

THE HIGH COURT

2004 No. 56 MCA

**IN THE MATTER OF THE FREEDOM OF INFORMATION ACTS,
1997 – 2003
AND
IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42(1)
OF THE SAID ACTS**

BETWEEN

THE MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT

APPELLANT

**AND
THE INFORMATION COMMISSIONER**

RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated the 25th day of January, 2006.

1. Factual background

On or about 14th January, 2001 Mr. Michael Freyne (the Requestor) applied to the appellant (the Department) for access to copies of the internal documentation which were compiled and presented by Waterford City Enterprise Board Limited (the Board) to its Evaluation Committee, concerning a grant application made by Mr. Freyne in March, 2000. The request was addressed to the appellant, as the Board is not currently a public body within the meaning and for the purpose of the Freedom of Information Act, 1997, (hereafter "the Act").

The Department responded to the Requestor by stating that the overall co-ordination and supervision of the Board was carried out by the Department but that the records the Requestor sought related to the day to day operational matters of the Board and were not held by the Department.

A formal refusal pursuant to s. 10(1)(a) of the Act was made. That provided for a refusal to grant the request if the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken ...

By letter of 4th February, 2001, the Requestor applied for an internal review of the decision which was affirmed on 27th February, 2001.

On 4th March, 2001 the Requestor applied to the Commissioner under s. 34 of the Freedom of Information Acts, 1997 – 2003 (hereafter "the Acts") for a review by the Commissioner of the decision of 27th February, 2001 made by the Department. A preliminary views letter dated 2nd June, 2004 was furnished by the investigator dealing with the review in the Commissioner's office to the Department, indicating that it was the investigator's preliminary view that a right of access existed under the Acts on the basis that the records were under the control of the Department pursuant to s. 2(5)(a) of the Acts. The Department made two submissions to the Commissioner on 8th July and 4th August, 2004. The latter focused on s. 2(5)(a) as its justification for refusal of access.

In her decision dated 18th October, 2004 the Commissioner considered that having examined the relevant operating agreement between the Department and the Board and the relevant memorandum and articles of association, the Commissioner found that the records were under the control of the Department. She noted that the Board was not proscribed as a public body for the purpose of the Acts. The Commissioner further stated that, in the event that the Department consider any exemption provision(s) to apply in respect of any such records, it was required to send copies of the records in question to her office so that she might make a supplementary decision with regard to any exemptions considered applicable.

2. Appeal

The Department initiated the current appeal pursuant to s. 42(1) of the Act against the decision, rendered by letter to Mr. Freyne, and dated 18th October, 2004.

Section 2(5)(a) defines the concept of records "held" by public bodies in providing that:

"A reference to records held by a public body includes a reference to records under the control of the body."

By originating notice of motion dated 24th January, 2005 the appellant applied for relief in the following terms:

1. An order discharging the decision of the respondent (the Commissioner) made on 18th October, 2004 in relation to Case 010147 (request of Mr. Michael Freyne, Waterford Braiding Limited) insofar as the Commissioner annulled the decision of the Department of Enterprise, Trade and Employment (the Department) dated 27th February, 2001, which decision of the Department refused access to Mr. Freyne (the Requestor) to documentation within the possession of Waterford City Enterprise Board (the Board) namely, internal documentation which was compiled and presented by the Board to its Evaluation Committee concerning Mr. Freyne's grant application.
2. An order discharging the decision of the Commissioner dated 18th October, 2004 in relation to Case 010147 insofar as the Commissioner directed the Department to grant access to the Requestor to the records.
3. A declaration that the said decision and consequential directions given by the Commissioner in connection therewith are wrong in point of law.
4. A declaration that the records are not held by the Department for the purpose of the Freedom of Information Act, 1997 – 2003.
5. A declaration that the records are not under the control of the Department for the purpose of the Act.
6. A declaration that the Requestor is not entitled to access to the records within the possession of the Board.
7. A declaration that right of access to documentation does not constitute "control" over the said documentation for the purpose of the Act.

8. Such orders and directions pursuant to the Act as to this Honourable Court may appear necessary or proper.

9. If the court should consider it necessary or proper to do so, an order remitting the request the subject matter of this appeal for further consideration and/or determination by the Commissioner in accordance with law and in accordance with such orders and/or directions as the court may make therein.

The extensive grounds detailed in the notice of motion can be summarised as errors of law by the Commissioner in her construction and application of the Acts, in particular in relation to s. 2(5)(a); ss. 6(9) and 6(11) and in relation to the error of law in relation to the Board not being proscribed as a public body and in purporting to direct the Department to exercise its powers in a manner inconsistent with the operating agreement with the Board; that the Commissioner erred in law in construction in the interpretation of s. 10(1)(a) and that the Commissioner erred in law in the construction and/or interpretation of the memorandum and articles of association of the Board.

In addition the appellant grounded its application on the Commissioner's usurping or purporting to unlawfully interfere with the powers granted to the Minister for Finance under the Act to proscribe a body as a "public body" and to make access to records of such public bodies by directing the Department to make access to the records and, in doing so, purported to deprive the Minister for Finance of his powers under the Act.

3. Grounding affidavit

Mr. Patrick McCourt, Assistant Principal Officer in the Department, filed an affidavit on 14th December, 2004 referring to clause 21 of the operating agreement entitled "Reporting and Monitoring Provisions" and to the memorandum of association which provides as follows:

"21. The Company [Board] shall ensure that all operations under its enterprise plan are fully and properly documented. The Minister and the European Union, their officers and agents shall, at all times, have access to all of the records of the Company and the Company shall ensure that all recipients of aid from the Company, including persons or bodies undertaking projects, provide similar access to the Minister and the E.U., their officers and agents. The Company agrees to furnish the Minister with copies of any relevant documentation requested by the Minister."

Mr. McCourt believes and was advised by counsel that the purpose for which the Minister and the E.U. may have access to records of the Board is for the purpose of enabling the Minister to monitor the Board's compliance with the operation agreement, which agreement related to the funding by the Minister of the Board and of the projects in which it invests, and for no other purpose. He referred to clause 13(c) which relates to financial assistance to projects which provides as follows:

"13(c). The Company shall forward to the Minister at the request of the latter any additional information concerning aid granted and supporting documents. To this end the Company agrees to any inspection of the books and accounts of the Company and the books and accounts of the recipients of aid by officers of the Minister (which shall be a condition attaching to such offers of aid), officers of the Comptroller and Auditor General and such other persons as the Minister may request to carry out the inspection which the Minister considers necessary, and further agrees to facilitate the carrying out of any such inspection."

Mr. McCourt further referred to article 17 of the articles of association which provided:

"17. Save as is necessary to carry out their functions and with the exception of disclosure to meet the information needs of the Oireachtas, the Minister, the Comptroller and the Auditor General, a court of law and the European Commission, to whom the Board shall disclose all relevant information in their possession when requested (included in the form of an annual report) and provided always that the Company provide or publish information on grants or other assistance given and the names of the participants thereof, the directors undertake to keep confidential and not to disclose to a third party any information relating to specific projects in respect of which support or assistance (including grant assistance) is sought. The directors further undertake to keep confidential and not to disclose any information in relation to the discussions, proceedings and decisions of the Board without the unanimous approval of the directors who attended the meeting(s) at which the discussions, proceedings or decisions took place."

Though not referred to by Mr. McCourt, article 18 of the articles of association would also appear to be relevant. That article provides as follows:

"18. Save as is necessary to perform their functions pursuant to article 9 hereof (which relates to the Board appointing and maintaining an Evaluation Committee to assist the Board and make recommendations on whether or not assistance should be given), the Evaluation Committee shall keep confidential and not disclose any information in relation to discussions, proceedings and recommendations of the Evaluation Committee."

Mr. McCourt avers that it is clear that the records of the Board are to be confidential save insofar it is necessary to meet the needs of the Minister, who has only a right of access to records for the purposes of ensuring that the Board is complying with its functions. Accordingly, he believes and was advised by counsel that the Minister did not have "control" over the documents of the Company.

The Board has not been proscribed as a body covered by s. 1(5) to schedule 1 of the Act.

He referred to the appeal, correspondence between the parties and to the originating notice of motion.

4. Affidavit of investigator

Mr. Stephen Rafferty, investigator in the office of the Information Commissioner, swore an affidavit on 18th February, 2005 which referred to Mr. McCourt's affidavit, the nature of the appeal, the factual background and the Commissioner's review and decision.

In relation to the decision, Mr. Rafferty pointed out that Mr. McCourt's affidavit which indicated that the Board, in common with all the CEBs, was an independent company in respect of which neither the Tanaiste nor the Department had any role. The Minister indicated that she had a role and, in particular, a role in the appointment of the Boards.

In the decision the Commissioner found that clause 21 of the operating agreement clearly provided the Minister with a right of access to all records of the Board and a right to obtain copies of any records requested. The decision continued:

"[w]hile it may be that the Minister's right of access to the records of the Board was included in the operating agreement

for the purpose [of verifying compliance with the funding requirements as set out in the operating agreement] there [was] not a restriction in the agreement itself as to the purposes for which access [might] be sought nor [did] article 17 [of the operating agreement] restrict the Minister's right of access other than to 'meet the information needs of ... the Minister'."

The Commissioner found that the requirement of the Minister to access records to address a request made under the Act was not inconsistent with meeting his information needs. The Commissioner concluded that the Board's records were under the control of the Minister and that a *prima facie* right of access to such records existed. The issue was more appropriately dealt with by way of legal submission.

He confined himself to one factual issue in relation to the Minister's grounds of appeal. Ground 17 claimed that the Commissioner erred in law in directing the Minister's Department to "make access to the records in excess of s. 6 of the Act". During her review, the Commissioner took account of the fact that the Minister opposed the proposed release of the records concerned on the sole basis that the records were not under the control of the Minister within the meaning of s. 2(5)(a) and that, accordingly, s. 10(1)(a) of the Act applied. That paragraph provides for the refusal of a request where the records sought "do not exist or cannot be found after all reasonable steps to ascertain their whereabouts have been taken". No mention was made by the Minister during the course of the review of the provisions of s. 6 of the Act generally. Section 6 and, in particular s. 6(9) and s. 6(11) had been raised as grounds of appeal but were not canvassed before the Commissioner during the course of the Commissioner's review.

Mr. Rafferty referred to s. 34(12)(b) of the Act which provides that, in a review by the Commissioner of a decision by a public body to refuse access to a record, that decision:

"Shall be presumed not to have been justified unless the head [of the public body] concerned shows to the satisfaction of the Commissioner that the decision was justified."

The onus of rebutting the presumption laid down in that provision accordingly falls on the appellant.

7. Legal submissions on behalf of the appellant

Ms. Peggy O'Rourke, counsel for the appellant, submitted that the records sought by the Requestor related to the ordinary day to day management of the Board. The Department did not hold records of the type sought. It held only statistical, financial, administrative and policy records. However, the Commissioner formed the view that the records sought were under the control of the Minister pursuant to s. 2(5) of the Act and consequently were records held by the Minister for the purposes of the Act. That provision stated that a reference to records held by a public body included a reference to records under the control of the body.

Section 6(9) provided that a record in the possession of a person who is always providing a service for a public body under the contract of services insofar as it relates to the service, be deemed for the purposes of this Act to be held by the body. The subsection goes further insofar as it deems to be included in the contract a provision that the person shall, if so requested by the body for the purpose of the Act, give the records to the body for retention by it for such period as is reasonable in the particular circumstances.

Ms. O'Rourke submitted that the relevant contractual provisions between the Minister and the Board related to the right of access or the purpose of ensuring that the Board was in compliance with its functions under the operating agreement. This did not give the Department control of the Board's records. Clause 21 of the operating agreement allows the Minister to have copies of all relevant documentation only.

Article 17 of the articles of association referred to relevant information to meet the information needs of the Oireachtas, the Minister, the Comptroller and Auditor General, a court of law and the European Commission.

Control is not defined in the Act but suggests a degree of authority/dominion/management of the records rather than mere access to the records. Counsel submitted that control is defined as the act or power of directing or regulating.

In *Readymix Concrete v. Minister for Pensions* [1968] 1 All E.R. 433 at 440 control, in the context of the employment relationship, was defined as follows:

"Control includes the power of deciding the thing to be done, the way in which it is done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant."

The Department was not entitled to direct the Board as to how to deal with the records sought as in *Dollfus Mieg et Compagnie S.A. v. Bank of England* [1950] 1 Ch. 333 at 359, where control was held to cover the right to tell the possessor what is to be done with the property.

In *O'Coidealbhain (Inspector of Taxes) v. Mooney* [1990] 1 I.R. 422 at 431, Blayney J. referred to the test as to the degree and extent of the control exercised by the Minister that, while the Minister lays down in the contract what is to be done, he does not direct how it is to be done.

In *Department of Justice v. Tax Analysts* 492 U.S. 137 [1989] the U.S. Supreme Court reviewed the provision of the Information Act which allows for access to "agency records" subject to exemptions. Marshall J. noted at p. 145 as follows:

"Second, the agency must be in control of the requested material at the time the F.O.I.A. request is made. By control we mean the materials have come into the agency's possession in the legitimate conduct of its official duties."

In the present case the records sought are not required by the Minister in the exercise of his duties under the operating agreement. They are not required in the conduct of the Minister's official duties.

The Department did not have sight of the records sought nor does it require such records in the conduct of its functions. It has no authority over the records. In the circumstances it is submitted that this does not constitute control for the purposes of the Act.

It was further submitted that the purpose and scheme of the Act was 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 as indicated in the long title to the Act.

Moreover, the public are entitled to have personal information relating to them amended. The Department is not in a position to alter, add or to delete information requested.

Sub-sections 6(9) and 6(11) deem certain records to be held by the public body. Those are records in the possession of a person who provides a service for the public body under a contract of services. In the appellant's submission this applies to consultants or independent contractors providing a service to the public body. The Board does not provide service under a "contract of services". Section 6(11) provides that the records of a body that may be subscribed under the first schedule to the Act, such as the Board, are not deemed to be records of a public body but would be subject to direct access when such Board were brought within the Act and proscribed.

Counsel argued that the effect of the Commissioner's decision was to bring the Board within the scope of the Act which was in excess of the jurisdiction of the Commissioner and usurped the powers of the Minister for Finance. The Board is a body which might be subscribed pursuant to para. 1(5) of the First Schedule to the Act. Moreover, the effect of the Commissioner's decision was to formulate policy in an area of freedom of information. If the decision were upheld by the Court it would constitute usurpation by the judicial power of an executive function. Keane C.J. in *T.D. v. Minister for Education* [2001] 4 I.R. 259 at 287 noted:

"The difficulty created by the order of the High Court in this case is not simply that it offends in principle against the doctrine of the separation of powers, though I have no doubt that it does. It also involves the High Court in effectively determining the policy which the executive are to follow in dealing with a particular social problem."

Counsel also referred to s. 10 of the Industrial Development Act, 1995, which deals with county enterprise boards such as the Board in the present case. The Minister has limited functions in relation to such boards.

8. Legal submissions on behalf of the Information Commissioner

8.1 Miss Emily Egan, on behalf of the Commissioner, referred to the Commissioner's decision of 18th October, 2004 and to the nature of the review by the Commissioner.

She referred to the decision of Fennelly J. in *Sheedy v. The Information Commissioner* [2005] 2 I.L.R.M. 374 in relation to his comments which were not inconsistent with the majority judgment and were, accordingly, applicable to the present case. He referred to the replacement of the presumption of secrecy with one of openness which was designed to open up the workings of government administration to scrutiny. It was not designed simply to satisfy the appetite of the media for stories but was for the benefit of every citizen. The Act was designed to let light into the offices and filing cabinets of our rulers. The principle of free access to publicly held information was part of a worldwide trend. He referred to the long title and to s. 6(1) of the Act in relation to any record held by a public body.

In her submissions Miss Egan says that those views were expressed by the High Court on repeated occasions as in *Minister for Agriculture v. Information Commissioner* [2000] I.R. 309; *Deely v. The Information Commissioner* [2001] 3 I.R. 439 and in *Sheehy*.

Section 42(1) refers to an appeal to the court against a decision of the Commissioner which provides:

"A party to a review under s. 34 or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision. The procedure is set out in order 130 of the Rules of the Superior Courts as amended."

The principle that a "tolerable margin of error" should be allowed by the High Court on determining such an appeal arises from the "curial deference" that is shown by the Court at specialised administrative tribunals.

Counsel referred to the decision regarding the records being under the control of the Department and thus being "potentially eligible for release" under the Freedom of Information Scheme. She further submitted that it was open to the Department to consider the applicability of and invoke accordingly the wide range of potential exemptions to the right of access to records conferred by s. 6. She referred to the twelve grounds of exemption in ss. 19 to 32 of the Act.

Counsel also stressed that the Requestor was not seeking, and the Commissioner had not ordered, the granting of access to the records recording the actual examination by the Evaluation Committee or by the Board of an individual grant application. The Requestor was merely seeking copies of the internal documentation which was compiled and presented by the Board to its Evaluation Committee concerning the application. Those were the only records which the Commissioner had found to be within the scope of the Act.

Thirdly, the response of the Department to the Requestor's request was on the grounds that the record concerned did not exist or could not be found after all reasonable steps to ascertain its whereabouts had been taken, as provided by para. (a) of sub-s. 10(1) of the Acts.

Fourthly, it was clear that the Department did not, at any stage, request the Board to make available the records requested and replied to the Commissioner on 8th July, 2004 referring to the operating agreement and the articles of association of the Board. Given that no request was made to the Board it was difficult, in counsel's submission, to see how such a stance amounted to or might be consistent with taking "reasonable steps" as was contemplated by s. 10(1)(a) or, more generally, how the Department could assert definitely, as a matter of fact, that the records concerned were not under its control.

8.2 Moreover, s. 2(5)(a) of the Acts provides that a reference to a record "held by a public body" included a reference to a record "under the control of" such body. A record which is not in the possession of a public body could, nonetheless, be under its control.

It is too narrow a view to say that the monitoring/supervisory function in relation to access to the records is unduly limited. Counsel referred to s. 10 of the Industrial Development Authority Act, 1995.

8.3 Counsel for the Information Commissioner submits that para. 6 of annex B provides that the Board shall not provide financial assistance to support projects which are contrary to public policy and that the views of the relevant state agencies on these points should be canvassed in advance for the information of the Evaluation Committee. Paragraph 9, counsel submits, allows the Minister to attach such further conditions to the payment of grants in particular circumstances as he may from time to time deem appropriate. Moreover, para. 12 imposes a limit for grants being subject to 50% of qualifying expenditure or to a maximum limit of £100,000 in respect of the relevant investment, unless approved by the Minister. Similar provisions apply to equity participation by the Board (para. 16). Loans, pursuant to para. 17, are subject to a limit of £25,000. Loans in excess require the express approval of the Minister

and given in advance in writing.

Counsel submitted that it was illogical to suggest that the Department had no role or function in monitoring or supervising the Board's disbursement of individual grant applications to ensure that projects supported meet the relevant criteria for eligibility. Paragraph 2 of appendix B specifically contemplates monitoring and/or supervision by the Department of individual grant applications according to counsel's submissions.

Counsel disagreed with the submissions of the Minister in relation to article 17 of the articles of association which provides for disclosure to meet the information needs of the Minister only and the publication of information in relation to grants or other assistance given in the names of the participants thereof. Otherwise the directors undertake to keep confidential and not to disclose to any third party any information relating to specific projects in respect of which support or assistance is sought.

Counsel submitted that the provisions of the operating agreement must, of necessity, permit access to records of the Board in relation to the assessment and determination of any individual grant application as it may deem fit.

9. Decision of the Court

A request had been made to the Department on 14th January, 2001 for access to copies of the internal documentation which were compiled and presented by the Board to its Evaluation Committee concerning a grant application made by a Mr. Freyne to the Board in March, 2000.

The Department refused to grant the request on the basis that the record concerned did not exist or could not be found after reasonable steps to ascertain its whereabouts had been taken. The Department added that the overall co-ordination and supervision of the Board was carried out by the Department but that the records the Requestor sought related to the day to day operational matters of the Board and were not held by the Department.

After an internal review that decision was affirmed on 27th February, 2001. On 4th March, 2001 Mr. Freyne applied to the Commissioner under s. 34 of the Acts for a further review by the Commissioner of the decision of 27th February, 2001.

In her decision of 18th October, 2004, the Commissioner considered that the records of the Board were under the control of the Department.

The Department appealed pursuant to s. 42(1) of the Act.

Section 42(1) provides:

"A party to a review under section 34 or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision. The procedure is set out in Order 130 of the Rules of the Superior Courts as amended."

Order 130, rule 2 which provides that an appeal to the court, pursuant to s. 42(1), s. 42(2) or s. 42(3) shall be brought by way of originating notice of motion.

Rule 5(c) and (d) of Order 130 provides that the notice of motion should state the grounds of the appeal and the points of law, where appropriate, and should also state the nature of the direction or order sought from the court.

The appellant seeks an order discharging the decision of the Commissioner refusing access to Mr. Freyne to documentation within the possession of the Waterford City Enterprise Board presented by the Board to its Evaluation Committee concerning Mr. Freyne's grant application insofar as the Commissioner directed the Department to grant access to the Requestor to the records.

Further declarations were sought that the records were not held by the Department for the purpose of the Freedom of Information Acts, 1997 to 2003 and were not under the control of the Department for the purposes of the Act.

Extensive grounds were detailed in the notice of motion. These included that the Commissioner erred in law in her construction and application of the Acts: that the Board was not proscribed as a public body and that the Commissioner erred in law in the construction and/or interpretation of the memorandum and articles of association of the Board. Moreover, the appellant said that the Commissioner has usurped or purported to unlawfully interfere with the powers granted to the Minister for Finance under the Acts to proscribe a body as a "public body" and to make access to records of such public bodies by directing the Department to make access to the records.

The preliminary issues to be considered by the Court are the nature of the boards, the control by the Department of the boards, the information which the Department may request from the boards and the manner in which the request was refused.

In this particular case the County Enterprise Board was established in 1993 as a company limited by guarantee pursuant to s. 10 of the Industrial Development Act, 1997. The section deals primarily with the grants made by the Minister to the Board for the purpose of promoting and assisting economic development within the Board's area of operation, in particular, by means of enterprise creation and business development. The Board is empowered to make a loan, grant or have equity investment or support local development as may be deemed expedient.

In relation to control, sub-s. (5)(c) of that section provides that the Minister may exercise any function under the section in relation to a board, either directly or by means of any person or body authorised to do so in pursuance of and in accordance with regulations made by the Minister under the section.

It would seem from the provisions of the Industrial Development Act, 1997 and from the articles of association of the Board, together with the operating agreements between the Department and the Board that the Minister's role appears to be that of financing and supervising such financing which emanates from both national and European sources. The operating agreement reflects the financing role of the Minister. The implementation of the County Enterprise Initiative is delegated to each of the relevant boards. The responsibility for making decisions on the implementation of the enterprise plan lies with the Board, pursuant to article 7 of the agreement, subject to any directions from time to time given by the Minister. Articles 13(e) and (f) provide for directions by the Minister in relation to determining the financial capacity of enterprises, the apportionment of financial assistance and the payment to promoters of projects.

It seems to the Court that ministerial directions do not take away from the responsibility of the Board in making decisions. The Board agrees, under the operating agreement, to refrain from entering into any commitment of any sort which would result in an upper limit of financial capacity duly set by the Minister being exceeded. The Board further agrees to insert a clause in all its grant approvals stating that claims for payment should remain only on the basis of qualifying expenditure vouched as paid or, in the case of employment grants, vouched by the Chief Executive Officer of the Board on the engagement of relevant additional full-time employees.

It seems to the Court that the directions that may be given by the Minister are meant to safeguard the grants given and would appear to be prudent banking conditions rather than reservations on the powers of the Board or, indeed, control of the business and administration of the Board by the Minister.

It does not seem to me that the submissions by counsel for the Information Commissioner that the Department has a role in the actual examination by the Evaluation Committee or the Board regarding individual grant applications. The determination of granting or refusal lies with the Board. The Department does not appear, from the operating agreement, to have any role in relation to the evaluation of individual grant applications.

This is, of course, the subject of the application for information, that is the internal documentation which was compiled and presented by the Board to its Evaluation Committee concerning Mr. Freyne's grant application.

Paragraph 13(e) and para. 13(f) relate to the overall financial capacity rather than individual grants. Those paragraphs extend to the apportionment of financial assistance between various forms of assistance within the Board's remit as may be deemed necessary by the Minister from time to time. This is, of course, a matter of policy and not a matter of operations.

The Board has to have regard to the advice submitted to it by the Evaluation Committee in respect of the application in question. Paragraph 2 of appendix B provides that where the Board decides it expedient to depart in any way from such advice this must be for clear reasons which must be set down in the minutes of the meetings of the Board making a decision on the application. Extracts from the minutes shall be supplied to the Minister on request. Does this further monitoring of the business of the Board amount to "control"?

It does not seem to the Court that the Minister controls the Board. I have considered *Readymix Concrete v. Minister for Pensions* [1968] 1 All E.R. 433, *Dollfus Mieg et Compagnie SA v. Bank of England* [1950] 1 Ch. 337 at 355 and in particular, *O Coindealbhain (Inspector of Taxes) v. Mooney* [1990] 1 I.R. 422 at 431. In the last mentioned case Blayney J. dealt with contracts for services. The case referred to the tests to be applied as to the degree and extent of the control to be exercised by the Minister (where the taxpayer was the manager of an employment office) and whether the taxpayer was in business on his own account. Blayney J. stated at 431, 2:

"Firstly, the test as to the degree and extent of the control exercised by the Minister. While the Minister clearly lays down in the contract what is to be done, he does not direct how it is to be done except in certain instances when things are to be done in accordance with instructions, nor does he direct when the work is to be done except that the office is to be open during specified hours from Monday to Friday inclusive. For example, one of the duties of the respondent is

'To register the requirements of employers desiring work people and work people desiring reemployment, to place the one in touch with the other, to exhibit particulars of vacancies and to keep such records as may be required by the Department.'

But it is nowhere stated how employers desiring work people and work people desiring employment are to be put in touch with one another – whether it is to be done by letter, by telephone, by personal introduction etc. This is left to the discretion of the respondent. Also the manner in which particulars of vacancies are to be exhibited. Another duty of the respondent is to keep certain records and prepare certain accounts, but there is no requirement as to when this work is to be done.

It was submitted on behalf of the appellant that the Minister exercised the necessary control by reason of the fact that the deputy employed by the respondent and any clerical assistance have to be approved by the Department. But the control given by the requirement to have the Department's approval is minimal. Once a deputy or a clerk has been approved, he is then in the employment of the respondent and under his control. It is he who decides what hours are to be worked in addition to the hours during which the office has to be kept open, and how any work is to be done in respect of which there are no express instructions from the Department. So the fact that the Department has to approve of their appointment is of little significance in regard to how or when they do their work.

The second test to be applied is whether the respondent is in business on his own account. In my opinion he is. I have no doubt that he is running a business, the nature of the business being to provide a particular service for the Minister. His profit is the amount by which his remuneration exceeds his expenses; the lower he can keep his expenses the greater his profit. If he employs no one other than a deputy, and does a substantial amount of the work himself, his profit will be much greater than if he does little of the work himself and employs another person to do it instead. Similarly, the amount of his profit will also depend on how much rent he has to pay for his premises, and how well he succeeds in keeping down his other expenses. All these matters require management decisions and in making them the respondent is working for himself and not for the Minister. So it seems to me that he is clearly in business on his own account as the profit he makes from the contract depends on how he decides to perform the work which has to be done."

In the view of the Court the Board is not controlled by the Minister. The Board is in business on its own account subject to limited and defined reporting requirements that do not include the information requested.

In the U.S. case of *Department of Justice v. Tax Analysts* 492 U.S. 137 [1989] regarding "agency" records, the records had to have come into the agency's possession in the legitimate conduct of its official duties. There is no relation of principle and agent in the present case. Moreover, the information that the Minister can seek does not extend to the information requested. Furthermore, the information requested had not come into the possession of the Minister.

There is no suggestion that the Board departed from the recommendation of the Evaluation Committee in relation to Mr. Freyne's application.

Article 17 of the articles of association provides for disclosure to meet the information needs of the Minister only and the publication

of information in relation to grants. The information needs of the Minister appear to be limited to the provision and monitoring of overall grant aid and not to extend to the process of evaluation of individual applications. Indeed, the directors have an obligation to keep confidential and not to disclose to any third party any information relating to specific projects in respect of which support or assistance is sought.

Counsel for the Commissioner submitted that the provisions of the operating agreement must, of necessity, permit access to records of the Board in relation to the assessment and termination of any individual grant application as it may deem fit. The court does not agree that the operating agreement provides for such excess except where the board makes a decision which is not in accordance with the Evaluation Committee recommendations.

The provision of para. 21 of the operating agreement provides that the Board should ensure that all of its operations are fully and properly documented. It then continues as follows:

"The Minister and the European Union, their officers and agents, shall at all reasonable times have access to all the records of the company and the company shall ensure that recipients of aid from the company, including persons or bodies undertaking projects provide similar access to the Minister and the E.U., their officers and agents. The company agrees to furnish the Minister with copies of all relevant documentation requested by the Minister."

Does this provision go beyond the overall monitoring? It appears so to do and, indeed, to require that recipients of aid from the Board should also provide access to their records to the Minister and to the European Union, its officers and agents. Moreover, the last sentence would seem to require the Board to furnish the Minister with copies of any relevant documentation requested by the Minister.

It seems to me that the word relevant is significant and limits the documentation to that required for the overall monitoring of the Board. Insofar as the requirement that the Minister should have access to the records of the company and of the body being grant aided, this seems to me to go beyond the powers of the Minister. Indeed, it would make the companies being grant aided part of the scope for information.

It seems to me to be beyond the scope of the Acts that information of a grant aided body undertaking projects should be accessible to the public.

Moreover, it is clear from the agreement that the directors of the Board, pursuant to article 17 of the articles of association, undertake to keep confidential and not to disclose to any third party any information relating to specific projects in respect of which support or assistance is sought.

Fennelly J. in *Sheedy v. The Information Commissioner* [2005] 2 I.L.R.M. 374, refers to the replacement by the Act of a presumption of secrecy with one of openness which was designed to open up the workings of government with administration to scrutiny this cannot, in my view, extend to separate corporate bodies which are not designated and, a *fortiori*, two bodies undertaking projects grant aided by the Department and the European Union through the independent valuation process of the Board.

The Court should also consider, in this regard, the manner in which the request was refused. The refusal was pursuant to s. 10(1)(a) of the Act which provided for a refusal where the record concerned did not exist or could not be found after all reasonable steps to ascertain its whereabouts had been taken. Clearly this was not, in the circumstances, an appropriate ground for a refusal. Indeed, before this Court the argument was made on the basis of the records being under the control of the Department pursuant to s. 2(5)(a) of the Act, as was clear from the two submissions of the Department to the Commissioner on 8th July and 4th August, 2004.

For the reasons given above it seems to me that the records sought, the internal documentation compiled and presented by the Board to its Evaluation Committee concerning Mr. Freyne's grant application, was not information which was under the control of the Department. Finally, the Court should have regard, in an appeal of this nature, to the discretion of the Information Commissioner. The curial deference which courts owe to deciding bodies should only be interfered with where the basis for their decisions are in any way erroneous, beyond their powers or unreasonable. In the present case it seems to this Court that the finding in relation to control while based on stateable grounds, was, on balance, an extension of the meaning of control beyond that which was, on analysis, not justified by the operating agreement and the articles of association of the Board.

Accordingly, the Court will make an order discharging the decision of the respondent made on 18th October, 2004 in relation to case 010147 (request of Mr. Michael Freyne, Waterford Braiding Limited) in relation to internal documentation within the possession of the Board which was compiled and presented by the Board to its Evaluation Committee concerning Mr. Freyne's grant application.

The Court will also order the discharge of the said decision insofar as the Commissioner directed the Department to grant access to their request or to the records.

In addition, the Court will make the following declarations:

A declaration that the said decision and consequential directions given by the Commissioner in connection therewith are wrong in point of law;

that the records are not held by the Department for the purpose of the Freedom of Information Act, 1997 – 2003;

are not under the control of the Department for the purpose of the Act;

the Requestor is not entitled to access to the records within the possession of the Board;

that the right of access to [such] documentation does not constitute "control" over the said documentation for the purpose of the Act.