

No. 2

O. 58, r. 18(1)



SUPREME COURT



Record No: S:AP:IE:2019:000101

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. Title of the Proceedings:

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES,

APPELLANT

V

THE INFORMATION COMMISSIONER,

RESPONDENT

AND

GAVIN SHERIDAN AND e-NASC EIREANN TEORANTA (TRADING AS "enet"),

NOTICE PARTIES

2. Name of Respondent: Gavin Sheridan

3. Application to extend time: Yes No

If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.

N/A

4. Do you oppose the applicant's application to extend time:

Yes No

If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.

N/A – the application was made within time

5. Do you oppose the applicant's application for leave to appeal:

Yes No

6. Matter of general public importance:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance.

This section should contain no more than 500 words and the word count should appear at the end of the text.

1. Section 22(12)(b) of the Freedom of Information Act, 2014 ("FOIA") states that a decision to *refuse* a request is presumed unjustified *unless* justified by the refuser. This is a crucially important general principle which the FOIA applies to all reviews being carried out by the Applicant. This presumption is fundamental to the operation of the FOIA and to the achievement of transparency. This presumption has underpinned every single decision by the Applicant and the Superior Courts (on appeal) since the FOIA and its predecessor was passed in 1997, with the exception of a single *obiter* comment by Ms

Justice Macken in *Rotunda* [2013] 1 IR 1.

2. Contrary to that long line of precedent the Court of Appeal has determined (see para.25-26) that the Commissioner erred in law in applying the presumption to what the Minister described in Court as "*exempt records*." This generally removes the application of the presumption to the vast majority of cases that come before the Applicant and, if upheld, makes the FOIA entirely incapable of discharging the purposes of the Act repeatedly identified by this Court in, *inter alia*, *Deely v The Information Commissioner* [2001] 3 IR 439.
3. The consequences are clear and profound. If the presumption does not apply to exempt records (as per the decision of the Court of Appeal) then a requester can (and the Notice Party's extensive experience of the FOIA suggests) and will be routinely refused access to records involving expenditure of public money (on the basis that they are commercially sensitive) and/or critical matters relating to public policy and transparency (on the basis that they relate to the decision making process of that FOI body).
4. If the Notice Party (or any other journalist) then seeks a review of that decision by the Applicant the inevitable consequence of the decision of the Court of Appeal is that the Applicant would be required to justify the release of those documents in circumstances where it does not have sight of them. This is an impossible position and will result in the FOIA being rendered entirely toothless. The presumption as it applied prior to the decision of the Court of Appeal operated to;
 - a) secure the primary purpose of the FOIA (the release of information).
 - b) to prevent FOI bodies refusing access on the basis of pro-forma reasoning in the knowledge that the Notice Party could not see the documents to gainsay that reasoning, and,
 - c) to ensure that applicants could only be refused access to records (which they could not see in order to make a submission on) in the face of cogent and persuasive reasoning by the FOI body.

All of these protections have now been removed by the decision of the Court of Appeal and the burden of proof has been placed on the requestor to prove, in effect, that they

are entitled to access records they cannot see.

Word count – 482

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The purpose of the FOIA is to *inter alia* promote transparency and accountability in public life. The FOIA is the key and fundamental mechanism by which this is achieved. The FOIA and in particular section 22(12)(b) rebalances the inherent inequality of arms between individuals and institutions.
2. Without the benefit of the presumption of a right of access there is no practical way for individuals or journalists to overcome the advantages inherently enjoyed by an institution seeking to resist disclosure (access to the documents, institutional capacity and detailed operational knowledge of the operations of the FOI body).
3. It is no exaggeration to say that the principles identified by Mr Justice Fennelly in *Sheedy v The Information Commissioner* [2005] 2 IR 272 that “*the passing of the Freedom of information Act constituted a legislative development of major significance, the Oireachtas took a considered and deliberate step which dramatically alter[ed] the administrative assumptions and culture of centuries ... replac[ing] the presumption of secrecy with one of openness ...[and] open[ing] up the workings of government and administration to scrutiny*” will be reversed by the decision of the Court of Appeal.
4. In the Notice Party’s respectful submission, it is in the interests of justice for the precise application of the presumption of a right of access and what constitutes an “exempt record” to be clarified in order that the FOIA is not entirely sterilised.

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. It is, with respect to the Court of Appeal, entirely unclear upon what basis it concluded that Section 22(12)(b) did not apply to “exempt records”. The Court of Appeal did not engage at all with the fact that the section applies to all reviews being conducted by the Commissioner. On the contrary the Court of Appeal identified and relied almost entirely upon an avowedly *obiter* and entirely tentative statement by Ms Justice Macken in *Rotunda* as a correct statement of the law but without giving any reasons as to why that *obiter* comment should be preferred over;
 - a) The clear wording of the Statute,
 - b) If there is any ambiguity a purposive approach applied to achieve the purposes of the Act,
 - c) The counter-vailing and opposite *ratio* of Mr Justice Fennelly in the same case,
 - d) Every single other decision of the Commissioner and the Superior Courts (see *infra West Wood Club v Information Commissioner* [2016] IEHC para 47).
2. This all arises from the judgment. The decision of the Court of Appeal creates a systemic and insuperable difficulty for the Notice Party (and all other users of FOI be they journalists or private citizens) as they will be forced to seek access to records they have not seen and counter submissions they will not see (the Commissioner does not share submissions made by the FOI body resisting release to requesters).
3. It is exceptionally important to the healthy functioning (or the functioning at all) of Irish democracy that the Court of Appeal decision generally and the ambit of the presumption in particular be definitively clarified by the Supreme Court.

Word count – 271

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

The Respondent Notice Party supports the appeal

10. Cross Application for Leave:

N/A

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

N/A

12. Priority Hearing: Yes No X

If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

This section should contain no more than 100 words and the word count should appear at the end of the text.

The Notice Party requests a priority hearing as the decision of the Court of Appeal is likely to have a chilling effect on the operation of the FOIA. In the subsequent decision in *UCC v Information Commissioner* [2019] IEHC 195 the High Court followed the Court of Appeal decision condemning the Applicant's long standing interpretation of the presumption of a right of access which has been applied in 1000s of previous decisions.

Word count: 72

13. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.

This section should contain no more than 100 words and the word count should appear at the end of the text.

N/A

Appendix
Grounds of Opposition (and Cross Appeal)

1. Title of the Proceedings: [As in the Court of first instance]

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES,
APPELLANT

V

THE INFORMATION COMMISSIONER,
RESPONDENT

AND

GAVIN SHERIDAN AND e-NASC EIREANN TEORANTA (TRADING AS “enet”),
NOTICE PARTIES

2. Respondent’s grounds for opposing an appeal if leave to appeal is granted:

Please list concisely in numbered paragraphs, the Respondent’s ground(s) of opposition to the grounds of appeal set out in the Appellant’s Notice of Appeal.

N/A as the notice party is supporting the the application for leave to appeal.

3. Additional grounds on which the decision should be affirmed:

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

N/A as the notice party is supporting the application for leave to appeal.

4. Cross Appeal

Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.

N/A as the notice party is supporting the application for leave to appeal

5. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

1. An order setting aside the Orders of the Court of Appeal.
2. An order for the Notice Party's Costs in the Court of Appeal.
3. An order providing for the costs of this appeal.
4. Such other Order as the Court deems fit of its own accord or on submission to it.