**THE HIGH COURT**

**[2015 No. 394 MCA]**

**IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014**

**BETWEEN**

**THE MINISTER FOR COMMUNCIATIONS,**

**ENERGY AND NATURAL RESOURCES**

**APPELLANT**

**AND**

**THE INFORMATION COMMISSIONER**

**RESPONDENT**

**AND**

**GAVIN SHERIDAN**

**FIRST NOTICE PARTY**

**AND**

**E-NASC EIREANN TEORANTA (TRADING AS "ENET")**

**SECOND NOTICE PARTY**

**JUDGMENT of Mr. Justice Noonan delivered on the 6th day of April, 2017**

1. This matter comes before the court by way of appeal on a point of law pursuant to s. 24(1) of the Freedom of Information Act 2014 ("the 2014 Act"). The appellant ("the Minister") brings the appeal against a decision of the respondent ("the Commissioner") dated 30th November, 2015. The first notice party ("Mr. Sheridan") was the original requester of the information the subject matter of this appeal, which information concerned the second notice party ("enet"). enet did not participate in this appeal other than by way of submitting an affidavit which was filed by the Minister on his own behalf.

**Background Facts**

2. The State is the owner of an infrastructure of fibre optic cables in towns and cities throughout the country which are known as "metropolitan area networks" (MANs). The MANs enable telecoms operators who do not possess their own infrastructure to utilise the MANs to provide services such as telephone and broadband to their customers. Such operators access the MANs on commercial terms. Following a tendering process instigated by the Minister, enet was awarded a concession with the State to maintain, manage and operate the MANs. The terms of this concession are embodied in a written agreement entered into in 2009 between the Minister and enet. On foot of this agreement, enet operates as a wholesaler of access to the MANs selling services to retail telecoms operators. The MANs constitute an important State owned asset.

3. On 2nd January, 2015, Mr. Sheridan made a Freedom of Information request to the Minister for access to four categories of records. The fourth record is the concession agreement. No issue arises any longer in relation to the first three records so this appeal is concerned solely with the concession agreement.

4. On the 14th January, 2015, the Minister wrote to enet to advise it of Mr. Sheridan's request. The letter noted that s. 38 of the 2014 Act required the Minister to consult with enet as a third party to whom the record sought related. The Minister said that the records were being considered in accordance with ss. 35 and 36 concerning confidential information and commercially sensitive information respectively and noted that both sections required the undertaking of a public interest test to determine if the records should be released. The letter went on to say:

"My preliminary view in this matter is that the public interest would on balance be better served by granting the requester the information rather than refusing it unless there are objective reasons to the contrary."

5. enet replied on 3rd February, 2015. It submitted that the records should not be released on the grounds that they were commercially sensitive and the public interest did not favour release. The letter made a legal submission in the context of previous decisions of the Commissioner. However, the letter provided no specific information as to how the concession agreement ought to be regarded as commercially sensitive. It stated that release of the agreement might provide an incomplete picture of the relationship between the Minister and enet.

6. The Minister communicated his decision to Mr. Sheridan by letter of 16th February, 2015. The letter cited both ss. 35 and 36. It noted that a duty of confidence exists between the parties to the concession agreement being the Minister and enet. Release of the agreement would be a breach of this duty of confidence. The letter makes no reference to the requirement to consider the public interest under s. 35(3) or whether s. 35(1) applied at all having regard to the terms of s. 35(2) to which I will refer further.

7. Having cited s. 36, the Minister's letter went on to state:

"enet has an obligation to manage, moreover, maintain and operate the MANs on behalf of the State. The release of the concession agreements and any matters pertained to these agreements could have a negative impact on the ability of enet to continue the business of managing the MANs on behalf of the State in a competitive environment and could result in a material financial loss to the company."

8. That appears to be the extent of the Minister's consideration of the commercial sensitivity of the concession agreement in issue. Of note, the Minister's decision makes no reference of any kind to the requirement to consider the public interest under both ss. 35 and 36. This is in contrast to the Minister's preliminary decision that the public interest required the disclosure of the information. No reason is given for departing from that preliminary view.

9. Mr. Sheridan appealed this decision to the Commissioner. On 12th May, 2015, the Commissioner wrote to the Minister asking for submissions in relation to the matter. In the course of that letter, the Commissioner said:

"It is important to note that s. 22(12) (b) of the Freedom of Information Act places the onus on the public body of satisfying the Commissioner that its decision to refuse to grant a request was justified. Therefore, failure to justify a claim for exemption may lead to a decision by a Commissioner to release the records at issue."

The Minister replied on 26th May, 2015, and in the course of an email of that date said:

"In effect, this will amount to penalising the company for transacting business with the State. It could also act as a disincentive to any future potential bidders for the MSC contracts, i.e. knowing that all of their commercial dealing is liable to end up in the public domain.

The release of the contract details would also undermine the State's ability to negotiate similar types of contract in the future and could undermine the State's negotiation future tender process."

10. On 28th July, 2015, the Commissioner wrote by email to the Minister seeking clarification of how the release of the records would harm enet's commercial position. The Minister replied on 30th July, 2015, saying:

"If enet's commercial details were to be published, it would place them at a disadvantage with both their customers and competitors – i.e. both would know enet's costs and prices. The disclosure of this information would undermine enet's business."

11. On 24th August, 2015, enet made further submissions to the Commissioner attaching the agreement and highlighting the areas that they viewed as being the most commercially sensitive and which they argued should be rejected. The email continued:

"I would reiterate that we would still see the entire contract as commercially sensitive and had previously understood that it would remain confidential as intended under the confidentiality clause contained within the agreement. As outlined previously, the disclosure of commercially sensitive information could impact our business adversely from a number perspectives and could result in financial loss to the company.

enet operates in the wholesale market, which is very competitive and our competitors are operators such as Eircom and BT offer similar services to enet (over the networks that they own). Any commercially sensitive information that is disclosed which pertains to enet's business model could result in our competitors being better positioned to compete against enet and could also result in our customers requesting price reductions thereby adversely impacting in its ability to earn a commercial return."

12. The Commissioner made his decision on 27th November, 2015, and it was communicated to the Minister on 30th November, 2015.

**The Commissioner's Decision**
13. In dealing with preliminary matters, the Commissioner said:

"Before I consider the exemptions claimed, I wish to make four general points. First, s. 22 (12) (b) of the FOI Act provides that when I review a decision to refuse a request, there is a presumption that the refusal is not justified unless the public body 'shows to the satisfaction of the Commissioner that the decision was justified'. Therefore, in this case, the onus is on the Department to satisfy me that its decision is justified …"

14. This statement is one to which the Minister has taken exception in this appeal for reasons which I will explain further.

15. In dealing with the scope of the review, the Commissioner noted that Mr. Sheridan had agreed to exclude schedule 3 to the Commission agreement from the review so that it did not arise for consideration.

16. Dealing with s. 36, the Commissioner said:

"Having considered these submissions and having examined the record at issue, I am not satisfied that the first limb of s. 36(1) (b) applies. The parties have not demonstrated to my satisfaction that there is a 'reasonable expectation' of 'material loss' accruing to the third party."

17. In respect of the second limb of s. 36(1) (b) the Commissioner found that it did apply i.e. that enet's competitive position could be prejudiced, and accordingly that it was necessary to consider the public interest under s. 36 (3). In this regard, the Commissioner said:

"Having found that s. 36 (1) (b) applies, s. 36(3) of the FOI Act requires me to consider whether, on balance, the public interest would be better served by granting them by refusing the request. I take the approach that in considering the public interest in cases of this kind, I must consider the interests of each party. The FOI Act itself recognises the public interest in ensuring the openness and accountability of public bodies as to how they conduct their business. I take the view that there is a public interest in the proper administration of public contracts and in ensuring that value for money is obtained. I consider that openness about the expenditure of public funds is a significant aid in ensuring the effective oversight of public expenditure and that the public obtains value for money, and in preventing fraud and corruption and the waste or misuse of public funds. This public interest is not limited to the expenditure of public funds; I also recognise that there is a public interest in transparency and accountability in the use of public property and public assets.

Set against that, s. 36 (1) itself reflects the public interest in protecting commercially sensitive information. There is a legitimate public interest in entities being able to conduct commercial transactions with public bodies without suffering commercially as a result. As my predecessor observed in cases 98114, 98312, 98164 and 98183 (Eircom plc & Department of Agriculture and Food & Ors.), the public interest in openness about the expenditure of public funds is not absolute; for example where the effect of disclosure would be to totally undermine the business of the company and thereby deter public bodies from transacting business with the State.

> The MANs are a valuable State asset. In my view, it is in the public interest to disclose the terms and conditions under which enet has agreed to manage, maintain and operate this valuable State asset."

18. The Commissioner went on to refer to earlier decisions of his predecessors including McKeever Rowan Solicitors and the Department of Finance (Case 99183) and noted that in that case, the Commissioner had stated:

"He also stated that the public body in that case 'could not reasonably be expected to keep that information or any of the other contract terms confidential in the absence of exceptional circumstances.' "

The Commissioner continued:

"I adopt the views espoused in the cases referred to above. The parties have not pointed to any exceptional circumstances that apply in this case such as to override the need for transparency. In my view, enet was the successful bidder in a tender process for the use of a State-owned asset which generates Revenue and there should be transparency around this transaction.

> In the first place, I do not accept that the release of this information would deter future potential bidders from seeking to manage, maintain and operate this revenue-generating asset on behalf of the State. Indeed, as the former Commissioner observed in Case 98049 cited above, there would appear to be a contradiction between the arguments that on the one hand, competitors will use the information in future tenders, and yet on the other hand, competitors will be deterred from entering into future tenders.
>
> Secondly, in any event, I do not accept that the information contained in the records would automatically benefit future tenderers. This contract relates to one particular phase of the MANs; it does not follow that the State's requirements for any future phase will be exactly the same. Moreover, I note that the current prices in respect of part of the services are on enet's website.
>
> Thirdly, neither the Department nor enet has demonstrated to me that releasing the contract would 'totally undermine' enet's business (see Case No. 98114 above). Finally, I agree with the findings of the former Commissioner in Case No. 98114 that the possibility of information being misunderstood is not a good reason to refuse access to records. It would be open to the Department and/or enet to put further information in the public domain, if that were necessary to clarify enet's contractual relationship with the State or any other aspects of enet's operations.
>
> Furthermore, I am mindful that s. 11(3) of the FOI Act requires public bodies to have regard to the need to achieve greater openness and in their activities and inform scrutiny, discussion, comment and review by the public of their activities. I consider this to be relevant here in that it is a public interest which equates with 'a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law' as referred to by Macken J. in *Rotunda Hospital* v. the Information Commissioner [2011] IESC 26.
>
> Having regard to the above, I find that, on balance, the public interest would be better served by the release of the fourth record."

19. With regard to s. 35, which deals with confidential information, the Commissioner was of the view that s. 35(2) which disapplies the confidentiality exemption in the case of agreements between public bodies and service providers, was applicable in this case. However, he went on to consider that in any event, s. 35(1) did not apply for the reasons he set out.

**The 2014 Act**

20. The following provisions of the 2014 Act are material to this appeal. Part 4 of the Act comprises ss. 28 – 41 inclusive and is entitled "exempt records". S. 2 is the interpretation section which defines inter alia, "exempt records" as meaning:

"(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 …"

Section 11 is entitled "access to records" and provides, insofar as relevant

here:

"(1) Subject to this Act, every person has a right to and shall, on request

therefor, 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…

(3) An FOI body, in performing any function under this Act, shall have regard

to—

(a) the need to achieve greater openness in the activities of FOI bodies and to promote adherence by them to the principle of transparency in government and public affairs,

(b) the need to strengthen the accountability and improve the quality of decision- making of FOI bodies, and

(c) the need to inform scrutiny, discussion, comment and review by the public of the activities of FOI bodies and facilitate more effective participation by the public in consultations relating to the role, responsibilities and performance of FOI bodies…

(7) 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."

21. Section 22 provides for review by the Commissioner of decisions of Freedom of Information bodies such as the Minister and at subs. (12) provides:

"(12) In a review under this section—

…

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

22. Section 35, entitled "information obtained in confidence" replaces s. 26 of the Freedom of Information Act 1997 and provides as follows:

"35.(1) Subject to this section, a head shall refuse to grant an FOI request if—

(a) the record concerned contains 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, or

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

(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.

(3) 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. …"

23. Section 36 is entitled "commercially sensitive information" and provides as follows:

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

…

(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, or

…

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

24. Where the public interest override provision in ss. 35 or 36 apply, s. 38 requires the head to notify the person to whom the requested information relates of the request and allow that person to make submissions before deciding to grant a refusal request.

**The Arguments**

25. Although a very large number of grounds were originally raised by the Minister in his grounding affidavit, as the case proceeded, these essentially distilled down to the following core propositions:

(a) The Commissioner was in error in considering that the presumption under s. 22(12) (b) applied to records which are exempt under the 2014 Act. The sole basis for this contention is a passage from the judgment of Macken J. in *Rotunda Hospital* v. Information Commissioner [2013] 1 I.R. 1 to which I will refer in more detail.

(b) In applying the public interest tests under both ss. 35 and 36, the Commissioner fell into error in applying a standard not provided for by the express words of the Statute. Thus the application of an "exceptional circumstances" test was neither lawful nor appropriate. The fact that the Commissioner followed earlier decisions of his office in that respect is immaterial. In deciding that the 2014 Act requires transparency in relation to State Bodies, the Commissioner effectively ignored the exemptions created by Part 4 which *prima facie* exempts records from disclosure. This was to reverse what the statute actually required. The Commissioner further fell into error in applying a standard that required the Minister to demonstrate that the release of the contract would "totally undermine" enet's business. This was not a test provided for in the Act and for the same reasons as applying an "exceptional circumstances" test was *ultra vires* the Commissioner. It was further submitted that the balancing test required to be performed by the Commissioner was erroneously carried out. The Minister had applied the test correctly and concluded that the public interest favoured non disclosure.

26. The Minister further submitted that the Commissioner was in error in considering that s. 35 (2) applied to the facts of this case. The Minister submitted that s. 35 (2) applies to a record prepared by the head (or other person acting as agent such as a service provider) in the course of performance of his or her functions qua head. In this instance, enet was such a third party, not a service provider performing the functions of a head; and it did not negotiate an agreement on behalf of the head with itself.

27. Both the Commissioner and Mr. Sheridan submitted that the Commissioner was correct in concluding that s. 22 (12) (b) applied to exempt information as it applied to all other information. They contended that insofar as the views expressed by Macken J. in *Rotunda Hospital* suggested to the contrary, those views where obiter, were contradicted by other dicta which were not obiter and in any event were expressed before the passage of the 2014 Act which, despite the expression of those views, repeated verbatim the wording of the 1997 Act.

28. They submitted that s. 35 (2) was clear in its terms and applied in this case with the effect that s. 35 (1) was not relevant. They contended that the Minister was in any event precluded from relying on any argument at s. 22 (12) (b) did not apply as this argument

had never been made before the Commissioner. In that regard, they relied on the dicta of Fennelly J. in *Rotunda Hospital* and also the views of this court expressed in *McKillen v. The Information Commissioner* [2016] IEHC 27.

29. They submitted that the standard of review argued for by the Minister was akin to an appeal on the merits wherein the Minister argued that he got the balancing test right and the Commissioner got it wrong. The correct test was whether or not there was no evidence to support the Commissioner's decision and the onus was on the Minister to establish this.

30. They submitted that the "exceptional circumstances" test was one that the terms of the Act itself by definition required – all information is prima facie disclosable unless coming within an exception specified by the Act. It was in any event a test approved by the court in a number of authorities to which I shall refer. Furthermore, the Commissioner was entitled to adopt a standard which he considered appropriate in the context of disclosing information alleged to be commercially sensitive. In adopting the criterion that there was no evidence that enet's business would be "totally undermined", this was a standard he was entitled to adopt within the margin of discretion afforded him by the Act and it could not be disturbed unless it was so irrational as to fly in the face of fundamental reason and common sense.

31. On the issue of s. 35 (2), the Commissioner and Mr. Sheridan submitted that this section is clear in its terms and applied to this case. Accordingly the Minister was not entitled to rely on any confidential information exemption provided for by the terms of s. 35 (1).

**Discussion**
32. The standard of review in an appeal on a point of law from a decision of the Commissioner has been considered in a number of cases. In Deely v. The Information Commissioner [2001] 3 I.R. 439, McKechnie J. said (at p. 452):

"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."

*Deely* was an appeal on a point of law pursuant to s. 42 of the 1997 Act, the predecessor of s. 24 of the 2014 Act.

33. *Killilea v. the Information Commissioner* [2003] 2 I.R. 402 was another s. 42 appeal in which Murphy J. said (at p. 426):

"If a decision of the respondent to discontinue a review, taken in the exercise of the discretion vested in him by the Oireachtas by means of s. 34(9) of the Act is, properly speaking, within the scope of s. 42(1) of the Act, it is submitted that the court ought only to upset the respondent's exercise of such discretion if the same were found to have fallen foul of the judicial review standard of reasonableness. In other words, it is submitted that the court ought not to interfere with the respondent's decision to discontinue his review of the decision made by the Department in this case unless it considers his decision to fly in the face of fundamental reason or common sense or to be so irrational or unreasonable that no reasonable Commissioner could have come to it."

34. Similar sentiments were expressed by Kearns J. in the Supreme Court in *Sheedy v. Information Commissioner* [2005] 2 I.R. 272, where he said (at p. 299):

"Nor do I believe that any exhaustive analysis conducted by reference to detailed evidence was necessary before the respondent could decide to apply the public interest provision of s. 21(2) of the Act of 1997 to direct release of the reports. Once there was some evidence before him 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. This assessment, which involved a balancing exercise between various competing interests, was one uniquely within his particular remit."

35. In a similar appeal in *Gannon v. the Information Commissioner* [2006] 1 I.R. 270 Quirke J. applied the *Deely* and *O'Keeffe* standard to an appeal on a point of law. Again in *Westwood Club v. the Information Commissioner* [2014] IEHC 375, Cross J. also followed *Deely* and determined that the onus of proof in an appeal on a point of law rests on the appellant who has to satisfy the O'Keeffe test.

36. In reviewing these authorities in *McKillen v. The Information Commissioner* [2016] IEHC 27, I offered the view (at p. 21):

"It seems to me therefore that at this juncture, it is beyond argument that the standard to be met by an appellant in a s. 42 appeal is virtually indistinguishable from that applied by the court in judicial review matters. Accordingly, a decision of the respondent will not be interfered with unless it is either based on no evidence or flies in the face of fundamental reason and common sense. It is thus immaterial if the court would have arrived at a different decision based on the same evidence. Inferences will not be set aside unless they are such that no reasonable decision maker could have drawn them."

37. In *Fitzgibbon v. The Law Society of Ireland* [2015] 1 I.R. 516, Clarke J., speaking *obiter* in the Supreme Court, said that appeals on points of law should be assumed to permit some greater degree of review than might apply in judicial review. In that context he suggested that errors of law which might amount to errors within jurisdiction might not be amenable to judicial review but could form the subject matter of an appeal on a point of law.

38. The Minister's argument in relation to s. 22 (12) (b) rests almost entirely on the following passage from the judgment of Macken J. in *Rotunda Hospital* which considered the latter section's predecessor under the 1997 Act, s. 34 (12) (b). At page 78 of the judgment, Macken J. said:

"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), to have regard to the provisions of s. 34(12)(b) of the Act. 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.'

> 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). 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. It is difficult to see how it would apply to the provisions of ss. 19 to 32, other than the head in question meeting the terms of the various sections. Even then it is difficult to see how a head goes about "justifying" a decision in the case of, say, s. 19(1)(a), which exempts from disclosure, inter alia , a record which has been or is proposed to be submitted to the Government for its consideration, which I take as the first example of the type of record covered. Either s. 34(12) does not apply to such exempt records, or it is sufficiently satisfied by proof that the record in question is, in fact, one submitted to or is proposed to be submitted to the Government. Such proof would likely suffice if it is made by an appropriate person, and could not be rejected by the respondent, save in the most exceptional circumstances, of which I can imagine none. If therefore s. 34(12) of the Act does apply, and I do not accept the respondent has established that it does, to Part III records, then compliance with the terms of s. 26(1)(a) also appears sufficient to justify the decision made. In the present case I am satisfied that that legal requirement was complied with by the submissions made on the part of the appellant responding to the criteria mentioned in the section itself, and from the terms of its original refusal. As I have mentioned previously in this judgment, neither the respondent nor the High Court Judge suggested that the opinion criteria mentioned in s. 26(1)(a) were not met."

39. The Minister argues that this passage establishes the proposition that s. 22 (12) (b) does not apply to exempt records under Part 4 of 2014 Act. I disagree. The first point to be noted about the above passage is that it is, as Macken J. herself remarked, entirely obiter. It is also appears to be somewhat at odds with the views of Fennelly J. expressed in the same case. At page 29 of the report, he considers the issue of whether or not the High Court should have entertained a point not raised before the Commissioner. In dealing with this, he said (at page 30):

> "[87] It is important to bear in mind that the appeal to the High Court is taken from a review by the respondent pursuant to s. 34 of the Act. [*He then recites the Section*].
>
> [88] The respondent relies, in particular, on para. (b), which places a burden on the body refusing a request to justify its decision. I agree that it is, thereby necessarily implied that the body will raise before the respondent any point of law which supports its position. Although s. 42(1) does not expressly say so, I think it is an integral part of any appeal process, other than possibly an appeal by complete re-hearing, that any point of law advanced on appeal shall have been advanced, argued and determined at first instance."

40. Accordingly, Fennelly J. expressly accepted that the presumption contained in s. 34 (12) of the 1997 Act applied to the facts of that case which concerned exempt records.

41. In *Westwood Club*, which was concerned with commercially sensitive and thus exempt records, Cross J. accepted the proposition that the presumption under s. 34 (12) of the 1997 Act applied to such records. – (see paras. 100 to 107 of the judgment). That of course post dated the *Rotunda Hospital* case. It is also of significance that the 2014 Act was enacted subsequent to the decision of the Supreme Court in *Rotunda Hospital*. Despite the comments of Macken J. to which I have referred, the Oireachtas re-enacted s. 22 (12) (b) in identical terms to the earlier s. 34 (12) (b). It seems to me that had the Oireachtas wished to create an express exception from the presumption for exempt records as that expression is defined in s. 2 of the 2014 Act, it would have been a simple matter to do so. It could have prefaced the subsection by words such as "save in the case of exempt records", or words to like effect to make clear that the presumption does not apply to, inter alia, Part 4 records. The Oireachtas chose not to do so and it seems to me that the meaning and intent of the section is absolutely clear. It applies to all information in the possession of public and other bodies subject to the 2014 Act. I am therefore of the opinion that in applying the presumption in this case, there was no error on the part of the Commissioner.

42. However, even if I were to be wrong in expressing that view, I am satisfied that this is not a point that the Minister is entitled to raise in this appeal as it was not raised before the Commissioner. In the letter of 12th May, 2015, referred to above, the Commissioner made it clear that he was of the view that s. 22 (12) (b) applied and thus he was approaching the matter in the light of the presumption provided for in that subsection. The Minister raised no objection. In *Rotunda Hospital*, Fennelly J. said (at p. 29):

"[90.] I do not accept that the new point should have been considered either because many other cases raised the same issue or because it was a matter of importance. The Act is clear: an appeal to the High Court lies only in respect of a point of law. It must be a point of law involved in the decision under appeal. Thus, I do not think the High Court should have entertained the point."

43. In McKillen I referred to this and the earlier authorities of *South Western Area Health Board v. the Information Commissioner* [2005] 2 I.R. 547 and *Minister for Education v. The Information Commissioner* [2009] 1 I.R. 588 as well as the above cited dicta of Fennelly J. and concluded (at p. 23):

"A s. 42 appeal is not a *de novo* hearing where the appellant is at large to advance new arguments or evidence not put before the respondent. It is an appeal on a point of law which was considered and dealt with by the respondent. It is not here suggested that there are new arguments or evidence not available to the appellant at the time the respondent decided the matter or that the appellant was disadvantaged in any way, for example, by the lack of legal advice. As Smyth J. remarked, it would be entirely unsatisfactory if appeals on pure points of law could be run on the basis of matters never raised before, let alone considered and decided by, the respondent. That would transform the appeal into something quite different from that envisaged by the Act."

44. Turning now to s. 35 of the Act, the s. 35 (1) confidentiality exemption only arises if it is not disapplied by s. 35 (2). It seems to me that s. 35 (2) is unambiguous. It was not suggested on behalf of the Minister that enet is other than a service provider within the meaning of the subsection. In general, a Freedom of Information body and a party providing services to such body cannot rely on a confidentiality clause as between themselves to prevent access to information held by the Freedom of Information body. There are obviously sound policy reasons why this should be so, consistent with the object of the legislation. The only exception that arises is in cases where the duty of confidence is owed to a third party other than the Freedom of Information body or the service provider.

45. The long title to the Act makes clear its objectives which include:

"to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies …"

46. The Act's "mission statement" is further amplified by the terms of s. 11 (3) above. In dealing with the 2014 Act's predecessor, Fennelly J. made the following observations in *Sheedy v. the Information Commissioner* [2005] 2 I.R. 272, at page 275:

"The passing of the Freedom of Information Act 1997 constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers. The principle of free access to publicly held information is part of a world-wide trend. The general assumption is that it originates in the Scandinavian countries. The Treaty of Amsterdam adopted a new Article 255 of the EC Treaty providing that every citizen of the European Union should have access to the documents of the European Parliament, Council and Commission."

47. It would be somewhat surprising if the laudable objectives identified by the Act itself could be defeated by the simple expedient of inserting confidentiality clauses into contracts between public bodies and those who provide services to them for reward. The interpretation contended for by the Minister is in my view somewhat tortuous and contrary to the plain meaning of the words actually used.

48. I am therefore satisfied that s. 35 (2) applies in this instance and accordingly, a consideration of s. 35 (1) or (3) is immaterial.

49. With regard to the s. 36 issue, it is common case as between the parties that the information in question is commercially sensitive and that s. 36 (1) therefore applies. In that event, it was necessary for the Commissioner to consider whether the public interest would on balance be better served by granting than, by refusing the Freedom of Information request under s. 36 (3). In respect of this, the Minister criticises the Commissioner for considering that exceptional circumstances needed to be shown by the Minister to justify the refusal. The provisions of the Act to which I have referred make clear that all information is disclosable subject to exceptions. By definition therefore, exceptional circumstances must exist to justify the refusal. In this case, the onus of justification rested upon the Minister having regard to the provisions of s. 22 (12) (b). This is also consistent with the approach of the courts. In *Minister for Education v. The Information Commissioner* [2009] 1 I.R. 588, McGovern J. noted (at p. 594):

"The Act provides that it was the intention of the Oireachtas that it is only in exceptional cases that members of the public should be deprived of access to information in the possession of public bodies. It is clear that the legislation operates on the basis that a decision to refuse to grant a request is to be presumed by the Commissioner not to have been justified."

50. Similar views were expressed by O'Donovan J. in *Minister for Agriculture & Food v. the Information Commissioner* [2000] 1 I.R. 309 at p. 319 where he said:

"… in the light of its preamble, it seems to me that there can be no doubt but that it was the intention of the legislature, when enacting the provisions of the Freedom of Information Act, 1997, that it was only in exceptional cases that members of the public at large should be deprived of access to information in the possession of public bodies and this intention is exemplified by the provision of s. 34(12)(b) of the Act which provides that a decision to refuse to grant access to information sought shall be presumed not to have been justified until the contrary is shown."

51. To my mind therefore there is nothing novel or innovative and less still erroneous in the Commissioner's determination that the onus was on the Minister to demonstrate exceptional circumstances to justify the refusal in this case.

52. It will be recalled in the instant case that the preliminary view expressed by the Minister was that the public interest favoured disclosure of the concession agreement. However, he came to a different conclusion after consultation with enet despite the fact that there appeared to be little of substance in enets's submission regarding what the actual commercial sensitivity alleged was. In this respect, the Commissioner in his decision noted:

"Furthermore, neither the Department nor enet identified for this office particularly sensitive information within the contract, the release of which would disclose (for example) enet's internal business methodology. In the High Court case of *Westwood Club v. The Information Commissioner* [2014] IEHC 375, Cross J. held that a public body must do more than repeat the requirements of the exemption. It must engage with the question of why the particular documents, if disclosed, could prejudice the position of the third party."

53. This appears to me to be an eminently reasonable conclusion on the part of the Commissioner having regard to the effect of the presumption against refusal and it is difficult to see how it could ever be said that this was somehow irrational or contrary to fundamental reason and common sense.

54. It is clear from the Commissioner's decision that, unlike the Minister, he explicitly engaged with the arguments advanced in support of non disclosure and discounted them in turn. He did not accept the argument that the release of the information would deter future bidders or that it would automatically benefit future tenderers. Following earlier decisions of the Commissioner, he concluded that neither the Minister nor enet had demonstrated that the release of the contract would totally undermine enet's business. Of course this conclusion has to be viewed in the light of the submission made by the Minister on 30th July, 2015, to the Commissioner in which the Minister said:

"the disclosure of this information would undermine E-Net's business."

55. This was but one factor in the overall conclusion reached by the Commissioner and in the context of this particular case, I do not think it could be said that this was an irrational consideration or one that was not within the Commissioner's discretion to apply in reaching a determination of what was, or was not, in the public interest. It was no more than part of the balancing exercise undertaken by the Commissioner in relation to his assessment of the competing interests that had to be weighed in that balance, regard being had at all times to the overarching presumption against refusal and the objectives of the Act. As Kearns J. noted in Sheedy that balancing exercise was one uniquely within the Commissioner's remit. It is not for the court to revisit the correct balance.

**Conclusion**

56. At the end of the day, it seems to me difficult to resist the conclusion that the Minister's case comes down to the contention

that he got the balance right and the Commissioner got it wrong. For the reasons explained, that is not something with which the court can engage in an appeal on a point of law.

57. Accordingly, I must dismiss this appeal.