THE HIGH COURT

[2024] IEHC 649
Record No. 2023/251MCA

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 24 OF THE FREEDOM OF INFORMATION ACT 2014 AND ORDER 130 AND ORDER 84C OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

INDUSTRIAL DEVELOPMENT AGENCY (IRELAND)

APPELLANT

-AND-

THE INFORMATION COMMISSIONER

RESPONDENT

-AND-

RIGHT TO KNOW CLG

NOTICE PARTY

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 15th day of November, 2024.

INTRODUCTION

1. This application comes before me by way of statutory appeal pursuant to s. 24 of the Freedom of Information Act, 2014 (hereinafter "the 2014 Act") brought by the Industrial Development Agency (Ireland) (hereinafter "the IDA"). At the heart of this appeal is the IDA's

contention that disclosure of information in relation to the acquisition of property by it in discharge of its statutory functions would adversely affect its ability to carry out those functions by placing it at a commercial disadvantage.

2. The records at issue comprise (i) an advisory report prepared by a property consultancy firm for the IDA concerning the potential purchase of the site in question, and (ii) the agenda and notes of an internal meeting of the IDA property committee with respect to the site.

3. The redacted information in the first record includes information relating to the site folio details, details of the previous owners' expenditure on and prior plans for the site, a range of figures relating to the site including a potential valuation figure and details relating to other comparable sites.

4. The information redacted from the second record includes the date of the internal meeting and the meeting number, information concerning the IDA land bank, possible potential future use for the site, the IDA's engagements with the landowner, the site folio, and the identity of the landowner.

BACKGROUND

5. The IDA was established under the Industrial Development Act, 1993 and operates under the Industrial Development Acts, 1986/2019. The functions of the IDA are primarily found in s. 8 of the Industrial Development Act, 1993 and s. 11 of the Industrial Development Act, 1986. These functions are directed at the provision of industrial development activities in the State. As confirmed on affidavit in these proceedings, its main objective is to encourage investment into Ireland by foreign owned companies. It operates in a competitive global marketplace with a view to attracting companies to establish their operations in Ireland and to increase the scale of existing businesses located in the State. The powers granted to the IDA to fulfil those functions include the power to acquire, hold, develop and dispose of land and property.

6. In exercise of the functions assigned to it, the IDA acquires land in the State with a view to it being used by IDA clients in furtherance of industrial development activities in the State. The IDA maintains that its property portfolio is central to the successful implementation of the IDA's statutory objectives, supporting the agency in winning new name Foreign Direct Investment (hereinafter "FDI") and the expansion of the

existing client base, thereby delivering employment growth and robust flow of investments into the regions. The IDA's property portfolio is also said to support the property needs of the IDA's sister agency, Enterprise Ireland.

7. The IDA's property investment in the regions is aimed at supporting economic development and job creation. The IDA maintains that it is crucial that each region has a competitive, sustainable property offering with appropriate zoning, planning and required infrastructure in place to enable the attraction and retention of investment and jobs. The availability of competitive, sustainable property solutions aligned to meet investor needs is a key enabler for regions to compete for mobile FDI, and on that basis the IDA keeps its land holding nationally under constant review with a view to ensuring that a stock of land banks is available to accommodate such investments.

8. Property and land acquisition by the IDA is carried out on the commercial market, in which the IDA engages in negotiations with private sector entities and in respect of which the IDA is in competition with third party private sector entities. The IDA acquires and disposes of properties pursuant to Board approved property procedures which detail the process to be followed, steps to be taken and appropriate approval under delegated powers to be obtained for each proposed transaction. A site evaluation process is undertaken for proposed acquisitions. In these proceedings, it is maintained that the ability of the IDA to acquire land and property in a cost-effective manner is a key element of the role played by it in attracting FDI to the State. In that context, it is considered by the IDA that it be important that it can engage in appropriate negotiations in respect of the acquisition of property and that it not be placed at a commercial disadvantage by reason of its status as an FOI Body.

REQUEST FOR INFORMATION AND THE IDA RESPONSE

9. By request dated the 28th of June, 2021, Right to Know CLG ("Right to Know") sought access pursuant to the 2014 Act to copies of any *"valuation reports, cost benefit analyses or business case associated with"* the purchase by the IDA of a 39-acre site in Drogheda, County Louth in 2021, the acquisition of which had been reported upon in the media. In making the request, Right to Know referred to a previous decision of the Commissioner.

10. By decision of the 26th of July, 2021, the IDA identified that two records fell within the scope of the request (referred to in this Notice of Motion as Record 1 and Record 2) and granted partial access to those records. On the 27th of July, 2021, Right to Know sought an

internal review of the IDA's decision, this time referring the internal reviewer to a further decision of the Commissioner, namely Decision OIC-99202, asking that note be taken of the points made by the Commissioner in relation to *"the IDA's continued and unsupported use of section 35 and section 40 to exempt records where it simply does not apply"*. This decision has been referenced on several occasions by the parties throughout the process. It is a decision in a case involving the same parties and a very similar subject matter in which reliance had been placed by the Respondent on the *Department of Public Expenditure and Reform Circular 17/2016 - Policy for Property Acquisition and for Disposal of Surplus Property* [hereinafter "the Circular"] as emphasising the need to ensure that optimal value for money is achieved in managing the State's property portfolio as reflecting the public interest in allowing scrutiny of information regarding expenditure on property using public funds.

11. The IDA affirmed its original decision on internal review on the 19th of August, 2021. In explaining its decision, it stated:

> *"As part of acquiring landbanks, IDA Ireland holds confidential discussions with landowners and developers and often commissions specific reports on landbanks if deemed suitable which must remain confidential until all related negotiations and engagements have concluded. IDA Ireland must ensure that it invests in the right property to gain maximum benefit for the Irish economy. Disclosure of this information could have a detrimental effect on the negotiating position of the Agency and impact IDA Ireland's ability to carry out its mandate and execute its organisational strategy for property solutions in these challenging times.*
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> *Delivering timely and suitable property solutions is critically important to support the needs of new name FDI investments and in addition, supporting the expansion needs of existing clients in Ireland. IDA Ireland regularly reviews its property portfolio to determine if it meets the needs of current and future clients.*
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> *Over the past few years, IDA Property Division has continued to ensure that those client expectations have been met and location criteria fulfilled in the context of delivering and identifying property solutions to support the winning of new investments and expansion enterprise projects across IDA and Enterprise Ireland (EI) clients. IDA client companies often depend on IDA Property Division to guide them through to finalisation in their property transactions.*
>
> *Delivering suitable property solutions are a crucial part of Ireland's value*

proposition in attracting and securing investment with prospective client companies across all the targeted sectors and is often the key differentiator in the international marketing effort to secure FDI. The availability of suitable sites and property solutions for clients is a key element of IDA's suite of marketing tools and a key differentiator in winning, sustaining and continuing to support investments for Ireland."

12. In its assessment of the exemption provided under s. 30 of the 2014 Act, the IDA noted that as part of its remit, it holds confidential discussions with landowners, developers, and commissions confidential reports on sites of land. It was explained that revealing this information could affect the IDA's ability to negotiate effectively in future and impact the quality of discussions taking place as part of the IDA's discussions with property agents and landowners ensuring confidentiality. It was further reasoned that revealing this information could reasonably be expected to affect the quality of discussions and prejudice the effectiveness of any advice or investigations sought on Ireland's options for future developments in this area. It was noted that it would not be in the public interest to release all the information sought as it could reveal the IDA's competitive position and future investment plans, which could impact on the IDA's ability to deliver on its property strategy. It was further explained that there is also a public interest in the IDA being able to maintain the confidentiality of its negotiations where those negotiations relate to on-going negotiations with promoters, investors, landowners, and developers.

13. Factors identified by the Internal Reviewer as weighing in favour of a public interest in the release of information were:

(a) The right of individuals to have access to information
(b) The public interest in openness of administration, including the need for the public to be better informed
(c) The public interest in obtaining access to information held by public bodies.

14. Factors identified as weighing against a public interest in the release the information were:

(a) The IDA should not be unduly impeded in the effective pursuit of its business.
(d) The release of this information could reduce the effectiveness of internal procedures within IDA Ireland and undermine the deliberations of staff.

(e) The need to protect the integrity and viability of the decision-making processes of IDA Ireland and other Government bodies.

(f) Undermining IDA Ireland's competitive position.

(g) The potential impact on the efficient and economical performance of IDA Ireland.

(h) The need to preserve utmost confidentiality having regard to the subject matter and the circumstances of the communications.

15. The Internal Reviewer concluded that in weighing up the public interest regarding the release or non-release of the information in these records; on balance, preserving the IDA's credibility in its relations with its stakeholders, its ability to deliver property solutions, results in economic development terms for the state and its people should take precedence to the public interest in the openness and accountability of public bodies.

16. Similar reasoning was deployed in respect of ss. 35, 36, 37 and 40 of the 2014 Act.

17. In relation to s. 35, it was pointed out that the IDA was given information in confidence in the preparation of the valuation report and was not broadly shared with other parties. It was stated that crucial stakeholders to the IDA provide sensitive information to us on the clear understanding that it will not be shared publicly. By revealing the content of this information, it would prejudice third parties from providing information of a similar nature to the IDA in future. It was stated that to ensure it meets its property strategy, the IDA will continue to need this type of information from third parties to make informed decisions on property acquisitions as part of its ongoing task of attracting and retaining FDI in Ireland. The public interest in the release of the information was acknowledged, but it was considered to be outweighed by the importance of valuation reports to the IDA when planning its property strategy and deciding on the acquisition of additional land for marketing purposes, and in ensuring that the IDA obtains value for money on the acquisition of suitable land for current and future clients.

18. It was considered that, contrary to the public interest, the release of information contained in the valuation report could impede the IDA in future negotiations and impact the IDA's ability to compete internationally for FDI, would prejudice companies and third parties from providing information of a similar nature to IDA in future and would prejudice the IDA and private parties being able to maintain the confidentiality of their deliberative process where those deliberative processes relate to ongoing and future negotiations.

19. Under his treatment of the exemption provided under s. 36, the Internal Reviewer reiterated the importance of property solutions for FDI investment and expansion and stated that disclosing this information and making this information publicly available would give other countries an insight into Ireland's position, potentially reducing Ireland's competitiveness for FDI and expansions, thereby threatening Ireland's competitive position with other countries who are also seeking investments and could result in a material financial loss to the economy of Ireland. It was explained that revealing the information contained within the valuation report would give an insight into the competitive position of a particular site and of the service providers to that site. It was explained that this information in question also includes commercially sensitive data and that the release of this would prejudice consultants, site owners and service providers from providing information of a similar nature to the IDA in future. It was indicated that disclosing the cost associated with the purchase of the land was commercially sensitive to the IDA and the former owner of the land. The Internal Reviewer concluded that the public interest in the IDA being able to maintain the confidentiality of their deliberative process where those deliberative processes relate to ongoing and future negotiations should prevail, as the release of the information sought could impede the IDA in future negotiations.

20. In relation to s. 37, the Internal Reviewer reasoned that the personal information not released included the name of the vendor and the price he obtained for the land which was sold to the IDA. Public interest factors weighing against disclosure, which were found to prevail were identified as including the protection of the rights to privacy, the provision of information with the expectation that it would not be shared and the fact that the information provided no insight into the workings of public bodies**.**

21. As for the exemption afforded under s. 40 in respect of

> "*A record which could reasonably be expected to have a serious, adverse effect on the ability of the Government to manage the national economy or on the financial interests of the State."*
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> The Internal Reviewer reasoned that if the information sought was prematurely released, it could significantly interrupt the IDA's ability to carry out its mandate, with a key part of this mandate involving property transactions, regarding industrial development in the State through FDI. It was explained that FDI has always had an important role in the Irish economy and that if the securing and acquisition of suitable potential sites were not identified and sourced by the IDA,

this would seriously impact IDA's capability to attract FDI and could reasonably be expected to have a serious, adverse effect on the financial interests of the State, particularly in the areas of industrial development and FDI.

22. It was explained that disclosing the information within the report could result in potential market disruption at the specified location and could provide a competitive advantage to other developers, third parties and in turn, could encourage speculative bidding for lands by competing speculators (investors and funds) other than IDA, therefore, increasing the value of the lands at a substantial cost to IDA and ultimately the taxpayer. The Internal Reviewer noted that disclosure of this information could reasonably be expected to affect the competitive position of IDA in relation to the significant activities carried out by IDA's Property Department and in turn, result in unwarranted loss to the IDA and the State.

REVIEW APPLICATION TO THE INFORMATION COMMISSIONER

23. On the 20th of August, 2021, Right to Know lodged a review application in respect of the decision of the IDA with the Information Commissioner ("the Commissioner") pursuant to s. 22 of the 2014 Act. Thereafter, correspondence passed in relation to the appeal, including by:

(a) letter dated the 21st of September 2021 from the Commissioner to the IDA requesting a 'Focused Submission';

(b) 'Focused Submission' of the IDA to the Commissioner dated the 19th of October 2021;

(c) email from the Commissioner to the IDA dated the 24th of November 2021;

(d) email from the IDA to Commissioner dated the 1st of December 2021;

(e) email from the Commissioner to the IDA dated the 5th of January 2022;

(f) reply from the IDA to the Commissioner dated the 19th of January 2022;

(g) email from the Commissioner to the IDA dated the 4th of April 2023; and

(h) IDA response to queries from the Commissioner dated the 25th of April 2023.

24. In submissions before the Commissioner, the IDA cited s. 30(1)(c) as a basis for withholding all the redacted information in both records. The IDA submitted that a single FDI can involve multiple negotiations over an extended period of time, for example, between the investor and the IDA, and between the IDA and domestic landowners or local authorities. It maintained that these negotiations are all interconnected, but that it can take a number of years before an investment is realised. The IDA position was that single FDIs cannot be divorced from other current or future FDIs. As such, the IDA argued that the release of the information would impact multiple current or future negotiations. As an example, it said it is actively pursuing acquisition opportunities in key locations where existing IDA land-banks have diminished due to FDI maintaining that there were engagements underway at a number of different locations.

25. On the specific question of what matters covered by s. 30(1)(c) the IDA considered could reasonably be expected to be disclosed if the information at issue was released, the IDA argued that disclosure of the information could reasonably be expected to disclose the positions taken by the IDA based on its specialised knowledge and opinions of the Irish property market; the positions taken by the IDA in relation to the valuation of the property in question, including the amounts which the IDA was considering paying to the landowner for the site; the basis for the valuation of the site, including the criteria which the IDA (and its service providers) might consider in determining what an appropriate valuation of a site might be, and the method by which the IDA identifies and secures potential property vendors and potential pieces of land which would be particularly suited to FDI. Therefore, the IDA maintained that the release of the information would provide an insight into its negotiating tactics and its method of identifying appropriate land for investment.

26. In its submissions, the IDA said that in conducting its operations, and in carrying out its statutory function of attracting FDI to Ireland, it needs to be able to deal confidentially with, and gather information through confidential interactions with, third parties. In addition, it said that it needs to be able to create or receive records which may be used for or relate to commercially sensitive negotiations conducted or to be conducted by the IDA with various stakeholders including, in this case, a landowner with a view to an acquisition of property being made. It argued that such sensitive information includes, but is not limited to, valuations of the land in question. It said it also engages with and sells to indigenous Irish companies and argued that they would also be negatively impacted by the release of sensitive and confidential information. It argued that disclosure of the redacted

information in the records concerned could have a detrimental effect on its negotiating position and would negatively impact its ability to carry out its mandate.

27. The IDA added that it holds confidential discussions with landowners and developers, and commissions confidential reports on sites of land, including information regarding their value. It argued that revealing this information could affect its ability to negotiate effectively in future and impact the quality of discussions taking place as part of its discussions with property agents and landowners. It argued that revealing this information publicly could reasonably be expected to affect the quality of discussions and prejudice the effectiveness of any advice or investigations sought on Ireland's options for future developments in this area. It argued that the release of information relating to its property portfolio and the availability of public and private lands in the region to national and international competitors as well as to other prospective vendors would significantly weaken its negotiating power.

28. The IDA further argued that there is a public interest in the IDA being able to maintain the confidentiality of its negotiations where those negotiations are on-going with promoters, investors, landowners, and property developers, as this would ultimately result in a benefit to the Irish taxpayer where FDI is secured because of such confidential negotiations. It argued that even where negotiations have concluded, there is still a strong public interest in exempting such details from disclosure as they will highlight the IDA's negotiation strategy and will be indicative of its future negotiation strategy. It argued that this may put the IDA at a significant disadvantage.

29. The IDA went on to say that other negotiations may also be impacted by the release of advice, valuations, strategy, and other information relating to this case. It said it is actively pursuing acquisition opportunities in key locations where existing IDA land-banks have diminished due to FDI and that there are engagements currently underway at a number of different locations. It considers these locations highly confidential and sensitive at this point in time and it argued that if it became known that information such as valuations and folio numbers (which therefore link the property to the pricing) of IDA purchases and sales were likely to be made public, it could jeopardise ongoing and future negotiations with respect to investment at those locations between the IDA and potential vendors, purchasers or other relevant stakeholders.

30. The IDA added that the release of the information would provide an insight to

competitors into its negotiating tactics and its method of identifying appropriate land for investment. It argued that it is important to note that while it is a semi-state body, it competes with private sector bodies in respect of land acquisition, and it also competes with bodies which carry out a similar role to the IDA in other jurisdictions which are seeking to attract FDI. It argued that an insight into the negotiation processes and strategies of the IDA would have a similar impact on the IDA as it would have on any private sector company whose confidential and commercially sensitive information is disclosed, including providing an undue competitive advantage to competitors.

31. The IDA proceeded to identify a range of factors it deemed to be public interest factors against release of the information at issue. The arguments made might generally be summarised as relating to concerns that the release of what it regards as sensitive, confidential and commercial information could reasonably be expected to prejudice ongoing and future negotiations and that release of information that discloses its negotiation strategy would be indicative of its future negotiation strategy, thereby putting it at a significant disadvantage. The IDA argued that the acquisition of lands in Ireland can be very sensitive and that vendors typically seek to engage in the strictest of confidence. It argued that the potential disclosure in the public domain of the amounts paid for, and other details in relation to, the site that it acquired at this highly sensitive stage could negatively impact the ongoing negotiations. It said disclosure could require it to disengage from the confidential process as commercial/financial expectations of potential vendors may be unduly elevated.

32. In relation to the case made under s. 36, the IDA cited ss. 36(1)(b) and (c) of the 2014 Act as grounds for refusing access to most of the material it redacted from Record 1 and some of the material redacted in Record 2. Much of the IDA's submissions in respect of the applicability of s. 36 concerned the information in the record relating to the valuation and proposed purchase price of the site (ultimately found to be exempt under s. 30(1)(c)). Apart from that, the IDA made no specific reference to any of the other redacted information in its submissions.

33. On the applicability of s. 36(1)(b), it argued that disclosing the redacted information would give insight into the value of a particular site, and the competitive position and strategy of the IDA and the owners of the site. It said the redacted information discloses the costs associated with the purchase of the site and that its release could reasonably be expected to result in a financial loss or gain to the vendor of the site, as it might highlight the vendor's approach to property sales by revealing its negotiating position.

The IDA further argued that the release of the redacted information could be expected to result in material financial loss to the IDA in the context of negotiations to attract FDI where all underlying costs of a project are in the public domain and would give competitors an insight into the State's position and strategy in this area.

34. As for the applicability of s. 36(1)(c), the IDA again argued that by disclosing the costs associated with the purchase of the site, this could be expected to prejudice the outcome of future negotiations that the IDA may have with other vendors and with foreign investors where those negotiations relate to the acquisition and/or use of lands by revealing the negotiating position that the IDA tends to take.

35. In its submissions in reliance on s. 37 of the 2014 Act, which protects against the disclosure of personal information, the IDA argued that the name of the landowner is personal information, as is the price he was paid for the land sold, comprising information relating to his financial affairs. The IDA noted that the vendor is an individual with the property registered in a company which incorporates his name and from which he is clearly identifiable.

36. Finally, in relation to its relation to its reliance on s. 40 of the 2014 Act, the IDA submitted in reliance on s. 40(1)(a) which provides for refusal to disclose where access to the record sought could reasonably be expected to have a serious, adverse effect on the ability of the Government to manage the national economy, or on the financial interests of the State, that its ability to attract FDI to Ireland had a direct impact on the economic prosperity of the State. It argued that the release of the unredacted records would result in the loss of an ability to negotiate on a confidential basis and the loss of an ability to protect commercially sensitive information, which had the potential to damage the State's broad financial interests, particularly in the areas of industrial development and FDI, to the detriment of the taxpayer. It argued that access to the records could result in potential market disruption at the location of the property. It also argued that the release of the records could give a competitive advantage to other developers and third parties and could encourage speculative bidding for lands by competing investors and funds, potentially driving up the value of lands at a significant cost to it and ultimately the taxpayer.

37. Citing s. 40(1)(c) of the 2014 Act, which exempts from a requirement to disclose a record which could reasonably be expected to have a negative impact on decisions by enterprises to invest or expand in the State, on their research activities or on the effectiveness

of the industrial development strategy of the State, particularly in relation to the strategies of other states, the IDA argued the disclosure of the information contained in the records about the value of lands and negotiating position taken by the IDA would prejudice the IDA in future negotiations with investors as the underlying costs of any IDA proposal related to these lands would be in the public domain.

DECISION OF COMMISSIONER

38. By decision dated the 7th of July, 2023, Case Number OIC-111926-H1J782, the Commissioner varied the decision of the IDA and found that it was not justified in redacting all the information in both Record 1 and Record 2 which had been withheld from Right to Know.

39. Noting the provisions of ss. 22(12)(b) and 25(3), the Commissioner considered first the provisions of s. 30(1)(c) of the 2014 Act observing that s. 30(1)(c) provides that an FOI body may refuse to grant a request if it considers that access to the record concerned could reasonably be expected to disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the Government or an FOI body.

40. The Commissioner observed that s. 30(1)(c) is designed to protect positions taken for the purpose of any negotiation carried out by or on behalf of the Government or an FOI body and it is sufficient that access to the record concerned could reasonably be expected to disclose such negotiation positions, plans etc. The Commissioner noted that there is no requirement to take a view on the consequences of the disclosure of those positions or on whether disclosure would have an adverse effect on conduct by the Government or the FOI body of its negotiations. However, the exemption is also subject to s. 30(2), which provides that s. 30(1)(c) does not apply where the public interest would, on balance, be better served by granting than by refusing to grant the request.

41. The Commissioner added that while the exemption does not require release of the records to give rise to any particular harms, such issues may be relevant when considering where the balance of the public interest lies. In ruling that s. 30(1)(c) applied to exempt some of the information, the Commissioner observed:

"It seems to me that having sought to withhold all of the information at issue

under section 30(1)(c), the IDA has essentially taken a blanket approach to the use of section 30(1)(c) as a ground for redacting all of the information. Such an approach is wholly inappropriate. As specified in paragraph (c), it is incumbent upon an FOI body to show that the granting of access to the redacted information could reasonably be expected to disclose (i) a position taken or to be taken, or (ii) plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations. For example, the IDA has not explained how the disclosure of the date and number of the meeting of the relevant committee redacted from Record 2 or details of the folio number redacted from both records could reasonably be expected to disclose any of the matters specified in paragraph (c), nor is it apparent to me how such disclosure could. Moreover, it seems to me that some of the information at issue might reasonably be described as information that was of relevance to the IDA's decision to purchase the lands, but it does not necessarily follow that the disclosure of such information could reasonably be expected to disclose positions taken or plans, procedures, criteria or instructions used or followed."

42. The Commissioner considered that some information sought to be exempted simply did not come within the scope of s.30(1)(c) at all e.g folio numbers and the date and number of the meeting of the relevant committee. It was considered that the IDA had not properly justified its application of the exemption by reference to the contents of the documents.

43. Referring to the earlier decision in Case OIC-000528 where the then Commissioner found with regard to an earlier iteration of s. 30(1)(c), that the likelihood that disclosure of certain information in a record might have particular consequences does not necessarily mean that its disclosure could reasonably be expected to result in the disclosure of a position or plan *etc.* as envisaged by s. 30(1)(c), the Commissioner added:

"It seems to me that the matters the IDA identified (outlined above) as matters that the disclosure of the records could reasonably be expected to disclose, do not comprise plans, procedures, criteria or instructions used or followed for the purpose of negotiations. Having carefully examined the information at issue, I find that the IDA has not sufficiently explained how the disclosure of the information at issue could reasonably be expected to disclose plans,

procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by the IDA. As to whether the release of the information could reasonably be expected to disclose positions taken, or to be taken, for the purpose of any negotiations carried on or being, or to be, carried on by the IDA, I accept the IDA's argument that the disclosure of the amounts which the IDA was considering paying to the landowner for the site and the basis of the valuation for the site could reasonably be expected to disclose positions taken in the particular negotiations for the purchase of the site in question."

44. In this way, the Commissioner accepted that certain specific information came within the scope of s. 30(1)(c) of the 2014 Act.

45. Having found that some information was captured by s. 30(1)(c), the Commissioner then went on to consider whether s. 30(2) served to disapply s. 30(1)(c) on the basis that s. 30(1)(c) does not apply where the public interest would, on balance, be better served by granting than by refusing to grant the request. In this regard, the Commissioner referred to the decision of the Supreme Court in *The Minister for Communications, Energy and Natural Resources and the Information Commissioner & Ors* [2020] IESC 57 (the "*Enet case*"), setting out that the Supreme Court had found that a general principle of openness does not suffice to direct release of records in the public interest and *"there must be a sufficiently specific, cogent and fact-based reason to tip the balance in favour of disclosure"*.

46. The Commissioner recorded that in Case OIC-99202 involving the same parties and similar information, it had been noted that the Circular emphasises the need to ensure that optimal value for money is achieved in managing the State's property portfolio. It was found that the Circular reflects the public interest in allowing scrutiny of information regarding such expenditure. The Commissioner observed:

"Likewise, I am of the view that the Circular reflects and evidences a clear public interest in allowing scrutiny of information regarding expenditure on the acquisition of state property, including the manner in which such acquisition and disposal is negotiated, as set out in the records in this case."

The Commissioner added that in light of that public interest in favour of disclosure:

> *"It seems to me that while section 30(1)(c) makes no distinction between disclosures which have the potential to prejudice current or future negotiations or to cause some other harm and disclosures which do not, it is very difficult to see how it could reasonably be argued that the public interest would be better served by refusing access to the information at issue in this case if release of the information could not harm current or future negotiations or cause any other related harm. For that reason, I believe it is relevant to consider whether disclosure of the information at issue will harm current or future negotiations."*

47. Referring to further clarifications obtained from the IDA on its argument that the release of the records at issue could reasonably be expected to result in material financial loss or gain to the IDA in the context of negotiations to attract FDI into Ireland, the Commissioner noted that the IDA provided further information relevant to consideration of the public interest balancing test in s. 30(2). He noted that he was limited in the extent to which he could divulge that information by s. 25(3) of the 2014 Act which requires the Commissioner to take all reasonable steps in conducting a review to prevent the disclosure of exempt information but observed that the IDA had identified certain ongoing current negotiations that it considered could be adversely affected by the release of the information to which s. 30(1)(c) had been found by the Commissioner to apply.

48. Dismissing the IDA's argument that third parties will refuse or be reluctant to negotiate with the IDA in relation to the acquisition of land if, details such as the precise identity of the land and financial details such as the valuation of the property were to be disclosed, the Commissioner observed that as a general proposition, he did not accept that parties engaged in the sale of lands to a semi-state body that has been subject to the FOI Act for more than twenty years can reasonably expect that such information would remain confidential once the sale has been completed. While accepting that there would be a general expectation that negotiations would remain confidential whilst ongoing, he did not believe that those expectations would reasonably continue after the completion of the negotiations.

49. It was considered noteworthy that neither of the third-party vendors notified of the review under s. 22 sought to make a submission in relation to the possible release of the certain information concerning their dealings with the IDA. Accordingly, it was not accepted that third parties would be reluctant or refuse to negotiate with the IDA in relation to the acquisition of land if such details were disclosed upon completion of the sale. It was not accepted that the disclosure of any of the information at issue would disclose the IDA's

negotiating position to the extent that it could be used to the disadvantage of the IDA in other ongoing or future negotiations. It was noted that there is nothing in the information at issue that would allow negotiating parties to undermine the IDA's negotiating positions or strategies in any way, once the negotiations which were the subject of the records were completed.

50. As the IDA had, however, identified certain ongoing current negotiations that it considered could be adversely affected by the release of the information to which the Commissioner found s. 30(1)(c) to apply, it was accepted that the release of the following information could give rise to the harms identified, namely:

> Record 1:
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> (a) Final two bullet points on page 1
>
> (b) All redactions on page 2
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> (c) All information from "Cushman" onwards redacted from Table in Appendix 1 entitled "Summary of Overview Numbers"
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> Record 2:
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> (a) Sentence commencing "Their initial..." in paragraph 3 of page 2
>
> (b) Paragraphs 4 and 5 on page 2
>
> (c) The final redaction on page 2

51. The Commissioner concluded that the public interest would, on balance, be better served by refusing access to this information *"at this time"* so that the IDA can continue the negotiations in question without them being adversely affected by the release of the information. The Commissioner reiterated, however, that once the negotiations in question were completed, the balance of the public interest would shift the balance in favour of release, particularly in respect of the price paid for the site. Having concluded that this information was exempt from disclosure under s. 30(1)(c), he did not proceed to consider whether any of the other identified exemptions might also apply in respect of the information.

52. On the other hand, the remaining information was, in the Commissioner's view, quite specific to the purchase of the specific site at issue. He did not accept that its release could adversely affect the ongoing negotiations referenced by the IDA such as to exempt it from disclosure under s. 30(1)(c). He added:

> *"Accordingly, in light of the public interest in allowing scrutiny of information regarding expenditure on the acquisition of state property generally, including the manner in which such acquisition and disposal is negotiated, I find that the public interest would, on balance, be better served by the release of the remaining information."*

53. He proceeded to consider whether this information might otherwise be exempt on any of the grounds urged on behalf of the IDA.

54. Ultimately, the Commissioner also held that the redaction of the remaining information was not justified having regard to s. 35(1), s. 36(1), s. 37(1) and s. 40(1) of the 2014 Act.

55. In relation to s. 35(1), the Commissioner observed that the IDA had made no references in its submissions as to why it considers a duty of confidence might be owed to a person other than the IDA or a service provider which is providing services to it or to another FOI body, nor was it apparent to the Commissioner how such a duty of confidence might be owed. He found that the IDA has not justified its decision to refuse access to any other of the remaining information at issue under s. 35(1). It was indicated before me that no appeal is being pursued in respect of this finding.

56. Addressing s.36(1)(b) of the Act which provides that an FOI body shall refuse to grant a request if the record concerned contains 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, the Commissioner observed that:

> *"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. For section 36(1)(b) to apply, there must be a link between disclosure and the harms alleged. In the High Court case of Westwood Club v The Information Commissioner [2014] IEHC 375, Cross J held that it was not sufficient for a party relying on section 36(1)(b) to merely restate the provisions of the section,*

list the documents and say that they are commercially sensitive. A party opposing release should explain why disclosure of the particular records could prejudice their financial position. As the Supreme Court observed in The Minister for Communications, Energy and Natural Resources and the Information Commissioner & Ors [2020] IESC 57 (the "Enet case"), it is not sufficient for the FOI body to merely assert that disclosure could prejudice its competitive position; an FOI body must also have a reasonable basis for that position."

57. As for the exemption under s. 36(1)(c), the Commissioner noted that it provides for the mandatory refusal of a request where the record sought contains information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates. He observed that the standard of proof required to meet this exemption is relatively low in the sense that the test is not whether prejudice or harm is certain to materialise, but whether it might do so. The Commissioner noted that a party relying on s. 36(1)(c) is expected to show that contractual or other negotiations were in train or were reasonably foreseen which might be affected by the disclosure and to explain how exactly the disclosure could prejudice the conduct or outcome of same.

58. Addressing the information remaining at issue in record 1, the Commissioner noted that it comprises, among other things, the site folio, details of amounts spent on work to the site by the vendor and costs of further infrastructural works and details of other available market evidence. The information remaining at issue in record 2 contains information relating to the IDA's land-bank, details of a previous sale of land by the IDA, general details of engagements with the vendor, the site folio, the identity of the vendor and details of the IDA's marketable lands. Having considered that information, the Commissioner said:

"I do not accept the IDA's arguments as to the harms that might arise by its release. The release of that information would not, in my view, give insight into the value of the particular site or the competitive position and strategy of the IDA. Moreover, its release would not result in all underlying costs of the project being in the public domain. On the matter of the harm to the vendor identified, the IDA has not satisfactorily explained how the disclosure of the information

at issue might highlight the vendor's approach to property sales or its negotiating position. It is relevant, in my view, that the vendor made no submissions despite having been invited to do so. It seems to me that the IDA has made rather broad arguments in support of its position that no salient financial information relating to land purchase transactions should ever be released. While it has identified numerous harms it argues could arise, it has generally not, in my view, supported those arguments with a sufficient explanation of how such harms might arise from the release of the remaining redacted information at issue. The identification of specific harms alone, without identifying how such harms might arise as a result of the disclosure of the specific information at issue, does not meet the FOI body's obligation to justify its refusal of a request. In summary, therefore, having regard to the provisions of section 22(12), I find that the IDA has not justified its refusal of the relevant information under section 36(1)."

59. Turning next to the IDA's reliance on s. 37(1) as the basis for withholding the folio details of the site in question in record 1 (pages 1, 3 and 4), monetary amounts in first paragraph and first 2 bullet points (page 2), the valuation figure (shown twice) (page 2), the folio number of a separate property under the heading "*Appendix 1; Summary of Limited Available Market Evidence*" (page 3) in Record 1 and the section of the record under the heading "*Current Status*" (page 2), the Recommendation (page 2), the Folio Number (page 2), the Name of vendor (page 2), the Price (page 2) and the Folio details (page 4) in Record 2, the Commissioner noted that s. 37(1) provides that, subject to the other provisions of the section, an FOI body shall refuse to grant a request if access to the record concerned would involve the disclosure of personal information.

60. Referring to s. 2 of the 2014 Act where personal information is defined as information about an identifiable individual that either (a) would ordinarily be known only to the individual or to members of his/her family or to his/her friends, or (b) is held by an FOI body on the understanding that it would be treated by the FOI body as confidential, the Commissioner notes that the Act details 14 specific categories of information that is personal without prejudice to the generality of the definition including, at s. 2(ii), information relating to the financial affairs of the individual and, at s. 2(xiii), information relating to property of the individual (including the nature of the individual's title to any property)

61. Rejecting the contention that personal information was disclosed by releasing the name of the landowner discernible from a company name, or the price a human person was paid for the land sold, the Commissioner referred to Case 98022 where the then Commissioner said the following in relation to whether certain information about a company can be said to comprise personal information relating to an individual:

> *"The essential question to be decided in relation to all the records sought is whether they contain information about Mr. AAG. Where a document contains a record of the views, comments or actions of a company director in relation to the business of the company or the views, comments or actions of another party in relation to the company director in his capacity as a director, I am of the view that the mere reference to the director by name in the record is not sufficient to enable it to be said that the record relates to personal information about the director. A company can only act through the agency of natural persons, generally its directors or employees. As a consequence it is almost inevitable that in a record referring to matters about a company or its business, references will also be made to such persons. In such cases it is necessary to decide whether the information in the record is about that individual or about the company….It is clear from the definition of "personal information" that the term can only apply to information about an identifiable individual, meaning a natural person as opposed to a legal person such as a company. In my view there is no basis for seeking to treat a company as the same person as its directors or shareholders or any of them, for the purposes of the FOI Act."*

62. Applying the same reasoning previously adopted in Case 98022, the Commissioner noted that the records at issue concern the IDA's dealings with a named limited company, concluding that the information is about the business of the company and does not comprise personal information relating to an individual. The fact that the name of the limited company may incorporate the name of an individual was not found to mean that the information is personal information relating to that individual for the purposes of the 2014 Act. He concluded that none of the redacted information relating to the site in question comprises personal information for the purposes of the 2014 Act observing as follows:

> *"Regarding the folio number of a separate property as it appears at page 3 of Record 1, the details of the sale of the property are included under the heading*

> *"Summary of Limited Available Market Evidence". The contents of the record suggest that the information in question was publicly available. The IDA argued that the specific folio number is personal information. While there is no evidence before me to suggest that the disclosure of the folio number would involve the disclosure of personal information relating to an identifiable individual, it seems to me, in any event, that section 37(2)(c) would serve to disapply the exemption in section 37(1). Section 37(2)(c) provides that section 37(1) does not apply if information of the same kind as that contained in the record in respect of individuals generally, or a class of individuals that is, having regard to all the circumstances, of significant size, is available to the general public. Folio numbers are publicly available through the Property Registration Authority."*

63. Finally, addressing the IDA's reliance on s. 40(1)(a) and (c) as grounds for refusing access to most of the material it redacted from Records 1 and 2, the Commissioner noted that s. 40(1) is a harm-based provision, adding that where an FOI body relies on s. 40(1) it should, firstly, identify the potential harm specified in the relevant paragraph of subsection (1) that might arise from disclosure and, secondly, having identified that harm, consider the reasonableness of any expectation that the harm will occur. Observing that s. 40(1)(a) provides that an FOI body may refuse to grant a request if it considers that access to the record sought could reasonably be expected to have a serious, adverse effect on the ability of the Government to manage the national economy or on the financial interests of the State, the Commissioner noted that the FOI body should show the link between granting access to the record concerned and that the harm identified as a claim for exemption under s. 40(1) must be made on its merits, in light of the contents of each particular record concerned and the relevant facts and circumstances of the case.

64. Rejecting the IDA's argument that its ability to attract FDI to Ireland had a direct impact on the economic prosperity of the State, the Commissioner noted that it was based on the assumption, not accepted by the Commissioner, that the release of the information at issue would result in the loss of an ability to negotiate on a confidential basis and the loss of an ability to protect commercially sensitive information. The Commissioner did not accept that disclosure of the remaining information at issue could reasonably be expected to result in those harms.

65. Regarding its concerns about speculative bidding, the Commissioner concluded

that the IDA had not explained how the release of the information at issue could give rise to those harms. He noted, for example, that it is already public knowledge that the IDA has purchased the site in question. For these reasons, and having regard to the provisions of s. 22(12), he found that the IDA has not justified its refusal of the relevant information under section 40(1)(a).

66. As for the apprehended detriment to the IDA's negotiating position, should the information contained in the records about the value of lands be disclosed because the underlying costs of any IDA proposal related to these lands would be in the public domain, the Commissioner concluded that the IDA had not explained how such harms might arise. He did not accept that the release of the remaining information at issue could reasonably be expected to prejudice the IDA in future negotiations and that the IDA had not justified its refusal of any of the information at issue under s. 40(1)(c) having regard to the provisions of s. 22(12) of the 2014 Act.

67. The information in Record 1 and Record 2 directed to be disclosed by the Commissioner was identified with particularity as follows:

Record 1:

(a) The first two redactions on page 1
(b) The information under the heading "Information Supplied to MCHN & Relied Upon"
(c) The heading used above the final two bullet points on page 1
(d) All the information in Appendix 1
(e) The information under the heading Appendix 2 on page 4 proposed for redaction in the decisions of the IDA

Record 2:

(a) The first two redactions on page 1

(b) The information in the Executive Summary proposed for redaction in the decisions of the IDA

(c) The information under the heading "Current Status" proposed for redaction in the decisions of the IDA

(d) The information under the heading "Recommendation" proposed for redaction in

the decisions of the IDA

(e) The information in the Table and Pie Chart on page 4 proposed for redaction in the decisions of the IDA

(f) The information under the heading Subject Site Summary - Title on page 4

(g) The information in Appendix C

68. In a separate booklet handed into court by agreement but not exhibited in the proceedings, I was provided with the *inter partes* submissions in the decision-making process, as well as the two records in question with different colour highlighting denoting the information which the IDA sought to hold exempt from disclosure and a lesser level of information which the Commissioner accepted could properly be held exempt from disclosure at this time. These records form part of the record of the decision and inform the reasoning for Decision, particularly insofar as the colour coding is concerned in that it provides a readily accessible and visible representation of the disputed information in the context of the balance of the documents.

OBSERVATIONS ON THE RECORDS AND THE CIRCULAR

69. To assist in contextualizing the Decision challenged in these proceedings, it is appropriate to add some general comment in relation to the records in question and Circular 17/2016.

Records sought to be held Exempt from Disclosure

70. Mindful of the restraints on me under s. 25(1) of the 2014 Act, it is nonetheless appropriate to make some general observations about these documents and record the effective use of different colour highlighting to differentiate what is proposed for release by the IDA and those additional documents which remain in dispute. Where no highlighting is applied, that part of the document has already been released.

71. Reviewing then what is accepted and what remains in dispute, I note in general terms that no information is proposed for release in respect of the IDA's valuation of the site or figures indicated as asking prices or offers for the purpose of the negotiation. The IDA's position regarding the exempt status of this information has been accepted by the

Commissioner.

72. The contested information proposed for release in the first document includes two folio numbers. The information which the IDA seeks to withhold also identifies the previous owners' team of advisors and includes information provided by the previous owners in relation to the site. There is, however, an overlap between information which the IDA seeks to withhold and that which it has already agreed to release, specifically in relation to the fact that estimates in relation to remaining site works had been provided by the previous owners but were required to be verified and the identity of some of the previous owners' advisors. It is therefore immediately clear that the IDA's proposed redactions capture information which it has agreed to release elsewhere in the same record suggesting some lack of consistency in the approach adopted.

73. In an Appendix document, a spreadsheet is provided which compiles information from different sources to present market information and values pertaining to a range of different, identified properties. The general thrust of this information might loosely be described as "market research" seemingly carried out to inform the IDA's decision making on land value by reference to sale prices achieved in respect of other properties. The IDA seek to hold this document in its entirety exempt from disclosure whereas the Commissioner considers that only that part which relates to negotiation on the specific site is properly exempt.

74. The second document includes information which the IDA seeks to hold exempt in relation to landbank options, discussion of possible uses of land in the area of the subject land, information in relation to engagement with the landowner by agents on behalf of the IDA which includes information on values identified through this engagement and in connection with its which the Commissioner accepts should be held exempt. In further redactions not accepted by the Commissioner, the IDA seeks to withhold information in relation to the date and number of the meeting and the internal decision-making processes.

Circular 17/2016 - Policy for Property Acquisition and for Disposal of Surplus Property published by the Department of Public Expenditure and Reform ("the Circular").

75. Circular 17/2016 was circulated by the Department of Public Expenditure and Reform to provide some guidance on what should be considered before a decision is made to acquire or dispose of property but focusing on the approach to implementation of the decision, including

the timely management of professional advice, to ensure that the decision is implemented as intended and the interest of the Exchequer are protected. The Circular is expressed to be directed to parties with an entitlement to acquire or otherwise hold State property, including State bodies or agencies.

76. Under the Circular, stakeholders are required to take appraisal steps demonstrating that value for money considerations have been taken into account and develop a business case for each possible acquisition and disposal with the objective of optimizing value for money. The necessity for legal, valuation, planning, structural and other advice in implementing a decision is set out and guidance is provided in relation to the proper conduct of negotiations with potential vendors or purchasers. Considerations which ought properly inform the purchase of sites are identified.

PROCEEDINGS

77. By originating Notice of Motion returnable to the 9th of October, 2023, the IDA sought, inter alia, an order setting aside the Decision of the Commissioner together with a declaration that the documents identified as Record 1 and Record 2 not already disclosed to Right to Know, are exempt from disclosure having regard to sections 30(1), 35(1), 36(1), 37(1) and 40(1) of the 2014 Act.

78. As noted above, the documents in question were not exhibited in the proceedings but were available by agreement of the Appellant and the Respondent for my consideration during the hearing and for the purpose of this judgment. Right to Know did not participate in the appeal.

ISSUES

79. On this wide-ranging appeal, it is contended that the Commissioner erred in law and misapplied the 2014 Act in determining that the IDA were not justified in redacting the information identified in Records 1 and 2 by reference to ss. 30(1)(c), 35(1), 36(1), 37(1) and 40(1) of the 2014 Act. It is proposed to address the challenge to the decision to redact under each of the provisions identified on behalf of the IDA in turn except for s. 35(1) which was not pursued in argument. In total, some 21 grounds of appeal are identified in the Notice of Motion relating to the way in which the Commissioner considered and applied ss. 30, 36, 37 and 40 of the 2014 Act.

STANDARD OF REVIEW

80. As a statutory appeal pursuant to s. 24(1) of the 2014 Act, the issues arising on this appeal fall to be determined by reference to established principles discussed in cases such as Deely v. Information Commissioner [2001] IEHC 91, [2001] 3 IR 439 and Minister for Communications, *Energy & Natural Resources v. Information Commissioner* [2020] IESC 57 *("Enet").* In *Enet,* Baker J. summarised the principles governing such an appeal (at para. 114):

> *"In summary, it may be said that an appeal from the decision of the Commissioner under the Act invokes the following propositions:*
>
> *(a) no deference is due to the Commissioner insofar as an appeal raises a matter of statutory interpretation or otherwise an issue of pure law;*
>
> *(b) as with any appeal on a point of law, deference would be shown to a decision of the Commissioner in the exercise of discretion, or where what is in issue is the application of his or her expertise. These types of decisions are more akin to decisions on facts;*
>
> *(c) the hearing is not a de novo hearing, but an appeal on a point of law where there are many characteristics of judicial review, see White J. in Irish Life and Permanent Plc v. Financial Services Ombudsman [2011] IEHC 439, at p.2;*
>
> *(d) sometimes therefore the test will be akin to the one laid down in O'Keefe v. An Bord Pleanála [1993] 1 IR 39, but not when what is in issue is a matter of law, including statutory interpretation (see, for example the dicta of Kearns J. in Sheedy v Information Commissioner, at para. 79: "Once there was some evidence before [the Commissioner] as to the circumstances in which these reports are compiled, as undoubtedly was the case here, the well-established principles of O'Keefe v An Bord Pleanála [1993] 1 IR 39 make it clear that his decision is not to be interfered with")."*

81. While it is clear from the above dicta from *Enet* that no deference is afforded on issues of pure law, equally it holds that the Commissioner will be afforded deference on the types of determinations referenced at para. 114(b), namely the exercise of discretion, or where what is in

issue is the application of the Commissioner's expertise. As found in cases such as *FP v Information Commissioner* [2019] IECA 19 held (see para. 73) and *Jackson Way v Information Commissioner* [2022] IECA 213 (see para. 120) considerable deference is afforded to the Commissioner as an expert decision-maker. He undoubtedly enjoys a wide margin of appreciation in areas of discretion falling within his field of expertise in the consideration of FOI requests. Notwithstanding this high degree of deference and the wide margin of appreciation afforded to him, in general an appeal will succeed if it is demonstrated that there was an error of law by the Commissioner or that he acted irrationally in the way the exemptions contained in the 2014 Act were applied or interpreted.

DISCUSSION AND DECISION

82. In presenting the facts which ground its appeal on affidavit, the IDA contend that the Decision of the Commissioner will have consequences for the ability of the IDA to exercise its functions and for it to engage effectively in the commercial property market. Thus, it is necessary to briefly explain the nature of those consequences. The IDA apprehend that the Decision will result in the IDA being placed at a significant disadvantage in future negotiations, as the information which it has been directed to disclose is such that can demonstrate the overall strategic approach of the IDA to the acquisition of land and property. Further, the IDA fear that it may mean that parties who are wholly private entities operating in the private sector, where there is an expectation of confidentiality, will be reluctant to enter negotiations with the IDA.

83. It is generally pointed out that while the IDA is a public body, it also has a commercial remit and is required to engage with the private sector on a commercial basis. It is contended that it is therefore necessary for it to engage with the commercial private sector in a manner aligned with how that sector operates, which includes the understanding that there is a high level of confidentiality in respect of the way in which negotiations are conducted and concluded.

84. In addition, the IDA believes that the disclosure of the Redacted Information will place the IDA at a commercial disadvantage, as it may reveal the overall strategy which is employed by the IDA in the acquisition of property and land, both generally and at specific locations. It is contended that allowing third parties to have access to this information will likely hinder the position of the IDA in other negotiations. In that context, it is pointed out that it is not unusual for the IDA to seek to acquire lands contiguous to existing land holdings and for such acquisitions to occur proximately to each other. According to the IDA, the

Decision means that parties who may either be in such negotiations or will enter those negotiations in the future will have access to information that would not ordinarily be in the public domain, thereby placing the IDA at a commercial disadvantage in the context of any such negotiations.

85. The IDA further relies on the fact that it competes with similar overseas bodies seeking to attract FDI to those jurisdictions. In consequence, the IDA are concerned that the disclosure of the Redacted Information will impact the ability of the IDA to achieve value for money for the State in respect of future property acquisition contracts, could cause a distortion in the market, could prejudice the future sale of lands and the price which could be achieved in respect of those sales and could put the IDA at a competitive advantage *vis-a-vis* other similar bodies based in other jurisdictions competing for FDI.

86. The IDA complain generally that the Decision establishes a precedent that highly confidential and commercially sensitive information should be released and be available to competitors of IDA and those with which it is engaged in negotiations, placing the IDA at a disadvantage as regards its position and operation in the commercial property market. In addition to the possibility that the IDA would be required to pay inflated prices for land and property acquisition, there is the concern that third parties will be reluctant to engage with the IDA as it will not be possible to provide assurances as to confidentiality of information, which would ordinarily apply in the context of transactions of this nature.

Section 30(1)(c) and s.30(2)

87. The first issue which arises concerns s. 30(1)(c) of the 2014 Act. Section 30 is contained in Part 4 of the 2014 Act. It provides exemption from disclosure but allows that disclosure may still be made in the public interest. Section 30(1)(c) empowers an FOI body to refuse to disclose information where such disclosure could disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the Government or an FOI body, subject to a public interest balancing exception contained in s. 30(2). Section 30(2) disapplies s. 30(1) in relation to a case in which:

> *"..in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the FOI request concerned."*

88. While s. 30(2) requires an *"opinion"* to be formed and an *"exercise of discretion"*, attracting deference, the application of s. 30(2) also involves the identification of the correct legal test in the proper assessment of the public interest by the decision maker. As noted above, the identification of the correct legal test is a matter of law, and no deference is due to the Commissioner where it is established that he has applied the incorrect legal test (para. 117(a) of *Enet*).

89. As apparent from the terms of the Decision summarized above, in conducting his review under s. 24 in this case, the Commissioner concluded that s. 30(1)(c) applied to some of the information which the IDA seeks to withhold on the basis that disclosure could reasonably be expected to disclose positions taken negotiations for the purchase of the site in question. The Commissioner then considered whether that information should be released having regard to the public interest balancing test required by s. 30(2) and conducted that balancing exercise by express reference to the decision of the Supreme Court in *Enet* before deciding that:

> *"In light of the public interest in allowing scrutiny of information regarding expenditure on the acquisition of state property generally, including the manner in which such acquisition and disposal* is *negotiated, I find that the public interest would, on balance, be better served by the release of the remaining information."*

90. It is contended on behalf of the IDA that there are four legal errors in the analysis of the Commissioner to which we now turn in the sequence in which argued.

The Public Interest Test under s. 30(2)

91. First, it is contended that the Commissioner erred in law and misapplied ss. 30(1)(c) and 30(2) of the 2014 Act in concluding that while the Redacted Information came within the meaning of s. 30(1)(c) of the 2014 Act, the public interest would be better served by the release of that information. It is argued on behalf of the IDA that the Commissioner misapplied the public interest balancing test required by s. 30(2) of the 2014 Act and failed to carry out a proper and correct public interest balancing test. Specifically, it is contended the public interest balancing test was carried out by reference to general principles of public interest informing the provisions of the 2014 Act, rather than the public interest applicable in

the case of exemptions and that the Commissioner failed to carry out a proper assessment of whether the public interest identified would, on balance, be better served by granting rather than by refusing to grant the FOI request concerned.

92. It is common case between the parties that the proper approach to the application of the public interest test in s. 30(2) is that identified by the Supreme Court in *Enet*. Based on the approach adopted in *Enet*, s. 30(1) creates a specific exemption from the general principles of transparency and openness underpinning the 2014 Act. Section 30(1) operates as statutory acknowledgement of the fact that there is a public interest in maintaining the privacy of negotiations carried out on behalf of an FOI body. Through the provisions of s. 30(2), however, the Legislature also acknowledges that there may be weightier public interest considerations in favour of disclosure of information in relation to such negotiations by providing for the disapplication of the exemption where *"in the opinion of the head concerned, the public interest …".*

93. As the parties have agreed that *Enet* correctly identifies the principles yet are not agreed as to the terms of the test and whether its requirements were met in this case, it is necessary to consider *Enet* in some greater detail.

94. In *Enet*, Baker J. noted that there was no statutory guidance as to how *"public interest"* was to be interpreted in this context (at para. 184). She was of the clear view, however, that s. 36(3) - which contains a similar exception to s. 30(2) - required a different consideration of the public interest to the general public interest in disclosure of documents which underpins the 2014 Act. This was necessary to avoid circularity.

95. While I did not understand any case to be made by either side that a different approach was warranted in the case of a s. 30(1)(c) exemption as compared with s. 36 exemption (the provision at issue in *Enet*) because the exemption is provided for in discretionary terms in s. 30, but in mandatory terms in s. 36, I am mindful of the differences between the two provisions. In addition to the fact that s. 36 requires the application of an exemption subject to a public interest override whereas s. 30 merely permits exemption subject to the override, another potentially material difference is that s. 30(1)(c), does not require demonstration of any harm in order to trigger the application of an exemption, and in this way is quite different to s. 36 where likely prejudice or harm is in issue under the statutory test triggering mandatory application of the exemption. Relative degrees of harm may, however, weigh both in deciding whether to apply the exemption at all (given that it is

discretionary) and in the application of the public interest test as part of a balancing exercise.

96. Bearing these points of difference in mind, it seems to me that a number of principles nonetheless emerge from *Enet* which assist in determining the proper approach to s. 30 of the 2014 Act as follows:

(a) There is a presumption in favour of disclosure under the framework of the 2014 Act, such that a refusal to disclose must be fully reasoned and sufficiently coherent, fact specific and logically connected to the document or record to demonstrate that the justification is sufficient (para. 160);

(b) The exemption is not self-executing and documents must be assessed with regard to threshold requirements for the exemption in question (para. 138);

(c) In the case of s. 30(1)(c), it must reasonably be expected that release of the record concerned would disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of negotiations carried on or being or to be carried on by or on behalf of the Government or an FOI body (para. 158);

(d) Where documents come under s. 30(1) this does not lead to an automatic exclusion from a duty to release. Before deciding to exercise a power to withhold the record in reliance on s. 30(1)(c), it is necessary to balance the public interest considerations weighing in favour and against release (s. 30(2)) (by application of principles identified at paras. 139-144 of *Enet*);

(e) The onus to justify refusal rests on the FOI body (paras. 145-150 of *Enet*). A decision to refuse to release on the application of an exemption is not justified unless justifying reasons are provided (para. 157 of *Enet*). As the exemption is not general, its application should be considered in light of the contents of each document and the impact of disclosure (para. 152 of *Enet*);

(f) In both applying the exemption and applying a public interest exception to that exemption, the FOI body must offer sufficient information about the records, complete with an analysis which justifies and explains its conclusion that the records should not be released;

(g) The reason for disclosure in the public interest where an exemption might otherwise be

applied should be identified in the contents of the record and reflected in the balancing exercise weighing the public interest in maintaining the privacy of the record as against the public interest in disclosure of that content (para. 188 of *Enet*);

(h) To avoid circularity and reflect legislative intent, the public interest which favours disclosure must be a different public interest to the general public interest in disclosure. In other words, something beyond the overall statutory aim of fostering transparency, which weighs against the specific public interest protecting negotiations as provided for by the terms of the exemption, is required (para. 190 of *Enet*);

(i) Assessing public interest in the context of an exemption under the 2014 Act requires a balancing of interests and rights by engaging with specific documents for the purposes of analysing whether release or refusal would better serve the public interest and to ascertain where the public interest genuinely lies (paras. 192 and 196 of *Enet*);

(j) Where under the scheme of the 2014 Act an exemption may be applied subject to a public interest override, application of a public interest override occurs only following an analysis of the contents in a manner which rationally leads to the conclusion that disclosure of the records is in the public interest by reason of those contents;

(k) The test is whether the public interest that might be gained or lost by the release of the specified documents, having regard to their content, might, for reasons relevant to the document and its contents, be better served by either release or refusal (para. 204 of *Enet*). The public interest at play at this balancing stage of the process is the public interest in disclosure of the content of the documents (para. 205 of Enet).

97. In my view, the most concise statement of the test governing the decision to release or withhold an otherwise exempt document is found at para. 204 in *Enet* where Baker J. states:

> *"... The test is whether the public interest that might be gained or lost by the release of the specified documents having regard to their content, might for reasons relevant to the document and the record and their contents be better served by either release or refusal."*

98. The parties join issue on this appeal as to whether the Commissioner adopted the correct approach to the application of this public interest test from Enet. The IDA contend

that the entirety of the Commissioner's analysis in respect of the information which he decided should be released is framed by reference to the general public interest in allowing scrutiny of information regarding expenditure on the acquisition of state property, and the manner in which that acquisition and disposal is negotiated. It is complained that the Commissioner did not identify anything relating to the records in issue which are relevant to the balancing of public interest and does not specify anything in the documents which would suggest that the public interest favours disclosure, contrary, it is contended, to a proper application of the relevant test identified in Enet.

99. For his part, the Commissioner contends that the test in Enet requires a balancing of interest and rights and that the head of the FOI body must form an opinion whether the public interest, on balance, would be better served by granting, rather than by refusing, the request requiring engagement with the specific documents. The Commissioner contends that this is the approach reflected in his decision. The Commissioner argues that the Decision expounds several justifications for why the s.30(2) balance fell to be applied against the IDA and in favour of release.

100. In this regard, the Commissioner points a series of reasons discernible from the Decision involving a consideration of the information itself.

101. Firstly, the Decision stated (at p.8):

> *"…I do not accept that parties engaged in the sale of lands to a semi-state body that has been subject to the FOI Act for more than twenty years can reasonably expect that such information would remain confidential once the sale has concluded".*

102. Secondly, it was stated (at p.8 of Decision):

> *"…It is noteworthy that neither of the third party vendors that this Office notified of the review sought to make a submission in relation to the possible release of the certain information concerning their dealings with the IDA."*

103. Thirdly, the Decision determined (at p.9) – on the basis of the decision-maker's

review of the records – that:

> "*There is nothing in the information at issue* [which would allow] *negotiating parties to undermine the IDA's negotiating positions or strategies in any way, once the particular negotiations which were the subject of the records were concluded."*

In weighing competing interests, while the documentation came within s. 30(1)(c), it was not considered to raise pressing concerns for the IDA's negotiating position.

104. Fourthly, the Decision **(**p.9) continued that IDA had not *"sufficiently explained"* how release could *"reasonably be expected to disclose"* the plans, procedures etc. referred to. The Commissioner continued in respect of six identified types of information in the Records (i.e. listed at p.9's bullet points in the Decision) that the public interest would be better served if that information were not released. The Decision specifically and methodically addressed where such effect would arise and where it would not.

105. Fifthly, it was noted (p.9) that the *"remaining information"* – i.e. which the Commissioner was directing be released - was *"quite specific to the purchase of the specific site in question"* and, accordingly, its release could not affect the negotiations IDA had referenced.

106. Sixthly and finally, because, on the decision-maker's assessment of the records the suggested adverse effects had not been demonstrated, the *"public interest"* in *"scrutiny of information regarding expenditure on the acquisition of state property"*, including how "*such acquisition and disposal is negotiated"* (p.9) meant that *"the public interest would better be served by release of the remaining information"* (p.10).

107. It seems to me that the Decision's analysis, as summarised above, demonstrates an assessment of the records in issue relevant to the balancing of public interest. Having done so, the Commissioner concludes that the public interest in scrutiny of information regarding expenditure on the acquisition of state property including how *"such acquisition and disposal is negotiated"* (p. 9) outweighed the public interest against disclosure. This means that the overall public interest would better be served by release of the remaining information. The Commissioner's conclusion was squarely premised on the basis of the Commissioner's stated view that the content proposed for release was quite specific to the purchase of the specific site in question, with the result that its release could not affect the negotiations IDA had referenced.

108. The public interest weighing in favour of disclosure as identified by the

Commissioner was noted to find expression in the Circular. I am satisfied that this public interest is an appropriate consideration under s. 30(2) of the 2014 Act having regard to the guiding principles identified in *Enet*. It is a different public interest to a general interest in transparency and openness underpinning the 2014 Act as whole. On evaluation of the content of the documents carried out by the Commissioner, it was his opinion, to which I show deference once formed on an application of the correct test, that the countervailing public interest was weak to non-existent in view of the specific content of the information it was proposed to release.

109. While there are obvious difficulties in reciting the precise information in question in a decision which is to be made public and which may be subject to challenge, the careful engagement with specific content is reflected by the manner in which the Commissioner proposed release of some additional content, but not all content, and maintained the exemption in respect of distinct parts of the documents. The approach taken by detailed approach taken by the Commissioner in accepting some redactions and rejecting others is demonstrative of a nuanced evaluation of the specific content of the records. Demonstrably, the Commissioner distinguished between different types of information and weighed relative sensitivity against the public interest in scrutiny of information regarding expenditure on the acquisition of State property and value for money considerations in arriving at a decision.

110. Reviewing what is accepted and what remains in dispute, I note in general terms that no information is proposed for release in respect of the IDA's valuation of the site or figures indicated as asking prices or offers for the purpose of the negotiation. The IDA's position regarding the exempt status of this information has been accepted by the Commissioner and a consistent position is demonstrated by the Commissioner by agreeing the redaction in each place it occurs.

111. The contested information proposed for release in the first document includes two folio numbers. It is self-evident that these folios are matters of public record. The only objection to disclosure articulated is that disclosure would identify previous owners. Indeed, it was pointed out in the Decision itself that the IDA had not explained how s. 30(1) applied to this information at all. Given that the folio numbers related to publicly accessible records which may be searched to identify who owns a property, I find it difficult to take the objection to disclosure in this regard seriously bearing in mind that the location of the site in question is already in the public domain.

112. The information which the IDA seeks to withhold also identifies the previous owners' team of advisors and includes information provided by the previous owners in relation to the site. There is, however, an overlap between information which the IDA seeks to withhold and that which it has already agreed to release, specifically in relation to the fact that estimates in relation to remaining site works had been provided by the previous owners, but required to be verified and the identity of some of the previous owners' advisors. It is therefore immediately clear that the IDA's proposed redactions capture information which it has agreed to release elsewhere in the same record. The IDA's attempt to withhold information which it has released in other parts of the same document or documents is not understood.

113. The balance of information proposed for release includes an Appendix document wherein a spreadsheet is provided which compiles information from different sources to present market information and values pertaining to a range of different, identified properties. As regards the Appendix and other information, the disclosure of which has been directed on an application of s. 30(2), the Commissioner considers that only that part which relates to negotiation on the specific site is properly exempt. The Commissioner's position is explained in the Decision on the basis that there is nothing in the information at issue that would allow negotiating parties to undermine the IDA's negotiating positions or strategies once the particular negotiations which were the subject of the records were completed. The information is specific to the purchase of the site at issue, and it was not accepted that its release could adversely affect the ongoing negotiations referenced by the IDA. It was concluded that the public interest in allowing scrutiny of information regarding expenditure on the acquisition of state property including the manner in which such acquisition and disposal is negotiated should prevail.

114. The approach of the Commissioner in this case falls to be contrasted with the approach taken in *Enet* where reliance was placed on a general public interest and an unduly high bar was imposed on the FOI body by requiring evidence of justifying reasons amounting to "exceptional circumstances" to establish a lawful refusal to disclose. This was not the approach adopted in this case. Instead, in my view, the Commissioner engaged in precisely the type of balancing exercise envisaged within the statutory scheme. Having done so he was satisfied that the public interest that might be gained or lost by the release of the specified documents captured by an opinion arrived at within the terms of s. 30(1)(c) was for reasons relevant to the document and the record and their contents better served by release when the public interest in knowing the process followed to protect the interest of the Exchequer through appraisal steps demonstrating value for money consideration and due diligence in terms of legal, valuation, planning and other advices in implementing the decision to purchase the lands in question are weighed against the

public interest in protecting against the disclosure of positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the IDA having regard to the content in question.

115. From the records generated in the decision-making process which are available to me, I am satisfied that the content proposed for release evidence the processes followed and checks relied upon by the IDA in acquiring the site. These processes and checks are legitimately the subject of public scrutiny in line with the public interest identified in the Circular. On the other side of the balance, the material proposed for release does not disclose any sensitive information relating to price or negotiation tactics which might undermine the ability of the IDA to negotiate effectively and in a competitive environment in the manner clearly apprehended by the IDA and envisaged as being amenable to protection under s. 30(1)(c) of the 2014 Act.

116. The IDA have not established an error in law or a misapplication of ss. 30(1)(c) and 30(2) of the 2014 Act on the part of the Commissioner in concluding that while the Redacted Information came within the meaning of s. 30(1)(c) of the 2014 Act, the public interest would be better served by the release of that information.

Reliance on Circular 17/2016 - Policy for Property Acquisition and for Disposal of Surplus Property

117. Specific complaint is directed at reliance placed on the Circular published by the Department of Public Expenditure and Reform, referred to in more detail above, as part of the public interest balancing test required by s. 30(2) of the 2014 Act. It is contended that in placing reliance on the Circular, the Commissioner erred in law and acted in breach of fair procedures and natural and constitutional justice by failing to notify the IDA that he intended to rely on the Circular and failing to give an opportunity to the IDA to comment on the alleged relevance of the Circular to the operation of the public interest balancing test.

118. The Commissioner makes a number of points in response. It is pointed out that the Circular is relied upon as evidencing a particular public interest, not as creating it. This much is clear from the words used in the decision which states (at p. 6) that the Circular *"reflects and evidences a clear public interest in allowing scrutiny of information regarding expenditure on the acquisition of state property."* It is further pointed out that the IDA have not disputed that a

public interest in allowing expenditure of on the acquisition of state property be subject to scrutiny.

119. In *Grange v. Information Commissioner* [2020] IECA 153, Haughton J. stated (at para. 88) that what fairness demands is dependent on the context of the governing statute, here the 2014 Act, the right to FOI that it provides, and the limitations on that right. It is also dependent on the factual context observing:

> *"In the instant case the correspondence and the adverse decisions of the Department that preceded the application to the respondent - all of which were directed to the appellant and were communications/documents of which he had full knowledge."*

120. In *Grange,* the factual context included the fact that Mr. Grange was deemed *"well aware"* of the Department of Foreign Affairs' position. In submissions on behalf of the Commissioner reliance was also placed on *Deerland Construction Ltd v Aquaculture Licences Appeals Board* [2009] IEHC 289, [2009] 1 IR 673, a case involving a duty to give reasons, which had quoted with approval from *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953, where Brown L.J. stated (p.1964):

> *" … Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."*

121. Notwithstanding that *Deerland* is primarily directed to reasons, I consider reliance on this decision to be well-placed insofar as it recognizes that a challenge by way of judicial review on fairness grounds requires demonstration of genuine and real prejudice by reason of the procedural failure complained of. The same is clear from other cases cited in relation to this issue namely, *J & E Davy v. Financial Services Ombudsman* [2008] IEHC 256, [2008] 2 ILRM 507; *P.O. v. Minister for Justice and Equality* [2015] IESC 64, [2015] 3 IR 164 and *McMonagail agus a Mhic Teoranta v. Ireland & A.G.* [2023] IEHC 223.

122. In his judgment in *P.O. v. Minister for Justice and Equality,* Charleton J. addressed the right to be heard in the particular context of a decision in the deportation process, where it had been claimed that the intention to rely on information other than that submitted by the applicant should have been notified before making a decision. Charleton J. acknowledged that

situations may arise where such disclosure would be just and appropriate, citing several cases including *Ahmed v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 24th March, 2011). There Birmingham J. identified a potential need for specific notice where a document sourced late in the procedure has the capacity to radically alter the entire basis of the case or where a decision maker had access to a stream of information which was not publicly available but was in conflict with publicly available material.

123. Likewise, in his judgment in *McMonagail agus a Mhic Teoranta v. Ireland & A.G.*, Ferriter J. rejected the complaint made in that case on the basis that it came very close to arguing for a right to a draft adverse decision with a right to make submissions on such draft, notwithstanding that an earlier opportunity had been afforded to make submissions, a proposition for which no Irish authority had been cited. Ferriter J. observed that relevant context for the fair procedures question arising was the fact that where a planning decision involving a quarry is concerned, the applicant must be taken to know that the authorities are likely to have regard to publicly available maps and photos when assessing issues of quarry use. In rejecting a fair procedures complaint in that case, Ferriter J. attached importance to the fact that the material relied upon without specific notice was publicly available material which could have been obtained by the applicant. It was also material which could reasonably be envisaged as potentially being relied upon in the decision-making process.

124. A central consideration for me in the context of the fair procedures argument advanced before me is that the Circular had previously been relied upon by the Commissioner in a case cited by the Notice Party and referred to by the IDA itself in the context of the IDA's assessment of the FOI request in this case. By reason of the Notice Party signaling his reliance on the previous case, the IDA were on notice of the potential relevance of the Circular in the decision-making process and had an opportunity to make submissions addressed to the Circular. It elected not to do so. It is also very significant that the earlier decision in question (OIC 99202) involved the same parties as the present case. It is therefore undeniable that the IDA were on notice of the existence of the Circular, its contents and the fact that the Commissioner considered it to evidence the existence of a public interest impacting on a decision whether to release information under the 2014 Act.

125. Indeed, the fact that the previous case involved the same parties was expressly referenced in the Decision under appeal, also reflecting the decision maker's recording of the fact that the IDA should not be surprised by the finding in this case and should have anticipated reliance on the Circular in light of the earlier decision to which they were also party. As pleaded

in the Statement of Opposition (para. 9(b)), *"the Appellant well knew of the existence and relevance of the Circular"*. From the index of pleadings, the IDA does not appear to dispute that it knew about the existence and relevance of the Circular, their complaint being that the intention to rely on it was not disclosed in advance (see Affidavit of Mr. Nolan sworn on the 3rd day of August at para. 23).

126. Furthermore, it is relevant to the question I must decide on this aspect of the appeal that the only response the IDA have made to the substance of the Circular, which it might have advanced in submissions to the Commissioner had the IDA been on notice of intended reliance on the Circular, is to say that it does not apply to the IDA. This would be an important submission, one that the IDA might have required an opportunity to make prior to the decision were they not aware of the Circular already (which is not the case here) if the Circular was being relied upon as applying to the IDA. This is plainly not the significance attached to the Circular by the Commissioner, however, as clear from the language of the Decision in explaining that the Circular evidence (not creates or imposes) a public interest.

127. Having regard to the legal and factual context in this case, I am satisfied that intended reliance on the Circular in the manner which occurred did not trigger a requirement for specific notice under the principle of *audi alteram partem* or the dictates of constitutional justice. This is because it was neither a new document nor one which radically altered matters under consideration. It was also a public document which was available to the IDA. Manifestly the contents of the Circular did not alter the scope and nature of the review conducted by the decision maker. As was the case in *Grange*, the IDA well knew, through the previous decision and Mr. Foxe's reliance on it again in the present case, the potential relevance of the public interest evidenced by the Circular and the fact that weight had previously been attached to this public interest in decision-making by the Commissioner.

128. Not only had the Circular been previously considered by the Commissioner in a case involving the IDA (OIC 99202), but this earlier case was expressly relied upon by the Notice Party in this very case in support of its request for information. This alone constituted sufficient notice of the possibility that reliance would be placed on the Circular in the circumstances of this case such that were objection taken to reliance on the Circular, the basis for objection should be set out in submissions made to the Commissioner. I am quite satisfied that there was no obligation to specifically inform the IDA of an intention to rely on the Circular in the decision on review before making that decision in all the circumstances of this case.

129. In addition to the absence of specific notice complaint advanced by the IDA, it is also contended that in relying on the Circular, the Commissioner erred in law and had regard to irrelevant considerations. The public interest identified in the Circular does not depend for its existence on the Circular but is a recognition of or an expression of a legitimate public interest, namely a public interest in ensuring the proper use and management of public funds, which is of obvious relevance and application to land acquisition by the IDA. The suggestion that there is no such public interest in ensuring proper scrutiny of IDA expenditure of public funds or that such public interest is not relevant to a decision in reliance on s. 30(2) of the 2014 Act was not seriously pressed in argument before me but is, in any event, clearly without any merit.

130. It is further complained that the Commissioner failed to give reasons for his conclusion that the Circular is relevant to the operation of the public interest balancing test in the context of a request for information made to the IDA and by failing to give any adequate reasons as to why the public interest would, on balance, be better served by the release of the Redacted Information. It is argued that insofar as any reasons are contained in the decision of the Commissioner, they are directed at the conclusion that the IDA was justified in redacting certain information in Record 1 and Record 2 but fail to properly address why the IDA was not justified in refusing to disclose the Redacted Information.

131. The duty to give reasons is well-established as clear from cases cited including *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2012] 3 IR 297, *EMI Records (Ireland) Ltd v Data Protection Commissioner* [2013] IEHC 64, [2013] 2 IR 669, *Connelly v An Bord Pleanala* [2018] IESC 31, [2021] 2 IR 752, *Balz v An Bord Pleanála* [2019] IESC 90, *NECI v Labour Court* [2021] IESC 36, [2022] 3 IR 515 and the decision in *Enet* itself considered at length above. Statutory context is of clear relevance when assessing what procedural fairness requires, including any alleged deficiencies in reasons or alleged non-engagement. Reasons are to be assessed by reference to what a reasonable person with full knowledge of the background would conclude by reading the relevant text. Flexibility is afforded regarding the level of detail required and the Supreme Court in *Connelly* noted that (at para. 82)

> *"…a decision-maker is not required to give a discursive determination along the lines of what might be expected in a superior court judgment…*".

132. In *Killegland Estates v Meath County Council* [2022] IEHC 393 (from which the

Supreme Court dismissed an appeal, [2023] IESC 39), Humphreys J. stated (at para. 77):

> *"…there is no obligation to 'engage with' submissions in the sense of some sort of discursive, hand-to-hand combat sense, as distinct from the obligation to give reasons."*

He added (at para. 83)

"…*there is no legal requirement to state reasons for what is obvious*."

133. Moreover, a decision's reasoning must be considered holistically and as noted in *Connelly* (at para.73):

"*The reasons may be found anywhere…*".

134. In responding to the complaint of lack of reasons and a lack of engagement with IDA submissions, the Commissioner relies on the terms of the Decision and accompanying documents to demonstrate that no deficiency regarding reasons or engagement with submissions arises but proceeds to make a number of additional points in reliance on the case law and the statutory scheme.

135. In the first instance, the Commissioner points to several unique statutory provisions which impact on the extent to which FOI decisions can, or must, be expansive regarding reasons or engagement with particular arguments. The Decision specifically noted (pp.2, 8, 9) that s.25(3) prevented it giving as full an account of certain matters as might otherwise have occurred. Section 25(3) requires precautions to prevent disclosure to the public of information or matters which would cause the record to be exempt which means that there is a restriction on reasoning which might disclose the content of material in respect of which an exemption status is claimed.

136. The Commissioner also refers to s.45(6) which creates a statutory imperative towards informality, providing that the review process *"…shall be as informal as is consistent with the due performance of the functions of the Commissioner."* It is pointed out that the Decision already runs to 17 pages of detailed text, much of it concerned with the IDA's arguments.

137. Separately, I am referred to ss**.**11(11) and 18(1) which provide for release of

certain parts of records, and redaction of the parts not to be released. It is pointed out that this is the approach the Decision adopts after a careful review. It is submitted that the very specificity of that approach itself goes some way to enabling IDA to understand why certain matters are being released, and why its arguments to the contrary failed.

138. Although it is pointed out that s.22(12)(b) places the onus of justification on FOI bodies which it is submitted distinguishes the authorities IDA relies on, in making this submission, the Commissioner does not address the clear requirement in *Enet* to reason a decision to disapply an exemption. The fact that the onus of justification is on FOI bodies under the statutory scheme does not obviate the necessity to explain a decision to direct release on public interest grounds of a record which might otherwise be exempt, but for the public interest in disclosure which arises referrable to the content of the record itself.

139. Bearing in mind that reasons may be found anywhere and that there is no obligation to state reasons for the obvious, it should be recalled that in addition to the written decision which runs to 17 pages, the IDA also has the two documents concerned. To my mind it is significant that these have been redacted in a clear and selective manner using colour highlighting which illustrates the information which it is considered should be held exempt and that information which may be disclosed on foot of the public interest assessment under s. 30(2) and where points of disagreement arise between the IDA and the Commissioner. It is also noteworthy that the IDA makes no averment in support of these proceedings that it somehow cannot understand the Decision and no contention is made that it lacked *"enough information to consider whether they can or should seek to avail of any appeal"* (*Connelly v An Bord Pleanála* [2018] IESC 31, [2021] 2 IR 752, para. 46) and it has, in fact, proceeded to expound some 21 appeal grounds.

140. Having carefully considered the Decision in the context of the exchange of submissions which led to the Decision and the records themselves with the redactions noted on them as proposed by the IDA and by the Commissioner respectively, I am satisfied that the Decision is adequately reasoned save in one discrete respect to which I will return.

141. Various reasons can be discerned in the text of the Decision itself, six of which were noted on behalf of the Commissioner and are referred to above. The core reason, as apparent from the Decision itself, for directing the release of additional material from a document which it is accepted contains exempt material, is that the public interest in scrutiny of information regarding expenditure on the acquisition of state property, including how such

acquisition and disposal are negotiated, was weightier than the public interest leaning against disclosure. It was concluded that the public interest would better be served by release because the additional content proposed for release, as identified through careful use of colour highlighting superimposed on the text, was specific to the purchase of the site in question with the result that its release could not affect the negotiations IDA had referenced as justifying the application exemption.

142. Accordingly, the primary reasons for the Decision are readily ascertainable and clear. The content proposed for release evidence the processes followed and checks relied upon by the IDA in acquiring the site. These processes and checks are legitimately the subject of public scrutiny in line with the public interest identified in the Circular, specifically referred to by the Commissioner in his Decision. On the other side of the balance and as patent in the Commissioner's reasoning contained with his Decision, the material proposed for release does not disclose any sensitive information relating to price or strategies which might undermine the ability of the IDA to negotiate effectively in a competitive environment in the manner clearly apprehended by the IDA and envisaged as being amenable to protection under s. 30(1)(c) of the 2014 Act.

143. In terms of specific areas of dispute and the duty to reason such as the release of a record disclosing a folio entry, I am reminded of the established position that there is no need to state reasons for the obvious. Self-evidently folio records are public records and accessible for search as such. It is noted that the question of folio records is returned to by the Commissioner in his consideration of s. 37 where the Commissioner specifically notes that *"the content of the record suggests that the information in question was publicly available*" and that folio numbers are publicly available through the Property Registration Authority.

144. Similarly, a refusal on the part of the Commissioner to allow overly broad redaction in a blanket way does not require further explanation as it should be obvious to the IDA from the documents themselves that it is illogical on its part to adopt a contradictory position in respect of the same information. In the round, I am satisfied that the Decision is adequately reasoned and there is no ambiguity as to the reasoning underpinning the Decision.

145. One discrete issue has troubled me in relation to the information proposed for release. The Commissioner has adopted a different approach in relation to the figures representing expenditure by the vendor on the site and an estimate of further costs, allowing this information to be redacted in one place in Record 1, but not in a second place where the same

information is given. No rationale is advanced for this different or inconsistent approach by the Commissioner to what is essentially the same information. When this was raised during the hearing before me, it was submitted that the IDA could not complain in relation to a redaction favourable to its position.

146. This does not seem to me to be a full answer because it applies only if the information ought to be disclosed. However, if the Commissioner had determined that it should not be disclosed, then this position ought properly to have been maintained consistently. The information in question relates to expenditure and costs which would normally be factored in calculating value and in deciding on the price which might ultimately be paid, but in this instance the figures were *"subject to verification"* and were estimates which together inputted into an assessment of value but did not disclose the sums under negotiation for purchase.

147. Although there is some ambiguity as to whether the Commissioner intended the release of this information or not, on the logic of the Commissioner's decision the intention must have been to direct its release as it is site specific but does not directly reveal the price paid for the site. Accordingly, this apparent inconsistency in approach as between the two places in which the figures appear does not result in any improper release of information because the intention must have been to direct its release.

Temporal Limitation

148. Next in respect of the s. 30 exemption, it is contended that insofar as the Commissioner purported to limit the entitlement of the IDA to refuse to disclose those parts of Record 1 and Record 2 in respect of which it was concluded that the public interest would be better served by refusing access to that information, to the period of time in which certain negotiations are being undertaken, it is contended that the Commissioner erred in law and acted in breach of ss. 30(1) and 30(2) of the 2014 Act. It is further submitted that the Commissioner failed to identify adequate legal basis for the decision that the justification to refuse to release the information was subject to a temporal limitation.

149. It seems to me that this complaint is based on a misreading of the Decision. The Commissioner in his Statement of Opposition does not contend for a temporal limitation and accepts that any suggestion of a temporal limitation would have no legal effect. Those aspects of the Decision relied upon as suggesting a temporal limitation amount to no more than an indication that a decision might be different when the ongoing negotiations relied upon to justify the exemption are at an end. This does not, however, pre-empt the outcome of a proper and fair

process upon a further request for information at a future date. There may well be different considerations advanced at that time to justify the application of the s. 30 exemption or some other exemption. Any fresh application would be subject to a new process in which the IDA and the requester would both be free to make submissions and that process would, in turn, be amenable to review by the Commissioner and ultimately by this Court.

150. Whether the information which is exempt from disclosure at this time will become disclosable in the future is not a question determined by the Decision under review and the Decision does no more than suggest that the outcome might be different were the ongoing negotiations concluded. This expression of a possible other outcome is not legally binding in any way and does not form part of the operative part of the Decision in terms of the Direction given at the conclusion of the Decision.

Rationality

151. Finally, in respect of s. 30 of the 2014 Act, it is pleaded that the Decision is unreasonable and/or irrational. This complaint was not pursued in either written or oral submissions and the complaint advanced in this regard has not been substantiated. As already noted above, the Decision has been adequately reasoned and I am satisfied that it is within a range of decisions open to the Commissioner properly directed in law, as I am satisfied he was.

Section 36

152. Having addressed the claim for exemption under s. 30 and rejected that claim in respect of specific parts of the record, the Commissioner's Decision continued to address whether any of the other claimed exemptions applied. Several criticisms are advanced in respect of the manner in which the Commissioner dealt with the claim for exemption under s. 36 of the 2014 Act. Exemption had been claimed under s. 36(1)(b) and 36(1)(c).

Conflation of Exemptions

153. The IDA contends that the Commissioner erred in law and failed to properly apply ss. 36(1)(b) and/ or 36(1)(c) of the 2014 Act to the Redacted Information by failing to properly distinguish between the two exemptions and failing to properly consider the application of each separate exemption.

154. In addition, it is contended that the Commissioner erred in law in failing to conclude that the release of the Redacted Information could result in a material financial loss to the IDA, could prejudice its position in the conduct of its business or could prejudice the conduct or outcome of contractual and other negotiations in which the IDA will be engaged. It is argued that the Commissioner failed to have any or any proper regard to the fact that the release of the Redacted Information could prejudice the ability of the IDA to undertake its duties in the future as it would enable third parties to understand the position and strategy of the IDA regarding the acquisition of land both generally and in the area of the site.

155. In relation to the complaint of non-engagement on the part of the Commissioner with the IDA's submissions, it is pointed out on behalf of the Commissioner that the Decision records (p. 12) that the IDA's s. 36 submissions were mostly addressed to *"the valuation and purchase price which I have found to be exempt under s. 30(1)(c)."* It is noted that no specific reference is made by the IDA to any of the other redacted information in its submissions.

156. While it is protested on behalf of the IDA that this is a mischaracterization of their submissions, having reviewed those submissions with some care, I am satisfied that the Commissioner fairly summarized the submissions which were in fact made. While counsel on behalf of the IDA focused on information proposed for disclosure in relation to the IDA's landbank as being commercially sensitive, and the failure to engage with this submission, it is a fact that the release of information in relation to the landbank is not specifically referred to as being the likely cause of material loss or gains or as prejudicing the competitive position of the IDA or any other person. Such submissions as were made addressed to the s. 36(1) tests were generic.

157. The only specific information identified as being commercially sensitive by reason of its content was information in relation to price (being the information which the Commissioner had found was largely covered by the s.30 exemption). It is unsurprising therefore that that the Commissioner found that the IDA had not discharged the onus on it regarding the non-disclosure of that information. The test as restated in *Enet* is recalled. The Commissioner's position in respect of the burden on the IDA is entirely consistent with the requirement on the FOI body, as stated in *Enet,* to provide a sufficiently coherent, fact-specific justification logically connected to the specific content of the document or record which it was sought to exempt from disclosure, to demonstrate that the justification was sufficient having regard to the overriding presumption in favour of disclosure under the

2014 Act.

158. In my view, the Commissioner's conclusion that this onus had not been discharged in relation to the asserted reliance on s. 36(1) is sustainable when due regard is had to the nature of the case which the IDA had made for the exemption.

Failure to Reason

159. A complaint is also made that the Commissioner has failed to give adequate reasons as to why s. 36(1)(b) and (c) does not exempt the Redacted Information from disclosure. Having regard to the terms of the Decision, I cannot accept that this complaint has been substantiated. It is plainly stated that there has been a failure to discharge the onus on the IDA regarding the non-disclosure of that information. This is an unambiguous statement of a reason for refusal.

160. The Decision does not rest there, however, but elaborates on the reasons for refusing to consider the exemption to apply. Specifically, it was asserted in plain terms in the Decision that release of the remaining information would not *"give insight into the value of the particular site or the competitive position and strategy of the IDA".* It would not "*result in all underlying costs of the project being in the public domain".*

161. Some weight was attached to the fact that the vendor had *"made no submissions"* despite invitation. It was repeated that no satisfactory explanation of anticipated effects on the vendor had been advanced by the IDA and that the IDA had not provided *"a sufficient explanation"* of *"how"* the harms it identified *"might arise from release of the remaining redacted information."* The reasons advanced are apt to apply to both s.36(1)(b) and (c) – including the lack of any insights emerging from the relevant records, and the IDA's own failure to provide proper explanations.

162. The asserted error of law by reason of a failure to properly reason the refusal to apply the exemption under s. 36 (either (1)(b) or (c)) has not been established when the terms of the Decision and the records of the decision-making process are considered. This record includes the submissions and correspondence exchanged in the process and the colour highlighted redactions of both the IDA and the Commissioner respectively. It is undeniable that the submissions advanced in reliance on s. 36 were generic and non-specific save in relation to the issue of price.

163. The obligation to engage with submissions made is heightened where material and

relevant submissions are made, such that a properly reasoned decision should address the relevant considerations identified. Where a sufficiently cogent case requiring consideration is not advanced, the obligation to provide extensive reasoning is reduced in consequence. In other words, the stronger the case made, the greater the requirement to justify a refusal to accept that case. In my view, the case made on behalf of the IDA under s. 36 insofar as aspects of the documents other than price were concerned was notably weak.

Standard of Proof

164. Finally in relation to s. 36, it is contended that the Commissioner applied an inappropriate standard of proof to the application of s. 36(1)(b) and s. 36(1)(c) of the 2014 Act to the Redacted Information. It is the IDA's case that the exemptions contained in ss. 36(1)(b) and 36(1)(c) are triggered where disclosure "*could*" have the identified consequences. It is the IDA's position that the standard of proof applied by the Commissioner is more than that which is contained in ss. 36(1)(b) and 36(1)(c) of the 2014 Act. This complaint does not find support in the text of the Decision. Indeed, it is expressly noted that the *"standard of proof" is "relatively low"* under s.36(1)(c) by reason of the language use s.36(1)(c) (*"could prejudice"*).

165. In my view, the Commissioner's requirement that the IDA not only *"identify the harms"* but also *"specify how the harms could arise"* is not at odds with the standard of proof prescribed under s. 36(1)(b) and (c). In *UCC v Information Commissioner* [2020] IESC 58, [2022] 1 IR 54, Baker J. stated regarding s.36(1)(b) at para. 74:

> "*For the reasons more fully explored in* [Enet], *I am not satisfied that it is sufficient for an FOI body to identify the records and merely assert that they could prejudice the competitive position of a person. An FOI body must also have a reasonable basis for that position."*

166. The onus of justification resting on the FOI Body in invoking an exemption was made crystal clear in *Enet*. Moreover, in *Westwood v Information Commissioner* [2014] IEHC 375, [2015] 1 IR 489 the notice party there was criticised for failing to engage with *"…why these particular documents, if disclosed, could prejudice the financial position of the notice party"* (para. 67). The IDA were not taken by surprise by the Commissioner's requirement that there be engagement with the documents to show how the prejudice protected against could arise. Indeed,

the Commissioner wrote on several occasions asking the IDA to elucidate on its assertion that harm was anticipated, and the basis for this assertion. The Commissioner asked the IDA in express terms to show how, or why, the particular information concerned met the criteria of the relevant exemption and provided the IDA with questionnaires as a prompt to provide information addressed to the statutory test. It was therefore clear that the Commissioner required the IDA to engage specifically with the content of the documents in justifying the application of the exemption.

Section 37

167. Section 37(1) provides that, subject to the other provisions of the section, an FOI body shall refuse to grant a request if access to the record concerned would involve the disclosure of personal information. The effect of s. 37 is that, generally speaking, access to a record shall be refused if it would involve the disclosure of personal information relating to individual(s) other than the requester. Under s. 37(1), personal information cannot be released unless one of the other relevant provisions of s. 37 applies.

168. Section 2 of the 2014 Act defines personal information as information about an identifiable individual that either (a) would ordinarily be known only to the individual or to members of his/her family or to his/her friends, or (b) is held by an FOI body on the understanding that it would be treated by the FOI body as confidential. The Act details 14 specific categories of information that is personal without prejudice to the generality of the foregoing definition including, at s. 2(ii) information relating to the financial affairs of the individual and, at s. 2(xiii) information relating to property of the individual (including the nature of the individual's title to any property).

169. In relation to s. 37, it is contended on this appeal that the Commissioner erred in law and wrongly concluded that certain facets of the Redacted Information were not personal information within the meaning of s. 37(1) of the 2014 Act and failed to properly have regard to the fact that the company is named after a specific, identifiable individual. It is contended that the Commissioner wrongly interpreted the definition of personal information in s. 2 of the 2014 Act and failed to properly have regard to the fact that the information concerned is information relating to the financial affairs of an individual and is also information relating to property of the individual.

170. In its submissions to this Office, the IDA argued that the name of the landowner

is personal information, as is the price he was paid for the land sold, comprising information relating to his financial affairs. It noted that the vendor is an individual with the property registered in a company which incorporates his name and from which he is clearly identifiable.

171. In his Decision, the Commissioner referred to the earlier decision in Case 98022 in which the then Commissioner rejected the contention that certain information about a company could be said to comprise personal information relating to an individual, concluding that the mere reference to the director by name in the record is not sufficient to enable it to be said that the record relates to personal information about the director. It was found that a company can only act through the agency of natural persons, generally its directors or employees. Consequently, as found in Case 98022 and cited in the Decision in this case, it is almost inevitable that in a record referring to matters about a company or its business, references will also be made to such persons.

172. In Case 98022, the then Commissioner found that it is clear from the definition of *"personal information"* that the term can only apply to information about an identifiable individual, meaning a natural person as opposed to a legal person such as a company. In consequence, he concluded that there is no basis for seeking to treat a company as the same person as its directors or shareholders or any of them, for the purposes of the FOI Act.

173. The IDA's primary point in relation to s. 37 is that the name of the vendor company *"was the name of an individual"*. Quoting from reasoning in OIC-99202 (which the IDA had not appealed) the Decision noted (at p.15) that the Act's definition of *"personal information"* applies to information about an identifiable *"individual"*. The Decision assessed that the information at issue was *"about the business of the company."*

174. Applying the earlier decision in OIC-98022 the Commissioner concluded that the information in question is about the business of the company and does not comprise personal information relating to an individual. He concluded that the fact that the name of the limited company may incorporate the name of an individual does not mean that the information is personal information relating to that individual for the purposes of the 2014 Act. He found that none of the redacted information relating to the site in question comprises personal information for the purposes of the FOI Act.

175. Regarding the folio number of a separate property as it appears at page 3 of Record 1, the Commissioner noted that the details of the sale of the property are included under the heading *"Summary of Limited Available Market Evidence"*. He observed that the contents of the

record suggest that the information in question was publicly available. While the IDA had argued that the specific folio number is personal information, the Commissioner pointed out in the Decision that there was no evidence before him to suggest that the disclosure of the folio number would involve the disclosure of personal information relating to an identifiable individual and the folio entry itself is not available in evidence to establish what information is in fact thereby disclosed.

176. The Commissioner maintains that even if this folio entry were to contain the information identifying a natural person, he considered that s. 37(2)(c) would serve to disapply the exemption in s. 37(1). Section 37(2)(c) provides in somewhat convoluted terms that s. 37(1) does not apply if information of the same kind as that contained in the record in respect of individuals generally, or a class of individuals of significant number that is, having regard to all the circumstances is available to the general public. As noted by the Commissioner, folio numbers are publicly available through the Property Registration Authority. Moreover, as noted by the Commissioner in the Decision, not only were folio numbers and *"details of the sale of the property" "publicly available"* (p.15) but details of the IDA's acquisition of the site had been *"reported in the media"* (p.1).

177. Recalling the presumption in favour of disclosure which underscores the 2014 Act and the requirement to interpret exemptions restrictively, I am satisfied that s. 37 read together with s. 2 does not preclude disclosure of a company name or folio records simply because the company name is the same as an individual's or the folio record discloses the identity of the registered owner where the registered owner is a company. Furthermore, even if information was considered to constitute personal information within the meaning of s. 37(1) by disclosing the identity of a natural person as opposed to a company, the fact that the information is publicly available triggers the operation of s. 37(2) to permit disclosure of the information in question. I do not read ss. 2 and 37 of the 2014 Act as precluding the disclosure of information already in the public domain and a matter of public record.

178. In my view, the Commissioner's conclusion that the IDA has not justified its decision to withhold any of the information at issue under section 37(1) of the 2014 Act as required by the provisions of s. 22(12)(b) of the 2014 Act, is not vitiated by error of law.

Section 40

179. Section 40(1) of the 2014 Act permits disclosure to be refused where:

> *"(a) access to the record could reasonably be expected to have a serious, adverse effect on the ability of the Government to manage the national economy or on the financial interests of the State.*
> *(c) access to the record could reasonably be expected to have a negative impact on decisions by enterprises to invest or expand in the State, on their research activities or on the effectiveness of the industrial development strategy of the State, particularly in relation to the strategies of other states, or…"*

180. It is contended by the IDA that the Commissioner erred in law and failed to properly apply s. 40(1)(a) of the 2014 Act to the Redacted Information in wrongly concluding that the Redacted Information was not exempt from disclosure and that the release of the Redacted Information would not prejudice the ability of the IDA to exercise its functions properly, including in respect of attracting FDI to Ireland and would not hinder the ability of the IDA to enter into and engage in commercial negotiations and to protect commercially sensitive information.

181. It is further argued that the Commissioner failed to give any or any adequate reasons as to why s. 40(l)(a) of the 2014 Act did not exempt the Redacted Information from disclosure and it is complained that the Commissioner failed to engage with the substance of the arguments made by the IDA.

182. In addition, it is contended that the Commissioner erred in law and failed to properly apply section 40(1)(c) of the 2014 Act to the Redacted Information in that the Commissioner failed to properly consider whether the release of the Redacted Information could reasonably be expected to have a negative impact on decisions by enterprises to invest or expand in the State, on their research activities or on the effectiveness of the industrial development strategy of the State, particularly in relation to the strategies of other states. It is argued that the Commissioner failed to properly have regard to the fact that s. 40(1)(c) is directed at the types of activities in which the IDA is engaged and is intended to preclude the release of information where disclosure will have a negative impact on those activities.

183. While the IDA charges a lack of engagement with the terms of s.40(1)(a) or (c),

and alleges that the Decision *"wrongly focuses simply on the fact of negotiation"*, it is correctly pointed out on behalf of the Commissioner that effects on negotiations were the key argument which IDA advanced as carefully noted by the Commissioner at p.16 (third paragraph) and p.17 (first full paragraph) of the Decision. In this way the Commissioner engaged with arguments the arguments made.

184. It bears emphasis that s. 40(1)(a) concerns access which *"could reasonably be expected"* to have a *"serious adverse effect"* on Government's ability to *"manage the national economy"* or on *"the financial interests of the State".* It is patently addressed to macro interests – e.g. the ability of the Government and the *"national economy"*.

185. Section 40(1)(c) concerns access which *"could reasonably be expected"* to have an adverse effect on decisions by enterprises to expand/invest, or on their research activities, or on *"the industrial development strategy of the State"*. Again, the focus of s. 40(1)(c) on the macro interest of the industrial development strategy of the State is clear through the language used. Given the nature of the macro interests sought to be protected by s. 40, it seems to me that the Commissioner was quite entitled to decide that the IDA had not, for s.22(12) purposes, demonstrated that such adverse effects could *"reasonably be expected"* to arise, such that its refusal under s.40 was justified bearing in mind the limited nature of the remaining information in the Records in question. No error of law is disclosed in the Commissioner's approach and the decisions taken under s. 40 are *"akin to decisions on facts"* such that deference arises. I see no proper basis for interfering with the Decision of the Commissioner in this regard.

Failure to Reason

186. It is separately complained that the Commissioner failed to give adequate reasons as to why s. 40(1)(c) of the 2014 Act did not exempt the Redacted Information from disclosure and is not entitled to rely on reasons given in respect of a different exemption.

187. The complaint that the Decision under s. 40 "merely" relied on earlier findings is disputed on behalf of the Commissioner who points out that the IDA's written submissions fail to explain what precise effects for s.40(1) purposes could *"reasonably be expected"* to arise, which are not "caught", or dealt with, by the Decision's earlier findings. It is further disputed that this characterisation is correct, and it is pointed out that the s.40 determination additionally notes:

i. "…*it is already public knowledge that the IDA has purchased the site in question*" (p.16);

ii. "*The IDA has not explained how such harms might arise*" (p.17, also p.16).

188. I am satisfied that there is no want of reasons in the Decision in relation to the application of s. 40 of the 2014 Act and grounds for challenge on this basis have not been established.

Standard of Proof

189. Finally, it is again contended that the Commissioner applied an inappropriate standard of proof to the application of s. 40(1)(c) of the 2014 Act to the Redacted Information on the basis that the exemptions contained in s. 40(1)(c) are triggered where disclosure *"could"* have the identified consequences. A proper reading of the Decision, however, does not disclose any error of law in relation to the applicable standard of proof. Instead, the Commissioner correctly observes that s. 40(1) is a harm-based provision, adding that where an FOI body relies on s. 40(1) it should, firstly, identify the potential harm specified in the relevant paragraph s. 40(1) that might arise from disclosure and, secondly, having identified that harm, consider the reasonableness of any expectation that the harm will occur. The Commissioner points out that the FOI body should show the link between granting access to the record concerned and the harm identified. A claim for exemption under s. 40(1) must be made on its merits and in light of the contents of each particular record concerned and the relevant facts and circumstances of the case.

190. In stating the test thus, the Commissioner does no more than correctly apply the *ratio* of the Supreme Court in *Enet* to the application of the exemption under s. 40. While the standard of proof does not require identified harm to be established as a high probability or a certainty, there is nothing on the face of the Decision to suggest that the Commissioner applied such a heightened test.

191. While the test does not require a demonstration of certain harm but uses a formula of *"could reasonably be expected to have"*, it does require an analysis of the content sought to be exempted from disclosure and an explanation as to how it could result in the harm protected against having regard to the presumption in favour of disclosure which underpins the 2014 Act and the obligation to justify non-disclosure. There is no error of law established in the Commissioner's approach and when regard is had to the remaining information, the IDA falls

well short of discharging the onus on it to justify exemption on s. 40 macro grounds on the basis of the content in question.

CONCLUSION

192. For the reasons given, the Commissioner's Decision is not vitiated by error of law, and I have concluded that the IDA is not entitled to the relief sought. I dismiss this appeal. I will hear the parties in respect of any consequential matters and the form of my final order, if necessary and this matter shall be listed before me following the expiry of fourteen days from the date of delivery of judgment unless the parties communicate the terms of a consent order in advance.