[2020] IEHC 430

THE HIGH COURT

JUDICIAL REVIEW

[2019/ 287 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO ARTICLE 13(1) OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007 - 2018

BETWEEN

M50 SKIP HIRE & RECYCLING LIMITED

APPELLANT

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

AND

FINGAL COUNTY COUNCIL & MR. XY

NOTICE PARTIES

JUDGMENT of Mr. Justice Heslin delivered on the 2nd day of September 2020

Introduction and brief summary of the background

1. These proceedings concern a decision made by the Respondent on 10th July 2019 in Case No. CEI/18/0027 (hereinafter "the Decision"). The Appellant brings an appeal to this Court by way of an originating notice of motion which is dated 9th September 2019. In the manner pleaded in the said motion, the Appellant seeks inter alia an order pursuant to Regulation 13 of the European Communities (Access to Information on the Environment) Regulations 2007, as amended (hereinafter "the 2007 Regulations") setting aside, varying or annulling the Decision as well as a range of declaratory relief.

2. The background to the proceedings can be summarised briefly as follows. The Appellant is a limited liability company, having a registered office in Santry, Dublin, which carries out business as a waste collector. It is not in dispute that the Appellant provides skips for the removal of waste. In the context of holding a permit to collect waste, the Appellant is required to furnish certain information to the First Notice Party, examples being the quantity of waste collected, where it was collected from and where waste was delivered to. Such information is comprised in what is known as an Annual Environmental Report (hereinafter "AER"). On 16th June 2018, the Second Notice Party made a request to the First Notice Party for the Appellant's AER in respect of the year 2017. On 12th July 2018, the First Notice Party informed the Second Notice Party that part of the 2017 AER could be accessed but refused access to certain information including, in particular, information described as the waste destination data (hereinafter the WDD). It is not in dispute that the WDD comprises information as to the facilities to which the Appellant sends waste. Nor is it in dispute that the refusal of access to the WDD was based on the First Notice Party's view that such information was commercially or industrially confidential within the meaning of s. 9(1)(c) of the 2007 Regulations. On 26th July 2018, the Second Notice Party requested a review of the First Notice Party's decision to redact the WDD from the information furnished to the Second Notice Party, arguing that it was in the public interest for that information to be disclosed. On 24th August 2018 the First Notice Party affirmed its decision to refuse access to the WDD, citing a decision of the Respondent in a case No. CEI/17/0005 entitled "SLR Environmental Consulting (Ireland) Ltd. and Offaly County

Council", being a decision which issued on 24th April 2018 (hereinafter "the SLR decision"). On the same date, the Second Notice Party made an appeal to the Respondent against the First Notice Party's refusal of access to the WDD. On 10th July 2019, the Respondent allowed the said appeal, setting aside the earlier decision by the First Notice Party to refuse the Second Notice Party access to the Appellant's WDD, being the decision which is challenged in the present proceedings. At the outset of the hearing, it was explained that the parties agreed that the Appellant's WDD would not be made available, pending the outcome of the proceedings before this court.

Relevant legislation

3. The 2007 Regulations were adopted to give effect to Directive 2003/4/EC of the European Parliament and of the Council on Public Access to Environmental Information (hereinafter "the AIE Directive"). The AIE Directive was adopted to give effect to the 1998 UNECE Convention on Access to Information, Public Participation in Decision – making, and Access to Justice in Environmental Matters (hereinafter "the Convention"). For the sake of clarity, it is appropriate to set out certain extracts from the foregoing.

The AIE Directive

4. The first recital of the AIE Directive emphasises the importance of increased public access to environmental information and states the following: -

> *"Whereas:*
>
> *(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment . . ."*

Article 1 of the AIE Directive specifies the objectives of the Directive in the following terms:-

> *"Article 1*
>
> *Objectives*
>
> *The objectives of this Directive are:*
>
> (a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise;
>
> and
>
> (b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. . . .".

"disclosure of environmental information should be the general rule"

5. For the purposes of the AIE Directive, "environmental information" is given a very wide definition. It is not in dispute that the Appellant's WDD comes within the definition of environmental information. It is clear from the contents of the AIE Directive that the general rule is that information should be disclosed, with any refusal by a public authority to disclose information being restricted to clearly defined cases and in circumstances where grounds for refusal should be interpreted in a restrictive way. Recital 16 of the AIE Directive states:-

> *"(16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. The reasons for a refusal should be provided to the Applicant within the time limit laid down in this Directive".*

6. Article 4 of the AIE Directive is entitled "Exceptions" and Article 4(1) sets out certain grounds upon which member states may provide for a request for environmental information to be refused. Article 4(2)(d) states that:-

> *"2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:*
>
> . . .
>
> (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest,including the public interest in maintaining statistical confidentiality and tax secrecy";

"grounds for refusal of information… shall be interpreted in a restrictive way"

7. Article 4, echoing the contents of Recital 16, goes on to make clear that: -

> *"The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. . .."*

"right of access…without..having to state an interest"

8. Recital no. 8 of the AIE Directive makes clear that those who request environmental information are not required to state their interest in making such a request: -

> *"(8) It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest".*

9. Furthermore, Article 3(1) of the AIE Directive, under the heading "Access to Environmental Information Upon Request" states that: -

"1. Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest".

The Convention

10. The foregoing provisions reflects similar found in the Convention. Article 1 of the Convention provides:-

> *"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention".*

11. Article 4 of the Convention lists grounds for refusal and states: -

> *"The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment".*

The 2007 Regulations

12. The 2007 Regulations give effect to the AIE Directive. Unsurprisingly, the definition of "environmental information" found in the 2007 Regulations is a broad one and mirrors that found in the AIE Directive. The following provisions in the 2007 Regulations are of particular relevance to the present case: -

> *"Request for environmental information*
>
> *6.(1) A request for environmental information shall—*
>
> (a) be made in writing or electronic form,
> (b) state that the request is made under these Regulations,
> (c) state the name, address and any other relevant contact details of the Applicant,
> (d) state, in terms that are as specific as possible, the environmental information that is the subject of the request, and
> (e) if the Applicant desires access to environmental information in a particular form or manner, specify the form or manner of access desired".
>
> *(2) An applicant shall not be required to state his or her interest in making the request".*

The foregoing provisions of 6(2) of the 2007 Regulations reflect the contents of Recital No. 8 and Article 3(1) of the AIE Directive. It is plain that, under the 2007 Regulations, an applicant for information does not need to state their interest in making the relevant request. As such, the intent behind the application for information would not appear to be a relevant consideration insofar as the request is concerned.

The action which a public authority is required to take, upon a request being made, is set out in Article 7 of the 2007 Regulations, whereas Article 8 deals with grounds that, subject to Article 10, mandate a refusal by a public authority of environmental information.

Article 9(1)(c) of the 2007 Regulations

13. Article 9 (1) (c) of the 2007 Regulations is of particular relevance to the present proceedings. Under the title "Discretionary grounds for refusal of information" subsection (1) states the following: -

"9.(1) A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect—

(a) international relations, national defence or public security,
(b) the course of justice (including criminal inquiries and disciplinary inquiries),
(c) commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest, or
(d) intellectual property rights". (emphasis added)

Plainly, a public authority is entitled to refuse to make environmental information available where it has reached a finding that Article 9(1)(c) applies.

Two-step analysis required under the 2007 Regulations

14. The foregoing, however, is not the end of the analysis as can be seen from Article 10. It is clear that the 2007 Regulations require a public authority to engage in a two–step process. For the purposes of the matters at issue in these proceedings, the first step in the process is for an analysis as to whether the exemption provided for in Article 9(1)(c) applies. If a decision is made that it does apply, the second step in the process is to conduct a public interest balancing, test in accordance with Article 10(3) and in the context of the provisions of 10(4). Article 10 states the following: -

"Incidental provisions relating to refusal of information

10.(1) Notwithstanding articles 8 and 9 (1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment.

(2) The reference in sub-article (1) to information on emissions into the environment does not include a reference to any discussions on the matter of such emissions at any meeting of the Government.

(3) The public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal.

(4) The grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure.

(5) Nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information.

(6) Where a request is refused pursuant to article 9(2)(c) because it concerns material in the course of completion, the public authority shall inform the Applicant of the name of the authority preparing the material and the estimated time needed for completion.

(7) Where a decision is not notified to the Applicant within the relevant period specified in article 7, a decision refusing the request shall be deemed to have been made by the public authority concerned on the date of expiry of such period . . .".(emphasis added)

As can be seen from the foregoing, Article 10(3) explicitly provides that a public authority *shall* consider each request on an individual basis. Furthermore, the public authority is mandated to conduct a balancing exercise in each case, namely to weigh the public interest served by disclosure against the interest served by refusal. Moreover, Article 10(4) is explicit that grounds for refusal shall be interpreted restrictively in light of the public interest served by disclosure. That provision mirrors Recital 16 and Article 4 of the AIE Directive.

Disclosure is the general rule as the Court of Justice has confirmed

15. The foregoing is underlined by views expressed by the Court of Justice in Case C71/10, *Office of Communications v. Information Commissioner* (2011), a preliminary ruling concerning an application for information regarding the precise location of UK mobile phone bases stations, wherein it was stated, at para. 22:

> *"It should be noted that, as is apparent from the scheme of Directive 2003/4 and, in particular, from the second subparagraph of Article 4(2) thereof, and from recital 16 in the preamble thereto,* the right to information means that the disclosure of information should be the general rule *and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal."(*emphasis *added).*

No statutory definition of "public interest"

16. It is noteworthy that no definition of "public interest" is contained in either the 2007 Regulations or in the AIE Directive. It is clear from the terms of Article 10(3) that a public authority (or, for present purposes, the Respondent) enjoys a discretion insofar as weighing up, in each individual case, the public interest served by disclosure against the interest served by refusal of environmental information. It is also clear that Article 10(4) applies to the Respondents decision-making. It is not in dispute that the Respondent is a creature of statute and it cannot be in doubt that the Respondent has the powers conferred on him, including under Article 10(3). Despite Articles 9 and 10 making reference to a "public authority" it is clear that the provisions in these Articles apply

equally to reviews conducted by the Respondent, having regard to the contents of Article 12 of the 2007 Regulations.

Article 12 of the 2007 Regulations

17. Article 12 of the 2007 Regulations is entitled "*Appeal to Commissioner for environmental information*". Subsection (1) establishes the office of Commissioner for environmental information, whereas subs. (2) of Article 12 requires that the holder of the office be the same person who holds the office of Information Commissioner under the Freedom of Information Acts. Subsection (3) concerns appeals from a person other than an applicant or third party and subs. (4) deals with time-limits in respect of appeals. Article 12(5) states the following: -

> "*(5) Following receipt of an appeal under this article, the Commissioner shall—*
>
> (a) review the decision of the public authority,
> (b) affirm, vary or annul the decision concerned, specifying the reasons for his or her decision, and
> (c) where appropriate, require the public authority to make available environmental information to the Applicant,
>
> *in accordance with these Regulations". (emphasis added)*

18. The inclusion of the words "*in accordance with these Regulations*" in Article 12(5)

makes clear that the provisions of the 2007 Regulations which refer to a "*public authority*", such as the provisions of Articles 9 and 10, apply equally to the Respondent. For present purposes this means that the provisions of Article 9(1)(c) and Article 10(3) apply to reviews conducted by the Respondent, following receipt of an appeal. It is also clear from the contents of Article 12 of the 2007 Regulations, that the Respondent enjoys a wide jurisdiction to conduct a *de novo* consideration of a request for access to environmental information. Article 12(6) sets out the Respondent's entitlement to require a public authority, inter alia, to make environmental information available, whereas subs. (7) mandates compliance by a public authority with a decision of the Respondent under subs. (5) within three weeks. Subsection (8) allows the Respondent to apply to the High Court for an order directing a public authority to comply with a decision, whereas subs. (9) entitles the Respondent to refer any question of law to the High Court and subs. 10 deals with the staff and resources available to the Respondent.

Article 13 of the 2007 Regulations

19. Article 13 is entitled "*Appeal to High Court on point of law*" and begins as follows: -

> "*13.(1) A party to an appeal under article 12 or any other person affected by the decision of the Commissioner may appeal to the High Court on a point of law from the decision.*
>
> *(2) An appeal under sub-article (1) shall be initiated not later than 2 months after notice of the decision under article 12(5) was given to the party to the appeal or other person affected . . ."*

The present proceedings are brought under Article 13(1) of the 2007 Regulations and the appeal was initiated within the 2 – month period specified in Article 13(2).

The interpretation of the 2007 Regulations in light of the Directive

20. Given that these proceedings concern Regulations which were introduced by way of a Statutory Instrument in order to give effect to obligations contained in an EU Directive, it is appropriate to quote from the Supreme Court's decision in *National Asset Management Agency v. Commissioner for Environmental Information* [2015] IESC 51 (at para.10) in which Mr. Justice O'Donnell explained the proper approach to the interpretation of the former, having regard to the latter, as follows:

> *"…It does not seem to me to be possible, and if possible, would not be correct, to approach the question of interpretation solely through the prism of national law, and the sometimes elaborate approach to statutory interpretation in Irish Law in particular. There are rules for the interpretation of legislation introduced implementing an international treaty. In particular, this specific obligation undertaken by Ireland as a member of the EU requires that the courts approach the interpretation of legislation in implementing a directive, so far as possible, teleologically, in order to achieve the purpose of the directive. But furthermore, the language used in this statutory instrument, and in particular subparagraphs (a) to (c) is derived directly from Directive 2003/4/EC addressed to member states and intended to take effect in different national legal systems. That language is in turn derived from an international treaty negotiated between and agreed upon by a large number of international states with different legal systems.*
>
> *In this particular context, it is important to bear in mind that the concepts of administrative law and public law can differ substantially between countries, and in particular between common law systems and civil law systems. It does not appear possible, or indeed lawful, therefore to address the meaning of this statutory instrument in isolation from that context….If even as a matter of purely domestic interpretation, the provisions of those subparagraphs might appear to either fall short of what is required by the Directive, or go further, an Irish court might be required to adopt another interpretation which is consistent with the provisions of the Directive, if that is possible. Accordingly, in order to understand what the statutory instrument means and does in this case, it is necessary, perhaps first, to understand exactly what the Directive does and means, which in this case may also mean interpreting the provisions of the Convention."*

Examination of the evidence in this case

21. The evidence before the court comprises an affidavit sworn by Mr. Brian Redmond, a Director of the Appellant, on 9th September 2019 and the exhibits thereto, a replying affidavit sworn on 6th November 2019 by Ms. Elizabeth Dolan, Senior Investigator in the office of the Respondent, the supplemental affidavit sworn by Mr. Redmond on 29th January 2020 together with the exhibit referred to therein, the second affidavit of Ms. Dolan sworn on 18th June 2020 and the exhibits thereto, the third affidavit of Mr. Redmond sworn on 25th June 2020, and the third affidavit of Ms. Dolan sworn on 2nd

July 2020. From a careful consideration of the contents of the foregoing, the following facts emerge, which I propose to set out in chronological order.

24th April 2018 Case No: CEI/17/0005-SLR

22. On 24th April 2018, the Respondent gave a decision in case no. CEI/17/0005, entitled *"SLR Environmental Consulting (Ireland) Limited and Offaly County Council* (hereinafter "the *SLR* decision"). In that case, the Respondent considered a request for, inter alia, the release of waste destination data and came to the view that release of the WDD in that case would adversely affect commercial confidentiality where such was provided for in national or community law as per Art. 9(1)(c) of the 2007 Regulations. The Respondent went on to consider the public interest test in accordance with Art. 10(3) of the 2007 Regulations and came to the view that the interest in refusing access outweighed the public interest in releasing the information. Thus, the Respondent, having reviewed Offaly County Council's decision to provide access to data on waste types, waste quantities and WDD from the annual environmental reports which the Council held for the year 2015, decided that the Council was not justified for the reasons set out in the Respondent's decision. Under the powers given to the Respondent by Art. 12(5) of the 2007 regulations, he annulled the Council's decision and required the Council to provide access to all data on waste types and waste quantities but not to provide access to the WDD. It is useful to point out at this juncture that Offaly County Council is the National Waste Collection Permit Office for the purposes of waste collection permits.

June, July and August 2018

23. It is not in dispute that, on 16th June 2018, the Second Notice Party made a request to the First Notice Party for a copy of the latest AER submitted by the Appellant and, on 12th July 2018, the Appellant was informed that part - access to the 2017 AER would be granted by the First Notice Party. It is common case that access to the Appellant's WDD was refused on the basis that the exception to disclosure, as set out in Art. 9(1)(c) of the 2007 Regulations, applied. Thus, the WDD information was redacted. The Second Notice Party sought an internal review of the First Notice Party's decision on 26th July 2018 and, on 24th August 2018, the First Notice Party's original decision was affirmed under Art. 9(1)(c), with the First Notice Party citing the Respondent's decision in the SLR case in support of the position it adopted. On the same day, the Second Notice Party made an appeal to the Respondent in relation to the First Notice Party's refusal of access to the WDD.

31st January 2019 Case No: CEI/17/0044 – Conor Ryan

24. On 31st January 2019 the Respondent gave a determination in case no. CEI/17/0044 entitled "Conor Ryan & Offaly County Council" (hereinafter "the Conor Ryan decision"). In the foregoing case the Respondent again considered that Art. 9(1)(c) of the 2007 Regulations applied to the waste destination data which had been sought. The Respondent then went on to consider the public interest balancing test in accordance with Art. 10(3) of the Regulations. In the manner set out in the Respondent's decision he considered various factors including the arguments made by the parties to the case and the public interest under Art. 10(3) and came to the view that, in this particular case, the public interest in disclosure outweighed the interests served by refusal. Accordingly, the

Respondent varied Offaly County Council's decision and required the Council to make available the WDD which it held concerning seven waste permits which had been specified by the Appellant in that case in respect of the years 2012 to 2016.

Notwithstanding the explicit statutory obligation on the Respondent, in every particular case, to weigh the public interest served by disclosure against the interest served by refusal of environmental information, the Appellant in the present proceedings argues that the Respondent erred in law in reaching the Decision of 10th July 2019 which is challenged in the present case, notwithstanding the previous decision of the Respondent in the SLR case. This is explicitly pleaded at para. (e) of the Appellant's Notice of Motion. Implicit in the Appellant's case is that the Respondent was wrong in the Conor Ryan decision and right in the SLR decision.

The reasoning employed in the Conor Ryan decision – *RTÉ Investigates*

25. Later in this judgment I will examine the Respondent's letter, dated 21st February 2019, which drew the Appellant's particular attention to the *Conor Ryan* Decision (CEI/17/0044) and made clear that the Respondent would conduct a fresh review of all aspects of the appeal and also stated that the Respondent "*… may apply similar reasoning in this appeal*". That being so, it is appropriate to make certain observations concerning the Conor Ryan decision which runs to thirteen pages and sets out information under headings which include: "*Scope of Review", "OCC's Position", "The Appellant's Position", "The Appellant's Arguments Regarding Commercial Confidentiality – Article 9(1)(c)", "The Appellant's Public Interest Arguments", "Third party positions", "Analysis", "The public interest"* and "*Decision*". Under the heading "*Third party positions*", the Respondent referred to submissions made by certain of the permit holders. On internal page 8 of the *Conor Ryan* Decision, the Respondent stated the following with regard to third party submissions, indicating that one of the permit holders: "*… referred to the industry having had significant negative publicity in the media in recent times*". The Respondent also stated the following on page 8 of the *Conor Ryan* Decision: "*Another permit holder made a submission in which it complained that an RTE Investigates television programme had 'massively damaged [its] reputation, so much so that [it] lost customers because of it'*." The Respondent went on to say, *inter alia*, the following on page 12 of the *Conor Ryan* Decision:

> *"… I am aware that serious shortcomings in both the management of waste and the enforcement of waste management legislation in Ireland have been reported in recent times. In my view, investigations and commentary in the media and in the Oireachtas have raised serious questions as to whether the public interest is sufficiently secured by public servants having access to the waste information, which is one of the third party's arguments in favour of withholding the destination information from release. I think it is fair to say that at this point in time there is a lack of confidence in Ireland's ability to manage waste properly."*

26. It is clear from the foregoing that, in the Conor Ryan case, separate submissions from two of the third party licence holders made reference to negative publicity in the media including a specific television programme aired by the national broadcaster. It is equally

clear from the *Conor Ryan* Decision that the Respondent was aware that shortcomings, regarding both the management of waste and the enforcement of waste management legislation, had been reported in the media and had been commented upon in the Oireachtas. It seems uncontroversial to suggest that media reporting of such shortcomings could result in a lack of confidence in Ireland's ability to manage waste properly, being the view expressed by the Respondent, for stated reasons, on page 12 of his 31st January 2019 decision in the *Conor Ryan* case. It is also uncontroversial to suggest that a response to an erosion of public confidence in the State's ability to manage waste properly might reasonably include an increased focus on transparency with regard to the making available of environmental information to the public. That clearly seems to be the view taken by the Respondent who went on to say, on page 12 of the *Conor Ryan* Decision, that:

> *"I concluded that it would be appropriate to apply an additional weighting to the disclosure of environmental information on waste-management because such disclosure would facilitate further public scrutiny, which would support responsible and compliant waste-managers while at the same time exposing less-responsible and less-compliant competitors to the risk of being identified."*

Clearly, the *Conor Ryan* Decision is not the subject of the current appeal. It is, however, a matter of fact that the Respondent drew the Appellant's particular attention to the *Conor Ryan* Decision and to the reasoning which the Respondent had employed therein. This was done by the Respondent in the context of inviting the Appellant to make submissions. In para. 9 of the Appellant's legal submissions in the present case, it is argued that *"The Respondent in following his decision made in the Conor Ryan matter simply adopted his rationale, 'cut and pasted' his decision, as it were, on the aspect of why the public interest would be served by disclosing the waste destination data*." Later in this judgment, I will look closely at both the invitations to make submissions and the submissions made by the Appellant in response and it is fair to say that neither of the two submissions made by the Appellant refer to the *Conor Ryan* Decision or to the reasoning employed by the Respondent in the said case.

21st February 2019 letter from the Respondent to the Appellant

27. On 21 February 2019 Ms. Lisa Underwood, an Investigator with the office of the Respondent wrote to the Appellant by post and email. The said letter provided information in relation to the Respondent's role, referred the Appellant to the Respondent's website for further information, notified the Appellant that an appeal had been received in relation to the decision of the First Notice Party to refuse to provide the requester with access to WDD in the 2017 AER (i.e. Annual Environmental Report) submitted by the Appellant for a site in Cloghran, regulated by Waste Facility Permit WFPFG/15/0001/01, and continued by stating the following:

> *"If you have any questions regarding the request that is the subject of this appeal or Fingal County Council's position on the matter, please contact the Council.*
>
> *Purpose of this letter*

The purpose of this letter is as follows:

1. *To make you aware of this appeal.*

2. *To ensure that you are aware that the Commissioner could decide that Fingal County Council must release the requested information to the requester.*

3. *To see if you consent to the release of the waste destination data in the relevant AER.*

4. *To invite you to make a submission setting out your view on the matter.*

Relevant Provisions of the AIE Regulations

Fingal County Council refused access to information waste destination date (sic) in the 2017 AER under Article 9(1)(c) of the AIE regulations (available at www.ocei.ie). Article 9(1)(c) provides that a public authority (in this case Fingal County Council) may refuse to make available environmental information where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.

Article 10(3) obliges a public authority to consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal. Accordingly, if the Commissioner finds that disclosure of the requested information would adversely affect commercial or industrial confidentiality and that such confidentiality is provided for in national or Community law to protect a legitimate economic interest, he will go on to apply Article 10(3). Having done that, he could decide that the public interest served by disclosure would outweigh the interest served by non-disclosure. In other words, he could require disclosure even if he is persuaded that disclosure would harm your company's interests.

Please note that the Commissioner recently made a decision requiring the disclosure of waste destination data in CEI/17/0044 (Conor Ryan & Offaly County Council) (available at www.ocei.ie). The Commissioner is not bound to follow his decision in CEI/17/0044 and will conduct a fresh review of all aspects of this appeal (CEI/18/0027), however, he may apply similar reasoning in this appeal."

28. It is clear from the foregoing that, as a matter of fact, the Respondent drew the Appellant's attention to the two-stage process of analysis which the Respondent was required to engage in, having regard to the provisions of, firstly, Art. 9(1)(c) and, secondly, Art. 10(3). It was made clear that, even if the Respondent considered that the Art. 9(1)(c) exemption applied, he could still require disclosure depending on the application of the public interest balancing test required by Art. 10(3). Furthermore, it is a matter of fact that the Respondent drew the Appellant's attention to what was the then recent decision by the Respondent in a Conor Ryan case. Moreover, the Respondent made it explicit that he was not bound to follow a prior decision. It was also made clear that a fresh review of all aspects would be carried out but a similar reasoning might be applied

by the Respondent. It is also clear that the Respondent was alive, at this early stage, to the potential that disclosure could harm the Appellant's interests. As is clear from the balance of the letter, the Respondent explicitly requested information as to whether disclosure would negatively affect the Appellant and, if so, in what way. The Appellant was also asked, not only about the fact and mechanism for negative effects, but to explain how serious the effects would be, and why. This is clear from the final section of the letter which reads as follows:

> "***Invitation to make a submission***
> *I would like to invite you to make a submission setting out your views on the issues notified to you above. Any submission which you might make will be considered by the Commissioner when he makes his decision.*
>
> *If you make a submission, please address the following:*
>
> - *Whether you provide your consent for the waste destination in the relevant AER to be released to the requester.*
> - *Whether disclosure would negatively affect your company.*
> - *If it would, in what way would it negatively affect your company (i.e. what would be the mechanism for the causing of negative effects)?*
> - *If it would affect your company negatively, how serious for your company would the effects be and why is that?*
>
> *If you would like to make a submission please do so by the close of business on Friday 15 March 2019, by email, in a Word document, to me at Lisa.Underwood@ocei.ie.*
>
> *If you decide not to make a submission, I would appreciate if you would let me know that, by email.*
>
> *If you do not make a submission the Commissioner might conclude that your company would not be negatively affected by disclosures.*
>
> *Please note that it would not be appropriate for me to either identify the requester. You will be notified of the Commissioner's decision in due course.*
>
> *Kind regards."*

On an analysis, this letter invited the Appellant to supply as much relevant information as possible in relation to any negative affect anticipated by the Appellant to result from any future decision by the Respondent to disclose the information in question and to explain and quantify such negative effects. It was also made explicit that the Respondent would consider the contents of any submission made. As is plain from the foregoing letter, the Respondent did not inform the Appellant of the identity of the requester. However, there is no suggestion that the Second Notice Party did not identify himself to the Respondent.

I am satisfied that there was no statutory obligation on the Respondent to disclose the identity of the requester to the Appellant.

7th March 2019 letter from the Appellant to the Respondent

29. On 7th March 2019 the Appellant responded to the 21st February 2019 letter from Ms. Underwood. It is fair to say that the Appellant's response was brief, comprising just two paragraphs as follows:

> *"Thank you for your recent letter notifying us of the appeal regarding the requisition of our destination data submitted on AER 2017 from Fingal County Council.*
>
> *The information contained in the AER report is commercially sensitive. If this information were to be released it would have an adverse impact on our business. Considering this, we do not consent to the release of this information.*
>
> *Yours sincerely,"*

Thus far, it is clear that the Respondent wrote in very detailed terms explaining the Respondent's role, and, *inter alia*, requesting a submission from the Appellant, as well as setting out, in some detail, what should be addressed in the submission insofar as any negative affect was concerned. The submission by the Appellant in the form of the 7th March 2019 letter did, as a matter of fact, maintain that the information was commercially sensitive. Furthermore, this submission stated that, if the information was released, it would adversely impact the Appellant's business. However, nothing more was said in the submission, other than a very clear statement that the Appellant did not consent to the release of the information.

30. No submission was made as to the way in which release of the information would negatively affect the Appellant. No information was given with regard to the mechanism for causing the negative effects anticipated. Nor was any indication given by the Appellant as to how serious the effects would be. Moreover, nothing was said by the Appellant as to why the effects would be so serious. The foregoing questions were very clearly flagged by the Respondent in Ms. Underwood's 21st February 2019 letter, but were not addressed in the Appellant's 7th March 2019 submission. If the Respondent had gone on to make a decision based on the 7th March 2019 submission by the Appellant in response to the Respondent's 21st February, 2019 invitation, the Appellant could hardly complain that they were not given an adequate opportunity to make a submission, nor could they complain that they lacked clarity with regard to what should be addressed in the submission. It is clear, however, that the Respondent did *not* proceed, at that point, to make any decision. Rather, the Respondent took the trouble, by means of a very lengthy letter, to seek further information from the Appellant and to try and extract from the Appellant, by way of a further submission, information on the anticipated negative effect of any future disclosure. I am satisfied that this was done purely so that the Respondent could have as full a picture as possible of the negative effect, as anticipated by the Appellant, of any future disclosure of the relevant information, so that the

Respondent could consider same when discharging his statutory functions under the 2007 regulations, in particular as regards Art. 9(1)(c) and (10) (3).

8th March 2019 letter sent by email by the Respondent to the Appellant

31. The foregoing is clear from the contents of the 8th March 2019 letter sent by email by Ms. Underwood of the Respondent to Ms. Maria Travers of the Appellant, which communication was also CC-d to Mr. Redmond. The following is a verbatim setting out of that communication:

> *"Dear Maria,*
>
> *I wish to acknowledge receipt of M50 Skip Hire submission in this case. The submission has been noted and incorporated into the file for this case which will go before the Commissioner when he is making his decision in this case.*
>
> *I note that the submission states that the information contained in the AER report is commercially sensitive and release of the information would have an adverse impact on your organisation's business. I also note that M50 Skip Hire do not consent to the release of it.*
>
> ***Purpose of this Letter***
>
> *The purpose of this email is to invite M50 Skip Hire to make a further submission to clarify some queries I have from its current submission. Please note that any views that I may express in this letter merely reflect my own observations at this point in time as the investigator assigned to this case and are not binding on the Commissioner and that any response you make will be taken into account before any final decision is made on the matter.*
>
> ***Scope of the Review***
>
> *I wish to clarify that the only information that is at issue in this case is the waste destination data contained in the 2017 AER. Accordingly, the Commissioner's review in this case is concerned solely with the question of whether Fingal County Council was justified in refusing access to the waste destination data in M50 Skip & Grab Hire 2017 AER Site Facility Permit WFP FG/15/0001/01.*
>
> ***Commercial sensitivity***
>
> *I would also like to clarify that the relevant provisions of the AIE Regulations to consider where information is said to be commercially sensitive is Article 9(1)(c) of the AIE Regulations.*
>
> ***Article 9(1)(c) of the AIE Regulations***
>
> *Article 9(1)(c) provides that a public authority may refuse to make environmental information available where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.*

However, Article 10(1) of the AIE Regulations states: 'Notwithstanding Articles 8 and 9 (1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment.' In addition, Article 10(3) of the Regulations requires public authorities to consider the public interest served by disclosure in relation to each request. Moreover, article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest.

Section 36 of the FOI Act

As M50 Skip Hire has submitted that the information is commercially sensitive, section 36 of the Freedom of Information Act, 2014 (FOI Act) is also relevant to this case. Section 36 provides that:

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

(a) trade secrets of a person other than the requester concerned,

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

(c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

Please note that the full text of section 36 is not reproduced above.

It is my understanding that M50 Skip Hire are relying on section 36(1)(b) in this case. In other words, that the waste destination data concerns financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to M50 Skip Hire or could prejudice the competitive position of M50 Skip Hire in the conduct of its profession or business or otherwise in its occupation. If my understanding is incorrect, please let me know that.

Please note that the Commissioner takes the view that section 36 is primarily aimed at protecting the commercial interests of parties engaged in commercial activity. It is my understanding in this case that section 36 is being claimed to protect the commercial interests of M50 Skip Hire which is engaged in waste recovery.

1. Please state whether my understanding is correct or incorrect.

Please note that while the Regulations do not explicitly provide that the burden of proof rests with the public authority in relation to justify a refusal to make information available, the Commissioner considers that the scheme of the Regulations, and of Directive 2003/4/EC upon which the Regulations are based,

makes it clear that there is a presumption in favour of release of environmental information. Therefore, if you wish to make submissions in support of Fingal County Council's decision to refuse to grant access to the information, you should provide full and succinct reasoning as to why the waste destination data in the 2017 AER should not be released under the terms of the AIE Regulations. Assertions or blanket claims are generally not sufficient; it must be shown how or why the particular information meets the criteria of the relevant refusal provisions. The public interest should also be addressed.

M50 Skip Hire's submission did not provide any information showing how release of the waste destination data would have an adverse impact on its business. This is important as in order for the exemption in section 36(1)(b) to apply to the waste destination data in the 2017 AER the Commissioner must be satisfied that release of the waste destination data could reasonably be expected to result in a material financial loss or gain to M50 Skip Hire, or could prejudice the competitive position of M50 Skip Hire in the conduct of its profession or business or otherwise in its occupation. If this is not shown in this case, the Commissioner may require Fingal County Council to release the waste destination data in the 2017 AER to the Appellant.

Answering the following queries may help to show why the waste destination data is commercially sensitive and how releasing it would have an adverse impact on your organisation.

2. *Please identify the material financial loss or gain which is expected to result to M50 Skip Hire if the Commissioner were to require Fingal County Council to release the waste destination data in the 2017 AER, and*

3. *Please show how release of the waste destination data in the 2017 AER could reasonably expected (sic) to cause that result, and/or*

4. *Please describe how the competitive position of M50 Skip Hire could be prejudiced by the release of the waste destination (sic) in the 2017 AER.*

5. *Provide details of the public interest factors in favour of release of the waste destination data in the 2017 AER and the public interest factors against its release which you consider relevant in this case.*

6. *Please explain why you consider that, on balance, the public interest would not be better served by granting this request.*

I also wish to explain that the questions identified above are merely those that I, as the investigator, regard as particularly relevant based on my initial examination of the case file. Therefore, you should include in your submission any other information that you consider may be relevant to the Commissioner's review."

32. It is clear from the foregoing that, as of 8th March 2019, the Appellant was invited to furnish specific information in relation to, *inter alia*, the material financial loss expected to arise if the Respondent were to direct the release of the Appellant's WDD. The Appellant was also invited to furnish specific information, as opposed to assertions or blanket claims, on a range of other issues, including how release of the Appellant's WDD could reasonably be expected to cause the identified material financial loss and how the Appellant's competitive position could be prejudiced by the release of the information in question. In addition, the Appellant was invited to provide details of the public interest factors in favour and against the release of the WDD which the Appellant considered relevant and to explain why, balancing the Appellant's interest against the public interest in disclosure, favoured a refusal to make the information available. The importance of providing the foregoing information was made very clear and the role which that information would play in the carrying out by the Respondent of his statutory obligations was also explained in a letter which highlighted, among other things, that the 2007 Regulations and the Directive to which the regulations gave effect favour the disclosure of environmental information as a general rule, with grounds for refusal being interpreted on a restrictive basis. It is also clear from the 8th March 2019 communication that the Appellant was told, firstly, that the Respondent would be undertaking a de novo consideration of the relevant request, secondly, the Respondent was anxious to get as much relevant information and as much specific detail as the Appellant could provide and, thirdly, there was no suggestion by the Respondent that any prior decision in any other case would bind the Respondent or determine the question at issue. The 8th March 2019 communication concluded as follows:

> **"*Invitation to make a submission***
>
> *I would like to invite you to make an additional submission clarifying the queries above, and any other matters or observations that you wish to bring to the Commissioner's attention. Please also note that you should consider this invitation to make a submission to be a final opportunity to justify your position in this case. The Office will have regard to any submissions received by the date above. If no substantive response is received it will be assumed that M50 Skip Hire has no further submission to make.*
>
> *In preparing your submission, you may find it helpful to have regard to the following legislation and resources relating to the AIE Regulations, all of which are available on our website at www.ocei.ie:*
>
> - *The AIE Regulations*
> - *Previous decisions made by the Commissioner relating to Article 9(1)(c) of the AIE Regulations. The Commissioner has made decisions concerning whether to release similar information in CEI/17/0044 and CEI/17/0005. Please note that the Commissioner will conduct a fresh review of all aspects of this appeal (CEI/18/0027) and is not bound to follow his decision in either of those two cases.*

- *The Guidance provided by the Minister for the Environment, Community and Local Government on implementation of the Regulations.*
- *Directive 2003/4/EC (AIE Directive).*
- *United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, public participation in decision-making and access to justice in environmental matters.*
- *The Aarhus Convention: And Implementation Guide (Second edition, June 2014).*

You might also find it helpful to have regard to the following legislation and resources relating to the FOI Act, all of which are available on our website at www.oic.ie:

- *The FOI Act.*
- *The OIC Guidance Notes on section 36 of the FOI Act.*
- *The OIC Sample Questions on section 36 of the FOI Act.*

I would ask that your submission be received by this Office within 10 days of the date of this letter i.e. by the close of business on Tuesday 12 March 2018 please. This office will have regard to any submissions received by the date above. If no substantive response is received it will be assumed that M50 Skip Hire has no further submission to make and the Commissioner may proceed to a decision without further reference to your organisation.

I appreciate that as a private third party you may not be familiar with the AIE regulations. If you have any questions in relation to the above or to this appeal more generally, please do not hesitate to contact me directly at lisa.underwood@ocei.ie or 01 6395754.

Yours sincerely,"

The foregoing letter was sent by email on Friday 8th March 2019 at 15:20. Nine minutes later, at 15:29 on 8th March, Ms. Underwood sent a further email to Ms. Travers of the Appellant, Cc-d to Mr. Redmond, stating that M50 Skip Hire's submission should be received by close of business on Friday 22nd March.

Reference in the 08 March 2019 letter to the *Conor Ryan* and *SLR* decisions

33. The reference to "CEI/17/0044", in the Respondent's 8th March 2019 communication to the Appellant, is a reference to the *Conor Ryan* decision, dated 31st January 2019, and the reference to "CEI/17/005" is a reference to the *SLR* decision made by the Respondent on 24th April 2018. Thus, it is a matter of fact that on 8th March 2019 the Respondent drew the Appellant's attention, for a second time, to the Respondent's decision in the *Conor Ryan* case while emphasising that the Respondent would be conducting a fresh

review of all aspects in this particular appeal and was not bound to follow any decision in an earlier case. It is a matter of fact that the Respondent gave the Appellant the opportunity to make submissions as to why the Respondent should not apply similar reasoning, in the review concerning the Appellant's WDD, as the Respondent had previously applied in the *Conor Ryan* decision. It is fair to say that, despite having been invited to do so, the Appellant did not make any submission to the Respondent which specifically referenced the Conor Ryan decision or the reasoning adopted by the Respondent in that decision. This is clear from the contents of the Appellant's two submissions which are examined in this judgment. It is also a matter of fact that, subsequent to drawing the Appellant's attention to the reasoning employed in the Conor Ryan Decision insofar as the public interest was concerned, the Respondent specifically asked the Appellant to make submissions detailing the public interest factors against as well as in favour of release of the information in question, which the Appellant considered relevant. Furthermore, the Appellant was specifically asked to explain why it considered that the public interest would not be best served by granting the request for the information. In the manner explained in this judgment, neither of the Appellant's two submissions mentioned the term "*public interest*". I have, however, analysed both the form and the substance of the Appellant's submissions and have identified such factors as can fairly be said to constitute public interest arguments.

No response by the Appellant to the Respondent's 8th March 2019 invitation to make a submission

34. It is a matter of fact that despite being invited, on 08 March 2019, to make an additional submission and to do so by 22nd March, the Appellant did not make any further submission by 22nd March. Nor did they furnish any submission in April. Furthermore, there is no evidence that the Appellant made any response whatsoever to the 8th March 2019 communication. Had the Respondent proceeded, in April 2019, to make a decision in accordance with its statutory role and based on a consideration of the single submission by the Appellant, dated 7th March 2019, the Appellant could hardly complain that it was not given an opportunity to make or was unclear about the contents to be addressed in a further submission.

3rd May 2019 letter from the Respondent to the Appellant sent by email

35. In fact, rather than proceeding to make a decision, the Respondent wrote to the Appellant for a third time to invite the Appellant to make a submission. At 13:10 on Friday, 3rd May 2019 Ms. Underwood of the Respondent wrote to Ms. Travers and Mr. Redmond of the Appellant, stating the following:

> *"I am following up in relation to my invitation to make a submission on 8 March 2019. I note that M50 Skip Hire did not make any further submission in relation to this case.*
>
> *Purpose of this letter*
>
> *The purpose of this letter is to give M50 Skip Hire a final opportunity to make a submission in relation to this case in response to the issues and questions outlined by me on 8 March 2019. Any such submissions should be received by this Office*

within two weeks of today, i.e. by Friday 24 May 2019. Please note, however, that if no substantive response is received by this date, it will be assumed that you have no further submissions to make in relation to the records concerned and the Commissioner may proceed to a decision without further reference to your organisation.

Please note that the Commissioner considers that the scheme of the Regulations, and of Directive 2003/44/EC upon which the Regulations are based, makes it clear that there is a presumption in favour of release of environmental information.

Please also note that the Commissioner must be satisfied that the conditions of any exemption of being relied upon to refuse a request are met. Mere assertions or blanket claims for exemption are generally not sufficient. Rather, full and succinct reasoning should be provided to show how or why the particular information concerned meets the criteria of the relevant exemption provisions. The public interest test should also be addressed.

Conclusion

As indicated above, you should consider this invitation to make submissions to be the final opportunity to do so. This Office will have regard to any submissions received before making a binding decision on the matter. As outlined above, if no substantive response is received by Friday 24 May 2019, it will be assumed that you have no submissions to make and the Commissioner may proceed to a decision without further reference to your organisation. In the meantime, if you have any queries in relation to this case, please do not hesitate to contact me at the details below.

Yours sincerely"

23rd May 2019 letter from the Appellant to the Respondent

36. On 23rd May 2019, the Appellant made a submission to the Respondent in the form of a letter from Mr. Redmond to Ms. Underwood, the contents of which stated:

"Thank you for the opportunity to make this submission. Our position on this request has not changed. We do not consent to the release of this information.

All our information is logged with the local authorities who are satisfied with the information provided. We regularly get audited by the relevant authorities, we have had no issues to-date.

We hope you appreciate the commercially sensitivity (sic) of this information, it could give any competitor in-depth knowledge of our company business which could have a severe impact on our business, customer base and in turn our ability to continue to provide employment for the current number of staff, it may also prohibit us to develop and grow the business in the future.

We are a small business and currently face several obstructions in our day to day running, this we feel could add to the issues we are working to resolve.

We do respect that the Commission has to investigate this request. We are open to any organisation we deem not to have a conflict against our business to contact us directly to request any information. We would gladly work with their request.

Yours sincerely"

37. It is clear from the foregoing that the Appellant asserted that the information which was the subject of the request (being WDD) was, in the Appellant's view, commercially sensitive. It was also made clear that the Appellant did not consent to the release of the information. Although it is not appropriate to analyse the contents of correspondence as if it were legislation to be interpreted, it is nonetheless fair and necessary to see what was said and in the two submissions made by the Appellant. It will be recalled that in the Appellant's first submission, dated 7th March 2019, the Appellant claimed that the release of the relevant information "*would have an adverse impact*" on the Appellant's business but no further detail was given as to how this was anticipated or the scale of same. In the 23rd May 2019 submission, it is stated that release of the information "*could give any competitor in-depth knowledge*" of the Appellant's business and this "could have a severe impact" on the Appellant's business, customer base, ability to provide employment and grow in the future. It is fair to say that the 23rd May 2019 submission squarely puts on the record the Appellant's view that release of the WDD "*could*" advantage a competitor and "could" severely damage the Appellant's business. But it is equally fair to say that the Appellant does not, in specific terms "*identify the material financial loss… which is expected to result to M50 Skip Hire if the Commissioner were to require Fingal County Council to release the"* 2017 WDD, notwithstanding the fact that the foregoing was a specific question which the Respondent posed on 8th March 2019. It is also fair to say that, not having identified the material financial loss with any particularity, other than saying that it could arise and could be severe, the Appellant's 23rd May 2019 submission does not "*show how release of the waste destination data in the 2017 AER"* could reasonably be expected to cause the material financial loss complained of by the Appellant, being a question previously posed on behalf of the Respondent, other than saying that it could give a competitor in-depth knowledge of the Appellant's business which would advantage the competitor. In other words, although the 23rd May 2019 submission asserts that release of the WDD could give a competitor in-depth knowledge of the Appellant's business, no detail is provided as to how this could arise. It is certainly asserted that a competitor could possibly gain an advantage as a result of the release of the Appellant's WDD but how this could arise is not set out. Nor did the Appellant set out with any particularity, the nature or extent of any competitive advantage which could be gained by a competitor as a result of the release of the information. Furthermore, no specifics were given by the Appellant as to how the Appellant's competitive position could be prejudiced by the release of the information.

No specific reference to the "*public interest*"

38. It can also be said that the Appellant's 23rd May 2019 submission does not address question 5 which had been posed by the Respondent on 8th March, when Ms. Underwood asked the Appellant to "*provide details of the public interest factors in favour of release of the waste destination data in the 2017 AER and the public interest factors against its release which you consider relevant in this case*." The foregoing is not a criticism of the Appellant, but I believe it is fair to say that neither the 7th March nor the 23rd May 2019 submissions by the Appellant specifically set out any "public interest" factors against the release of the WDD which the Appellant considered relevant. I think it is also fair to say that question 6, as posed by the Respondent on 8th March 2019, was not specifically addressed by the Appellant in the 23rd May 2019 submission, namely the invitation to "*please explain why you consider that, on balance, the public interest would not be better served by granting this request*." Again, this is not to criticise the Appellant. It is simply to point out that, in advance of that submission being made, the Respondent directed the Appellant's particular attention to a range of issues which the Appellant was invited to address, in order that the Respondent could have the fullest understanding of the Appellant's position, to enable the Respondent to conduct the two stage test required by Article 9 (1) (c) and Article 10 (3). It is not in dispute that the only submissions made by the Appellant to the Respondent are those of 7th March and 23rd May 2019.

Absence of specific reference to the "*public interest*" against disclosure

39. It is a matter of fact that neither of the Appellant's submissions used the term "*public interest*". Neither of the Appellant's submissions state whether the public interest is, or is not, in favour of disclosure as the Appellant sees it, despite the Appellant having been specifically invited to do so. Taken together, the contents of the Appellant's 7th March and 25th May 2019 submissions are, it is fair to say, focused mainly on the commercially sensitive nature of the documentation, according to the Appellant, and to potential damage resulting from disclosure, according to the Appellant, being arguments directed mainly towards the Art. 9(1)(c) issue. It is uncontroversial to suggest that a focus on the commercially sensitive nature, according to the Appellant, of its WDD, is a focus on a *private* commercial interest and does not specifically address the public interest, including any public interest in disclosure as the Appellant may see it.

Discussion between the Appellant and Mr. Conor Walsh and the identity of "Mr XY"

40. It will be recalled that the Decision which is challenged in the present proceedings issued on 10th July 2019. In his affidavit sworn 29th January 2020, Mr. Redmond refers to certain events which occurred *after* the Respondent issued the Decision and it is convenient to deal with these at this point. Among other things, Mr. Redmond avers that, on 29th August 2019, the Appellant made a third, and on this occasion successful, attempt to apply for membership of the Irish Waste Management Association. Mr. Redmond goes on to aver that, having attended a meeting of the said Association on 27th November 2019, Mr. Redmond spoke to the secretary of the Association, Mr. Conor Walsh, on 29th November 2019. The Appellant avers that he asked Mr. Walsh whether the latter was aware of the Appellant's case and that Mr. Walsh informed him that is was, in fact, Mr. Walsh who had requested the information from the first named notice party. In the manner averred by Mr. Redmond in his 29th January affidavit, the identity of Mr.

XY became known to Mr. Redmond. Mr. Redmond swore a third affidavit on 25th June 2020, the only relevant paragraph of which states the following:

> *"I make this affidavit solely to bring to this Honourable Court's attention the fact that Mr. Conor Walsh as well as being the Secretary to the Irish Waste Management Association, is an employee of SLR Consulting Ireland Limited the same entity which unsuccessfully appealed the decision of the Respondent bearing reference CEI/17/0005."*

Appellant's submissions made on the basis that its WDD would become known to competitor

41. It is self-evident that, were data to be sought by a member of the public who was not engaged in commercial activity and not involved in the waste management industry, concerns around competitor advantage would not arise. At the time of making its 7th March and 25th May 2019 submissions, it is a matter of fact that the Appellant did not know the identity of the party seeking the data in question, described as "Mr. XY". Despite not knowing Mr. XY's identity, it is very clear, however, that the Appellant made its submissions on the assumption that Mr. XY was either a competitor or on the basis that, if Mr. XY obtained the WDD in question, it would be made available to a competitor, to the Appellant's disadvantage. This is clear from the third paragraph of the Appellant's 25th March 2019 submission which states, inter alia, that disclosure of the information "… *could give any competitor in-depth knowledge of our company business which could have a severe impact on our business*…" (emphasis added). The foregoing is of some significance in the present case in circumstances where the Appellant learned the identity of Mr XY some time *after* the Decision was issued and, as averred by Mr. Redmond, it appears that Mr. XY was employed by SLR. I am satisfied that the identity of Mr. XY and his motivation for seeking environmental information are not relevant issues in the present case. Furthermore, what cannot be in doubt is that, as early as 25th May 2019, the Appellant was adopting the stance that, if released, its WDD would become known to competitors and could give any competitor in-depth knowledge of the Appellant's business thereby causing it damage. In other words, the Appellant had competitors in mind from the outset and made submissions accordingly, *prior* to the Decision which is challenged in these proceedings. Therefore, and leaving aside any issues of law, the evidence demonstrates that as a matter of fact the revelation, *subsequent* to the Decision, that Mr. XY was employed by a company involved in the waste industry changes nothing. This is for the simple reason that the Appellant made its submissions, prior to the Decision, with a clear and explicit focus on competitors. Later in this judgment, I will make further reference to the motivation behind a request for environmental information in light of the contents of the Regulations and Directive and will make further comment in relation to the issue of the identity of Mr. XY.

Factors in the Appellant's submission which can be said to relate to the public interest

42. Despite the fact that the Appellant did not even use the words "*public interest*" in either of its submissions, I believe it is fair to say that, taken together, the contents of the Appellant's two submissions do contain certain arguments which are relevant to a weighing up of the public interest under Art. 10(3). Firstly, the Appellant's statements

that all its information is logged with the Local Authorities who are satisfied with same and that the Appellant gets audited and have had no issues, seems to me to be a submission that the public interest is *against* disclosure of the data sought. Regardless of the form, it appears to be, in substance, a submission that, firstly, any public interest in favour of making the data available is met by the fact of disclosure to public servants and, secondly, that such disclosure to public servants in Local Authorities outweighs any public interest in wider disclosure to members of the public, having regard to the damage which, according to the Appellant, could be caused to its business, in the manner set out in its 7th March and 23rd May 2019 submissions. In light of the foregoing, it will be necessary to examine whether the Respondent considered the foregoing submissions prior to coming to the Decision which is challenged by the Appellant in the present proceedings. In the manner explained later in this judgment, I am entirely satisfied that he did. The Appellant's submissions contain nothing else which, either in form or in substance can be said to constitute a submission touching on the public interest. As is clear from the contents of the Appellant's two submissions, neither contained any reference to the reasoning employed by the Respondent in the Conor Ryan decision, nor did the Appellant make any submission as to why the reasoning employed by the Respondent in the Conor Ryan decision was, in the Appellant's view, in any way inappropriate.

10 July 2019 Decision which is challenged in the present proceedings

43. Among the submissions made by the Appellant in this case is that the Respondent engaged in "*absolutely no scrutiny*" of the Appellant's information and it is submitted that there was "*absolutely no consideration or discussion*" by the Respondent as to how the public interest would be served by the disclosure of the Appellant's WDD. It is further submitted that there was "*absolutely no consideration*" of whether the public interest would be served by the WDD being withheld. The foregoing is clear from, *inter alia*, paras. 10, 11 and 12 of the Applicant's legal submissions, in which it also claimed that the Respondent reached on "*entirely contradictory*" decision in the Appellant's case to that which the Respondent reached in the *SLR* decision and it is also submitted that, in following his decision in the *Conor Ryan* case, the Respondent "*simply adopted his rationale*," cut and pasted "his decision" on the aspect of why the public interest would be served by disclosing the WDD. The foregoing is clear from para. 9 of the Appellant's submissions. Given that the Decision is at the heart of the present proceedings, it is appropriate and necessary to set it out in full, which I now do as follows:

> *"Decision of the Commissioner for Environmental Information on an Appeal*
>
> *Made under Article 12 (5) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018*
>
> *(the AIE Regulations)*
>
> *Case CEI/18/0027*
>
> *Date of decision: 10 July 201[9]*

Appellant: Mr XY

Public Authority: Fingal County Council

Issues: Whether the Council was justified in refusing access to the waste destination data in the 2017 Annual Environmental Reports (AER) submitted by a named third party company

Summary of Commissioner's Decision: The Commissioner found that while article 9(1)(c) applied to the information, the public interest in disclosure outweighed the interests served by refusal. Accordingly, he annulled the Council's decision and required it to make the withheld environmental information available to the Appellant.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Background

Waste collection permits include conditions requiring the permit holder to compile and maintain information concerning their waste collection activity, for example the quantity of waste collected and the facility it was collected from or delivered to. This information is then given to the relevant nominated authority through an Annual Return procedure also referred to as an Annual Environmental Report (AER). On 16 June 2018 the Appellant requested a copy of the latest AER submitted by a named third party company. The Council informed the Appellant on 12 July 2018 that it had made a decision part granting access to the 2017 AER. It refused access to certain information in the 2017 AER including the waste destination data on the basis the information was commercially or industrially sensitive and fell under the exception in article 9(1)(c) of the AIE Regulations.

On 26 July 2018 the Appellant requested an internal review of the Council's decision to redact the waste destination data. He stated that he believed it is in the public interest for the information to be disclosed. The Council made its internal review decision on 24 August 2018 affirming its decision to refuse access to the waste destination data under article 9(1)(c). Its decision cited my decision in Case CEI/17/0005 (SLR Environmental Consulting (Ireland) Limited and Offaly County Council), available at www.ocei.ie, in support of its position.

The Appellant appealed the Council's refusal of access to the waste destination data to my Office on 24 August 2018.

In carrying out my review I had regard to the submissions made by the Appellant and the Council. I also had regard to:

- *the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance),*

- *Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based,*

- *the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), and*

- *the Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the Aarhus Guide).*

Analysis and Findings

Article 9(1)(c) provides that a public authority may refuse to make environmental information available where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest. In order to find that article 9(1)(c) applies to information, I need to be satisfied that:

- *The information at issue is commercially or industrially confidential.*

- *The confidentiality of the information is provided for in national or Community law to protect a legitimate economic interest.*

- *Disclosure would adversely affect that confidentiality.*

As noted above, the Council cited my decision in Case CEI/17/0005 in support of its refusal of access to the waste destination data. I am not bound to follow previous decisions, I conducted a fresh review of all aspects of this appeal and decided it on its own merits. In Case CEI/17/0005, I focussed on the common-law equitable duty of confidence in relation to the test of whether confidentiality is provided for in national or Community law. I note that the Council states that 'there exists an expectation of confidentiality in relation to some of the information provided by the permit holders'. My investigator wrote to the Council asking it to explain how or why it came to the conclusion that the permit holder expects confidentiality in relation to the waste destination data. The Council did not provide a response to this query. On the evidence before me I am not convinced that the waste destination data was given to the Council in circumstances imposing an obligation of confidence on it. Therefore, I am not satisfied that the waste destination data in this case meets the requirements of the common law equitable duty of confidence as summarised by Fennelly J. in the Supreme Court judgment in Mahon v Post Publications [2007] IESC 15.

The waste company whose AER is the subject of the request was invited to make submissions as a third party to this case. It submits that waste destination data is commercially sensitive. I consider that section 36 of the of the (sic) Freedom of Information Act 2014 (FOI Act) is the relevant national law in the current case.

Section 36(1) of the FOI Act provides that subject to subsection (2), a head shall refuse to grant an FOI request if the record concerned contains—

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

Section 36(2) provides that a head shall grant an FOI request to which subsection (1) relates if—

(a) the person to whom the record concerned relates consents, in writing or in such other form as may be determined, to access to the record being granted to the requester concerned,

(b) information of the same kind as that contained in the record in respect of persons generally or a class of persons that is, having regard to all the circumstances, of significant size, is available to the general public,

(c) the record relates only to the requester,

(d) information contained in the record was given to the FOI body concerned by the person to whom it relates and the person was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public, or

(e) disclosure of the information concerned is necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment, but, in a case falling within paragraph (a) or (c), the head shall ensure that, before granting the request, the identity of the requester or, as the case may be, the consent of the person is established to the satisfaction of the head.

I have no information to show that any of the conditions set out in subsection (2) apply in this case. In particular, I note that the third party does not consent to the release of the waste destination data.

The Council in its internal review states that 'there exists a risk that disclosure of the waste destinations could have a detrimental effect on the operation of this part of the waste industry'. In the part of its decision addressing the public interest it indicates that disclosure of the information would negatively impact on the waste

market which is a competitive market with many operators. My investigator asked the Council to explain how the waste destination data is commercially sensitive and how disclosure of it would have an adverse impact. However, the Council did not respond to this query to explain how or why the Council considers that disclosure of the information would have such a detrimental effect.

The third party submits that the waste destination (sic) could give a competitor an in-depth knowledge of its business and that this could have a severe impact on its business and customer base. It states this could affect its ability to continue to provide employment to its staff and prevent future growth of its business.

The Appellant rejects the argument that disclosure of the waste destination data could interfere with the ability of small waste companies to compete with larger waste companies. He notes that AERs for waste management facilities which produce annual returns for the Environmental Protection Agency (EPA) are published on the EPA's website including the waste destination data. He submits that larger companies are aware of all available authorised waste outlets for each waste material and as a result will not gain a commercial advantage by examining the outlets used by smaller companies. The Appellant states that all authorised waste outlets are listed on the EPA's website or the National Waste Collection Permit Office's (NWCPO) website and that the NWCPO facilitates searches for authorised waste outlets by specific categories of waste using a waste code - EWC Code.

In Case CEI/17/0044 (Conor Ryan & Offaly County Council), available at www.ocei.ie, which my investigator brought to the attention of the parties to this case, and in previous cases, I found that where the information is commercial in nature i.e. where it relates to the sale or purchase of goods or services, usually for profit, section 36(1) of the FOI Act provides for the protection of commercial confidentiality in order to protect economic interests, subject to a public interest test. The third party relies on the fact that, in its view, disclosure of the waste destination data would prejudice its business. I accept that the waste destination data is commercial in nature.

The essence of the test in section 36(1)(b) is not the nature of the information but the nature of the harm which might be occasioned by its release. The harm test in the first part of section 36(1)(b) is that disclosure 'could reasonably be expected to result in material loss or gain'. I take the view that the test to be applied is not concerned with the question of probabilities or possibilities but with whether the decision maker's expectation is reasonable. The harm test in in the first part of section 36(1)(b) is that disclosure "could reasonably be expected to result in material loss or gain". I take the view that the test to be applied is not concerned with the question of probabilities or possibilities but with whether the decision maker's expectation is reasonable. The harm test in the second part of section 36(1)(b) is that disclosure of the information 'could prejudice the competitive

position' of the person in the conduct of their business or profession. The standard of proof to be met here is lower than the 'could reasonably be expected' test in the first part of the exemption. However, as Information Commissioner, I have taken the view that, in invoking 'prejudice', the damage which could occur must be specified with a reasonable degree of clarity. I am prepared to accept the third party's submission that disclosure of the waste destination data could give the third party's competitors some knowledge of its business that they would not otherwise have and in turn 'could prejudice' its competitive position. For example, if other companies in the sector knew the destination in Ireland or elsewhere of facilities that accept waste from the third party they might target these and thus affect the third party's competitiveness. I am therefore prepared to accept that section 36(1)(b) of the FOI Act 2014 applies to the waste destination data in the AER.

I accept that the waste destination data continues to be treated by the third party and the Council as confidential. I am satisfied, in the circumstances, that disclosure of that information would result in the loss of its confidential quality and that the purpose of such confidentiality is the protection of legitimate economic concerns of the companies. I am therefore satisfied that disclosure of the withheld information would adversely affect 5 commercial confidentiality. I find that, subject to the weighing of the public interest, article 9(1) (c) of the AIE Regulations applies to the information.

The Public Interest

Article 10(3) provides that the public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) provides that the grounds for refusal must be 'interpreted on a restrictive basis'. The public interest balancing test in section 36 of the FOI Act is not identical to the requirement of article 10(3) of the AIE Regulations. However, for the purposes of this case, the relevant factors to be considered are common to both and I will deal with them together.

The Council acknowledges that there is a public interest in disclosure of the waste destination data. In favour of disclosure of the waste destination data, the Council states that it considered the interest in the openness and transparency of how the waste industry carries out its business which is vital for the protection of the environment. However, it states that this public interest is satisfied by the fact that the industry is regulated and as part of that regulation it is required to produce annual returns to public authorities which can enforce conditions on the waste companies. In favour of the interest in maintaining the article 9(1)(c) exception i.e. refusal, it states that disclosure of the waste destination data would potentially cause a negative impact on the waste market. It states that 'the public interest is better served by having a vibrant, competitive market with many operators and that anything which might negatively impact on the market would be detrimental'.

It concludes that, in its view, the public interest is better served by the non-disclosure of the waste destination data.

The Appellant submits that section 32 of the Waste Management Act 1996 (as amended) (1996 Act) places legal obligations on waste producers, including obligations with regard to the final destination of waste that is collected. He states that if a person gives waste to a waste collector, the waste producer has a right to know the destinations used. He says that if a person has access to waste destination data, they would be able to carry out due diligence in advance of selecting a waste management company. He further submits that tracking waste destinations is a key environmental protection measure and that the more eyes looking at the data the greater the likelihood that false information and unexplained anomalies will be revealed, thereby, contributing to greater enforcement in the waste industry. He concludes that the public interest in having full access to the waste destination data reported in the AER outweighs any other interests.

In Case CEI/17/0044, I stated that it is important to have regard to the purposes of the AIE regime in considering the public interest served by disclosure under AIE which includes facilitating public participation in environmental decision making with the aim of leading to a better environment, as reflected in Recital (1) of the Preamble to the Directive.

I am mindful also that section 11(3) of the FOI Act requires public bodies to have regard to the need to achieve greater openness in their activities and inform scrutiny, discussion, comment and review by the public of their activities. I consider this to be relevant to my assessment under section 36(3) as to whether it would be contrary to the public interest to release financial information.

On the other hand, both the AIE regime and the FOI Act recognise a public interest in restricting access to certain information. Competing interests must be assessed in order to weigh the public interest in favour of disclosure against the potential harm that might result from that disclosure. The public interest in openness and accountability is not limited to the expenditure of public funds. I consider that there is a very strong public interest in optimising transparency and accountability in relation to the manner in which agents of the State (including NWCPO and the Council), carry out their regulatory functions in relation to waste permits.

As I noted in Case CEI/17/0044, recent reports surrounding the management of waste and the enforcement of waste management legislation in Ireland have raised serious questions as to whether the public interest is sufficiently secured by public servants having access to the waste information. This is relevant to the Council's determination that the public interest in disclosure of the waste destination data is satisfied though oversight by public bodies. There is a lack of confidence in Ireland's ability to manage waste properly. There is a substantial public interest in the disclosure of the information because such disclosure would facilitate further public scrutiny on waste-management, and may even lead to the identification of gaps in

enforcement. In addition, I think that there is a public interest in waste producers being able to track the destination of their waste; this would facilitate the making of informed decisions about which waste collectors they opt to use to dispose of their waste.

The interests served by refusal are primarily those of protecting the legitimate economic interests of the third party from unnecessary prejudice. While there is a strong public interest in third parties being able to conduct commercial transactions with public authorities without fear of suffering commercially as a result, what is at issue here is not a commercial transaction with the Council but a mandatory requirement as part of the Council's regulatory function.

Having considered all of the above, the arguments of the parties, and the public interest under article 10(3) of the AIE Regulations, I find that, in this particular case, the public interest in disclosure outweighs the interests served by refusal.

Decision

I find that article 9(1)(c) of the AIE Regulations applies to the information at issue, but the public interest in disclosure outweighs the interests served by refusal under that article. Accordingly, I annul the Council's decision and require it to make available to the Appellant the waste destination data in the 2017 AER.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Peter Tyndall

Commissioner for Environmental Information

10 July 2019"

Discussion and decision

44. A number of observations can be made with regard to the Respondent's Decision which is the subject of the present proceedings. As a matter of fact, the Respondent stated in his Decision that "*I am not bound to follow previous decisions*". I am satisfied that the foregoing is correct as a matter of law and is a statement which clearly accords with the contents of Article 10(3) of the 2007 Regulations. The said statement also indicates the Respondent's mind-set, namely, that the Respondent was approaching this particular matter afresh. The Respondent went on to make a statement of fact, namely "*I conducted a fresh review of all aspects of this appeal and decided it on its own merits*". There are three elements to the foregoing statement. The first is that the Respondent conducted a fresh review. There is no evidence from which the court could conclude that

the Respondent did not carry out a fresh review of the relevant appeal. The second element of the Respondent's statement is that his review was of all aspects of the appeal. On the evidence, I accept that this is factually correct, there being no evidence to the contrary. Thirdly, the Respondent has explicitly stated that he decided the appeal on its own merits. Again, the evidence does not support any other finding.

A "*fundamental right*" of access and a "*strong imperative*" towards disclosure

45. The judgment of Ms. Justice Faherty in *Right to Know CLG v. An Taoiseach & Ors* [2018] IEHC 372, concerned the question of cabinet confidentiality and whether this right would be an absolute bar to the release of information. In disagreeing with the submission to the effect that the strong protection given to cabinet confidentiality in Irish law reflected that a balancing exercise could only ever come down in favour of the first respondent, the trial judge stated, at para. 83:- *"I find that I cannot agree with the Respondents' submissions in the above regard. The fact of the matter is that the Directive, and the AIE Regulations, provide for a fundamental right of access to environmental information*." Ms. Justice Faherty went on, at para 85. to state that: "*Given the strong imperative in the Directive towards disclosure of environmental information, it cannot suffice, as occurred in the present case, that the Applicant's request was refused by reference, inter alia, to Article 8(b) of the AIE Regulations, without some indication in the review decision as to why it was considered that the public interest in the confidentiality of Government discussions should prevail over the public interest in the which disclosure of the information would serve. The provisions of Article 10(3) and (4) of the AIE Regulations cannot be disapplied solely because the review decision-maker invoked Article 8(b) as a basis for the requested information*". It is clear from the above that there is a fundamental right of access to environmental information, consistent with access being the general rule and that there is a strong imperative towards disclosure of environmental information, the foregoing being the context in which the Respondent exercises his powers. That is not to say that a decision by the Respondent that environmental information be disclosed is immune to challenge, but it is plainly of relevance to the balancing exercise which the Respondent is required to carry out in accordance with the statutory provisions governing the exercise of his powers. For a challenge to be successful, it will not be enough for an applicant to say, however sincerely, that they believe the Respondent struck the "wrong" balance if the evidence demonstrates that the Respondent carried out a balancing exercise in which he weighted up factors for and against disclosure, including every factor raised by the Appellant, and did so with a correct understanding of his legal duties and, as expert decision maker, came to a decision which was not based on error. The strength of the sincerity with which an appellant disagrees with the outcome of the balancing exercise conducted by the Respondent is not a valid basis for a successful challenge to that outcome.

The contents of the Appellant's submissions can be seen in the Respondent's Decision

46. It is a matter of fact that the entire contents of all submissions made by the Appellant are set out by the Respondent (on internal pages 4, 5 and 6) under the heading "*Analysis and Findings*" before the Respondent sets out the "*Decision*" which he came to (towards the bottom of internal page 6). For the sake of clarity, the following are verbatim extracts:

"The third party submits that the waste destination [data] could give a competitor an in-depth knowledge of its business and that this could have a severe impact on its business and customer base. It states this could affect its ability to continue to provide employment to its staff and prevent future growth of its business" (internal p. 4 of the Decision);

The third party relies on the fact that, in its view, disclosure of the waste destination data would prejudice its business" (internal p.4 of the Decision);

… the third party's submission that disclosure of the waste destination data could give the third party's competitors some knowledge of its business that they would not otherwise have and in turn 'could prejudice' its competitive position'. For example, if other companies in the sector knew the destination in Ireland or elsewhere of facilities that accept waste from the third party they might target these and thus affect the third party's competitiveness" (internal p.4 of the Decision);

"… the industry is regulated and as part of that regulation it is required to produce annual returns to public authorities which can enforce conditions on the waste companies" (internal p.5 of the Decision);

… protecting the legitimate economic interests of the third party from unnecessary prejudice" (internal p.6 of the Decision).

47. Earlier in this decision I set out, verbatim, the Appellant's submissions which were made to the Respondent on 7th March and on 23rd May 2019. I am satisfied that, as a matter of fact, the contents of both submissions made by the Appellant are reflected, in full, in the Respondent's Decision under the heading "*Analysis and Findings*", as illustrated by the foregoing quotes. I am satisfied, on the evidence, that, as a matter of fact, the Respondent considered all submissions made by the Appellant, prior to coming to the decision which he took. I am also satisfied that, as a matter of fact, all submissions made by the Appellant were considered by the Respondent in relation to both stages of the two-stage process required under Articles 9 (1) (c) and 10 (3). This is apparent from the contents of the Decision and underlined by the Respondent's explicit statement that a fresh review was conducted of all aspects of the appeal which was decided on its own merits. Moreover, in the very final paragraph of the section entitled "*Analysis and Findings*", the Respondent makes it explicit that he has "*considered all of the above*" as well as "*the arguments of the parties*" before coming to his decision, which is then set out.

The factors *for* and *against* disclosure as considered by the Respondent

48. It is a matter of fact that, in his six-page Decision of 10th July 2019, the Respondent does not set out any definition of the "*public interest*" in the context of his analysis under Art. 10(3). This is wholly unsurprising in circumstances where no definition of that term is contained in the 2007 Regulations or in the AIE Directive. Thus, the concept of the public interest affords the Respondent the discretion to weigh many factors in the balance and

to do so at a particular point in time and with reference to the particular facts of the case before him. At a level of principle, there are numerous factors which could be said to be relevant to the public interest in refusing disclosure of data and many other public interest factors in favour of disclosure. It is plain from the contents of internal pages five and six of the Respondent's decision that he considered and explicitly referenced a number of factors, both for an against disclosure. The evidence is consistent with the Respondent having weighed these various factors in the balance prior to reaching the decision he came to. As well as confirming, explicitly, that he conducted a fresh review of all aspects of the appeal and decided it on its own merits, the Respondent explicitly referred to numerous factors against and *for* disclosure as is clear from the contents of the Decision, verbatim extracts from which include the following references:

Against

- *"… the third party does not consent to the release of the waste destination data";*
- *"the Council in its internal review states that 'there exists a risk that disclosure of the waste destinations could have a detrimental effect on the operation of this part of the waste industry.'";*
- *"…it indicates that disclosure of the information would negatively impact on the waste market which is a competitive market with many operators";*
- *"the third party submits that the waste destination could give a competitor an in-depth knowledge of its business and that this could have a severe impact on its business and customer base";*
- *"it states this could affect its ability to continue to provide employment to its staff and prevent future growth of its business";*
- *"the third party relies on the fact that, in its view, disclosure of the waste destination data would prejudice its business";*
- *"I am prepared to accept the third party's submission that disclosure of the waste destination data could give the third party's competitors some knowledge of its business that they would not otherwise have and in turn 'could prejudice' its competitive position. For example, if other companies in the sector knew the destination in Ireland or elsewhere of facilities that accept waste from the third party they might target these and thus affect the third party's competitiveness";*
- *"I am therefore satisfied that disclosure of the withheld information would adversely affect commercial confidentiality";*

- *"… this public interest is satisfied by the fact that the industry is regulated and as part of that regulation it is required to produce annual returns to public authorities which can enforce conditions on the waste companies";*

- *"… disclosure of the waste destination data would potentially cause a negative impact on the waste market";*

- *"the public interest is better served by having a vibrant competitive market with many operators and that anything which might negatively impact on the market would be detrimental";*

- *"both the AIE regime and the FOI Act recognise a public interest in restricting access to certain information";*

- *"… protecting the legitimate economic interests of the third party from unnecessary prejudice";*

- *"… a strong public interest in third party's being able to conduct commercial transactions with public authorities without fear of suffering commercially as a result";*

For

- *"the Appellant rejects the argument that disclosure of the waste destination data could interfere with the ability of small waste companies to compete with larger waste companies… He submits that larger companies are aware of all available authorised waste outlets for each waste material and as a result will not gain a commercial advantage by examining the outlets used by smaller companies";*

- *"the interest in the openness and transparency of how the waste industry carries out its business which is vital for the protection of the environment";*

- *"… if a person gives waste to a waste collector, the waste producer has a right to know the destinations used";*

- *"… if a person has access to waste destination data, they would be able to carry out due diligence in advance of selecting a waste management company";*

- *"tracking waste destinations is a key environmental protection measure and… the more eyes looking at the data the greater the likelihood that false information and unexplained anomalies will be revealed, thereby contributing to greater enforcement in the waste industry";*

- *"… it is important to have regard to the purpose of the AIE regime in considering the public interest served by disclosure under AIE which includes*

facilitating public participation in environmental decision making with the aim of leading to a better environment, as reflected in Recital (1) of the Preamble to the Directive";

- *"the public interest in openness and accountability is not limited to the expenditure of public funds. I consider that there is a very strong public interest in optimising transparency and accountability in relation to the manner in which agents of the State… carry out their regulatory functions in relation to waste permits";*

- *"as I noted in Case CEI/17/0044, recent reports surrounding the management of waste and the enforcement of waste management legislation in Ireland have raised serious questions as to whether the public interest is sufficiently secured by public servants having access to the waste information";*

- *"there is a lack of confidence in Ireland's ability to manage waste properly. There is a substantial public interest in the disclosure of the information because such disclosure would facilitate further public scrutiny on waste management and may even lead to the identification of gaps in enforcement";*

- *"there is a public interest in waste producers being able to track the destination of their waste; this would facilitate the making of informed decisions about which waste collectors they opt to use to dispose of their waste";*

- *"Article 10(4) provides that the grounds for refusal must be 'interpreted on a restrictive basis'.";*

49. The foregoing comprises verbatim extracts from the Respondent's Decision which is challenged in the present proceedings. They comprise arguments made or issues raised by either the Appellant, the First Notice Party, the Second Notice Party or the Respondent. I am satisfied that all of the foregoing factors were considered by the Respondent and weighed in the balance before he came to the decision he ultimately reached. The evidence demonstrates that each and every one of the submissions made by the Appellant was considered by the Respondent. In circumstances where the entirety of the Appellant's submissions are set out by the Respondent and in circumstances where the Respondent explicitly states that he has carried out a fresh review of all aspects involved in the appeal and explicitly states that he has considered all of the information recited in his decision and the arguments of the parties, it would be a perverse finding, running entirely contrary to the evidence, for this court to find that the Respondent did not consider each and every one of the Respondent's submissions and weigh them in the balance prior to arriving at the decision he came to. I am also satisfied that a number of arguments against disclosure, including a number of arguments to the effect that disclosure would be contrary to the public interest, were also considered by the

Respondent, despite the fact that they had not been raised by the Appellant, even though the Appellant had been specifically invited to make submissions directed to the public interest test and the balancing exercise which the Respondent would be required to engage in. The evidence is entirely consistent with the Respondent having engaged in precisely the exercise which he was required to engage in, pursuant to the terms of the 2007 Regulations, in particular, under Art. 10(3). The evidence does not support the proposition that the Respondent incorrectly interpreted his powers or misapplied the law insofar as his obligations and responsibilities were concerned. It is also clear that there was evidence before the Respondent to support the decision he made. Furthermore, it could not be said that the decision which the Respondent made was one which no reasonable decision maker could come to.

There was nothing vague about the balancing exercise conducted by the Respondent. He was very specific about numerous factors, both *for* and *against* disclosure, which he plainly took into account as is clear from the face of the Decision which the Appellant seeks to challenge. On the evidence, I am also entitled to conclude that the numerous factors which I have quoted, verbatim, above is not an exhaustive list of all the matters which the Respondent took into account. I say this for several reasons. Firstly, the Respondent confirmed at the bottom of p. 2 of his Decision that he conducted a fresh review "*of all aspects of this appeal*" (emphasis added) but nowhere did the Respondent state that his written Decision amounted to an exhaustive setting out of every factor or issue which he considered. Secondly, the Respondent made it clear that, in carrying out the review, he had regard to a number of relevant documents (described as the Minister's guidance, the AIE Directive, the Aarhus Convention and the Aarhus Guide). Thirdly, prior to setting out his decision on internal page 6, the Respondent made it clear that he had come to his decision, having considered "*all of the above, the arguments of the parties and the public interest under Art 10(3)*". I am satisfied that, as a matter of law, it was not necessary for the Respondent to set out exhaustively every single matter which played a role in his decision making or to repeat in his Decision the contents of the Directive, Convention or Guide. The reasons why the Respondent came to the decision he reached are, however, clearly, cogently and comprehensively set out and are well capable of being understood

What this court cannot do

50. In legal submissions made on behalf of the Appellant it was suggested that the task of this court was to review the entire material which was before the Respondent and to carry out a fresh review, engaging in the balancing exercise provided for in Art. 10(3) of the 2007 Regulations and weighing up whether the public interest was served by disclosure, or not. Regardless of the skill with which that submission was made, I am satisfied that this is not the role this court can or should engage in. In my view, the Oireachtas has entrusted to the Respondent the obligation, and attendant powers, to carry out, *inter alia,* a weighing up of various factors in order to determine the public interest balance as per Art. 10(3), in circumstances where the Respondent has a particular decision-making expertise, which this court does not possess. In my view, this court's role is properly restricted to considering whether the decision reached by the Respondent was based on

an error, or errors, of law in the manner pleaded in the Appellant's originating motion. It would be impermissible for this court to carry out the balancing exercise entrusted to the Respondent and to attempt to substitute the court's findings for the Respondent's findings particularly where it is clear that the Respondent's decision was reasonable, was underpinned by evidence and was not based on an erroneous view of the law.

The Appellant's reliance on Article 9 (1) (c)

51. It is clear from the Decision that the Respondent took the view that the Appellant's WDD came within the exception in Art. 9(1)(c) of the 2007 Regulations and, as such, there was a discretion to refuse disclosure of this information, subject to the weighing up of the public interest in a manner set out in Art. 10(3). The Appellant in this case has no difficulty with the Respondent's finding that the provisions of Art. 9(1)(c) applied to the relevant environmental information, yet appears to argue that the Respondent's finding that Art. 9(1)(c) applied to the WDD constituted the end of the matter. This is evident from the relief sought, including in para. (d) of the Appellant's originating motion, wherein the Appellant seeks *"A Declaration that the Respondent erred in law in reaching the decision dated 10th July, 2019 that it was in the public interest to direct Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 annual environment report of the Appellant in circumstances notwithstanding the finding by the Respondent that such information was commercially sensitive to the Appellant*;" (emphasis added). The foregoing plea wholly ignores the statutory obligation on the Respondent arising from Article 10(3) of the 2007 Regulations (which uses the mandatory term "*shall*" in the phrase "*…shall consider each request on an individual basis and weight the public interest served by disclosure against the interest served by refusal*"). In other words, having come to a decision under Art. 9(1)(c), the Respondent was *required* to consider the disclosure request on an individual basis and weigh the public interest served by disclosure against the interests served by refusal. Moreover, the Respondent was under another mandatory obligation having regard to Article 10(4), which states that "*The ground for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure*".

The obligation to carry out a public interest balancing test in every case

52. As made clear in the 16th December 2010 decision in *Stichting Natuur en Milieu & Oes -v- College voor de toelating van gewasbeschermingsmiddelen en biociden*. Case C-266/09:-

> *"It is apparent from the very wording of Article 4 of Directive 2003/4 that the European Union legislature prescribed that the balancing of the interests involved was to be carried out in every particular case…Article 4 of Directive 2003/4 must be interpreted as meaning that the balancing exercise it prescribes between the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose must be carried out in each individual case submitted to the competent authorities…"*

That obligation in Article 4 of the Directive is reflected in the provisions of Article 10(3) of the 2007 Regulations.

Public interest arguments *against* disclosure which the Respondent considered

53. A key submission made on behalf of the Appellant during the hearing of this case is that, prior to reaching his decision, the Respondent gave no or no adequate consideration to public interest arguments *against* the Appellant's WDD being disclosed. It will be recalled that, despite being invited to make a submission providing details of the public interest factors in favour of and against the release of the 2017 WDD which the Appellant considered relevant, the Appellant made no submission which addressed that issue specifically. Such request was made on 8th March 2019 and was renewed on 3rd May 2019. It will also be recalled that the Appellant's 23rd May 2019 submission did not specifically address why the Appellant considered that, on balance, the public interest would not be better served by granting the request for information. Despite the foregoing, it is a matter of fact that the "*Analysis and Findings*" section of the Respondent's Decision sets out numerous arguments against as well as arguments in *favour* of disclosure, insofar as the public interest was concerned. Given that the Appellant in the present proceedings did not use the terms "*public interest*" or "*public interest test*", specifically, it is unsurprising that the Respondent does not refer to public interest arguments against or in favour of disclosure as submitted by the Appellant. But that is not an end of the analysis. Regarding the public interest in disclosure of the WDD in the interest of openness and transparency, the Respondent refers to a range of arguments *against* such disclosure, being arguments put forward by Council which are set out in the Decision, as follows:-

- *"… This public interest is satisfied by the fact that the industry is regulated and as part of that regulation it is required to produce annual returns to public authorities which can enforce conditions on the waste companies and"* (page 5 of the Decision);

- "*In favour of the interest in maintaining the Article 9(1)(c) exception i.e. refusal, it states that disclosure of the waste destination data would potentially cause a negative impact on the waste market"* (page 5 of the Decision);

- "*It states that 'the public interest is better served by having a vibrant, competitive market with many operators and that anything which might negatively impact on the market would be detrimental'*." (page 5 of the Decision);

- "*It concludes that, in its view, the public interest is better served by the non-disclosure of the* waste destination data" *(page 5 of the Decision);*

54. All the foregoing public interest arguments, against disclosure of the relevant data and in favour of maintaining the Art. 9(1)(c) exemption, can be seen on internal page 5 of the Respondent's Decision. Given the fact that the Respondent took the trouble to set these out in detail and explicitly stated that he conducted a fresh review of all aspects of the appeal and explicitly stated that he considered all of the above as well as the arguments of the parties prior to reaching a decision, it is simply not possible for this court to reach a finding that the Respondent did not give due consideration to public interest arguments

against the disclosure of the Appellant's WDD prior to coming to a final decision, notwithstanding the submission made on behalf of the Appellant to that effect.

Public interest argument against disclosure as cited by the Respondent

55. Quite apart from the manner in which public interest arguments were deployed by the First Notice Party Council against disclosure which are referred to by the Respondent in the Decision, the Respondent himself also explicitly stated the following (on internal page 5 of his decision):

> *"On the other hand, both the AIE regime and the FOI Act recognise a public interest in restricting access to certain information. Competing interests must be assessed in order to weigh the public interest in favour of disclosure against the potential harm that might result from that disclosure".*

In addition, it is clear that the Respondent gave explicit consideration, in the context of weighing up public interest arguments, to what he described as "*protecting the legitimate economic interests of the third party from unnecessary prejudice*.". The reference to the third party was, of course, a reference to the Appellant (see internal page 6 of the Respondent's Decision).

The Court's role in this case

56. The court's role in the present proceedings is not to conduct a de novo review of the matter. Rather, this is a statutory appeal, pursuant to Regulation 13(1) of the 2007 Regulations, in circumstances where the Appellant alleges that the Respondent erred in law. In *Minch v. Commissioner for Environmental Information* [2017] IECA 223, the Court of Appeal discussed the parameters of an Article 13(1) appeal and Mr. Justice Hogan stated the following from para. 11 onwards:

> *"[11] t seems implicit in the judgment of the Supreme Court in NAMA v. Commissioner for Environmental Information [2015] IESC 51 that questions of statutory interpretation of the 2007 Regulations are ultimately purely questions of law to be judicially determined by reference to the underlying objectives of the 2004 Directive.*
>
> *[12] In that respect I broadly agree with the approach taken by Baker J. in the High Court when she said:*
>
> > *"In my view the approach that I take in the appeal is that identified by O'Neill J. [in An Taoiseach v. Commissioner for Environmental Information [2013] 2 I.R. 510], namely, I may consider whether the conclusion reached by the Commissioner was based on a correct or erroneous view of the law, as noted by McEochaidh J. in [the High Court in] NAMA v. Commissioner for Environmental Information. I may engage "all legal issues arising", and I may consider the issues of the interpretation of the underlying Directive and of the Regulation. The appeal does engage the full jurisdiction of the court, but not as argued by the Appellant, in that I cannot substitute findings of fact, and I*

cannot reverse the inferences drawn by the Commissioner with regard to the nature of the Report."

[13] I would, for my part, slightly qualify that statement by saying that the High Court could review findings of fact or inferences drawn from those facts where these were findings of fact which could not reasonably have been found or inferences which could not reasonably have been drawn: see generally the analysis of this issue found in the judgment of McKechnie J. in Deely v. Information Commissioner [2001] IEHC 91, [2001] 3 I.R. 439."

In the *Deely* case, which involved an appeal on a point of law under the Freedom of Information Act, 1997, McKechnie J. stated the following, at 452:-

"There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following :-

(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;

(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;

(c) it can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision."

It could not be said that there were errors of fact made by the Respondent or that any facts relied upon by the Respondent were unsupported by evidence. There is no question of setting aside any findings of primary fact and it is not pleaded that the Respondent made any errors of fact. Similar comments apply in relation to any inferences drawn from facts. In the present case, the appeal to this court is made pursuant to Article 13(1) which permits an appeal on a point of law. The core question before this court is whether the Respondent Commissioner took an erroneous view of the law and for the reasons set out in this Judgment, I am entirely satisfied that the evidence does not support any such finding by this court.

57. In the Supreme Court decision of *Sheedy v. Information Commissioner* [2005] 2 IR 272, Kearns J. approved the foregoing principles from Deely, stating that it was:-

"…obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect…"

I am satisfied that, in the present case, the Respondent Commissioner did not misunderstand his role and did not operate under an erroneous interpretation of the law, in particular the provisions of the 2007 Regulations.

The *Sheedy* case concerned the release of certain reports about schools, as directed by the Commissioner and the Court's reluctance to disturb the balance which was struck by the expert in question is clear from the comments by Mr. Justice Kearns, at 299, as follows:

> *"Nor do I believe that any exhaustive analysis conducted by reference to detailed evidence was necessary before the Respondent could decide to apply the public interest provision of s. 21 (2) of the Act of 1997 to direct release of the reports. Once there was some evidence before him as to the circumstances in which these reports are compiled, as undoubtedly was the case here, the well-established principles of O'Keeffe v. an Bord Pleanála [1993] 1 I.R. 39 make it clear that his decision is not to be interfered with. This assessment, which involved a balancing exercise between various competing interests, was one uniquely within his particular remit."*

In the present case, the Respondent Commissioner undoubtedly occupies a unique role, conferred on him by statute, and expert decision-maker tasked with weighing a range of factors, in each individual case, and coming to a decision as to whether the public interest is best served by disclosure or by refusal of environmental information, the foregoing task being governed by the provisions of the 2007 Regulations which include Articles 10(3) and 10(4). In the present case, the evidence is that the Respondent did just that and reached a particular decision which the Appellant does not like but it could not be argued that the Respondent in the present case did not have "*some evidence before him*" on which to base the Decision which is challenged. In the manner explained in this judgment, there was ample evidence before the expert decision – maker who, as a matter of fact, considered a range of factors both *for* and *against* the release of the Appellant's WDD, including factors against such disclosure in the public interest which the Appellant did not even raise, and the evidence demonstrates that, having conducted a balancing exercise between various competing interests, the Respondent came to a decision which was uniquely within his remit. The Appellant may not like that decision but it is not for this court to interfere with it unless it is found to have been vitiated by error which, in the manner explained in this judgment, simply does not exist.

Curial deference – wide margin of discretion to decision makers

58. The concept of curial deference is in my view of considerable significance in the present case. In *Westwood v. Information Commissioner* [2015] 1 IR 489, Cross J. stated, at [86]:-

> *"The Respondent has in her submissions eloquently raised the issue of curial deference and the fact that the court in a statutory appeal no more than a judicial review should lightly interfere with any findings of fact… I fully accept the Respondent's submissions. The law allows a wide margin of discretion to decision*

makers. It is not for the court to impose its standards of excellence or otherwise upon what decision makers should decide or how they should decide it. Anxious scrutiny, or as it works in practice officious scrutiny, forms no part of our law and represents an attempted blurring of the separation of power by those who advocate it. Whereas the Respondent is not an expert with expertise in, for example, planning or engineering, and a distinction is rightly made in that regard by the Appellant, the Respondent is the person who has been charged at law with the decision making of these matters and has an expertise in so deciding."

Certain arguments made by the Appellant

59. It is plain that the Respondent Commissioner has been charged at law with weighing the public interest served by disclosure, as against the interest served by refusal, in respect of the Appellant's WDD. During the course of legal submissions, it was argued on behalf of the Appellant that the Respondent did not have regard to public interest argument *against* disclosure. For the reasons set out earlier in this judgment, I am satisfied that this submission is incorrect and is unsupported by an analysis of the evidence. It was also submitted on behalf of the Appellant that the Respondent Commissioner had not engaged in any manner as to the harm which would be caused to the Appellant if the relevant data was made available. Again, that submission is not supported by the evidence. On the contrary, the evidence discloses that the Respondent did, in fact, consider the issue of potential harm to the Appellant when weighing up whether the public interest lay in favour of disclosure or refusal of access to the Appellant's information in this particular case. It is also said on behalf of the Appellant that there was a complete and exclusive focus on the public interest in disclosure of environmental information. Once more, this is simply not supported by the evidence. Numerous factors against, as well as in favour of disclosure were considered by the Respondent as a matter of fact.

The claim that the Respondent got the balance "wrong" or committed an "error" as to where the correct balance lay

60. In the manner pleaded by the Appellant in a variety of ways in the originating motion, the Appellant essentially submits that the Decision taken by the Respondent was wrong. In circumstances where I am satisfied that the Respondent's Decision was evidenced based and did not involve an erroneous interpretation of the law, it is not for this Court to say that the Respondent, who plainly conducted an exercise of weighing up various factors, got the balance *wrong*. Among the submissions made by the Appellant is that the alleged "*error*" made by the Respondent was an "*error*" as where the correct balance lay. In other words, the Appellant argues that the correct balance lay against, rather than in favour of disclosure. That argument is made in a variety of ways but it is essentially to argue that, although the Respondent did weight things in the balance, the scales should have tipped in the direction of a refusal of access to the Appellant's WDD, rather than in favour of disclosure. For the reasons explained, this Court cannot substitute its view for one reached by a decision-maker who exercised a statutory power lawfully and without falling into any error of fact or law. Regardless of how aggrieved the Appellant may feel and regardless of how genuinely convinced the Appellant may be that the outcome of a balancing exercise conducted by the Respondent was wrong, the evidence in this case does not support the proposition that the Respondent's Decision was vitiated by any

error. Comments made by Noonan J. in the High Court decision in *Minister for Communications Energy and Natural Resources v Information Commissioner* [2017] IEHC 222 (the ENET decision), would seem to apply equally in the present case:-

> *"At the end of the day, it seems to me difficult to resist the conclusion that the Minister's case comes down to the contention that he got the balance right and the Commissioner got it wrong. For the reasons explained, that is not something with which the court can engage in an appeal on a point of law."*

A similar point was made by the Court of Appeal in *F.P. v. Information Commissioner* [2019] IECA 19, in which Peart J. stated at [73]:-

> *"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… 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."*

Serious and significant error or series of errors

61. In *Nowak v. Data Protection Commissioner* [2016] 2 IR 585 concerned a statutory appeal pursuant to s. 26 of the Data Protection Acts. In *Nowak*, O'Donnell J. indicated that the appropriate standard to apply was that set out in *Orange v. The Director of Telecommunications Regulations & Anor* [2000] 4 IR 159. In *Orange*, the then Chief Justice, Keane C.J., held, at [185]:-

> "…an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In arriving at a conclusion on that issue, the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the *[first defendant]."*

The evidence in the present case does not support a finding that the Respondent operated under any error or mistake of fact or law, much less a serious or significant error or series of such errors. I am satisfied that no error of law was committed by the Respondent insofar as his interpretation of and application of the provisions of the 2007 Regulations was concerned. I am also satisfied that the Decision reached by the Respondent was based on evidence before him and it could not be said that the decision reached by the Respondent flies in the face of fundamental reason or common sense.

The claim that the Conor Ryan decision was "*cut and pasted*"

62. The Appellant's attention was drawn to the *Conor Ryan* decision on two separate occasions. Therefore, and as a matter of fact, the Appellant was given the opportunity to make submissions as to why any reasoning employed by the Respondent in the *Conor Ryan* decision should not be employed in the context of the Respondent's review of the appeal concerning the Appellant's WDD. It is fair to say that nowhere in either of the

relatively short submissions made by the Appellant is there any attempt to take issue with the reasoning employed by the Respondent in the Conor Ryan decision. No mention is made of the *Conor Ryan* decision in the Appellant's submissions of 7th March and/or 23rd May, 2019. Insofar as the Appellant argues that the *Conor Ryan* decision was merely "*cut and pasted*" onto the review Decision which is the subject of the present proceedings, the evidence does not support that submission. On the contrary, the evidence entitles me to find that the Respondent gave proper consideration to the facts of the particular case before him and carried out a balancing exercise involving numerous factors, for and against disclosure of the Appellant's WDD, as a result of which the Respondent ultimately reached a decision which was not vitiated by error.

The proposition that the Respondent was confined to considering whether the Local Authority followed a prior decision by the Respondent

63. The Respondent was, at all material times, explicit that he would neither be bound by the earlier decision in the *Conor Ryan* case, nor in the *SRL* matter. Insofar as the Appellant argues that the Commissioner is confined, in a review, to determining whether a public authority correctly followed Commissioner Decisions in existence at the time of the review, I am satisfied that this is not a correct statement of the law. Such a proposition is undermined both in fact and in law. As to the law, Article 10(3) makes it clear that each request for environmental information shall be considered "*on an individual basis*", insofar as weighing the public interest served by disclosure against the interest served by refusal. The foregoing is, of course, reflective of the provisions in Article 4(2) of the 2003 Directive which states, *inter alia*, that "*in every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal*". Furthermore, as a matter of fact, the Respondent explicitly stated that "*I am not bound to follow previous decisions, I conducted a fresh review of all aspects of this appeal and decided it on its own merits*". In short, the Respondent is not bound by the rule of *stare decisis*. The Respondent is obliged to consider each particular case on its merits and the evidence demonstrates that he did so. The Respondent must apply the law and could not apply different and inconsistent interpretations of the law, but there is no evidence to support a finding that the Respondent misapplied the law in the present case or misunderstood his legal rights and responsibilities under the 2007 Regulations. Rather, the evidence demonstrates that, having conducted a balancing exercise - as the Respondent undoubtedly had the power and duty to do - he arrived at a particular conclusion which was evidence-based and was not unreasonable, irrational or vitiated by error. Insofar as the Appellant argues that the decision in the SRL case was correct and should have been followed, the foregoing is essentially an argument that the Respondent is bound by the doctrine of precedent, which is not so. It is also an argument which ignores the reality that the Respondent, as he was obliged to do, conducted an entirely fresh review of all aspects of the appeal made to him and decided same on its own merits by way of the 10th July 2019 Decision, having explicitly stated that he was not bound to follow previous decisions.

Deciding on the basis of the facts and circumstances pertaining at the time of the review

64. At this juncture it is convenient to emphasise that the Respondent was under an obligation to make a decision in light of the facts and circumstances which pertained at the date of the review before him and not otherwise. I make this point because there was a suggestion made on behalf of the Appellant, that the Respondent should have decided the matter on the basis of the position which pertained when the matter came before the First Notice Party Council. Any such suggestion is undermined by the authorities and, in this regard, it is useful to refer to the 31st July 2001 decision of Mr. Justice O'Caoimh in *The Minister for Education and Science v. The Information Commissioner.* Comments by the learned judge at p. 28 of his judgment, in relation to a hearing de novo by the Information Commissioner, apply equally to the case before this court, namely:

> *"…it is clear that the decision that was to be made by [the] Information Commissioner in light of the appeals taken to him were to be made in light of the facts and circumstances applying at the date of the review by him and not those facts and circumstances pertaining on the date of the original decision".*

Points of law advanced at first instance

65. It is also settled law that this Court, in carrying out its statutory appeal function, can only entertain points of law involved in the Decision under appeal, i.e. upon which the Respondent had made a decision, the judgment of Fennelly J. in *The Governors and Guardians of the Hospital for the Relief of Poor Lying-in Women [Rotunda Hospital] v. Information Commissioner* [2013] 1 IR 1 being relevant in this regard. As Mr. Justice Fennelly put it, at para. 88; *"I think it is an integral part of any appeal process, other than possibly an appeal by complete re-hearing, that any point of law advanced on appeal shall have been advanced, argued and determined at first instance*." Furthermore, Order. 84C, r. 2(3) of the Rules of the Superior Courts makes clear that:-

> *"Where the relevant enactment provides only for appeal to the High Court on a point of law, the notice of motion shall state concisely the point of law on which the appeal is made."*

As noted by Hyland J. in *Jackson Way Properties v. Information Commissioner* [2020] IEHC 73 at para. 48:-

> *"There are obvious reasons why a party cannot introduce a new argument for the first time at the oral hearing."*

There is no ground of appeal in the notice of motion which alleges any failure on the part of the Respondent to consider some specific relevant information tendered by one of the parties which would have had a bearing on the appeal. Nor does the Appellant plead that its submissions to the Respondent were misunderstood or mischaracterised in the context of the review which the Respondent undertook, prior to reaching the Decision. It must also be observed that several points made in legal submissions, with regard to the *Conor Ryan* decision, constitute arguments which do not feature in the Appellant's notice of motion. These include the claim that the Respondent merely "*cut and pasted*" from the

Conor Ryan decision but, in the manner explained in this judgment, the evidence simply does not support that proposition.

The significance of the identity of Mr. XY and the motivation for seeking environmental information

66. The submissions made to the court, on behalf of the Appellant, concerning the identity of Mr. XY neither featured in the review by the Respondent nor in the Appellant's notice of motion. As such, they are not matters which can avail the Appellant even if there was substance behind the submissions. For the following reasons, I am satisfied that there is no substance to the submissions. A careful consideration of the evidence before the court and the provisions of the Directive and Regulations reveals at least the following:

(1) Mr. Walsh was not identified to the Appellant as the party seeking its WDD at the time the Appellant made submissions or at any time prior to the Respondent's decision and I am satisfied, that as a matter of fact, the Appellant did not learn that Mr. Walsh was Mr. XY until after the Respondent reached the decision which is challenged in the present proceedings;

(2) There is no evidence that Mr. Walsh withheld his identity when he made the initial request of the First Notice Party Council for the release of the WDD in question. Nor is there any evidence that Mr. Walsh's identity was withheld from the Respondent at any time. On the contrary, it seems clear from the contents of the affidavit sworn on behalf of the Respondent on 18 June 2020 by Ms. Elizabeth Dolan, Senior Investigator, that the identity of the Second Notice Party, described as Mr XY was, in fact, known to the Respondent;

(3) There is no evidence before the court from which it can conclude whether or not the First Notice Party and/or the Respondent were aware that Mr. Walsh was an employee of SLR or secretary of the Irish Waste Management Association, as averred by Mr. Redmond but, even if the foregoing was known to the Respondent, it did not disentitle Mr. Walsh from making a valid request for the data in question.

(4) As a matter of law, an applicant for environmental information is not required to state his interest in making the request, as is clear from Article 6(2) of the 2007 Regulations, which states that "An applicant shall not be required to state his or her interest in making the request"*.*

(5) Irrespective of the foregoing, it is a matter of fact that the submissions made by the Appellant were made on the basis that, if disclosed, the Appellant's WDD would become known to a competitor*. Thus, even without knowing who Mr. XY was at the time of making the submissions, and at the time the Respondent made his Decision, it is clear from the evidence that the Appellant made submissions with a competitor or competitors in mind;*

(6) When weighing up the various factors including competing interests, the Respondent specifically considered the potential advantage, to a competitor, of the

Appellant's information and the potential damage to the Appellant's business, as is clear from the analysis carried out by the Respondent;

(7) Furthermore, Recital 8 of the Directive provides that "it is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest*";*

(8) Article 3 (1) of the Directive states that "Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applkicant at his request and without his having to state an interest".

The identity of the requester and the reason for requesting the Appellant's WDD were irrelevant

67. In light of the foregoing, I am satisfied both as a matter of fact and as a matter of law that the identity of Mr. XY and when the Appellant learned of his identity and why Mr XY wanted access to the Appellant's WDD are issues of no relevance to this court. Furthermore, there is no ground of appeal in the Appellant's originating motion which relates to the identity of the requestor being a relevant issue. Having regard to Article 6(2) of the 2007 Regulations and to both Recital 8 and Article 3(1) of the Directive, the identity of the requester and the reasons behind the request are both irrelevant matters. Whether the requester may be a neighbour, journalist, student, politician, member of the public or a competitor, the legislation focuses not on the requester or their motivation, but on the information and whether the release of same is or is not in the public interest in any given case, with the overall thrust of the legislation favouring release as the general rule. By way of comment, I note that the Commissioner for Environmental Information explained, in the 13th March 2013 decision in case CEI/12/0008, that *"…while it is envisioned under the Directive that public access to environmental information will lead, eventually, to a better environment, an interest in protecting the environment is not required in order to make an AIR request. Even where an applicant is interested in environmental protection, it is the action taken by the Applicant when equipped with the environmental information s/he seeks that may, depending upon the circumstances, have a positive impact on the elements of the environment, not the access to the information in and of itself….Moreover, in making decisions on whether or not to grant requests for access to environmental information, the staff of public authorities are simply carrying out their statutory functions in what should be a fair and impartial manner, having regard to various relevant interests, including the interests reflected in the grounds for refusal where appropriate. The intent of the Applicant in making the request, however, is not a relevant consideration."* In my view, the foregoing comments in relation to the question of the "intent" behind a request for environmental information, are correct as a matter of law.

Waste Management (Collection Permit) Regulations 2007 & 2008

68. During the hearing I was supplied with a copy the consolidated version of the Waste Management (Collection Permit) Regulations 2007 and Waste Management (Collection Permit) (Amendment) Regulations 2008 (hereinafter "the Waste Management Permit

Regulations"). It is not in dispute that a permit holder, such as the Appellant in the present proceedings has legal obligations which include supplying WMD to the Local Authority. Certain provisions from the Waste Management Permit Regulations are worth setting out, verbatim as follows. Under the heading *"Other Conditions to be Attached to Waste Collection Permits"*, s. 20(2)(e) and (f) state the following:

"20.(2)… the nominated authority shall attach to each waste collection permit granted by it conditions requiring the permit holder to –

…

(e) compile and maintain specified records, for a period of not less than seven years, relating to the –

…

(ii) origin and destination of such waste,

…

(f) furnish to the nominated authority, not later than 28 February in each year in such form as may be specified by the authority, summary information in relation to the nature and quantities of wastes collected by the permit holder in the preceding calendar year or part thereof, as the case may be, and delivered to individual facilities or otherwise transferred to other persons for the purpose of recovery or disposal,"

69. Thus, the Waste Management Permit Regulations oblige the First Notice Party in the present proceedings to require, as a condition of the permit issued to the Appellant, that the latter is required to compile and maintain records including WMD, which information must be provided, annually, to the Local Authority. Failure to do this is an offence as is clear from the provisions of s. 36 which states:

"36.(1) A person shall not compile information which he or she knows to be false or misleading in a material respect or furnish any such information in, or in support of, an application, notice or other document used for the purposes of these regulations and any person who does so will be guilty of an offence.

(2) A person who fails to comply with a notice or to provide information that a nominated authority or the agency requires under these regulations shall be guilty of an offence."

The Appellant's Waste Collection Permit

70. Although not exhibited in any affidavit, a copy of the Appellant's Waste Collection Permit dated 14th February 2019 was handed in during the hearing, by agreement of both parties to the proceedings. Of particular significance are the conditions attached to the permit. Among other things, Condition 1.5 states that: *"Any non-compliance with the conditions of this permit is an offence under the Waste Management (Collection Permit) Regulations, 2007 as amended and section 34(1) of the Waste Management Act, 1996."*

Furthermore, under the heading "Notification and Record Keeping", Condition 4.7 of the Permit *states the following*:

"4.7 The permit holder shall, not later than the 28th February in each year furnish to the NWCPO (National Waste Collection Permit Office) in such form as may be specified by the NWCPO, and Annual Report (AR) in respect of waste collection activities carried out by the permit holder in the preceding calendar year or part thereof, as the case may be. The AR shall be a summary of the records maintained under Condition 4.6 of the permit. The AR shall contain the following information in summary form, in respect of waste collected by the permit holder in the preceding calendar year:

i. Local Authority area of origin of waste

ii. List of waste (Low) code for each waste type and indicate whether or not the waste is hazardous

iii. Description of Waste

iv. Quantity (in tonnes) and units where specified of each waste type collected

v. Destination of waste (waste facility details) (emphasis added)

vi. Country of destination (if exported abroad)

vii. The Trans Frontier Shipment (TFS) notification number if the waste is exported abroad

viii. Details of the waste facility where waste was collected if waste is collected from a waste facility…"

The conditions in the Appellant's Waste Collection Permit reflect the legal obligations set out in the Waste Management Permit Regulations and it is beyond doubt that there is a mandatory obligation, as a condition of holding a permit, to provide, inter alia, WDD to the Local Authority.

The Appellant's submission that the Respondent did not know the nature of the WDD

71. It was suggested on behalf of the Appellant that the Respondent's Decision was vitiated by error stemming from a claim that the Respondent neither read nor understood the nature of the Appellant's WDD. There is no evidence from which this court could safely conclude that the Respondent did not read the Appellant's WDD. Furthermore, it is abundantly clear from the evidence, including the Respondent's analysis in his 10th July 2019 Decision, that the Respondent was, as a matter of fact, very well aware that the Appellant was the holder of a permit issued under the Waste Management Permit Regulations of 2007 and 2008. It also clear from the evidence that the Respondent was fully aware of the nature of the records which were being sought, namely, waste destination data in the Appellant's 2017 AER, as submitted by the Appellant to the first

named respondent. Indeed, the first section of the Respondent's Decision, under the heading "*Background*", states, *inter alia*, that:-

> *"Waste collection permits include conditions requiring the permit holder to compile and maintain information concerning their waste collection activity, for example, the quantity of waste collected and the facility it was collected from or delivered to. This information is then given to the relevant nominated authority through an Annual Return procedure also referred to as an Annual Environmental Report (AER)."*

There was no requirement in statute or at common law, for the Respondent Commissioner to read the Appellants' WDD into the record of his Decision. Indeed, had he done so, it would have rendered moot any subsequent appeal of the Respondent's decision.

Submission by the Appellant based on the presence of a sentence in the Conor Ryan and SLR decisions

72. In submissions to the court, Counsel for the Appellant emphasised that the Respondent's 24th April 2018 decision in the SLR case contains, inter alia, a sentence which states: *"I therefore considered this type of information in more detail*" and the 31st January 2019 decision by the Respondent in the Conor Ryan case contains, inter alia, a sentence saying: "*Having examined the information in the 35 records very carefully*…". It was argued on behalf of the Appellant that, because the Respondent's Decision in the present case, did not contain a sentence saying that *"I considered the Appellant's waste destination data in detail"*, or a similar sentence, the Court should conclude that the Respondent was unaware of what type of information it was and/or did not understand the nature of the Appellant's WDD. It was argued that the Respondent's Decision was vitiated by a fundamental error which the court should conclude, according to the Appellant's submission, was demonstrated by the absence of such a sentence. The evidence does not support such a submission, regardless of the skill and ingenuity with which it is made by Counsel for the Appellant. Leaving aside whether this is a submission grounded on any plea in the originating motion, I am entitled to conclude on the evidence that the Respondent was very well aware of the type, nature and significance of the records sought by way of the review before him, being the Appellant's WDD which the Appellant was, as a condition of its Permit, required to maintain and to furnish to the relevant local authority – something the Respondent made perfectly clear in his Decision.

Impermissible scrutiny of the Respondent's Decision

73. For this court to suggest that the Respondent's Decision is flawed, and fundamentally so, because it lacks a particular sentence would, in my view, plainly constitute an impermissible granular analysis of the way the Respondent expressed himself and would be, in truth, an utterly inappropriate focus on the *form* of the Respondent's Decision whilst ignoring the *substance* of it. It is not for this court to criticise the Respondent for the manner in which he expressed himself. To accept the argument put forward on behalf of the Appellant would be to engage in the type of "officious scrutiny", specifically impermissible scrutiny of how the Respondent explained the decision he reached, which

Mr. Justice Cross cautioned against in *Westwood v. Information Commissioner* [2015] 1 IR 489, when he made the following clear, at para. 86 of his judgment:

> *"The law allows a wide margin of discretion for decision makers. It is not for the court to impose its standards of excellence or otherwise upon what decision makers should decide or how they should decide it. Anxious scrutiny, or as it works in practice officious scrutiny, forms no part of our law and represents an attempted blurring of the separation of power by those who advocate it."*

The Appellant's claim that waste operators are likely to be more open with the Local Authority if the Appellant's WDD is not disclosed

74. Among other things, the Appellant submits that waste operators are likely to be more open with the Local Authority if the Appellant's WDD is not disclosed. The first thing to say is that the foregoing submission is not pleaded. Nor was it an argument canvassed by the Appellant before the Respondent in the context of the July 2019 review. As such, it is not an issue which is properly before the Court. Notwithstanding the foregoing, it is also a submission which ignores the mandatory obligations found in the Waste Management Permit Regulations of 2007 and 2008, to which I have referred earlier in this judgment, as well as the conditions pursuant to which waste collection permits are issued. It is not in dispute that there is a mandatory legal obligation on Waste Collection Permit holders to compile and maintain records and to furnish to the Local Authority, annually, information including in relation to the nature and quantities of waste collected by the permit holder and delivered to individual facilities for the purposes of recovery or disposal. Thus, the foregoing submission cannot avail the Appellant.

The Appellant's reliance on UK texts

75. The reliance, in the Appellant's legal submissions, on guidelines given by the U.K. Ministry of Justice, as summarised by MacDonald in "*The Law of Freedom of Information*" (2nd ed. 2009), ignores several key matters. Firstly, these are guidelines from a different jurisdiction. Secondly, they are not binding on the Respondent. Thirdly, they do not engage with the specific provisions in either the 2007 Regulations or the 2003 Directive which, among other things, make clear that the grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis, having regard to the public interest served by disclosure (Article 10 (4) of the 2007 Regulations). Fourthly, the Appellant refers only to factors from the aforesaid textbook, that weigh in favour of the public interest in *withholding* information, whereas the same text also sets out a range of factors in relation to the public interest in favour of disclosure. These can be seen on internal page 461 of that textbook and include, inter alia, the public interest in *favour* of disclosure in order to ensure transparency and accountability, proper scrutiny of actions, public money being used effectively and promoting openness and honesty. Finally, despite the Appellant's reference to factors against disclosure as set out in this UK text, it is as a matter of fact that the Respondent who conducted the relevant review took into account factors both in favour of and against disclosure in the context of the public interest balancing test which he was required to, and did, carry out. Although not central to the determination of the issue before this court, one does not need to go as far as the United Kingdom to seek a list of factors both in favour of and against the release of

information in the public interest. The Department of Public Expenditure and Reform produced, in May 2016, a "*Freedom of Information Decision Makers Manual*", part 2 of which contains, inter alia, section 10.4.2, entitled "*Factors in favour of release in the public interest*" and which lists a range of eight factors in favour of disclosure being in the public interest, in the context of Freedom of Information requests. Neither UK texts nor FOI guidance, however, are determinative of the question before this court. Rather, that question is determined by the evidence which overwhelmingly points to the Respondent having had a correct understanding of the law and reaching a decision which was not based on an error of law, despite the pleas made in the Appellant's Motion.

The Appellant's submission based on "*Information Rights Law and Practice*"

76. Insofar as the Appellant relies on extracts from "*Information Rights Law and Practice*" (Coppel 4th ed. 2014) as to the nature of the balancing exercise to be performed by the Respondent, as the Appellant sees it, para. [15-003] of the foregoing text begins:

> *"The public interest balancing exercise does not involve the exercise of discretion. It is an issue of mixed law and fact, and the Tribunal may substitute its judgment for that of the Commissioner …"*

The foregoing wholly ignores the role of the Respondent who must conduct a hearing de novo and, on the evidence, did so properly lawfully and without falling into error as to the proper interpretation of the legislation governing his review. It also ignores the role of this court which is not entitled to substitute its judgment for that of the Respondent in circumstances where the Respondent has the statutory duty as decision–maker and, as the evidence in this case demonstrates, properly carried out his role and came to a decision which was not vitiated by any error.

The submission that the Respondent did not consider the potential harm to the Appellant

77. Among other things, the Appellant claims that the Respondent did not engage in any manner as to what it describes as the undoubted harm which would be caused to the Appellant arising from its commercially confidential information being made available. That submission is wholly undermined by the facts in this case, as found from a careful examination of the evidence. In short, the evidence discloses that the Respondent did in fact consider that potential harm to the Applicant and weighed this in the balance when deciding whether the public interest was served by disclosure or by refusal. Earlier in this judgment I explained, with reference to specific quotes extracted verbatim from the Decision, why I have come to that conclusion.

78. Among other things, the Appellant submits that the Respondent failed to take into consideration the mandatory requirement of disclosure of WDD to local authorities. The evidence does not support this submission. I am satisfied that, as a matter of fact, disclosure of WDD to local authorities was a factor to which the Respondent had regard when conducting the balancing exercise under Article 10 (3). In the manner explained earlier in this judgment, the foregoing was one of the factors which the Respondent explicitly cited in his decision. The evidence demonstrates conclusively that there was no failure on the Respondent's part to take this factor into consideration. I would also

observe that the logic of an argument made by or on behalf of the Appellant to the effect that mandatory disclosure of environmental information to local authorities is, of *necessity*, always sufficient to protect the public interest in all circumstances, would mean that the explicit powers granted to the Respondent under the 2007 Regulations would be fettered or circumscribed. In other words, if disclosure to public servants (which is mandatory as a condition of obtaining a licence) will always meet the public interest in disclosure to an interested member of the public, the Respondent's hands would be tied in that he would be prevented from ever directing disclosure. That cannot be so, yet, among the submissions made on behalf of the Appellant is that disclosure to public servants in the local authority adequately meets the public interest in disclosure and that the Respondent could not have validly come to a different decision. For the reasons set out in this judgment, I do not accept that submission on behalf of the Appellant. I should also say by way of observation that it is not appropriate for this court to second guess an expert decision maker with regard to how much weight a particular factor should be given, in a particular case, where the evidence is that the factor is relevant. I say this in light of certain submissions made by on behalf of the Appellant to the effect that, although the Respondent considered a factor or factors which the Appellant accepts were relevant, it is argued by the Appellant that too much weight was given to one or other of them. I should add that the evidence does not demonstrate that undue weight was attributed to any factor or factors. That said, the caution against "*officious scrutiny*" which was given by Mr. Justice Cross in Westwood is also relevant to all such submissions on behalf of the Appellant, as are the comments by Mr Justice Noonan in Enet in relation to arguments that a decision maker got the balance "*wrong*".

79. Among other things, the Appellant seeks to rely on certain passages from the Supreme Court's decision in *Governors and Guardians of the Rotunda Hospital v. Information Commissioner* [2011] IESC 26, including para. 101 of Mr. Justice Fennelly's judgment, wherein he made reference to the High Court Judge pointing out that the Respondent in that case "…*did not, in striking that balance, take account of all of the right or duty of the Hospital to respect of the confidence of information confided to it by its patients*…". In the present case, there is no evidence from which I could conclude that there was a relevant factor which the Respondent failed to take account of. In para. 100. of the same judgment, Fennelly J. also referred to the Respondent's submission "…*that she balanced the factors in favour of the release of the information against those militating against, although she did not enumerate them in her decision.*" Leaving aside (a) that the *Rotunda Hospital* case concerned a request for birth records under Freedom of Information legislation, (b) the *obiter* nature of the comments relied upon by the Appellant and (c) that the Supreme Court did not overturn the public interest balancing test, the position in the present case is entirely different. Not only did the Respondent enumerate the factors militating against, as well as in favour of, the disclosure of the Appellant's WDD, the Respondent very clearly set out a range of factors which the Appellant had not put forward by way of a submission against disclosure, before coming to a decision which was made in the context of a correct understanding of Respondent's legal powers and duties.

Analysis of the relief sought by the Appellant

80. The following is the relief sought in the Appellant's originating notice of motion:

"(a) An Order pursuant to Regulation 13 of the European Communities (Access to Information on the Environment) Regulations 2007 as amended setting aside, varying and/or annulling the decision of the Respondent dated 10th July, 2019;

(b) A Declaration that the Respondent erred in law in reaching the decision dated 10th July, 2019, in directing Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant, notwithstanding the finding by the Respondent that such information was commercially sensitive to the Appellant;

(c) A Declaration that the Respondent erred in law in reaching the decision dated 10th July, 2019 that it was in the public interest to direct Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant:

(d) A Declaration that the Respondent erred in law in reaching the decision dated 10th July, 2019 that it was in the public interest to direct Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant in circumstances notwithstanding the finding by the Respondent that such information was commercially sensitive to the Appellant;

(e) A Declaration that the Respondent erred in law in reaching the decision dated 10th July, 2019 that it was in the public interest to direct Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant notwithstanding the previous decisions of the Respondent and in particular decision bearing case numbers CEI/17/005 and/or CEI/17/044;

(f) A Declaration that the Respondent erred in law in reaching the decision dated 10th July, 2019 that it was in the public interest to direct Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant where no consideration was given as to basis (sic) on which the information was sought;

(f) A Declaration that the Respondent erred in law in reaching the decision dated 10th July, 2019 that it was in the public interest to direct Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant where in so doing the Respondent effectively rendered nugatory the provided for exceptions as contained in Regulation 9 13 (sic) of the European Communities (Access to Information on the Environment) Regulations 2007 as amended;

(h) A Declaration that the Respondent erred in law in reaching the decision dated 10th July, 2019 that it was in the public interest to direct Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant where in so doing the Respondent misdirected himself on the interplay between the provisions of the European Communities (Access to Information on the Environment) Regulations 2007 and the provisions of the Freedom of Information Act, 2014 and in particular s. 36;

(i) A Declaration that the Respondent erred in law in reaching the decision dated 10th July, 2019 that it was in the public interest to direct Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant on such further legal grounds as may arise;

(j) An Order restraining Fingal County Council from providing access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant pending the determination of these proceedings;

(k) Such further or other orders as to which this honourable court may deem meet;…"

The relief at (a)

81. The relief at (a) of the Appellant's originating motion invokes Regulation 13 of the 2007 Regulations.

The relief at (b)

82. As to relief (b), it is entirely permissible for the Respondent to come to the view that the Appellant's information was commercially sensitive to the Appellant (i.e. to decide that the information was commercially confidential within the meaning of Art. 9(1)(c) of the 2007 Regulations) yet go on to direct its release, having applied the test specified in Art. 10(3) of the 2007 Regulations and decided that the public interest was served by disclosure, rather than by refusal. In other words, it is not true to say that a decision that Art. 9(1)(c) applies is determinative of all matters. Indeed, counsel for the Appellant fairly accepted that that was so.

The relief at (d)

83. The relief at (d) is almost identical to that sought at (b). Again, a finding by the Respondent that the Appellant's WDD was commercially sensitive, or commercially confidential to use the wording in Art. 9 (1)(c), does not, as a matter of law, resolve the issue in dispute in the present proceedings. The Appellant accepts, quite rightly, that the Respondent is entitled to, indeed obliged to, conduct the analysis required by Art. 10(3) of the 2007 Regulations. Thus, a finding that the Art. (1) (c) applies, does not determine the matter.

The relief at (e)

84. It is hard to regard the relief sought at (e) as other than, in substance, an argument that the Respondent was bound by the doctrine of precedent or *stare decisis* which, as a matter of law, is not correct. Elsewhere in this judgment I have looked closely at the various arguments made by the Appellant which touch on prior decisions in the *SLR* and

Conor Ryan cases and I am satisfied that those arguments are not borne out by the evidence in this case. It was no more open to the Respondent to decide the matter before him by simply stating, on 10th July 2019, that "*Fingal Co. Council correctly applied a previous decision of mine (SLR) at the time, so that's the end of the matter*", than it was open to the Appellant to argue that "*the Respondent was bound to follow the SLR decision and that is the end of the matter*". In truth, nothing which had been decided in the past in another case was determinative or could lawfully be determinative of the issue which was before the Respondent and that is so by virtue of the explicit provisions of the Directive and the 2007 Regulation, including the mandatory obligation under Article 10(3) to consider each request on an individual basis and to carry out a public interest balancing test on the specific request before the Respondent. That was something the Respondent understood. That was something the Respondent did and plainly did with a correct understating of his legal duties and the extent of his powers. Indeed, had the Respondent simply said that past precedent determines the matter, he would have fallen into serious error as it would have evidenced an erroneous understanding of the law governing his role and it would have constituted a failure to give effect to legal obligations including under Article 10(3).

The relief at (f)

85. With regard to the relief at (f), counsel for the Appellant quite rightly accept that a requester does not have to give a reason for the request. This, of course, reflects the legal position, as is clear from, *inter alia*, Art. 6(2) of the 2007 Regulations. Notwithstanding this, counsel for the Appellant submitted that the Respondent should have had some regard as to why the requestor wanted the data and what might be done with it, including the potential benefit to competitors. I have dealt with this issue at some length in this judgment. In short, although I am satisfied that the reason why the data was sought is not something the Respondent was obliged to consider, the evidence demonstrates that, as a matter of fact, the Respondent weighed up various factors for and against disclosure on the basis and clearly took into account, inter alia, the Appellant's submission that, if disclosed, the Appellant's WDD could benefit a competitor and could damage the Appellant's business. The plea that the exception in Art. 9 (1) (c) was rendered nugatory is in reality another way of suggesting that a finding that Art. 9 (1) (c) applied to the WDD should have been the end of the matter. This is plainly not so, having regard to Art. 10 (3) and the evidence demonstrates that the public interest balancing interest exercise was properly carried out by the Respondent under that Article.

The relief at (g)

86. Regarding relief (g), it is fair to say that, in substance, it is very similar to the relief sought at (b) and (d). It is a plea which, in effect, suggests that a finding that the Appellant's data comes within the provisions of Regulation 9(1)(c) determined the matter. It did not. The plea at (g) ignores the public interest balancing test which the Respondent is required to carry out under Art. 10(3).

The relief at (h)

87. As regards the relief at (h), there is no submission made on this ground. Indeed, the Appellant submitted that s. 36 of the Freedom of Information Act, 2014, was correctly

applied. It is of course the position that, in order for data to come within the discretionary grounds for refusal of information under Art. 9(1)(c) of the 2007 Regulations, commercial confidentiality must be provided for in national law to protect a legitimate economic interest. In short, I am satisfied that the evidence did not support a plea that the Respondent erred in law in the manner alleged at (h).

The relief at (i)

88. The relief at (i) and (c) is in identical terms, save for the reference in (i) to "*such further legal grounds as may arise".*

The relief at (c) which is at the heart of the present case

89. It is clear that, at the core of the present proceedings, is the plea at (c) namely the plea that "…*the Respondent erred in law in reaching the decision dated 10th July, 2019 that it was in the public interest to direct Fingal County Council to provide access to Mr. XY of the waste destination data in the 2017 Annual Environmental Report of the Appellant*". The foregoing is, in essence, a plea that all was well until the Respondent carried out the public interest balancing test. In other words, there is no criticism of how the Respondent approached Art. 9(1)(c) or the outcome reached by the Respondent to the effect that the Appellant's data was commercially confidential. Central to this plea is the Appellant's submission that the Respondent set out and focused on the public interest in the data being released, but not in a release of the data being refused. This is a submission which is simply not supported by the evidence. The Appellant also submits that the Respondent failed to consider the commercial confidentiality of the Appellant's data and the potential damage to the Appellant's business when the Respondent carried out the public interest balancing test under Art. 10(3). Again, this submission is undermined by the evidence. It also has to be said that no plea is made that the Respondent failed to consider any relevant material. Nor is there any plea that the Respondent made any error of fact. For the avoidance of doubt, I am satisfied on the evidence that the Respondent did consider a range of factors against as well as in favour of disclosure, ultimately coming to the Decision.

The Appellant's argument that the Respondent did not take into account the finding under Art. 9 (1) (c) as to the nature of the Appellant's WDD when conducting the Art. 10 (3) public interest balancing test

90. Among the submissions made on behalf of the Appellant is that, when applying the Article 10(3) public interest balancing test, the Respondent did not take into account the commercially confidential nature of the Appellant's WDD and gave no consideration to the fact that the Article 9(1)(c) exemption applied to the Appellant's environmental information. Regardless of the undoubted skill, with which it was urged on the Court by Mr. Walker on behalf of the Appellant, the evidence in this case wholly undermines that submission and I am bound to reject it. I am entirely satisfied that, as a matter of fact, the Respondent did take account of the fact that he had found the WDD to be covered by the Article 9 (1)(c) exemption when he went on to apply the Article 10 (3) test. I take this view for a range of reasons including the following.

91. Ms. Elizabeth Dolan, Senior Investigator in the Office of the Respondent, averred in paragraph 9. of her 6th November 2019 affidavit which was sworn on behalf of the

Respondent that, in making the relevant decision, the Respondent "*followed the statutory scheme"* which, she went on to say,:

> *"…involves a similar process for considering each AIE appeal. In outline that process is:*
>
> *a. Is the body holding the information a public authority under the Regulations?*
>
> *b. Is the information requested environmental information?*
>
> *c. If so, do any of the exemptions in Article 8 or 9 apply?*
>
> *d. If yes, does the public interest balancing test in Article 10(3) favour release or refusal?"(emphasis added).*

That averment is uncontroverted and I am entitled to find that, as a matter of fact, the Respondent followed the foregoing process, which is consistent with the statutory requirements in the 2007 Regulations, in relation to the Appellant's WDD. It is clear from the foregoing that, insofar as the Appellant's WDD is concerned, the Respondent engaged in stage "*d*" after and by virtue of arriving at an affirmative answer to stage "*c*" and, in fact, relied on the outcome of stage "*c*" as a basis for conducting the public interest balancing test under stage "*d*".

92. It will also be recalled that the Appellant does not plead that the Respondent made any error of fact. Furthermore, on the very first page of the Respondent's Decision dated 10 July 2018, the Respondent summarises his decision in the following terms: "*Summary of the Commissioner's Decision: The Commissioner found that while article 9(1)(c) applied to the information, the public interest in disclosure outweighed the interests served by refusal…*". In the foregoing statement, the Respondent refers specifically to the "*interests served by refusal*" of the information and it is plain from the Respondent's Decision that those include the private commercial interests of the Appellant served by not disclosing the data, being interests which flow from the Respondent's finding that "*article 9(1)(c) applied to the information*". It is also plain from the foregoing statement that these interests served by a refusal of access were, as a matter of fact, weighed in the balance when the Respondent conducted the Article 10(3) test. No other interpretation is reasonable of the statement that the public interest in disclosure "*outweighed the interests served by a refusa*l". In short, even the very first page of the Respondent's Decision makes clear that *private* interests of the Appellant (flowing from a finding that Article 9(1)(c) applied to the relevant data) were, in fact, weighted in the balance against the *public* interest in disclosure. This wholly undermines the Appellant's very sophisticated but unsustainable submission that the commercially confidential nature of the data was considered by the Respondent *only* in relation to applying the Article 9(1)(c) test, and was then disregarded by the Respondent when he applied the Article 10(3) test. The evidence demonstrates the contrary.

93. In submissions, Counsel for the Appellant invited the Court to find, in effect, that nothing said by the Respondent on pages 2, 3 or 4 of his 6-page Decision played any role in the conclusion which the Respondent came to in the context of the Article 10 (3) test. That was the logic of the Respondent's submission that, although the Respondent considered the nature of the WDD when forming the view that it was confidential and covered by the Article 9 (1) (c) exemption, the Respondent then, essentially, ignored the nature of the data and the potential damage to the Appellant which might result from its disclosure when he applied the Article 10 (3) test. "Proof" of this, according to the Appellant, is that the Respondent inserted a heading entitled "*The Public Interest*" at the top of internal page 5 of his Decision and, argued the Appellant, the Respondent did not consider the interests of the Appellant flowing from the finding that its data was confidential under Article 9(1) (c) when applying the public interest balancing test under the heading "*The Public Interest".* I am bound to reject that submission.

94. I am satisfied that everything under the heading "*Analysis and Findings*" comprises the Respondent's Decision, namely the contents of pages 2,3,4,5 and 6. It is plain that the Respondent, following the aforesaid process and carrying out what was required of him under statute, considered matters in a logical order, reaching a finding on the Article 9 (1) (c) issue before moving on to the Article 10 (3) test. But that is not "proof" that the Respondent ignored the former when considering the latter. There is no evidence to support that proposition and ample evidence to the contrary. Pages 2 to 6 set out the analysis engaged in by the Respondent and I am entitled to hold that all of that analysis fed into the final "*Decision*" which comprises just two sentences on page 6. At the very top of page 5, immediately before the heading "*The Public Interest*", the Respondent makes clear that the Article 9(1)(c) exemption against disclosure "*is subject to weighing up the public interest"* in its disclosure. Thus, the Article 9 (1) (c) issue was fundamentally linked to the Article 10 (3) issue as regards the ultimate decision which the Respondent had to make and the Respondent was explicit about that.

95. Furthermore, in the final paragraph on page 5, under the heading of "*The Public Interest*", the Respondent specifically refers to arguments against disclosure, including making explicit reference to "*the potential harm that might result*" from disclosure. It was on the previous page 4 that the Respondent analysed the potential harm to the Appellant and accepted the Appellant's submission "*that disclosure of the waste destination data could give the [Appellant's] competitors some knowledge of its business that they would not otherwise have and in turn could prejudice its competitive position".* Thus, the potential harm which might result from disclosure (being harm to the Appellant flowing from the nature of the documentation found to come within the Art 9 (1) (c) exemption) was certainly taken into account by the Respondent when conducting the public interest balancing test required by Art. 10(3).

96. Even if one confines oneself, as the Appellant suggests, to looking at the material under the heading "*The Public Interest*", page 6 of the Respondent's Decision refers, inter alia, to the "*interests served by refusal*". This is plainly a reference to the Appellant's private commercial interests which had been examined earlier in the Respondent's Decision.

Putting matters entirely beyond doubt, the Respondent on page 6, described those interests served by refusal of the data as being *"those of protecting the legitimate economic interests of the* [Appellant] *from unnecessary prejudice*". The foregoing was a reference under the heading "*The Public Interest*". It illustrates that the Respondent plainly weighed in the balance, the private commercial interests of the Appellant which flowed from his earlier finding that the relevant data could properly be considered to be commercially confidential under Article 9 (1) (c) when the Respondent carried out the Article 10 (3) public interest balancing test.

97. The foregoing also illustrates that the Appellant's attempts to divorce one section of the Respondent's Decision (ie the section entitled "*The Public Interest")* from the previous pages of the Decision, under the heading "Analysis and Findings" is to urge on the Court an artificial and inappropriate approach to considering what is plainly one Decision, not separate decisions or separate silos, or modules within the Decision, each bearing no relation to the other. To further illustrate this, one need only note the reference on page 5, under the heading "*The Public Interest*" to protecting the Appellant's "*legitimate economic interests*" and the references, on page 4, to possible prejudice to the Appellant's "*competitive position*" as well as the reference to "*legitimate economic concerns*", all the foregoing references being to *private* interests weighing against *public* disclosure and all being matters which the Respondent weighed in the balance before coming to the "*Decision*", set out on page 6. Indeed the fact that the Respondent did consider the commercially confidential nature of the Appellant's WDD when weighing up the public interest in disclosing it, or not, is perfectly clear from the Decision itself, in that the Respondent stated on page 6:

> *"Decision*
>
> *I find that article 9(1) (c) of the AIE Regulations applies to the information at issue, but the public interest in disclosure outweighs the interests served by refusal under that article…"*

98. The Appellant's submission that the Respondent, having found the WDD to be commercially sensitive, did not – in dealing with the public interest balancing test – take any account of its commercially sensitive nature and, in that manner, fell into "error" is a submission that is wholly undermined by the evidence. For the Appellant to suggest that the Respondent *failed* to consider that Article 9 (1) (c) applied to the relevant information when the Respondent applied the Article 10 (3) test and reached his Decision, is not supported by, indeed wholly undermined by, the evidence in this case. There was no such "*failure*" on the Respondent's part and no such "*error*" vitiating the Decision.

Conclusion

99. In truth, the fundamental basis for the Appellant's objection to the Decision is the view that a *different* outcome should have been arrived at by the Respondent when he carried out the public interest balancing test under Article 10 (3). Regardless of how sincerely the Appellant may feel that the Respondent struck the "wrong" balance, it is not a basis for an entitlement to any of the relief sought, where the evidence demonstrates that the

Decision which the Respondent came to was lawfully made and not vitiated by error. Regardless of the undoubted skill with which Mr. Walker, on behalf of the Appellant, made a range of very sophisticated legal submissions, both written and oral, the evidence does not support them. The evidence supports a finding that the Respondent's Decision was not based on any erroneous understanding of the law. It can also be said that the Respondent's Decision was clearly based on the evidence before him, does not fly in the face of reason or common sense and was not based on any error. In short, it would be wholly inappropriate for this Court to disturb the Respondent's Decision which was one carefully and lawfully arrived by an expert decision–maker, who properly understood and acted in accordance with their statutory obligations and powers.

For the reasons set out in this judgment, the Appellant is not entitled to any of the relief claimed.