

TECHNOLOGY

Supreme Court Rules that Public Bodies Must Justify Refusals to Disclose Exempted Records under the FOI Act

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On 25 September 2020, the Supreme Court ruled in two separate judgments that where a public body decides not to disclose certain records (on the basis of an exemption under the Freedom of Information Act 2014 (the “Act”)), the reasons for the decision must be fully explained, and the public body must be in a position to justify why the public interest is not better served by the release of the records.



Colin Rooney
Partner
+353 1 920 1194
colin.rooney@arthurcox.com



Ciara Anderson
Associate
+1 415 829 4247
Ciara.Anderson@arthurcox.com



Caoimhe Stafford
Associate
+353 1 920 1328
caoimhe.stafford@arthurcox.com

The Cases

The two cases involved similar sets of facts. Both cases involved applications for disclosure of certain records, which were opposed by the public bodies in question. In both situations, the Information Commissioner granted those applications, but had their decision reversed by the Court. The Information Commissioner is now required to carry out fresh reviews of the applications in view of the Supreme Court’s judgments.

In the Enet Case (Minister for Communications, Energy and Natural Resources v the Information Commissioner [2020] IESC 57 [59]), journalist Gavin Sheridan (and RTÉ) had sought a copy of a contract between the Department for Communications (“DfC”) and e-Nasc Éireann Teoranta to manage the State’s fibre-optic broadband network. In this case, the DfC’s refusal was based on two exemptions: commercial sensitivity and confidentiality. The DfC claimed it had a duty of confidence to the private interests of e-Nasc Éireann Teoranta, and that releasing the underlying contract would undermine the company’s ability to act on behalf of the State in a competitive environment.

In the UCC Case (University College Cork v the Information Commissioner [2020] IESC 57 [58]), RTÉ had sought details of a €100 million loan from the European Investment Bank (“EIB”) to University College Cork (“UCC”). UCC refused to disclose these records on the basis of

an exemption due to the commercial sensitivity of the information. UCC claimed that disclosing details of this loan could result in a financial loss to the EIB, and could compromise UCC’s ability to secure finance in future.

The Enet Decision

The Enet Case focused on the necessary justification of a decision to refuse disclosure (under section 22 of the Act), and the public interest “balancing test” (under sections 35 and 36 of the Act). Ms Justice Marie Baker concluded that the Information Commissioner was correct in stating that public bodies are required to justify a refusal to disclose their records (under sections 35(3) and 36(3) of the Act). However, she held that the Information Commissioner was incorrect in requiring evidence of “exceptional circumstances” to justify a lawful refusal to disclose, as this posed an “unduly high” bar on the public bodies. On the facts, Justice Baker dismissed the DfC’s claim that the records benefited from the confidentiality exemption. However, she held that information could be excluded if its disclosure would amount to a breach of a duty of confidence, as created by contract or statute, provided that the public interest override (in section 35(3)) did not apply to such information. The Court explained further that public bodies are precluded from generating confidentiality by their own actions, in the absence of a contractual or statutory basis.

The UCC Decision

The UCC Case revolved around the correct interpretation of the exemption from disclosure due to commercial sensitivity (under section 36.1(b) of the Act), and the trial judge's approach to the presumption of an unjustified refusal (under section 22.12(b) of the Act). The trial judge had followed the reasoning of the Court of Appeal in the Enet Case, concluding that if the disclosure of a record was the subject of a statutory

exemption, then no additional justification would be required. However, Ms Justice Marie Baker overturned this, and held that the Information Commissioner had been correct in requiring UCC to establish that the records were commercially sensitive, and that the public interest was not better served by disclosing them.

Conclusion

As we noted in our [briefing](#) on the Court of Appeal's decision in the Enet case,

the judgment represented a significant departure from the previous position in relation to the presumption in favour of disclosure as it applies to exempt records. In this regard, it is unsurprising that the Supreme Court has restored the original burden of proof. It is also encouraging that the Supreme Court has confirmed that public bodies need not demonstrate "exceptional circumstances" to justify the non-disclosure of commercially sensitive information.