# THE COURT OF APPEAL

**Appeal Number: 2020/89**

**Donnelly J.**
**Noonan J.**
**Binchy J.**

**Neutral Citation Number [2022] IECA 213**

**BETWEEN/**

**JACKSON WAY PROPERTIES LIMITED AND JAMES PATRICK KENNEDY**

**APPELLANTS**

**- AND -**

**THE INFORMATION COMMISSIONER**

**RESPONDENT**

**-AND-**

**DUN LAOGHAIRE/RATHDOWN COUNTY COUNCIL**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Binchy delivered on the 30th day of September 2022**

**1.** This appeal is concerned with the interpretation and application of section 15 (1) (c) of the Freedom of Information act 2014 (the "FOI Act"). That sub-section provides:

> "15. (1) A head to whom an FOI request is made may refuse to grant the request where……..(c) in the opinion of the head, granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a

substantial and unreasonable interference with or disruption of work (including disruption of work in a particular functional area) of the FOI body concerned."

**2.** The appeal arises out of a decision of the High Court (Hyland J.) handed down on 14th February 2020 whereby she dismissed the appeal of the appellants from a decision of the respondent made on 23rd January 2019 (the "Decision"), whereby the respondent had upheld a decision of the notice party to refuse a request for information made by the appellants to the notice party on 8 February 2017 (the "FOI Request").

**3.** By this appeal (which is an appeal pursuant to section 24 of the FOI Act, on a point of law only) the appellants raise questions concerning:

(1) What constitutes the "work" of an FOI body (as defined in the FOI Act) for the purposes of ss. 15(1)(c) This question arises in circumstances where the appellants contend that neither the work of the FOI section of an FOI body nor the work of its legal department can be considered the "work" of an FOI body for the purposes of ss15(1)(c). It is contended by the appellants that for the purpose of the sub-section, the "work" of an FOI body can only mean work associated with the discharge of its statutory functions as prescribed by the Local Government Act 2001 (the "Act of 2001") or work ancillary thereto.

(2) Whether "substantial" and "unreasonable" as used in the subsection have different meanings, each requiring identifiably separate consideration by the respondent? This question arises because the appellants contend that the respondent failed to have any or any adequate regard to the question of reasonableness in arriving at the Decision.

(3) Whether the concept of what is "unreasonable" must be considered having regard to the resources of the FOI body relative to the scope of the request?

(4) What is the weight of the evidential burden on an FOI body sufficient to justify a decision to refuse an FOI request on the basis of the sub-section? More specifically, whether the notice party in this case adduced sufficient evidence to meet what is described by the appellants as the "heavy" onus on it to satisfy the respondent that the decision of the notice party to refuse the FOI Request was justified in accordance with ss 15(1)(c).

**4.** More generally, in this appeal it is the contention of the appellants that the trial judge, in upholding the Decision, failed to have due regard to the underlying philosophy of the FOI Act as articulated in the long title thereto, and as construed by various decisions of the Superior Courts which have emphasised and given effect to that philosophy. The long title to the FOI Act provides, in relevant part:

" An Act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right of privacy, to information in the possession of public bodies, other bodies in receipt of funding from the State and certain other bodies and to enable persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide a right of access to records held by such bodies, for necessary exceptions to that right and for assistance to persons to enable them to exercise it…."

**Background**

**5.** The appellants and the notice party have been engaged in litigation for a considerable number of years arising out of the compulsory acquisition by the notice party of lands belonging to the first named appellant which were acquired for the purposes of the development and construction of the M50 Motorway. On 8th February 2017, solicitors

acting on behalf of the appellants sent the FOI Request to the notice party requesting copies of the following documentation pursuant to the provisions of the FOI Act:

*"....* Copies of all records of all communications between whomsoever, held by or under the control of Dún Laoghaire Rathdown County Council relating to Jackson Way Properties Ltd including, inter-alia, its property, its title, any covenant or burdens affecting or alleged to affect its land, any claims for compensation arising from any covenant or burdens affecting or alleged to affect its land, its directors, its claim for compensation against Dún Laoighaire Rathdown County Council in respect of its land compulsorily acquired for the M50 motorway, its legal proceedings against Dún Laoghaire Rathdown County Council and its legal proceedings against Thomas Kevin Smith and Mairead Smith*."*

**6.** The notice party failed to respond to the request within the time prescribed by the FOI Act, thus giving rise to a deemed refusal of the request pursuant to s. 19 of the FOI Act. The appellants then purported to appeal that deemed refusal to the respondent. However, the respondent replied that it was first necessary for the appellants to request the notice party to conduct an internal review of the deemed refusal, which the appellants promptly did. However, they were informed by the notice party that such a review was not possible because they had not requested it within the prescribed period (four weeks). In what appears to have been an informal (non-statutory process) that followed, the parties, i.e., the appellants and the notice party, exchanged correspondence with a view to narrowing the scope of the FOI Request. While the appellants made some concessions, these were not sufficient for the notice party and, by letter dated 13th July 2018, the notice party formally refused the FOI Request. In this letter the notice party described in detail the documentation which it had identified fell within the scope of the FOI Request, which dated back to 21st October 1998 and ran up to the date of the request. It identified 72 files

across six departments of the Council, as well as 9291 emails going back to 1st January 2006. It was not possible to search emails before that date. The Freedom of Information Officer of the notice party concluded his letter as follows:

> "It is clear from the above list of hard copy and electronic documents relating to your clients' Freedom of Information request that there is an extensive number of records that require retrieval, collation and review. It is the Council's position that the retrieval, collation and review of the number of hard copy and electronic records identified by the above scoping exercise would cause substantial and unreasonable interference with the work of the Council…. being a ground for refusal under s.15(1)(c) of the Freedom of Information Act, 2014…".

**7.** By letter dated 29th August 2018, the appellants' solicitors applied to the respondent to review the decision of the notice party to refuse the FOI Request.

**8.** By letter dated 6th September 2018, the respondent confirmed acceptance of the application to review the decision of the notice party. In the course of this letter, the respondent drew to the attention of the appellants that ss.15(1)(c) of the FOI Act was relevant to the application, and the letter went on to quote the sub-section almost *verbatim*. The letter further stated that the appellants could make a submission in support of the review request, and that any such submission would be taken into account in the review.

**9.** By letter dated 19th September 2018, the solicitors for the appellant made submissions running to some 48 pages largely comprising a summary of correspondence between the solicitors for the appellants and the notice party from the time of the making of the FOI Request on 8th February 2017.

**10.** On 16th October 2018, a Ms. Elizabeth Swanwick of the office of the respondent, sent an e-mail to the solicitors for the appellants, in which she summarised submissions

received from the notice party on the review application. Having done so, Ms. Swanwick then stated:

> "In light of the above information, I am at present of the view that the Council was justified in refusing your clients' request on the basis of s.15(1)(c) of the FOI Act. Therefore should this case proceed to a formal, legally binding decision, I intend to recommend to the Senior Investigator that he affirm the decision of the Council. Having considered my view, your client may wish to consider withdrawing its application for review at this time. …… if they do not wish to withdraw, this case will progress to a formal, legally binding decision which will be anonymised and published on our website.
>
> Please note that any views that I may have formed as the Investigating Officer are not binding on the Senior Investigator/Commissioner. Any comments you wish to make in response to this e-mail will be taken into account by him in making the final decision on your application for review. If your client has any further comments in relation to the above or wishes to withdraw their application for review, please forward your response to this office by Wednesday 31st October 2018."

**11.** The solicitors for the appellants replied by letter of 17th October 2018. They drew attention to a letter that they had sent on behalf of the appellants to the notice party whereby they had identified certain matters which they had confirmed were not included in the FOI Request, i.e. purportedly limiting the scope of the FOI Request They submitted that the FOI Request would not cause substantial or unreasonable interference with or disruption of the work of the notice party, including disruption of its work in a particular functional area under s.15(1)(c) of the FOI Act, or otherwise. They further submitted that the appellants had done everything possible to reduce the scope of the request and indicated an intention on the part of the appellants to exercise their right of appeal to the

High Court pursuant to s.24 of the FOI Act, in the event that the respondent failed to direct the notice party to comply with the FOI Request.

**The Decision**

**12.** The Decision was issued by Mr Stephen Rafferty, Senior Investigator of the respondent, on 23 January 2019. In the section headed "Analysis and Findings", the respondent stated as follows:

> "In its letter of 13th July 2018 to the applicant that it issued in response to the applicant's letter of 6th June 2018, the Council identified 72 files of potential relevance to the request, held in a variety of locations within the Council. It also explained that its mail system allows for a search of emails from 2006 onwards and that a number of searches, using various relevant search terms, uncovered 9,291 emails of potential relevance.
>
> In its submission to this Office, the Council stated that it estimated that it would take approximately 262 hours to examine the various files and records. It estimated that a review of the hardcopy files would require the involvement of six staff members (one from each section) and would involve an estimated 108 hours of manpower, while an examination of the emails located would require an additional 154 hours of manpower (assuming an examination rate of 60 emails per hour). It added that any relevant records identified would then have to be examined to determine whether they might be subject to legal professional privilege."

**13.** The respondent then observes that the FOI request is extremely broad, having regard to the time span and the subject matter involved, and that to the extent that the appellants had offered to narrow the scope of the request, that offer did little or nothing to reduce the amount of time and resources that would be required to process the request. As a result, it

was the conclusion of the respondent that the notice party was justified in its decision to refuse the FOI Request pursuant to ss.15(1)(c) of the FOI Act, on the grounds that the processing of the request would cause a substantial and unreasonable interference with or disruption of the work of the notice party.

**Grounds of Appeal to the High Court**

**14.** In accordance with the prescribed procedure, the appellants caused the issue of a notice of motion dated 21st February 2019, setting out the points of law on which the appeal is advanced. The motion is grounded upon the affidavit of the second named appellant, Mr. Kennedy, sworn on 22nd February 2109. Six points of law are relied upon, as follows:

1) The respondent erred in his interpretation and application of ss.15(1)(c) of the FOI Act;
2) The respondent erred in law in holding that ss.15(1)(c) of the FOI Act applied in circumstances where there was no or no sufficient evidence that the FOI Request would cause a substantial and unreasonable interference with or disruption of the work of the notice party;
3) The respondent erred in law in that the appropriate legal test for the application of ss.15(1)(c) of the FOI Act was not applied in the making of the decision, and the test applied by the respondent was based on a misunderstanding of the law, as recorded in the Decision, that s.15(1)(c) "… essentially allows for the refusal of voluminous requests";
4) The respondent erred in failing to have any or any adequate regard to the question of reasonableness in making the Decision;

5) The respondent erred in his interpretation as to what constitutes a "substantial and unreasonable interference with or disruption of work" within the meaning of ss.15(1)(c) of the FOI Act and,

6) The respondent erred in law in failing to have any regard to the importance to the applicant of the records sought.

**15.** In a statement of opposition filed on 17th April 2019, the respondent denies each and every ground relied upon by the appellants. It is pleaded that there was sufficient evidence before the respondent to support the conclusion that the FOI Request would cause a substantial and unreasonable interference with or disruption of the work of the notice party. It is pleaded that the respondent did have regard, or adequate regard, to the question of reasonableness.

**16.** It is further pleaded that in so far as the Decision states that: "Section 15(1)(c) …[of the FOI Act] … essentially allows for the refusal of voluminous requests", this statement was intended to be a high level summary of what the section entails and the phrase does not purport to be the appropriate legal test for the application of the section.

**Decision of the High Court**

**17.** At the outset of her judgment, the trial judge referred to the standard of review of decisions from the respondent and cited a recent decision of this Court in *FP v. Information Commissioner* [2019] IECA 19 wherein the court observed:

> "It is clear from these (cases) that considerable deference will be afforded to an expert decision-maker such as the Commissioner, that a wide margin of appreciation will be afforded to him, being the person who has by the Act, been charged with the making of decisions in relation to requests under s. 7 of the Act. It is not sufficient,

even were it to be the case, that in the exercise of the same discretion the court hearing an appeal might itself have reached a different decision".

**18.** The trial judge then went on to observe that, in so far as errors of law are concerned, the authorities make it clear that no deference is to be shown to the Commissioner when the High Court is interpreting a section of the FOI Act, this being a pure point of law.

**19.** The trial judge then went on to summarise some of the core principles applicable to FOI requests as follows:

1. The FOI Act is designed to enable members of the public to obtain access [to information] to the greatest extent possible consistent with the public interest and the right to privacy to information, in possession of public bodies (*Minister for Agriculture v. Information Commissioner* [2001] IR 309).
2. The Long Title to the Act is of importance in interpreting the Act (*Minister for Health v. Information Commissioner* [2019] IESC 40). Accordingly, the trial judge stated that when considering the correct interpretation of s.15(1)(c) of the FOI Act, she had regard to the objectives set out in the Long Title to the Act, and specifically that the aim of the FOI Act is to enable members of the public to obtain access to information the greatest extent possible.
3. Section 22(12) of the FOI Act requires a presumption of disclosure, and in reviewing a decision to refuse access, the decision to refuse shall be presumed by the respondent not to have been justified unless the head of the FOI body shows to the satisfaction of the respondent that the decision was justified. In this case that means that the notice party carried the burden of demonstrating why the documents requested should not be released.

**Preliminary matters**

**20.** Before addressing the substance of the appeal, it was necessary for the trial judge to address some preliminary issues. These concerned the admissibility of two arguments advanced on behalf of the appellants that had not been advanced before the respondent. The first of these concerns the meaning of the word "work" for the purposes of s.15(1)(c) of the FOI Act, and the second relates to an argument made by the appellants that the respondent had failed to consider whether or not the granting of the FOI Request would give rise to an *unreasonable* interference with or disruption of the work of the notice party, and focused only upon the question as to whether or not the FOI Request would involve a *substantial* interference with or disruption of the work of the notice party.

**21.** The respondent argued that these issues had not been raised nor the subject of any submissions in the course of its consideration of the appellants' appeal, and therefore formed no part of the Decision, and accordingly it was not open to the appellants to raise these issues before the High Court. Having received submissions from the parties, the trial judge decided to permit the appellants to argue them in the appeal before her. At the hearing of this appeal, counsel for the respondent informed the Court that the respondent was satisfied to deal with these questions, being questions of law, on the merits, and not to dispute further the entitlement of the appellants to raise them in the High Court for the first time.

**22.** However, the respondent strongly argued that the appellants were not entitled to raise a different issue which they submit is an issue of fact, that being the appellants' claim that in making the Decision, the respondent had failed to have any regard to the resources and staffing levels of the notice party when considering whether or not the interference with its work was unreasonable. This issue had not been raised by the appellants in their submissions to the respondent, and nor was it the subject of any evidence adduced before the respondent, and accordingly it was not addressed by the respondent in the Decision. It

was, however, the subject of submissions by the appellants to the High Court, and is addressed by the trial judge in her judgment.

**23.** In the interests of completeness, I should mention that the respondent also objected to the appellants raising, for the first time at the hearing of this appeal, arguments concerning the allegedly cumbersome and inefficient nature of the filing system of the notice party, and a further argument grounded upon s.27 of the FOI Act to the effect that the impact on the work of the notice party could be softened by the respondent availing of its entitlement to impose fees / charges in respect of the search and retrieval of documents, pursuant to s.27 of the FOI Act. However, these arguments were not pursued by the appellants at the hearing of this appeal.

**24.** Having addressed the preliminary issues referred to above, the trial judge then went on to consider the substantive arguments advanced in the court below, under four headings: The meaning of "Work", "Reasonableness", "Voluminous Requests", and "the Evidential basis for the Decision". The appellants have appealed the decisions of the trial judge under each of these headings. Accordingly, I will address each of these headings in the same order, first by summarising the decision of the trial judge on the relevant issue, and then by addressing the grounds of appeal relating to each before proceeding to address the next issue.

**Definition of Work**

**25.** The trial judge summarised the argument of the appellant at paras. 50 and 51 of her judgment. She stated:

"50. The argument goes that, because the nature of the work that could be considered was not identified, and because correspondingly there was no identification of how there was an interference or disruption with that work, this amounted to an error of law.

51. Further it is argued that the work of the FOI department and of the legal department is not work "involved in the discharge of the statutory functions of [the notice party] and therefore any interference or disruption with same is irrelevant for the purposes of s.15(1)(c)."

**26.** At para. 55 of her judgment, the trial judge noted that it was the appellants' submission that it is only work that constitutes a function of a local authority for the purposes of s.63(1)(b) of the Act of 2001, or alternatively a function ancillary thereto, pursuant to s.65 of the Act of 2001 that may be considered as being "work" of an FOI body for the purpose of ss.15(1)(c) of the FOI Act. Section 63(1)(b) of the Act of 2001 provides, *inter alia,* that the functions of a local authority are:

> "(b) to carry out such functions as may at any material time stand conferred on the relevant authority by or under any enactment."

**27.** At paras. 52 and 53 of her judgment, the trial judge traced the history of s.15(1)(c ) of the FOI Act, the precursor to which was s.10(1)(c ) of the Freedom of Information Act 1997. That section referred to "interference with or disruption of the *other* [my emphasis] work of the public body concerned". The words "the other" were deleted by the Freedom of Information (Amendment) Act 2003. As regards this amendment, the trial judge noted, at para. 52: *"*The Explanatory Memorandum to the Bill that became the Freedom of Information (Amendment) Act 2003, provided that the deletion of the word "other" is intended to clarify that a substantial and unreasonable interference with work, whether that is the work of a particular unit or section or the work of a body generally can constitute grounds for refusal of a request *…"* At para. 53, the trial judge noted that the corresponding section of the FOI Act includes the additional phrase: "including disruption of work in a particular functional area". The trial judge further noted that in "Freedom of Information law", third ed. Round Hall 2015, McDonagh observed:

> "The phrase 'including disruption of work in a particular functional area' was introduced by the 2014 Act to make it clear that the disruption referred to in Section 15(1)(c) does not have to extend to the organisation as a whole."

**28.** At para. 56, the trial judge held that: "it seems to me that any step taken by a local authority to comply with its statutory obligations under the FOI Act is to be treated as an ancillary function of the local authority under Section 65 [of the Local Government Act, 2001]. Equally the activities of the legal department must fall to be treated in the same way." The trial judge considered that this conclusion was supported by the amendment history to the precursor of the section. At para. 57 she held:

> "Counsel for the Appellants says that the amendment effected in 2014 - ("including disruption of work in a particular functional area") - in relation to the functional area assists him because it supports the argument that one must look at the functions of the FOI body i.e. the specific statutory functions and no other matter. In my view, that is not a correct interpretation of the words in parenthesis. Rather they simply make it clear that the interference/disruption of the work does not have to be in respect of the entirety of the work of the body but rather that disruption of work in a particular functional area is sufficient. "Functional" should simply be given its ordinary and natural meaning here and should not be construed as if it were a reference to specified functions under the Local Government Act 2001."

**29.** The trial judge then rejected the contention that only statutory functions of local authorities, as defined in the Act of 2001 can constitute "work" for the purposes of ss.15(1)(c). In the opinion of the trial judge, any *intra vires* activities carried out by a body subject to FOI are "work" within the meaning of s.15(1)(c) and there are no excluded categories of work, contrary to the arguments made by the appellants (para. 62 of the judgment of the High Court).

**30.** The trial judge further observed that the natural and ordinary meaning of the word "work" is not work that is being carried out to advance a defined end as contended for by the appellants, and that if that had been the intention of the legislature, one would have expected the legislation to say as much.

**Meaning of "Work" – Appellants' case**

**31.** In their notice of appeal, the appellants submit that the "work" of an FOI body is the work it does while discharging its statutory functions. It is submitted that the work carried out by the FOI section and the legal services department of the notice party are not statutory functions save only to the extent that a local authority is under a duty to comply with the FOI Act. However (it is submitted) this is not the same thing as a function conferred by statute in accordance with s.63(b) of the Act of 2001, or an ancillary function under s.65 of that Act. If it were otherwise, this would encourage the under resourcing of FOI departments by FOI bodies and that could then be relied upon to justify a refusal to grant almost every FOI request. In effect, the appellants argue that the work of the FOI section cannot be taken into account in the assessment as to whether or not the grant of a request would cause unreasonable interference with or disruption of the work of an FOI body, and the same applies to the legal services section of a public body.

**32.** The appellants also placed reliance upon a guidance note published by the respondent in which it is stated that "it should be noted that a refusal may be made on the basis of a disruption of the work of a particular functional area and not necessarily on the basis of disruption of work of the body as a whole". This, it is submitted, is consistent with an interpretation of "work" being work undertaken by an FOI body while discharging its statutory functions.

**33.** The appellants submit that the Decision does not identify the functional area or areas of work which would be substantially disrupted or interfered with by the granting of the FOI request. It is submitted that it is not sufficient to make a generalised reference to the administrative burden that a request will impose on an FOI body – this is inconsistent with the presumption of disclosure. Further, the absence of any evidence at all in relation to the size, staffing levels and work of the notice party generally has the result that the notice party failed to discharge the onus of establishing that the refusal of the request was justified in accordance with s.15(1)(c).

**Meaning of "Work"- Respondent's case**

**34.** In the respondent's notice, it is denied that the work of an FOI body is limited to that involving the discharge of its statutory functions. It is also argued that no such argument was advanced during the review process.

**35.** The respondent denies that the appellants are entitled to rely on the guidance note of the respondent at all, but even if they are, it is denied that it in any way supports the interpretation of "work" advanced by the appellants.

**36.** The respondent denies that the interpretation of "work" so as to include the work of the FOI unit would encourage the under resourcing of the FOI unit, as claimed.

**37.** The respondent denies that the Decision did not identify any particular functional area of the notice party, but even if it did, it is denied that this gives rise to any error. The respondent submits that the trial judge correctly held at para. 93 of her judgment that *"*there was an ample evidential basis for the Decision*"*.

**38.** The respondent submits that the appellants are not entitled to advance any argument or ground of appeal with respect to the size, staffing levels and work of the FOI body as a whole at this stage in the proceedings.

**Discussion and conclusion on meaning of "work"**

**39.** The parties are in agreement that there is no authority in which this question has previously fallen for consideration.

**40.** In their submissions on this issue, the appellants claim that the trial judge erred in the manner in which she interpreted the amendments to the precursor of ss.15(1)(c). They argue that the purpose of these amendments was not to include the work of the FOI section (or the legal department of an FOI body), but rather to make it clear that the entitlement to refuse a request on grounds of substantial and unreasonable interference with the work of an FOI body could relate to the work of that body generally, (following on from the 2003 amendment) or the work of a particular functional area of the FOI body, following on from the change introduced in the FOI Act.

**41.** At the risk of repetition, the submissions of the appellants on this issue may be summarised as follows:

(1) The functions, including ancillary functions, of public bodies are those set forth in sections 63 and 65 of the Local Government Act 2001, and do not include the work of the FOI section or the legal department of a public body;

(2) Only functions prescribed by the Act of 2001, or functions ancillary thereto, fall for consideration in the application of ss. 15(1)(c);

(3) The interpretation urged by the respondent would encourage under resourcing of FOI sections of specified FOI bodies and,

(4) The interpretation urged by the appellants is consistent with the respondent's own guidance note.

**42.** The respondent, on the other hand, submits that there is no basis for the interpretation of the subsection contended for by the appellants. Had the Oireachtas intended to restrict the meaning of "work" to the functions assigned to public bodies by statute, then they

would have done so. The court should not read into the subsection words that are not there (see *Equality Authority v. Portmarnock Golf Club* [2010] 1 IR 671, per Hardiman J. at 199).

**43.** While the appellants rely upon the addition of the words "in a particular functional area of the FOI body" in the latest version of the subsection in the FOI Act, the respondent argues that if anything the addition of those words suggest that disruption to work does not have to occur in a "functional area". It is the respondent's case that the trial judge was correct to hold, as she did at para. 58 of her judgment, that:

> "The natural and ordinary meaning of the word 'work' is not work that is being carried out to advance a defined end as contended for. If the concept of work had been intended to be so limited, one would expect the legislature to have identified that. In this respect, the deletion of the words "the other" in 2004 is important. The phrase "substantial and unreasonable interference with or disruption of the other work of the FOI body" does indeed suggest that the work of retrieving and examining the number or kind of records was not to be included when identifying interference or disruption. That wording suggests a division between work relevant to the application of the s.15(1)(c) test and work not so relevant. However, the removal of 'the other', to be replaced with a simple interference or disruption of 'work' of the FOI body, suggests there is no excluded category of work inherent in the word 'work'. In particular, the removal of the word 'the' is significant –the lack of same carries with it an implication of any work as opposed to a defined category of work".

**44.** I am in complete agreement with the conclusion of the trial judge on this issue. The starting point for consideration of this issue is to consider the ordinary and natural meaning

of the word "work". Unless qualified in some manner in the FOI Act, then it must be given its ordinary meaning. As already observed, it is in no way qualified.

**45.** In advancing their arguments under this heading, the appellants are, as has been submitted on behalf of the respondent, inviting the court to import words into the statute that simply are not there. This is impermissible.

**46.** The appellants contend that the work of the FOI section involves the performance of a statutory duty and not the discharge of a statutory function and so should not therefore be considered for the purpose of s.15(1)(c), but this does not follow. The processing of FOI requests by an FOI body is, on any ordinary meaning of the word, "work". The submission of the appellants that to construe the word on this basis will result in FOI bodies under resourcing their FOI sections is unconvincing. As the trial judge held, public bodies are required to act in good faith in complying with their statutory obligations, and it would not be appropriate for a court to assume that they would deliberately circumvent the provisions of the FOI Act in the manner suggested.

**47.** Moreover, if the work of the FOI section is to be excluded from the definition of "work" for the purposes of ss.15(1)(c), this could well have the effect that the FOI section of an FOI body could be overwhelmed by one or a small number of requests thereby inhibiting it from fulfilling a very important statutory duty in accordance with the strictures of the FOI Act.

**48.** Similarly, any work required of the legal department of an FOI body cannot and should not be treated as anything other than "work" even if it is the case that it cannot be identified with a particular statutory function of an FOI body. Moreover, the appellants' proposition, in so far as it relates to the work of the legal department of a local authority (being the kind of FOI body with which these proceedings are concerned), is demonstrably incorrect. The work of the legal department of a local authority is intrinsically bound up in

the discharge of the statutory functions of a local authority, and the legal department is very often centrally involved in the implementation and discharge of those functions. The instances of this are too numerous to mention, but a few examples relevant to local authorities demonstrate the point clearly: the in-house legal department of a local authority will typically be centrally involved in the acquisition of lands for housing and roads, the drawing up of compulsory purchase orders for such purposes and the enforcement of planning laws and regulations in the courts. Therefore, even on the appellants' narrow definition of the work of an FOI body (which I do not accept as being correct) the work of the legal department of a local authority must surely fall within the scope of its functions as conferred by statute.

**49.** I am also in full agreement with the trial judge that the amendment history of the precursor to subsection 15(1)(c) is consistent with and supportive of this interpretation. The deletion of the words "the other" before the word "work" from the corresponding section in the Freedom of Information Act, 1997 had the effect of removing what amounted to a qualification of the work that fell for consideration for the purposes of the section. As the trial judge observed, as originally phrased, the wording of the section did suggest that the work of retrieving and/or examining the number or kind of records referred to in an FOI request was not to be included when considering the extent of interference or disruption in the work of an FOI body, and the removal of the words "the other" clearly suggested that there was to be no excluded category of work for the purposes of the section.

**50.** Finally, on this point, the appellants contend that their interpretation of "work" is consistent with the statement in the respondent's guidance note which states at para.2.2.2: "It should be noted that a refusal may be made on the basis of a disruption of the work of a particular functional area, and not necessarily on the basis of disruption of work of the

body as a whole". This is no more than a reflection of the text of ss.15(1)(c) itself. It is unclear to me why the appellants' interpretation of the sub-section is any more consistent with the statement in the guidance note than the interpretation argued for by the respondent. In any case, whether or not the interpretation contended for by either party is consistent or inconsistent with the guidance note is immaterial, as it can be of no assistance to the Court in the interpretation of the FOI Act. The trial judge made a similar observation, at paragraph 84 of her judgment, regarding the reference to "voluminous requests" in the Decision, and I agree with that observation. I also agree with the trial judge that reading the sub-section as a whole, the ordinary meaning of the words used is intended to make it clear that is not necessary for an FOI request to interfere with the work of an FOI body across all of its divisions in order to invoke the sub-section in refusing a request. It is sufficient if compliance with the request would cause a substantial and unreasonable interference with the work of just one "functional area", which I take to mean any one identifiable section of an FOI body. To be fair to the appellants, the use of the words "functional area" is perhaps unhelpful in so far as they do have a particular meaning in local government law, being a geographical area within the jurisdiction of a local authority, but clearly that has no relevance to the matters at issue in these proceedings.

**51.** For the foregoing reasons, I am satisfied that there was no error on the part of the trial judge in her interpretation of ss15(1)(c), and in particular what constitutes "work" for the purposes of the sub-section. In construing the sub-section, she did so in accordance with the ordinary meaning of the words used, and the conclusion that she reached on the issue is in my view is both reasonable and consistent with the evolution of the precursor to the subsection. The interpretation argued for by the appellants, on the other hand, requires the court to interpret the subsection in a manner that qualifies the word "work" in a way

that is not apparent from the face of the sub-section, and runs contrary to the evolution of the precursor to the sub-section. I would therefore dismiss this ground of appeal.

**Reasonableness- the Decision of the Trial Judge**

**52.** Having disposed of the appellants' arguments regarding the meaning of "work", the trial judge then went on to consider the arguments advanced by the appellants that the respondent erred in his interpretation and application of ss.15(1)(c) of the FOI Act in failing to have any regard to the question of reasonableness in making the Decision or , more accurately, in failing to give adequate consideration as to what constitutes an "unreasonable" interference with the work of a FOI body. The trial judge referred to the appellants' argument that the word "substantial" in s.15(1)(c) relates, *inter alia,* to issues associated with the volume and nature of records, and so it follows that the word "unreasonable" must have a different and distinct meaning, necessitating an examination of the resources of the FOI body and whether the request is reasonable or disproportionate having regard to the available resources.

**53.** The trial judge noted that there is a statutory prohibition to giving any consideration to the reasons behind the making of an FOI request, and while that limits the nature of the enquiry as to what is reasonable or unreasonable, she did not consider it leads to the interpretation of the word "unreasonable" as advanced by the appellants.

**54.** The trial judge observed that "as with the word 'work' one must look to the natural and ordinary meaning of the word 'unreasonable' ". She considered the interpretation contended for by the appellants to be overly restrictive. While an analysis of the resources of an FOI body may be appropriate in certain circumstances, she said that this is only one

instance of the analysis that might be considered, and it is not the sole consideration and is not necessitated in all the circumstances.

**55.** In the view of the trial judge, the interpretation of s.15(1)(c) of the FOI Act does not require that considerations related to the number or nature of the records involved (being the records that require retrieval and examination in order to comply with the relevant request), may only be considered by reference to the word "substantial" in the subsection, and that what is "unreasonable" for the purposes of the subsection must mean something else. The trial judge also observed that while the guidance note of the respondent did indeed refer to the size and staffing levels of an FOI body as being factors to be taken into consideration, this was not mandatory and would be an overly narrow construction of the word "unreasonable".

**56.** At para. 72, the trial judge held:

> "In conclusion, I think 'unreasonable' must be given its natural or ordinary meaning within the constraints of the statutory scheme, i.e. having regard to the fact that the purpose of the request cannot be considered. When examining whether a request will cause unreasonable interference/disruption to work, potentially relevant matters to be considered will include those identified in the section being the number and nature of the records, the nature of the information, the nature of retrieval and examination, the nature of any interference or disruption of the work, and the type of work being disrupted and the extent of that disruption. In other words, the Commissioner must ask him or herself whether the interference/disruption is unreasonable in all the circumstances of the request."

**57.** The trial judge went on to consider the argument that the respondent had failed to consider specifically the unreasonableness of the burden to the notice party in complying with the FOI Request. While noting that it was true that the respondent did not separate

out unreasonableness from substantial when applying the test, the trial judge said, at para. 75 of her judgment, that:

> "Once it is accepted that the 'unreasonable' part of the test can be used to evaluate all matters relevant to the request (save for the motivation in making it), including the number of the records sought, their nature, the type of retrieval and examination, then any onus to specifically identify how the request constituted 'unreasonable' interference/disruption, as opposed to 'substantial' and 'unreasonable' interference/disruption falls away. Further, given that the section imposes a cumulative requirement, i.e. that the disruption/interference should be both substantial and unreasonable, I find it acceptable for the Commissioner to carry out an analysis that does not separate out unreasonable from substantial, but rather to take a global view that the statutory test in respect of both had been met."

**58.** The trial judge noted that the respondent had described the core features of the FOI Request and discussed its impact upon the work of the notice party. She said:

> "Certain features of the request were highlighted, including the temporal scope (being a request from 1998 to the date of the request with no temporal limitation i.e. a twenty-year period), the number of hard and soft copy files potentially impacted by the request and the burden on staff that would be imposed by same. In the circumstances, the conclusion that such a request was capable of placing a substantial and unreasonable interference/disruption on the work of the FOI body is unsurprising".

**59.** Moreover, the trial judge found that there was sufficient evidence before the respondent to support a conclusion of unreasonable interference and disruption (in the event that the FOI Request were to be granted) in the work of the Notice Party.

**Reasonableness - the Appellant's case**

**60.** In their notice of appeal regarding reasonableness, the appellants raise the following grounds of appeal:

1. The trial judge erred in concluding that because s.13(4) of the FOI Act provides that an FOI body cannot evaluate the reasons for an FOI request on the one hand and the necessity for the records sought by reference to those reasons on the other, this limits the inquiry as to the "unreasonableness" of the FOI Request. The appellants claim that the plain intention of the FOI Act, as set out in the long title thereto, is to provide the greatest possible access to the public to information in the possession of FOI bodies.
2. Section 11(3) of the FOI Act specifies the matters to which an FOI body is required to have regard in performing its functions under the FOI Act. These matters include (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. It is submitted that the trial judge erred in failing to have regard to any of these matters and to balance those requirements on the one hand, as against the entitlement of an FOI body to refuse an FOI request on administrative grounds, on the other.

3. It is also submitted that the trial judge erred in concluding that there could be a meaningful consideration as to whether or not the FOI request was "unreasonable" within the meaning of s.15(1)(c) of the FOI Act, in the absence of any evidence as to the size, staffing levels and work of the FOI body as a whole.
4. The appellants rely upon the long title to the FOI Act, s.11, s.15(1)(c) and s.22(12)(b). The last mentioned sub- section 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."

**61.** In his submissions in relation to these grounds of appeal, counsel relied upon the decision of the Supreme Court in *Minister for Communications, Energy and Natural Resources v. Information Commissioner* [2020] IESC 57 ("*ENET*"), being a decision of Baker J handed down on 25th September 2020, seven months after the judgment of Hyland J. in these proceedings.

**62.** What was at issue in *ENET* was the interpretation of ss. 35 and 36 of the FOI Act which make provision for the exemption of certain categories of record from the provisions of the Act, specifically if the disclosure of the information would constitute a breach of confidence provided for by a provisional agreement or enactment or otherwise by operation of law, or if the information concerned is commercially sensitive. Each of those sections also contains a provision allowing the FOI head (of the FOI body) to override those exemptions if the head is of the opinion that the public interest would, on balance, be better served by granting than by refusing the FOI request concerned. *ENET* was concerned with the interplay between the exemption from disclosure, and the exception to

that exemption, as well as s.22(12)(b) of the FOI Act, which, it will be recalled, provides that it shall be presumed that a refusal of an FOI request is not justified unless the FOI head concerned shows to the satisfaction of the respondent that was justified.

**63.** Baker J. analysed the principles to be adopted to exemptions provided for by the FOI Act. She referred to s.22(12), as well as the interplay between mandatory exclusion of access in ss. 35(1)(b) and 36(1)(b) and the presumption which favours the release of information read in the light of s.11(7) of the FOI Act, which provides that nothing in section 11 is to be construed as applying the right of access to an exempt record, in circumstances where the exemption is either mandatory or , where the exercise of a discretion is involved, the factors favouring refusal of disclosure outweigh the public interest in disclosure. The question that arose for consideration in *ENET* was put thus by Baker J., at para 51:

> "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?"

**64.** The appellants rely upon para. 154 of the judgment of Baker J., wherein she stated:

> "The presumption, therefore [in s.22(12) (b)] 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 that the starting point is that a decision to refuse is not justified unless justifying reasons are provided."

**65.** In the following paragraph, Baker J. quoted from the decision of Clarke J. (as he then was) in *FP v. Information Commissioner* [2009] IEHC 574 in which 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. The appellants submit that in *ENET,* Baker J. placed significant emphasis on the "asymmetry" of knowledge as between the person requesting information, and the FOI body. At para. 169, Baker J. stated:

> "The asymmetry of knowledge makes it logically difficult or even, in many cases, impossible for the requestor 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."

**66.** So, therefore, the appellants submit, while ss.15(1)(c) permits the respondent to refuse a request where complying with the request would cause a substantial and unreasonable interference with (or disruption of) the work of the FOI body, it is necessary for the FOI body to justify that refusal on a strict interpretation of ss.15(1)(c) by demonstrating that both limbs of the test i.e. substantial and unreasonable interference/disruption of the work of the FOI body – have been satisfied. This follows also from s.22(12) of the FOI Act.

**67.** It is the appellants' contention that "unreasonable" must mean something distinct from "substantial". Therefore, "unreasonable" must be measured in terms that have regard to the resources available to the relevant FOI body. Furthermore, in considering this issue, the court must have regard to the purpose and philosophy behind the FOI Act, which places emphasis on and favours disclosure over refusal of requests.

**68.** It is also the appellants' contention that this error is identifiable in the shorthand used by the respondent when referring to ss.15(1)(c) as permitting refusal of "voluminous" requests. The appellants contend that the respondent did not distinguish between requests causing a substantial interference with or disruption of the work of the notice party, and requests causing an unreasonable interference with or disruption of its work, and that, in

effect, the FOI Request was refused on the grounds that it was substantial only, without any regard to whether or not it was also unreasonable.

**69.** By way of comparison, the appellants draw attention to para. 2.2.4 of the respondent's guidance note in which the following is stated:

> "The FOI body should be in a position to provide all relevant details to support its position [to refuse the request based on ss.15(1)(c) of the FOI Act] …. It should only be on the basis of a documented and defensible estimate of how work of the body would be interfered with or disrupted to a substantial and unreasonable extent."

This paragraph of the guidance note then goes on to provide details of an actual example in which an FOI body had provided the respondent with details as to "its size and staffing level, the extent of the records covered by the request, the nature and number of the files to be examined, the estimated time it would take to check each file and the staff required to do so. It also provided details of the tasks, staff and length of time that would be involved in the decision making. The Commissioner agreed that the request was of an excessively broad and voluminous nature. She stated that while the FOI Act imposes statutory obligations on public bodies, compliance with these obligations is not intended to be unreasonably burdensome."

**70.** The appellants submit that while some information of this kind was provided in this case, the notice party had not provided the respondent with details as to its size and staffing levels, by reference to which interference with its work could be assessed, having regard to the number of staff that would be required to comply with the request.

**Reasonableness - the Respondent's case**

**71.** In his respondent's notice, the respondent denies that he misunderstood ss.15(1)(c) and further denies having determined the issue exclusively on the basis of the volume of the documentation requested. It is denied that the respondent did not give consideration as to whether or not the FOI request would give rise to unreasonable interference with the disruption of the work of the notice party.

**72.** The respondent also contends that "to the extent that the appellants are properly entitled to ventilate any argument or ground of appeal with respect to 'size, staffing levels and work of the FOI body as a whole', it is denied that any error arose".

**73.** However, in his submissions on this point, the respondent argues that the appellants are not entitled to raise any issues regarding the "size, staffing levels and work of the FOI body as a whole", because they did not raise this issue with the respondent at any time in the process before the respondent, and made no submissions in this regard to the respondent. The respondent acknowledges that the appellants raised this issue before the trial judge, and that she dealt with it and that her ruling in this regard is not subject to any cross appeal. However, it is submitted that the respondent was not obliged to file any cross appeal in respect of a matter which was substantively determined in his favour.

**74.** The respondent submits that this argument (that the respondent must have regard to the overall resources of an FOI body when considering what is unreasonable) effectively requires the court to read words into the Act that are not there. The respondent also submits that the trial judge was correct to conclude that the resources of the FOI body is only one of the matters to be taken into account in the consideration of this issue. Moreover, there was evidence before the respondent and the trial judge as to the staff of the notice party that would be detained in complying with the FOI Request.

**75.** Furthermore, the respondent contends, that even if there was information regarding the overall size of the FOI body, this argument as to the relative impact upon the body in complying with the request would not be of any assistance, because the scale of the request is so huge, it would interfere unreasonably with the work of any FOI body.

**76.** The respondent submits that it is apparent from the Decision that the respondent did indeed consider whether or not the FOI Request was both substantial and unreasonable. This, it is submitted, is apparent from the face of the Decision. So, for example, in the final paragraph of the Decision it is stated:

> "In the circumstances, having regard to the Council's explanation of the number of records concerned and the time and resources that would be required to retrieve and examine those records, I accept the Council's contention that processing the request would cause a substantial and unreasonable interference with, and disruption of, its work, including disruption of work in a particular functional area."

**77.** The respondent argues that the trial judge was correct in holding that there was no onus on the respondent to "specifically identify how the request constituted "unreasonable" interference/ disruption, as opposed to "substantial and unreasonable interference/disruption" and that the trial judge was correct to conclude that because the sub-section imposes a cumulative requirement, it was acceptable for the respondent to take a "global view".

**78.** Furthermore, the appellants accepted that no challenge was brought against the Decision on account of any alleged lack of reasons. The trial judge was therefore correct to hold, as she did at para. 77 of her judgment, that this was not part of the statutory appeal, and accordingly the issue was whether "the decision was made with no regard to the unreasonableness requirement", and the trial judge was correct to hold that this was not so.

**79.** The respondent submits that the argument of the appellants that the respondent had failed to conduct any balancing exercise between the right of the appellants to access the records requested, and the rights of the notice party is incorrect. This, it is submitted, is also apparent from the face of the Decision. For example, in the final paragraph of the Decision the respondent observes: "The FOI Act seeks to strike a balance in ensuring access to records to the greatest extent possible and managing the administrative burden on FOI bodies in dealing with requests that require a significant allocation of time and resources." The respondent further submits that the Decision throughout focuses on whether or not the decision of the notice party to refuse the FOI Request was justified.

**Reasonableness - discussion and Decision**

**80.** It is accepted by both parties to this appeal that the words "substantial" and "unreasonable" as used in ss.15(1)(c) of the FOI Act are cumulative. At first glance therefore, the appellants' argument that each word must have a separate and distinct meaning, and be addressed separately by the respondent in his decisions, appears persuasive. Of course, the appellants' argument does not stop there. They argue that in the context in which it is used in the FOI Act, "unreasonable" necessitates an analysis of the level of resources of the relevant FOI body. The respondent contends that the appellants may not raise this latter argument at all, not having done so in its submissions to the respondent, although the point was raised in the High Court, and is addressed by Hyland J. in her judgment.

**81.** The trial judge (at para. 69 of her judgment), considered that this was an overly restrictive interpretation of what is unreasonable, and that it does not accord with the ordinary meaning of the word. She considered that: "It is undoubtedly the case that it might be appropriate in certain circumstances to look at the overall size of the body and

staff quotient and the impact of the request on the body overall", but this was just one example of what might be considered when looking at what is "unreasonable", as opposed to the only matter to be considered. At para.70, the trial judge said:

> "Nor does the wording of s.15(1)(c) support the argument that factors relating to the volume and nature, retrieval and examination can only be relevant to considering the "substantial" interference/distortion. The section itself identifies that a request may be refused where a grant would by reason of the number or nature of the records or information, require retrieval and examination of such number kind of records as to cause substantial and unreasonable interference/disruption. That wording does not suggest that "substantial" is reserved exclusively for those types of considerations and that "unreasonable" reflects an entirely different type of concern limited to measuring the impact of the work by reference to its impact on the overall work of the FOI body."

**82.** At para. 72 the trial judge concluded on this issue as follows:

> "When examining whether a request will cause unreasonable interference/disruption to work, potentially relevant matters to be considered will include those identified in the section being the number and nature of the records, the nature of the information, the nature of retrieval and examination, the nature of any interference or disruption of the work, and the type of work being disrupted and the extent of that disruption. In other words, the Commissioner must ask him or herself whether the interference/disruption is unreasonable in all the circumstances of the request."

**83.** At para. 75, the trial judge further observed that:

> "Given that the section imposes a cumulative requirement, i.e. that the disruption/interference should be both substantial and unreasonable, I find it acceptable for the Commissioner to carry out an analysis that does not separate out unreasonable from substantial, but rather to take a global view that the statutory test in respect of both had been met."

**84.** I am in complete agreement with the conclusions of the trial judge. There is no reason to restrict the meaning of the word "unreasonable". It should be accorded its ordinary meaning, and what is or is not unreasonable will vary from case to case, depending on the evidence, and falls to be determined by the respondent whose conclusions on matter of fact will be accorded the deference identified by a well-established line of authority (see for example the decision of McKechnie J. in *Deely v. Information Commissioner* [2001] 1 IR 439 and the decision of the Supreme Court in *Fitzgibbon v. The Law Society* [2015] 1 IR 516 and also the summary of propositions relating to appeals under the FOI Act set out by Baker J. at para 114 of her judgment in ENET).

**85.** There may be cases where, in the opinion of the respondent, the volume of records to be identified, retrieved and analysed by the FOI body may cause a substantial interference with or disruption of the work of the FOI body, but not, in the circumstances of the case, an unreasonable interference with or disruption of its work. Likewise, there may be cases where the sheer volume of records identified by the FOI body would result in compliance with the request causing both a substantial and unreasonable interference with the work of the relevant FOI body, or a particular functional area of that body. There may also be cases where, although the request involves a substantial interference with the work of the FOI body , it is other factors in the sub-section (such as what is involved in retrieving the records) that renders compliance with the request unreasonable What is or is not

unreasonable is a matter of fact to be determined by the head of the FOI body in the first place, and thereafter (on appeal) by the respondent, in each case having regard to the evidence. In the absence of any qualifying words in the legislation, I agree with the trial judge that there is no basis upon which to give the word the restrictive meaning contended for by the appellants, and to do so would be inconsistent with the natural and ordinary meaning of "unreasonable".

**86.** Depending on the circumstances of any given case, it may be appropriate for the respondent to separate his or her considerations of what is substantial on the one hand or unreasonable on the other, but where, as in this case, it is apparent to the respondent from the evidence placed before it that compliance with the request would give rise to both a substantial and unreasonable interference with the work of the FOI body. I agree with the trial judge that it is acceptable for the respondent to take a global view that the statutory test in respect of both has been met.

**87.** Of course, this is dependent upon the evidence laid before the respondent and this is the subject of another ground of appeal of the appellants, that there was no, or no sufficient evidence before the respondent to come to the conclusion that compliance with the request would result in both a substantial and unreasonable inference with the work of the notice party. I address that ground of appeal below.

**88.** Finally, under this heading, the appellants place great emphasis upon the philosophy of transparency underpinning the FOI Act, as identified in its long title, and they claim that the trial judge erred in failing to have any regard to the requirement to balance the entitlement of an FOI body to refuse a request on administrative grounds, as provided for in ss.15(1)(c), on the one hand, against the right of the appellants to access on request information held by the notice party relating to them to the greatest extent possible,

consistent with the public interest and the objective of promoting transparency in government and public affairs, on the other.

**89.** In *ENET*, at para. 204, Baker J. stated "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." While these proceedings are not concerned with a statutory exemption but with a discretionary right of refusal, I consider that the same principle would apply to refusals under s.15(1)(c). Indeed, the trial judge made a similar observation at para. 73 of her judgment in stating: "The Act has permitted an exception in cases of administrative burden. The accepted obligation to ensure maximum transparency does not require an artificial construction of the section in a way not mandated by either the wording or the context." This passage clearly demonstrates that, contrary to the submission of the appellants, the trial judge did indeed balance the right of access to documents against the entitlement of an FOI body to refuse an FOI request on grounds of administrative burden.

**90.** More than that it is very clear from the judgment of the High Court that the trial judge afforded all due regard to the philosophy behind the FOI Act, the long title thereto and the presumption that a refusal of an FOI request is not justified unless the head of the FOI body shows to the satisfaction of the respondent that the decision was justified. At the very beginning of her judgment the trial judge summarises the statutory scheme, and at para. 6 states "Accordingly, when considering the correct interpretation of ss.15 (1) (c) of the Act I have had regard to the objectives set out in the long title to the Act, specifically that the aim of the Act is to enable members of the public to obtain access to the greatest extent possible. Equally, as per the case law referred to above it is necessary to have regard

to the overall scheme of the Act and I have sought to do so in considering the correct interpretation of ss15(1)(c)."

**91.** For all of the foregoing reasons, I would therefore dismiss the grounds of appeal advanced under the heading of "reasonableness". It also follows from the foregoing conclusions that it is unnecessary to address the respondent's submission as to the admissibility of the appellants' arguments about the resources of the notice party.

**"Voluminous" Requests**

**92.** By this ground of appeal, the appellants contend that the trial judge erred in holding that the respondent had not erred in interpreting ss15(1)(c) as permitting refusal of "voluminous complaints", concluding instead that the respondent had merely used that term in the Decision as a form of shorthand.

**93.** This argument, the trial judge considered, was a continuation of the argument that the respondent failed to consider the unreasonableness aspect of the test. The argument was based upon the reference in the Decision, to an earlier decision of the respondent (on a similar FOI request of the appellants to the notice party) that the notice party "had not chosen to refuse the request under ss.15(1)(c) which essentially allows for the refusal of voluminous requests".

**94.** In the view of the trial judge, this wording of the respondent in the Decision was clearly intended to be a shorthand description of ss.15(1)(c) and did not purport to be in any way exhaustive or comprehensive. She noted that the respondent's guidance note, in addressing this subsection, also uses the same terminology, but in the introduction section it is stated that the guidance note "is a short commentary on the interpretation and application of s.15(1)(c) of the Act by the Commissioner, it is intended to provide general guidance only and is not legally binding."

**95.** At para. 82, the trial judge stated:

> "The wording in the Decision is clearly intended to be a shorthand description of s.15(1)(c) and does not purport to be in any way exhaustive or comprehensive. The use of a form of shorthand to identify a section of the Act cannot be considered to be determinative of the Commissioner's interpretation of any given section. Rather, taking the Decision as a whole, including any material considered in arriving at the Decision, the question is whether the Commissioner applied the correct test and/or statute and applied all elements of the statute, including the reasonableness criteria. Decisions of the Commissioner should not be construed as if they were a statute. They should not be interpreted with such rigidity that a failure to refer to a statutory provision in anything but words that perfectly reflect the statutory requirements will result in the implication being drawn that the Commissioner has not properly interpreted the statute. It is important that the application of FOI, including by the Commissioner, does not become the exclusive preserve of lawyers. That would limit its application and undermine its purpose. To treat a shorthand description of a section by the Commissioner in an FOI decision as conclusively indicating misinterpretation of that section would tend towards such a result".

**96.** For these reasons, the trial judge said that she could not conclude that mere reference to "voluminous requests" as a way of referring to ss.15(1)(c) must inevitably lead to the conclusion that the respondent misapplied himself in interpreting the section.

**Voluminous Requests - the Appellants' Case**

**97.** By this ground of appeal, the appellants claim that it is clear from both the Decision and its own guidance note that the respondent incorrectly interpreted ss.15(1) of the FOI

Act as meaning that it permits the refusal of an FOI request on the grounds that it is "voluminous". This is an error of law in respect of which the respondent is not entitled to curial difference. Moreover, it led the respondent to make the decision on the basis of the volume of documentation involved, rather than on the basis of a conclusion that the FOI Request would result in an unreasonable interference with the work of the notice party. The trial judge then erred in holding that the respondent was merely using a form of shorthand which was not determinative of his interpretation of ss.15(1)(c), in circumstances where there was no separate analysis or consideration on the part of the respondent as to whether or not the FOI request would give rise to an unreasonable interference with the work of the notice party.

**Voluminous Requests- the Respondent's case**

**98.** The respondent points to the fact that, in the Decision, the reference to "voluminous requests" appears in the background section of the Decision and refers to an earlier decision of the respondent. On the other hand, in the analysis and findings section of the Decision, ss.15 (1) (c) is referenced in full.

**99.** The respondent contends that it is incorrect to seize on a single sentence in a report or judgment and to seek to interpret it out of context. The respondent relies in this regard, *inter alia*, on a statement made by O'Donnell J (as he then was) in *Shatter v Guerin* [2019] IESC ,9, at para.65 (xvii) wherein he stated: "… A court is not required or expected to conduct an in-depth analysis of individual sentences or paragraphs of a report once delivered. Where applicable, a court must form a view on the overall thrust of the report….."

**100.** The respondent also relies upon the following extract from paragraph 179 of the decision of Baker J. in *ENET*: " … the Commissioner is not be treated as creating a new test merely on account of the use of this language…."

**101.** Accordingly, the respondent contends, the trial judge was correct in her conclusion that the reference to "voluminous requests" on the part of the respondent was no more than a form of shorthand, and was not intended to be indicative of the respondent's interpretation of ss.15 (1) (c).

**Voluminous Requests - discussion and Conclusion**

**102.** Firstly, I am of the view that the trial judge was correct in stating that the substantive argument advanced under this heading is really a continuation of the argument advanced under the heading of "reasonableness". In substance the argument is one that the respondent - and on appeal the trial judge - erred in their interpretation as to what constitutes "unreasonable" for the purposes of ss15(1)(c), and this argument was mainly advanced by the appellants and considered and addressed by the trial judge under the heading of "Reasonableness".

**103.** I think the trial judge was entitled to conclude that the respondent was indeed using shorthand when referring to the subsection as permitting refusal of voluminous requests. Importantly, where the Decision is concerned, this description did not relate to the FOI Request, but to an earlier request, and, as the respondent submits, it appears only in the background section of the Decision. On no reasonable analysis of the Decision could it be said that the respondent was purporting to give a definitive or exhaustive interpretation of the subsection. The passage relied upon by the respondent from para.179 of the judgment of Baker J. in *ENET* is in my view apposite, and even more so when considered in light of the text just preceding it: "…. while his decision is one of legal import and required 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…."

**104.** Indeed, this is entirely consistent with the sentiments expressed by the trial judge at para.82 of her judgement, quoted at para.94 above, with which I am in full agreement. Accordingly, I would dismiss this ground of appeal also.

**Evidential basis for the Decision**

**105.** The trial judge in her conclusions on this issue had the following to say, at paras. 89 and 90 of her judgment:

> "89. The Decision concludes that, having regard to [the notice party's] explanation of the number of records concerned and the time and resources that would be required to retrieve and examine those records, its contention that processing the request would cause a substantial and unreasonable interference with, and disruption of, its work including that in a particular functional area is accepted.
>
> 90. There was undoubtedly evidence before the Commissioner to ground this conclusion. Interference is identified with the work of 6 departments including the legal department and the FOI department. In respect of the FOI department, the limited resources of same are identified in material provided by [the notice party]. The point is made that the section consists of 3 officials working part-time on FOI matters and the management time required for this request would seriously impact upon the ability of those officials to carry out their daily FOI tasks together with their additional duties not related to FO I. [The notice party] also identified that the work involved would also fall to an individual from each of the various departments/sections that may hold relevant records".

**106.** At para. 93 the trial judge set out her conclusions on this issue as follows:

> "In summary, it is apparent from the Decision that consideration was given to (a) the temporal scope of the request, (b) the number of the records concerned, in both hard and soft copy, (c) the time required to retrieve and examine the records, (d) the staff resources required to retrieve and examine the records, (e) the impact upon the work of [the notice party] of the use of staff resources in that way, and (f) the particular functional areas of [the notice party] that would be impacted, being the various departments affected by the request including but not limited to the FOI section and the legal department. In considering each of the above, [the notice party] but before the Commissioner material sufficient to justify the findings made in the Decision. In the premises there was an ample evidential basis for the Decision."

**Evidential basis for the Decision - the Appellants' case**

**107.** In their fourth ground of appeal, the appellants claim that the trial judge erred in finding that the notice party had adduced sufficient evidence to meet the "heavy onus" on it to satisfy the respondent that the decision to refuse the FOI Request was justified on the basis of the exception provided for by ss.15(1)(c) of the FOI Act.

**108.** The appellants submit that while the notice party adduced evidence as to the time and resources that would be required to retrieve and examine the relevant records, it did not adduce any evidence to establish how this would give rise to substantial and unreasonable interference or disruption of the work of the notice party.

**109.** Moreover, the respondent placed reliance on the assertion by the notice party that the legal services department of the notice party did not have the capacity to process the FOI Request, and would have to engage an external legal services provider. That being the

case, the FOI Request would therefore not disrupt the work of the legal services department.

**110.** It is further submitted that the time spent on the matter by the personnel in the FOI department of the notice party should be excluded from consideration. However, this argument has already been addressed in the context of what constitutes "work" for the purposes of s.15(1)(c).

**111.** The appellants rely upon *Minister for Agriculture v. Information Commissioner* [2000] 1 IR 309 in which O'Donovan J stated, as regards s. 6 (6) of the Freedom of Information Act, 1997 (which disapplied the right of access under that Act to certain personnel records):

> "Save where access to records is specifically prohibited by the Act e.g. an 'exempt record' …, there is a very heavy onus on a public body, which refuses to grant access to records sought from it, to justify that refusal."

**Evidential basis for the Decision – the Respondent's case**

**112.** The respondent contends that *Minister for Agriculture v. Information Commissioner* may not be on point, as it was not concerned with section 15, or its precursor. The respondent also submits that there must be some doubt as to the test posited by O'Donovan J. in that case, having regard to a comment made by Baker J. in *ENET*, wherein she stated at para. 86 (apropos both *Minister for Agriculture v. Information Commissioner* and another case, that of *Minister for Education v Information Commissioner*):

> *"*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*."*

**113.** The respondent places particular emphasis on the following passage appearing later in the judgment of Baker J. in *ENET,* at para. 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."

**114.** The respondent notes that in *ENET,* Baker J. found that the respondent had imposed an unduly high bar by requiring evidence of justifying reasons amounting to exceptional circumstances to establish a lawful refusal to disclose. While that case was concerned with s.36(3) of the FOI Act, the respondent argues that the approach which Baker J. found to be in error in that case, is not dissimilar from the very approach for which the appellants contend in this case, in the context of ss.15(1)(c).

**115.** In any case, the respondent contends that even if there is a "heavy onus" on it to justify the refusal to grant the FOI Request, that onus has been discharged. The respondent points to the ground of appeal of the appellants under this heading in a section of which the appellants appear to accept that the work of the FOI section would suffer a substantial interference or disruption of its work, where it is stated: "The notice party did not adduce evidence to establish that this would give rise to substantial interference or disruption of the work carried out by it, *with the exception of the FOI section*. [ my emphasis]". The respondent contends that if it is accepted that the FOI unit constitutes a "functional area" for the purposes of ss.15(1)(c) of the FOI Act, then it is evident from this ground of appeal that the appellants must accept that the work of the FOI section will be disrupted for the purposes of s.15(1)(c).

**116.** Moreover, the trial judge found that there was an ample evidential basis for the Decision, and it is submitted that once there is any evidence to justify it, that is sufficient to dismiss the appeal.

**Insufficiency of evidence – discussion and Decision**

**117.** It will be apparent from my conclusion as to the interpretation of the word "work" that the work of both the FOI section of the notice party and its legal department should be taken into account when considering the refusal of the FOI Request. However, it is also apparent from the words "in a particular functional area" in the subsection that a substantial and unreasonable interference with the work of one or other of those areas of work of the notice party may justify a refusal of the FOI Request.

**118.** Having said that, I do not think that the implicit acknowledgment by the appellants in their notice of appeal, that the work of the FOI section would suffer substantial interference or disruption is, by itself, sufficient to dismiss this ground of appeal, because it does not address that the question as to whether or not the FOI Request was also unreasonable, let alone constitute an acceptance that this is so. As already mentioned, the criteria of "substantial and unreasonable" are accepted by both parties as being cumulative and both must be met for the purposes of a decision to refuse an FOI request.

**119.** However, I agree with the trial judge that there was ample evidence before the respondent to justify the Decision. That evidence is summarised by Mr. Rafferty in the Decision (see para.12 above). Prior to the Decision, it had been set out in the letter sent by Ms. Swanwick to the solicitors for the appellants on 16th October 2018, referred to in para.10 above. This information contains significant detail and describes not just the work

involved, but the impact upon the individuals in the FOI section and the legal department of the notice party. The assessment of that impact upon the work of the notice party for the purposes of s.15(1)(c) of the FOI Act is a matter for the respondent in respect of which, as the trial judge stated, the respondent is entitled to a degree of deference from the High Court. This deference to expert bodies established by statute is grounded upon a long line of authorities, stretching at least as far back as *O'Keeffe v. An Bord Pleanála* [1993] 1IR 39, and more specifically in the case of the respondent, *Deely v. Information Commissioner.*

**120.** It bears observation that in the case of the respondent, he enjoys an almost unique degree of expertise in the consideration of FOI requests. No other person or body will have the breadth of view that the respondent does of FOI requests, their scope and the impact that they are likely to have upon an FOI body. In the context of the refusal of an FOI request on the basis of s.15(1)(c) , provided that it is clear that there was evidence before the respondent on which to ground that decision , the courts will be very slow to intervene and will certainly not do so simply to substitute their opinion on an FOI application for that of the respondent, as was made clear by this Court in *FP v Information Commissioner*, to which the trial judge referred (see para.17 above).

**121.** While both parties to this appeal have relied upon *ENET,* it seems to me that it is more helpful to the respondent's case than it is to that of the appellants. In that case Baker J. was considering statutory exemptions as distinct from the exercise of a discretionary power to refuse, but nonetheless it is apparent, following the decision of Baker J. in *ENET,* that in either case "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".

**122.** Finally, on this point, the appellants contended that since the notice party indicated that it would have to contract out the work that would be required of the legal department

in complying with the FOI Request, there would then be no burden on the legal department for the purposes of s.15(1)(c). In addressing this point, the trial judge observed that this argument required her to assume that the retention of, and liaising with, an external legal services provider would have no resource implications for the legal services department of the notice party. The trial judge did not consider this to be a sensible assumption.

**123.** That may well be so, but I think, more fundamentally, this argument is illusory. It seems to me to be axiomatic that if an FOI body, or a department within an FOI body, has to contract out the processing of an FOI request because of the impact that compliance with the request would have on its work generally (if it were to deal with the request itself), then compliance with the request by the FOI body must surely be considered to result in a substantial and unreasonable interference with the work of that FOI body, or the relevant department thereof. The point in time at which this assessment is made is the time of the request, not after the notional contracting out of the work associated with complying with the request. If it were otherwise, very many, if not all refusals of requests grounded on ss.15(1)(c) could be set aside on the basis that the FOI body could overcome the interference with its work by simply contracting out the work necessitated in complying with the request, whether the nature of that work be legal or administrative. That would hardly be consistent with ss.15(1)(c). In reaching this conclusion, however, I emphasise that each assessment of what is substantial or unreasonable must be undertaken in its own circumstances; it is not to be taken as endorsing a situation where an FOI body could fail to apply *any* resources to FOI compliance and thereby avoid disclosure by claiming it had to outsource the work.

**124.** I am satisfied that the trial judge made no error in her consideration of this issue. There was, as she said "an ample evidential basis for the Decision", or in the words of Baker J. in *ENET "*evidence that is sufficient in all of the circumstances to establish

justifying reasons for a refusal…." Accordingly, this ground of appeal must also be dismissed.

**Conclusion and final orders.**

**125.** It follows from my conclusions above on each individual ground of appeal that the appeal should be dismissed in its entirety, and the order of the High Court affirmed. Since this judgment is being delivered electronically, Donnelly J. and Noonan J. have authorised me to indicate here their agreement with it. As to costs, my preliminary view is that since the respondent has been entirely successful in resisting the appeal of the appellants, he is entitled to an order for the costs of this appeal. If the appellants wish to contend otherwise, then they should inform the Court of Appeal Office within 14 days of electronic delivery of this judgment, and a short costs hearing will be arranged. However, if they are unsuccessful with such submissions as they may make, the appellants will be at risk of incurring a further adverse order as to the costs associated with such hearing. If no application for a hearing is made, then the order of the Court shall be perfected in the terms indicated above after the expiration of 14 days.