[2020] IEHC 73

THE HIGH COURT

[RECORD NO. 2019 69 MCA]

BETWEEN

JACKSON WAY PROPERTIES LIMITED

AND

JAMES PATRICK KENNEDY

APPLICANTS

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Ms. Justice Hyland delivered on the 14th day of February, 2020

Introduction

1. This is a statutory appeal under the Freedom of Information Act 2014 as amended (the "FOI Act") brought by Jackson Way Properties Ltd and James Kennedy in relation to a decision of the Information Commissioner (the "Commissioner") made on the 23rd January 2019 (the "Decision") by Stephen Rafferty, Senior Investigator with the Commissioner, whereby the Commissioner upheld the decision of Dun Laoghaire Rathdown County Council ("DLRCC") to refuse the first named Appellant's request to access to certain records relating to it on the basis of s.15(1)(c) of the Freedom of Information Act 2014 as amended (the "Act"). This section permits refusal on the basis that processing the request would cause a substantial and unreasonable interference with or disruption of the work of the FOI body.

2. The Commissioner's decision was appealed to the High Court by way of Originating Notice of Motion of the 21st February 2019, grounded upon an affidavit of Mr. James Patrick Kennedy, who is both a director of the first named Appellant, Jackson Way Properties (Limited) ("Jackson Way") and the second named Appellant.

Statutory Scheme

3. Before dealing with the specific arguments raised by the Appellants, it is important to identify certain relevant statutory provisions. This is an appeal under s.24 (1)(a) of the Act whereby a party to an application under s.22 may appeal to the High Court on a point of law from the decision. There are many cases dealing with appeals under the FOI Act and the circumstances in which a court hearing an appeal on a point of law may intervene, including a recent Court of Appeal decision, *FP v. Information Commissioner* [2019] IECA 19 where the Court observed:

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

discretion the court hearing an appeal might itself have reached a different decision".

4. Insofar as errors of law are concerned, the case law makes it clear that no deference should be shown to the Commissioner when the High Court is interpreting a section of the Act, a legal interpretation of a statute being either correct or incorrect (see for example *Deely v. Information Commissioner* [2001] 1 I.R. 309).

5. The case law also makes clear that when interpreting the FOI Act, a court must have reference to the fact that it is designed to enable members of the public to obtain access to the greatest extent possible consistent with the public interest and the right to privacy to information in possession of public bodies (*Minister for Agriculture v. Information Commissioner* [2001] IR 309). Further, the Long Title to the Act is of importance in interpreting the Act (*Minister for Health v. Information Commissioner* [2019] IESC 40).

6. Accordingly, when considering the correct interpretation of s.15(1)(c) of the Act I have had regard to the objectives set out in the Long Title to the Act, specifically that the aim of the Act is to enable members of the public to obtain access to the greatest extent possible. Equally, as per the case law referred to above, it is necessary to have regard to the overall scheme of the Act and I have sought to do so in considering the correct interpretation of s. 15(1)(c).

7. Separately, s.22(12) requires a presumption of disclosure. When the Commissioner is reviewing the decision to refuse access, the decision shall be presumed by the Commissioner not to have been justified unless the head of the FOI body shows to the satisfaction of the Commissioner that the decision was justified. The presumption in favour of disclosure means that DLRCC carries the burden of demonstrating why the documents in question should not be released.

8. Turning now to s.15(1)(c), the subject matter of this appeal, it is headed up "Refusal on Administrative Grounds to Grant FOI Requests" and provides as follows:

> *"The head to whom an FOI request is made may refuse to grant a request where –*
>
> *(c) in the opinion of the head granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of work (including disruption of work in a particular functional area) of the FOI body concerned".*

9. Both counsel in this case agreed that the words "substantial" and "unreasonable" attach themselves both to "interference with" as well as "disruption of" work. In other words, whether one is considering interference or disruption, substantial and unreasonable interference/disruption must be demonstrated.

10. Counsel for the Commissioner, Mr. Kieran BL, focused on the importance of the first two lines of the section which identified that there is a distinction on the one hand between the number or nature of the records or the nature of the information concerned and on the other hand, the consequences that the request will have, i.e. the retrieval and examination of such number of records or an examination of such kind of the records concerned. It appears to me that the head must carry out a three part inquiry: first, they must consider the nature of the request by reference to scale and nature of the records/information sought, second they must identify the nature of the retrieval and examination of such records, and third they must evaluate whether such retrieval and examination will cause a substantial and unreasonable interference with, or disruption of, the work of the FOI body, including work in a particular functional area.

11. Section 15(4) provides that a head shall not refuse to grant an FOI request unless he or she has offered to assist or assisted the requester concerned in an endeavour to amend the request for resubmission such that, *inter alia,* it no longer falls within s.15(1)(c).

12. Of relevance also is s.27 headed up "Fees and Charges". In summary the FOI body is permitted to charge the requester of the information an amount equal to the estimated cost of the search for, retrieval of and copying of the record, subject to certain provisions.

13. Finally, I should mention s.13(4) whereby, in deciding whether to grant or refuse to grant an FOI request, any reason that the requester gives for the request shall be disregarded.

Chronology of Relevant Events

14. On 8th February 2017 a letter seeking access to the following records was sent to DLRCC:

> *"In accordance with our clients [sic] instructions we hereby request under the provisions of the Freedom of Information Act, 2014 on behalf of Jackson Way properties Limited and its director James Patrick Kennedy, copies of all records of all communications, between whomsoever, held by or under the control of Dún Laoghaire Rathdown County Council relating to Jackson Way Properties Limited including, inter alia, its property, its title, any covenant or burdens affecting or alleged to affect its land, any claims for compensation arising from any covenant or burden affecting or alleged to affect its land, its directors, its claim for compensation against Dún Laoghaire Rathdown County Council in respect of its land compulsorily acquired for the M50 motorway, its legal proceedings against Dún Laoghaire Rathdown County Council and its legal proceedings against Thomas Kevin Smith and Mairead Smith".*

15. Due to the failure of DLRCC to reply within the allotted time, there was a deemed refusal of the request under the relevant statutory provisions. This resulted in an appeal and the final decision of DLRCC was given on 13th July 2018. Prior to the final decision, correspondence was exchanged between the parties in respect of the potential narrowing of the request.

16. In its letter of refusal of 13th July 2018 (the "Refusal Letter"), DLRCC set out details of the nature of the records that were likely to contain records relevant to the FOI request. It identified the following potentially relevant documents: twelve files in property management, thirty-eight files in road design and construction, six files in water services, two files in finance and files in five different sets of legal proceedings relating to cases involving Jackson Way Properties and James Kennedy which themselves involved various correspondence, files and books of pleadings held in the legal services department.

17. In relation to electronic records there was a search done of all emails issued and received by DLRCC staff from 1st January 2006 to date (no search facility for emails prior to the 1st January 2016 being available) and, using a variety of search terms, 9,291 emails were thrown up including 3,566 emails relating to James Kennedy. (Many of those were stated by DLRCC to be unlikely to be relevant to James Kennedy, the second named Appellant, as DLRCC had an employee of the same name).

18. It was noted in the Refusal Letter that there was an extensive number of records that would require retrieval, collation and review in respect of the hard copy and electronic documents and that the retrieval, collation and review of the number of hard copy and electronic records identified by the above scoping exercise could cause substantial and unreasonable interference and disruption with the work of DLRCC. In those circumstances the request was refused pursuant to s.15(1)(c).

19. By letter of 29th August 2018, solicitors acting on behalf of the second named Appellant's solicitors appealed to the Commissioner. On 19th September 2018 the Appellants made a submission to the Commissioner summarising the correspondence to date. No complaint was made about any particular aspect of the refusal letter.

20. By email of 16th October 2018, Elizabeth Swanwick, Investigating Officer of the Commissioner made what has been variously described as a "provisional decision" and a "preliminary decision". For the purposes of this Judgment, I will refer to it as a preliminary view since it does not seem to me to constitute a decision, even in provisional or preliminary form. In Ms. Swanwick's email, she identified that she had sought and obtained a submission from DLRCC. Rather than providing that submission to the Appellants, she summarised its contents in her email.

21. I pause here to observe that it appears from the hearing that it is not the practice of the Commissioner to permit the parties to an appeal to see each other's submissions. Rather those submissions are summarised by the Commissioner and are communicated in that way to the parties to an appeal. Equally, when an appeal is brought to the High Court, it does not appear to be the practice of the Commissioner to make those submissions available either to the parties or indeed to the Court.

22. Ms. Swanwick noted that DLRCC had set out certain details in relation to the nature and number of records that would have to be retrieved to grant the request, and the functions of DLRCC which would be disrupted by doing so. DLRCC stated it had identified a total of 72 hard copy files which are held across various sections and that a total of 9,291 emails

were found following a search of emails back as far as 2006. She recorded DLRCC as stating that the estimated time involved in examining the 72 hard copy files and identify relevant records within each file, allowing one staff member an estimated 1.5 hours per file was 108 hours. In relation to the time involved to examine the 9,291 emails and identify relevant records, DLRCC had estimated 154 hours, allowing 1 hour per 60 emails. She summarises DLRCC's submission on impact as follows:

- given the nature and extent of the records, this amounts to an extremely substantial amount of work;

- a significant amount of work would fall to the FOI Section to co-ordinate and manage the request within the various departments/sections that may hold relevant records;

- the Section is made up of officials who each work part time on FOI matters and the management time required for this request will seriously impact upon the ability of those officials to carry out their daily FOI tasks together with their additional duties which are not related to FOI;

- the work involved would also fall to an individual from each of the various departments/sections that may hold relevant records; and

- given the nature of a significant number of the records involved, additional work would be required of the legal services department, that it did not have sufficient capacity and an external legal provider would be needed.

23. Finally, Ms. Swanwick's email contained a reference to compliance with s.15(4). This requires a head not to refuse a request unless he or she has assisted or offered to assist with the request concerned by way of amendment such that it no longer falls within s.15(1)(c). At the hearing, it was made clear that there was no point being raised in respect of compliance with s.15(4). Accordingly, I will not consider any further points arising in respect of s.15(4).

24. Ms. Swanwick concluded that DLRCC was justified in refusing the request on the basis of s.15(1)(c) of the Act and that, should the case proceed to a formal legally binding decision, she would intend to recommend that the Senior Investigator affirm the decision of DLRCC. She indicated any views were not binding on the Senior Investigator/Commissioner and that any comments the Appellants wished to make in response to her email would be taken into account by the Senior Investigator/Commissioner in making a final decision.

25. Comments were provided by the Appellants' solicitors by way of letter of the 17th October 2018, whereby reference was made to the previous submission that had been made to DLRCC. Further submissions were made to the effect that the documentation in question was created by DLRCC who should now be in a position to deal with their own administrative costs while making the documentation available to the Appellants. It was

submitted that the Appellants should not be prejudiced by DLRCC officials and that the Appellants' request "*would not cause a substantial and unreasonable interference with or disruption of the work of the Council including disruption of its work in a particular functional area under s.15(1)(c) of the Freedom of Information Act 2015 or otherwise".*

Decision of the Commissioner

26. On 23rd January 2019 a decision was made by Stephen Rafferty, Senior Investigator (the "Decision"). That Decision is dealt with in detail in the section in this Judgment dealing with the evidential basis for the Decision. In summary, Mr. Rafferty found that DLRCC was justified in its decision to refuse the Applicant's request for records on the ground that the processing would cause a substantial and unreasonable interference with or disruption of its work. The Appellants have asserted that the Commissioner has ignored the onus of proof and has failed to recognise the statutory burden on DLRCC of justifying the request. I do not accept that. In the "Analysis and Findings" section of the Decision, one sees a clear recognition that it is for DLRCC to justify the refusal, and a finding that DLRCC has done so.

The Pleadings

27. An originating Notice of Motion was filed on 21st February 2019 and a grounding Affidavit sworn by Mr. Kennedy on 22nd February 2019. Certain of the core complaints of the Appellants are identified in the grounding Affidavit of Mr. Kennedy, including the following:

- it is not possible to conclude that the correct legal test was applied in light of the description contained in the Decision on the basis on which an FOI body may refuse a request, having regard *inter alia* to the fact that the Decision states at the third paragraph to the Background section that s.15(1)(c) essentially allows for the refusal of voluminous requests (paragraph 57);

- this characterisation of the appropriate test is entirely incorrect and the summary of the provision as one which "*essentially allows for the refusal of voluminous requests*" is one which effectively extracts the requirement of reasonableness and focuses only on the substantial nature of the request;

- the Decision was made with no regard or no adequate regard to the requirement that the inference with or disruption of work arising from the request be unreasonable as well as substantial (paragraph 60);

- the Decision fails to make any assessment of the reasonableness or lack thereof of any interference or disruption of the work of the notice party except from the sole perspective of the notice party and that the decision is wrong in law on this basis also (paragraph 61).

28. In relation to the last point, as previously noted, s.13(4) of the FOI Act provides that in deciding whether to grant or refuse to grant an FOI request, any reason that the requester gives for the request shall be disregarded. At the hearing it became clear that

this point was not being pressed, presumably because of the wording of s.13(4). Accordingly, I will not consider that ground any further.

Application to exclude evidence

29. A replying affidavit was filed by Mr. Rafferty on 17th April 2019 and certain portions of that affidavit have been objected to by the Appellants on the basis that those portions breach the principle that a deponent may not seek to supplement an administrative decision or provide evidence of intention in relation to that decision by way of affidavit evidence. Accordingly, the Appellants seek the exclusion of certain paragraphs of the affidavit. Reliance is placed upon *State (Crowley) v. The Irish Land Commission and Others* [1951] IR 250 and the following passages from same:

> *While the affidavit showing cause was read and considered before me without objection, I am of opinion that the judgment and order of the Commissioners must speak for themselves and must be construed and interpreted by me in the words of the judgment and order…It is, however, sought to supplement the orders and written judgment by reference to the affidavit sworn by the Lay Commissioners. I do not consider that recourse can be had to the affidavit for this purpose. The determination of the Lay Commissioners appears in, and must be gathered from, the formal orders made by them and the affidavit cannot be utilised for the purpose of adding to, explaining, or contradicting their written orders."*

30. The parts of the Affidavit objected to by the Appellants may be found at paragraphs 15, 21 & 22. Paragraph 15 is in the following terms: *"I confirm that I had regard to all materials before me, including the request and the number and nature of the records being requested, as well as the correspondence between the parties, and the Submissions made to the Respondent's Office*".

31. That does not seem to me to be an impermissible averment in an affidavit having regard to the principles set out in *Crowley* or otherwise. Moreover, at page 3 of the Decision, it is stated that in conducting the review, the decision maker has had regard to the relevant correspondence between DLRCC and the Applicant on the request and to correspondence between the Office and DLRCC and the Applicant, including the Applicant's submissions of 19th September 2018 and 17th October 2018 on the matter. The impugned averment does not add significantly to what is already apparent on the face of the Decision. Even if there had been no reference in the Decision to the material relied upon, identifying at this stage what material was before the Senior Investigator is simply providing additional information to the Court and the parties, and is not in my view an attempt to supplement or add to the substantive Decision itself. In those circumstances I do not propose to exclude paragraph 15.

32. The position is different in respect of paras. 21 and 22. At para. 21 it is stated as follows:

> *"It is clear that words underlined at para. 15 of Mr. Kennedy's affidavit were intended to be a high level summary of s.15(1)(c) and did not purport to be a full*

statement of the test applicable thereunder. I am in a position to confirm that this is indeed the case because I was the author of the decision as well as the prior decision, as Mr. Kennedy notes at para. 15 of his affidavit….I entirely reject the point and/or submission by Mr. Kennedy at para. 58 of the affidavit that there has been any 'extracting' of the concept of reasonableness or unreasonableness from the assessment conducted in the decision. For the avoidance of all doubt I confirm that the quoted high level summary of s.15(1)(c) did not influence me in any way when I arrived at the decision herein. I also state and believe that this is clear from a reading of the decision itself."

33. In my view, this paragraph seeks to supplement or vary the Decision by explaining what certain passages in the Decision meant, to what extent they were material to the Decision and their impact on the Decision as a whole. This seems to me an impermissible attempt to add to the Decision in the way criticised in *Crowley*. The Decision must stand or fall on its own terms and should not require to, or be permitted to, read in conjunction with a later explanation. Accordingly, I will disregard this paragraph of the affidavit.

34. Paragraph 22 of the Affidavit provides as follows:

"I reject all of the grounds of appeal, including all contentions or arguments that an incorrect test under s.15(1)(c) was applied. For the avoidance of all doubt I confirm that I did have regard to the reasonableness or otherwise of the burden which would be imposed and formed the view on the basis of all of the material before me that it was unreasonable in all the circumstances. Indeed, I say and believe that this is once again apparent from the face of the decision itself."

35. For the reasons set out above I will also disregard this paragraph of the affidavit as it seeks to supplement reasoning in the Decision insofar as reasonableness is concerned.

Summary of Appellants' Arguments

36. The first error alleged is that the Commissioner made an error of law in failing to correctly interpret the concept of "work" in s.15(1)(c) of the Act. It is asserted that the only relevant "work" that may be considered is that involved in the discharge of the statutory functions of the FOI body. In the instant case those statutory functions are as identified in the Local Government Act 2001 at s.63. The argument goes that, because the nature of the work that could permissibly be considered was not identified, and because correspondingly there was no identification of how there was an interference or distraction with that work, this amounted to an error of law.

37. According to the Appellants, a necessary corollary of this argument is that, having regard to the Appellants' definition of work, the Commissioner impermissibly considered the work of the FOI and legal services department when considering whether the requirements of s.15(1)(c) were met.

38. The second point is that the Commissioner wrongly interpreted the concept of "unreasonableness" in s.15(1)(c) and failed to address the requirement to consider the reasonableness of the request separately at all, thus committing an error of law.

39. The third point is that the reference to "voluminous requests" in the Decision demonstrates that the Commissioner failed to properly interpret the Section, focusing only on the question of the volume of records and not on the unreasonableness of the interference or disruption of work.

40. The fourth and final point is that there was no or no sufficient evidence that the request would cause a substantial and unreasonable interference with or disruption of work.

Admissibility of the argument re the definition of "work".

41. Before dealing with the above arguments, I must address the arguments in respect of alleged inadmissibility of certain arguments on the basis that they were not identified by the Appellants following the preliminary view of Ms. Swanwick, and in certain cases were not identified in the pleadings or written submissions in these proceedings but had only been advanced on the day of the hearing.

42. It is indisputable that the argument in respect of the correct definition of "work" was not identified in the Originating Notice of Motion or in the grounding Affidavit of Mr. Kennedy of 22nd February 2019 despite the provisions of O.130, r, 5 of the R.S.C. which requires that a notice of motion bringing an appeal shall be grounded upon the affidavit of the appellant which must*, inter alia: "state the grounds of the appeal and the point of law, where appropriate* (paragraph c). No written legal submissions were put in on this point either and it was raised for the first time on the morning of the hearing.

43. The situation is somewhat different in relation to the unreasonableness argument as that argument was clearly flagged in the Affidavit of Mr. Kennedy (see paragraph 60), though not made to the Commissioner either before or after receipt of Ms. Swanwick's preliminary views.

44. In respect of the unreasonableness point, it is true that in the submissions made by the Appellants in response to Ms. Swanwick's email, there was a bare assertion that the provisions of s.15(1)(c) had not been met, although no explanation as to why this was the case. Mr. McGrath SC for the Appellants says that, following the decision of the Court of Appeal in *Minister for Communications, Energy and Natural Resources v. The Information Commissioner* [2019] IECA 68 (the Enet case), this constituted a sufficient identification of the point. He says that once the compliance with the subsection was raised, the position was quite different from that in the *Rotunda Hospital v. Information Commissioner* [2013] 1 I.R. 1 where an entirely new issue was raised at High Court level. He says that were a stricter approach to be taken it would (a) not be in conformity with the approach of the Court of Appeal in Enet and (b) would shut out many unrepresented litigants from challenging decisions of the Information Commissioner as it would impose too high a burden upon them. Mr. Kieran for the Commissioner says that Mr. McGrath is not entitled to raise the situation of the hypothetical litigant who is unrepresented, the

Appellants in this case being legally represented. He further asserts this is a point that could and should have been raised before the Commissioner and, had it been raised, the Commissioner could have gone back to the DLRCC to seek its views on same.

45. In my view, there is an obligation on the Commissioner to comply with the requirements of s.15(1)(c) and a failure to make a case that there was non-compliance by the DLRCC with the section for specific reasons at a preliminary stage does not in the circumstances of this case shut the Appellants out from making a more detailed argument as to why s.15(1)(c) was not complied with once the matter comes to the High Court. The Commissioner knew that DLRCC was wholly relying upon s.15(1)(c) to justify its refusal and under s.22(12), that decision shall be presumed by the Commissioner not to have been justified unless the head concerned shows justification. In the circumstances, the Commissioner had an obligation to ensure that every element of s.15(1)(c) was observed and complied with, whether those points had been taken by the Appellants or not. An applicant is entitled to test whether that is the case once the matter comes before the High Court, even if she or he did not raise those arguments at the initial stage. For that reason, I will not exclude any arguments by reason of their non-identification to the Commissioner. This disposes of any objection to the unreasonableness argument.

46. However, somewhat different considerations apply once the matter has been the subject of a High Court appeal. In that situation arguments must be pleaded in advance of the hearing. When asked to identify the complaint in relation to the definition of work and the alleged failure of the Information Commissioner to address himself to that definition correctly, Mr. McGrath could only identify para. (a) of the notice of motion. Paragraph (a) simply states: "*The respondent erred in law in his interpretation and application of s.15(1)(c) of the 2014 Act"*. That is not an identification of the complaint in relation to work. It is quite different to the reasonableness point where one sees quite clearly at para. (d) a plea that the Respondent erred in law in that the appropriate legal test for the application of s.15(1)(c) was not applied where the Respondent failed to have any or any adequate regard to the question of reasonableness in the making of his decision. That complaint was the subject of a reply by the Commissioner in the Affidavit filed by Stephen Rafferty, sworn the 16th April 2019.

47. It is true that, in the case of an FOI appeal, Order 130 r.5 of the RSC does not require a Statement of Grounds but rather prescribes that the arguments be made in the affidavit. However, there was no reference in the affidavit evidence to the point about the definition of work either. On inquiry as to whether the Commissioner was prejudiced by the fact that this specific legal argument in relation to the definition of work was only raised orally on the first day of the hearing, prejudice was asserted because the Commissioner had not been able to plead to the argument, had not been able to introduce affidavit evidence and had not been able to put in written legal submissions.

48. There are obvious reasons why a party cannot introduce a new argument for the first time at the oral hearing. I am satisfied the argument in respect of the alleged incorrect definition of work does constitute a new argument that ought to have been identified in

the statutory appeal. However, in the circumstances of this case, I will permit the point to be made for the following reasons. First, both parties made detailed oral submissions on the point. Mr. Kieran for the Commissioner had the benefit of replying to Mr. McGrath on the second day of the hearing, having heard the arguments on the first day, so could marshal his arguments in response to the point. Further I directed supplemental written legal submissions on this argument on a date post the hearing and received same from both parties. I also afforded the parties an opportunity to make further oral submissions on foot of the supplemental legal submissions and neither party sought to do so.

49. In the circumstances, I will allow the Appellants to make the arguments on the definition of work but only because I find that having regard to the circumstances of the hearing and the measures taken there is no prejudice to the Commission in this respect.

Alleged failure to interpret "work" in Section 15(1)(c) correctly

50. Section 15(1)(c) provides, *inter alia*, that a head may refuse a request where granting it would cause a substantial and unreasonable interference with or disruption of work of the FOI body. The Appellants' argument is that "work" must be interpreted exclusively as work involved in the discharge of the statutory functions of the FOI body. In the instant case those statutory functions are as identified in the Local Government Act 2001 at s.63. The argument goes that, because the nature of the work that could be considered was not identified, and because correspondingly there was no identification of how there was an interference or distraction with that work, this amounted to an error of law.

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

52. It is necessary to first construe the meaning of "work" in the section. There is no definition of "work" in the Definitions section in the Act. However, the legislative history of the section is of importance. In 1997, the precursor to s.15(1)(c), s.10(1)(c), referred to "*interference with or disruption of the other work of the public body concerned".* Subsequently, the words "*the other"* was deleted by the 2003 Act. The Explanatory Memorandum to the Bill that became the Freedom of Information (Amendment) Act 2003, provided that the deletion of the word "other" is intended to clarify that a substantial and unreasonable interference with work, whether that is the work of a particular unit or section or the work of a body generally can constitute grounds for refusal of a request (in respect of reference to Explanatory Memoranda, see *Oates v Browne* [2016] 1 IR 481 where Hardiman J., p.488 stated "*The pre-history of the* [Road Traffic] *1968 Act is instructive …*" quoting Fitzgerald C.J. in *Maher v. AG* [1973] on what "*…the explanatory memorandum published with the Act of 1968 points out …*".)

53. The Act was further amended in 2014 to add the words "(*including disruption of work in a particular functional area*)" to s.15(1)(c). McDonagh, in "*Freedom of Information Law*", Third Ed. Round Hall 2015, observes as follows:

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

Local Government Act

54. Counsel for the Appellants argue that the functions of local authorities are defined at s.63 of the Local Government Act 2001, relying on s.63(1)(b) which provides, inter alia, that those functions are:

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

Section 63(2) refers to various Acts identified in Schedule 12 to the Act that confer functions on local authorities or classes of same. Mr. McGrath points to that Schedule and notes that the Acts identified do not include the FOI Act, although I note that s.63(2) makes it clear that the list of Acts is not exhaustive of all Acts conferring functions on local authorities. More importantly, s.63(1)(c) states that the functions of a local authority include the carrying out of any ancillary functions under s.65. Section 65(1) provides as follows:

"A local authority may do anything ancillary, supplementary or incidental to or consequential on or necessary to give full effect to or which will facilitate or is conducive to the performance of, a function conferred on it by this or any other enactment or which can advantageously be performed by the authority in conjunction with the performance of such function".

Section 65(2)(a) provides as follows:

"The reference in subsection (1) to a function conferred on a local authority shall be read as including—

(a) all such functions as may at any material time stand conferred on the local authority by or under any enactment (including this Act and any other enactment whether enacted before or after this Act)" …

55. In the Supplemental Legal Submissions of the Appellants on this point, it is submitted that the "work" of the FOI body is what it does while discharging its statutory functions. At paragraph 13 it is accepted that a local authority is under a duty to comply with the FOI Act and to that extent, this can be described as a "function" of the local authority but that compliance with FOI is not a function conferred by Statute in accordance with s.63(1)(b) or an ancillary function under s.65. A similar argument is made in respect of the provision of legal services by the department in DLRCC responsible for same. According to this argument, the work of the FOI Department and the work of the legal services department, (both of which DLRCC identified as being interfered with by the request), not being functions conferred by statute, would therefore not constitute work for the purposes of the section and therefore any interference with their activities could not be considered an interference with or disruption of, work.

56. I do not believe work means only work involved in the discharge of the identified statutory functions in the Schedule to the Local Government Act. First, insofar as local authorities are concerned, s.65 is very widely drafted and essentially characterises as functions of a local authority anything ancillary, supplementary, incidental or consequential on or necessary to give full effect to or is conducive to the performance of, functions conferred on it by the Local Government Act or any other enactment. Even if one characterises the obligations under the FOI Act as duties rather than functions – and I am not deciding that question as I do not need to – it seems to me that any step taken by a local authority to comply with its statutory obligations under the FOI Act is to be treated as an ancillary function of the local authority under Section 65. Equally the activities of the legal department must fall to be treated in the same way. That conclusion would, without more, dispose of the arguments in respect of the inclusion of FOI and legal department activities.

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

Definition of "work"

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

59. Further, as noted by the Commissioner in the Supplemental Submissions at paragraph 5, certain FOI bodies have no statutory functions. Section 6(1) defines FOI bodies as not merely entities established under an enactment but also those "*appointed by the Minister, Companies Act companies in which a Minister holds a majority of shares, subsidiaries of*

the latter and entities controlled by any of the above". Further, the Minister may prescribe entities as FOI bodies including those that are wholly or partly publicly funded. The definition advanced by the Appellants was not stated to be limited to local authorities or indeed FOI bodies that are conferred with statutory functions. It is difficult to see how the meaning of the word "work" could differ depending on the body in question. Yet if this is not being contended for by the Appellants, then the interpretation of "work" advanced could not be applied to many bodies subject to FOI.

60. A statutory body is of course limited by the principle of *intra vires* and must act within its statutory remit. However, work that is done by the FOI body in the course of carrying out its statutory functions but is not directly advancing those statutory functions, such as for example FOI or data protection or legal services, may legitimately be considered "work". These activities may be necessary to enable the body to perform its functions or to discharge statutory obligations.

61. For those reasons, I reject the Appellants' argument that the reference to "work" means work involved in the discharge of the statutory functions of the FOI body. I have considered whether the Long Title and the purpose of the 2014 Act impacts upon my interpretation. I do not believe so. The meaning contended for is manifestly at odds with the clear wording and intention of the Section. Section 15(1)(c) introduces a provision permitting FOI bodies to refuse requests where they unreasonably and substantially interfere/disrupt the work of the body. The purpose of the Act and Long Title cannot be relied upon to artificially narrow the ambit of the "work" in question where that is not warranted by the wording of the section.

62. In conclusion, I am of the view that any *intra vires* activities carried out by a body subject to FOI are "work" within the meaning of s.15(1)(c) and there are no excluded categories of work contrary to the argument made by the Appellants.

Activities of FOI and legal services departments

63. I have already addressed the activities of the FOI and legal departments of a body covered by FOI and found that their activities constitute ancillary functions within the meaning of the Local Government Act 2001, thus disposing of Mr. McGrath's argument in this respect. However, even if that were not the case, I would still take the view that their activities constitute "work" within the meaning of s.15(1)(c). In respect of FOI, activities aimed at ensuring either compliance with the duties of a body under the FOI Act or the fulfilment of functions conferred by the FOI Act constitute work that is undoubtedly *intra vires* the body in question. Indeed, that work may take up a significant amount of the time and resources of bodies subject to FOI.

64. Mr. McGrath asserted that there was a circularity in permitting a burden imposed by an FOI request to be a justification for not meeting that request due to its impact on the FOI Department. I interpret that argument as meaning that if a department or section is set up to carry out FOI work, then any time spent on an FOI request cannot be an interference or disruption of that work.

65. However, on reflection, that argument does not seem correct. The workload of an FOI department may be considerable and an overly burdensome request is likely to interfere with the ability of the FOI department to process other FOI requests. In this way, a request could indeed interfere or disrupt that work. Indeed, that was precisely the impact of the request on the FOI section contented for by DLRCC as set out in Ms. Swanwick's summary of their submission. Thus, the interpretation urged upon me by the Appellants' counsel could undermine the aim sought to be advanced by the Long Title to the Act by preventing an FOI department from advancing other FOI requests due to the burden of a given request.

66. Mr. McGrath further said that treating activities carried out by the FOI department as "work" for the purposes of s.15(1)(c) could incentivise deliberate under resourcing of an FOI body to make it more likely that a request would overburden it, thus permitting a body to evade its obligations under FOI. Mr. McGrath's argument rests on an assumption of bad faith on the part of bodies governed by FOI insofar as it assumes they seek to escape their obligations. Bearing in mind the obligations placed on bodies subject to FOI legislation under the Act and that statutory bodies are required to act *bona fide*, I do not think it is correct for me to assume that bodies subject to same are seeking to deliberately circumvent the Act. Accordingly I will disregard this argument.

Reasonableness

67. The Appellants assert that the word "substantial" in s.15(1)(c) refers to any considerations in respect of the volume and nature of records, the amount of time covered by the request, the onerous nature of the retrieval and examination. It follows that the word "unreasonable" must therefore have a distinct meaning, necessitating an examination of the resources of the entire organisation and a consideration of whether the request is unreasonable or disproportionate having regard to the level of resources in the FOI body. According to this argument, the reasonableness of a request must be considered exclusively from that standpoint. The Appellants assert there was no examination of unreasonableness by reference to this distinct meaning or indeed at all.

68. Finally, it is submitted that one must look at the reasonableness of the burden and not the reasonableness of the request and any attempts to narrow it or not. I accept that last point.

69. It is quite clear and agreed by all that, unlike in a discovery request, a head cannot evaluate the reasons for the request on one hand and the necessity for the record sought by reference to those reasons on the other, due to the statutory prohibition on considering the reason for the requests at s.13(4). That undoubtedly limits the nature of the inquiry in the unreasonableness sphere and conditions the interpretation of "unreasonable". But that limitation does not lead one to the interpretation of the word unreasonableness as advanced by the Appellants. There is no basis for limiting its meaning in the manner suggested. As with the word "work" in the Section, one must look at the natural and ordinary meaning of the word "unreasonableness". In my view the interpretation contended for by the Appellants is overly restrictive. It is undoubtedly the case that it might be appropriate in certain circumstances to look at the overall size of the

body and staff quotient and the impact of the request on the body overall. But this can only be one instance of the analysis that might be considered relevant when looking at "unreasonable", as opposed to the sole matter to be considered. Equally, in another situation, it might not be necessary to look at the impact of the request on the entire body but rather consider its impact on a particular functional area or areas only, as was done in the instant case. Indeed, as discussed above, this was the explicit purpose of the amendment in 2014 in introducing the words "(*including disruption of work in a particular functional area*)". There is no suggestion in the Section that that amendment was limited to considering only substantial interference/disruption with work but not unreasonable interference/disruption.

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

71. I am mindful of the guidelines laid down at p. 5 of the Guidance Note when identifying the factors that may be considered as to whether a request would cause a substantial and unreasonable interference/disruption. One of those factors is the size, staffing levels and work of the FOI body. Undoubtedly those factors may be considered. However, to treat them as mandatory and exhaustive is in my view an overly narrow construction of the word "unreasonable" in its statutory context. There are many other factors to be considered, including those identified in the Section itself, as identified in the previous paragraph of this Judgment.

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

73. Nor do I consider that interpreting "unreasonable" in the manner contended for is required by the obligation to ensure the widest possible amount of transparency as required by the Long Title to the Act. The Act has permitted an exception in cases of administrative burden. The accepted obligation to ensure maximum transparency does

not require an artificial construction of the section in a way not mandated by either the wording or the context.

74. Linked to this ground of argument was the ground that the Commissioner had failed to consider at all the question of the unreasonableness of the burden. I deal with the issue of evidence below and the alleged insufficiency of same. It is true that the Commissioner did not separate out unreasonableness from substantial when applying the test in s. 15(1)(c). However, the statutory test was recited in full in the Decision and in the concluding section on "Analysis and Findings", Mr. Rafferty identified that he "*accepted the Council's contention that processing of the request would cause a substantial and unreasonable interference with, and disruption of, its work, including disruption of work in a particular functional area*" (page 4) and found "*that the Council was justified in its decision to refuse the applicant's request for records under section 15(1)(c) of the FOI Act on the ground that processing the request would cause a substantial and unreasonable interference with or disruption of its work"*.

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

76. As I discuss in more detail below, in the Decision, the Commissioner described the core features of the request and discussed its impact upon the work of DLRCC. Certain features of the request were highlighted, including the temporal scope (being a request from 1998 to the date of the request with no temporal limitation i.e. a twenty year period), the number of hard and soft copy files potentially impacted by the request and the burden on staff that would be imposed by same. In the circumstances, the conclusion that such a request was capable of placing a substantial and unreasonable interference/disruption on the work of the FOI body is unsurprising.

77. It is true the Commissioner did not separate out the reasons the request was considered unreasonable from the reasons it was considered substantial. However, as Mr. McGrath pointed out, this is not a "reasons" case, i.e. a case where a decision falls to be challenged because of a lack of reasons. That is not part of the statutory appeal. Rather I am being asked to quash the Decision on the basis that it was made with no regard to the unreasonableness requirement. Where I have found that the Decision explicitly finds that there was unreasonable and substantial interference/disruption, and where there was evidence before the Commissioner sufficient to support a conclusion of unreasonable interference/disruption, including the fact that the request covered a twenty year period

and would have had a very significant burden on the work of DRLCC across six sections, including the FOI and legal services sections, I do not consider the Appellants have established that the Decision was made with no regard to the unreasonableness requirement.

78. In conclusion, for the reasons set out I am not satisfied that the Appellants have established that the Commissioner wrongly interpreted the term "unreasonable" or failed to apply the "unreasonableness" part of the statutory test.

Voluminous Requests

79. Ground (c) of the notice of motion asserts as follows:

> *"The respondent erred in law in that the appropriate legal test for the application of s.15(1)(c) of the 2014 Act was not applied in the making of the decision and that the test applied was based on the misunderstanding of law that, per the Decision, 's.15(1)(c)…essentially allows for the refusal of voluminous requests'.*

80. I do not consider this to be a good ground of appeal. In the Decision, under the "Background Section" at p.2 the words identified as problematic by the Appellants appear in the third paragraph as follows: "*While I noted in that decision that there may have been a significant volume of records coming within the scope of the request, I also noted that DLRCC had not chosen to refuse the request under s. 15(1)(c) which essentially allows for the refusal of voluminous requests".*

81. The Appellants says that the words in italics demonstrated a misunderstanding of the law to the effect that the Commissioner considered only the size and scale of the request (i.e. the part of the test that relates to "substantial") and not the reasonableness of same. I have already considered whether the Commissioner correctly interpreted the meaning of "unreasonable" and whether he applied that test and I have answered yes to both those questions. This ground of appeal is essentially a continuation of the argument that the unreasonableness aspect of the test was ignored by the Commissioner. In my view the impugned wording in the Decision is insufficient to found the basis for a conclusion that the Commissioner essentially treated s.15(1)(c) as justifying a refusal on the basis of the volume of the request without considering the requirement that the request also be an "unreasonable" interference/disruption.

82. The wording in the Decision is clearly intended to be a shorthand description of s.15(1)(c) and does not purport to be in any way exhaustive or comprehensive. The use of a form of shorthand to identify a section of the Act cannot be considered to be determinative of the Commissioner's interpretation of any given section. Rather, taking the Decision as a whole, including any material considered in arriving at the Decision, the question is whether the Commissioner applied the correct test and/or statute and applied all elements of the statute, including the reasonableness criteria. Decisions of the Commissioner should not be construed as if they were a statute. They should not be interpreted with such rigidity that a failure to refer to a statutory provision in anything but words that perfectly reflect the statutory requirements will result in the implication being

drawn that the Commissioner has not properly interpreted the statute. It is important that the application of FOI, including by the Commissioner, does not become the exclusive preserve of lawyers. That would limit its application and undermine its purpose. To treat a shorthand description of a section by the Commissioner in an FOI decision as conclusively indicating mis-interpretation of that section would tend towards such a result.

83. I should conclude by noting that the Guidance Note referred to above of August 2015 describes requests under s.15(1) (c) as follows: "*Guidance Note Freedom of Information Act 2014 Section 15(1)(c) – Voluminous Request*". In the Introduction section it states the note is a short commentary on the interpretation and application of s.15(1)(c) of the Act by the Commissioner, is intended to provide general guidance only and is not legally binding.

84. The Guidance Note is essentially, in my view, irrelevant in respect of this head of appeal. If the reference to "voluminous" in the Decision is problematic, then the fact that there is a Guidance Note using the same language does not save it. Equally, if the reference to "voluminous" in the Decision is not otherwise indicative of a lack of appreciation of the correct test, the presence of the same formula in the Guidance note does not alter the position.

85. Accordingly, it seems to me that I cannot conclude that the mere reference to "voluminous requests" as a way of referring to s.15(1)(c) must inevitably lead to the conclusion that the Commissioner misapplied himself in interpreting the Section.

Evidential basis for the Decision

86. Finally, the Appellants challenges the Decision on the basis that there was an insufficient evidential basis for same. In this respect, as identified by counsel for the Respondent, the onus on the Commissioner is to demonstrate that there was some material before it to justify its decision. In *Deely* (cited above) McKechnie J. observed that when a court is considering a point of law, whether by way of an appeal or case stated, it is confined as to its remit, as follows: *"(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings; (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw"* (p. 452).

87. Here, the Commissioner has identified the evidence before it in respect of the impact of the request and has either made primary findings in respect of such evidence or has drawn inferences from such facts. A court must not step into the shoes of the decision maker in evaluating the nature and quality of evidence. The decision of the Commissioner in this respect is entitled to a certain degree of deference from the High Court.

88. I have identified above the impact of the request according to the letter of refusal, and the further information provided by DLRCC in response to a request from the Commissioner and summarised by Ms. Swanwick in her email to the Appellants. In the Decision, reference is made to the 72 hard copy files of potential relevance. Further

reference is made to the uncovering of 9,261 emails of potential relevance. The 262 hours required to examine the various files and records are identified. 108 hours are to review the hard copy files involving six staff members, one from each of the sections identified in DLRCC's letter of refusal, being the Property Management Section, Road Design and Construction Section, the Water Services Section, the Finance Section and the legal services department. An additional 154 hours of manpower are allocated to the examination of the emails. The Decision notes that any relevant records would have to be examined to determine whether they might be subject to legal professional privilege. As per Ms. Swanwick's email, the Commission were aware that would necessitate outside assistance due to a lack of resources in the legal services department.

89. The Decision concludes that, having regard to DLRCC's explanation of the number of records concerned and the time and resources that would be required to retrieve and examine those records, its contention that processing the request would cause a substantial and unreasonable interference with, and disruption of, its work including that in a particular functional area is accepted.

90. There is undoubtedly evidence before the Commissioner to ground this conclusion. Interference is identified with the work of six departments, including the legal department and the FOI department. In respect of the FOI department, the limited resources of same are identified in material provided by DLRCC. The point is made that the section consists of three officials who work part time on FOI matters and the management time required for this request would seriously impact upon the ability of those officials to carry out their daily FOI tasks together with their additional duties not related to FOI. DLRCC also identified that the work involved would also fall to an individual from each of the various departments/sections that may hold relevant records.

91. Separately, there is an identification of the fact that the legal department would not able to cope with the review needed, in circumstances where Jackson Way had indicated that files relating to four separate sets of proceedings were of interest to it. Each set of legal proceedings had correspondence files and pleadings files.

92. Mr. McGrath said that if the work was to be contracted out for the purposes of considering legal privilege, then there should be no impact upon the legal services department in the FOI body. That requires me to assume that the retention of and liaising with an external legal provider would have no resource implications for the legal services department in DLRCC. That does not seem a sensible assumption to me.

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

findings made in the Decision. In the premises, there was an ample evidential basis for the Decision.

94. Accordingly, I do not consider this ground of appeal well founded.

Conclusion

95. For the reasons set out above, I refuse the relief sought by the Appellants and uphold the decision of the Commissioner.