarding a possible public/private development. The preservation of the confidentiality of that information may be of particular importance to the third party if the joint venture does not go ahead. Information of that type is excluded from disclosure under s. 35(1)(a), subject to the public interest override in s. 35(3).

215. Second, information may be excluded if its disclosure would constitute the breach of a duty of confidence created by a contract, statute, or instrument made under statute. Of necessity, at least two contracting parties have an interest in the confidentiality of this information. Section 35(1)(b) provides for the exclusion of this information from the duty to disclose and the public interest override in s. 35(3) does not apply.

216. Third is information prepared by a public body or prescribed body or its agents or service providers dealt with by s. 35(2). This is essentially internal documentation, memoranda or records of the FOI body itself or prepared on its behalf. The third type of information is not entitled to the statutory exemption, unless it can be said the information is confidential for a reason other than internal reasons of the body, *i.e.* where the confidentiality arises from agreement or statute or otherwise by law.

217. The section is cumbersome, and I do not find it unambiguous as did Noonan J. But the fact that s. 35(2) refers to an FOI body must refer back to the definition of that phrase. This is why, in my analysis, I have not used the shorthand. The fact that the body at issue is an FOI body does not mean

that s. 35(2) must be read as if it applied only to the performance of FOI functions by the FOI division of the relevant body. The FOI obligations of the body are therefore incidental to a reading of the sub-section, and I therefore conclude that s. 35(2) restricts the exemption so that it does not apply to internal information of public bodies or prescribed bodies generated from any aspect of its functions, and not merely its FOI functions under the Act.

218. The sub-section prevents the body from generating confidentiality by its own actions where there is no contractual or statutory basis to do so.

219. The application of the equivalent of s. 26(2) of the old legislation, the equivalent of s. 35(2), was considered by McMahon J. in *Health Service Executive v. Information Commissioner* [2008] IEHC 298, [2009] 1 IR 700, at p. 710, para 24, where he held that:

> "The purpose of s. 26(2) is to make available to the requestor internal records prepared by staff in public bodies in the course of the performance of their functions. There can be no doubt that the social worker in the case before the court was indeed acting in such capacity when she was investigating and following up concerns expressed for the welfare of a child in her jurisdiction."

220. The Concession Agreement was presumably prepared by the procurement office of the Department, not by any part of the FOI division of the Department in its performance of FOI functions, but was prepared in the performance of that function by a member of staff. I cannot read the subsection so narrowly as to apply it only to records prepared by the division of the Department in the performance of FOI functions, as that would capture only a small portion of the records of the public body. The plain words of the sub-section do not limit its application to the records prepared by a public body *qua* FOI body, and therefore, the narrow construction is not afforded support by a literal reading.

221. It seems to me that s. 35(2) of the Act was enacted in order to avoid a situation where an FOI body and a third-party service provider could rely on a confidentiality clause to prevent release, and

the trial judge considered that there were "sound policy reasons" that this would be so. I agree with his observations.

222. I would therefore dismiss the cross-appeal.

Practical consequence

223. The Act makes no provision for the practical effect of a successful or partially successful appeal from the decision of the Commissioner under s. 24. What is to occur in a case must therefore depend on its specific facts. In the present case the practical solution seems that the matter be remitted to the Commissioner in the light of the conclusions in this judgment so that he may now conduct the review.

224. That was the approach of the High Court in *Minch v. Commissioner for Environmental Information* [2016] IEHC 91, upheld by the Court of Appeal [2017] IECA 223 on the merits without demur as to that practical consequence.