

Record No: 2020 53 MCA

THE HIGH COURT  
BEFORE THE HONOURABLE MR JUSTICE CIAN FERRITER

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24 February 2022

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MAURICE D LANDERS

v.

THE INFORMATION COMMISSIONER

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Lay Litigant:

Mr M D Landers

Counsel for the Respondent:

Mr Browne, BL

Maurice D Landers v. The Information Commissioner  
24 February 2022

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1 REGISTRAR: Good morning, Judge.

2 JUDGE: Good morning, Suzanne.

3 REGISTRAR: Starting today at 11.56, owing to the matter of Maurice Landers, he  
4 is litigant in person v. The Information Commissioner.

5 MR BROWNE: Good morning.

6 JUDGE: Good morning, Mr Landers is it?

7 MR LANDERS: Yes, good morning, your honour.

8 JUDGE: And Mr Browne?

9 MR BROWNE: Good morning, Judge -- yes Judge, I'm instructed by the Legal  
10 Services Unit in office of the Ombudsman and the Information Commissioner.

11 JUDGE: Great, thank you. So, I think this is -- I just received the papers in this and  
12 I was having a very quick look at the issues arising. So, this is an appeal in respect  
13 of a decision of the Information Commissioner to -- is that right Mr Landers?

14 MR LANDERS: Yes, that's correct your honour.

15 JUDGE: And it's listed for a half a day, two hours, is that right?

16 MR LANDERS: It is your honour. I did request from Judge Meehan just in case I  
17 needed an extra 30 minutes or so, if that would be possible, just in case there were  
18 more questions --

19 JUDGE: Yes, well just in terms of -- we're under a lot of pressure --

20 MR LANDERS: I understand.

21 JUDGE: -- with the list today, so I am going to have to keep it to the two hours but,  
22 have you discussed a potential division of that time as between you?

23 MR LANDERS: Yes, I believe an hour I'll present and then Information  
24 Commissioner I believe said they'll have 40 minutes and then I'll have 20 minutes for  
25 a rebuttal.

26 JUDGE: Yes, okay. So, what we'll do then Mr Landers, you will have up until  
27 lunch time, up until 1 o'clock to --

28 MR LANDERS: Okay sir.

29 JUDGE: -- present your case. Can I ask you, Mr Landers, I've seen the books.  
30 There is a set of written submissions from Mr Browne's side. Do you have any  
31 written legal submissions in respect of your application?

32 MR LANDERS: Well, the Information Commissioner has photocopied my  
33 affidavits and included them in the book of pleadings.

34 JUDGE: Yes?

1 MR LANDERS: Now, I have my own separately I'm going to follow because I had  
2 some notes on mine too. But I can give you a copy of mine if you wish.

3 JUDGE: You don't have formal -- a written legal submissions document, that's  
4 normally directed as part of these hearings. You don't have -- you're relying on  
5 what's in your affidavit, is that right?

6 MR LANDERS: Yes, your honour, that is correct, yes.

7 JUDGE: Okay.

8 MR LANDERS: And I'll just -- verbally make my argument.

9 JUDGE: Yes, okay. And are you planning to refer to any case law, Mr Landers?

10 MR LANDERS: Well, perhaps as I progress I may. I don't have any extensive case  
11 law, but I may refer to a particular case. I may refer to the case law of the  
12 Information Commissioner also --

13 JUDGE: Yes.

14 MR LANDERS: May I just --

15 MR BROWNE: Yes, I can assist you, we share that booklet of authorities, Mr  
16 Landers, you can have that book so, you won't be caught by surprise --

17 JUDGE: Yes.

18 MR BROWNE: -- by anything I'm certainly relying upon -- all the cases I'm going  
19 to relying upon are referred to in my submissions.

20 JUDGE: Okay great.

21 MR LANDERS: My only question, your honour, before we proceed, is that I do ask  
22 that the book of authorities, the case law and the legal submissions that they not be  
23 admissible in Court. The reason I ask for that is because I received them at the end  
24 of January of this year. Firstly, I wasn't expecting them as lay litigant. And  
25 secondly, they were a week late, and I didn't have really have much time to respond.  
26 And I'm just -- in terms of court procedure, you know I have followed the court  
27 procedure correctly. I'm based in the US and I was able to still get all my documents  
28 into Court on time --

29 JUDGE: Yes?

30 MR LANDERS: -- and I was under the same constraints as the Information  
31 Commissioner and I wasn't late in of my filings. The Information Commissioner has  
32 been on two occasions late, so I ask that in respect of court procedure we not admit  
33 these particular legal submissions.

34 JUDGE: What do you have to say to that Mr Browne?

1 MR BROWNE: Judge, I'll have to object to that application because it's somewhat  
2 unusual to be objecting to legal submissions, the legal submissions having been filed.  
3 I understand they were a couple of days late, Judge, I do apologise to Mr Landers for  
4 that, but there certainly wasn't anything that could easily prejudiced and I don't think  
5 -- hopefully will be raised in affidavit today so, Judge, clearly if I can't make  
6 submissions I'm discommoded defending the case and it wasn't raised before today,  
7 Judge and I'd ask if the book of authorities and submissions be admitted.

8 JUDGE: No, Mr Landers what I'm going to do is I'm going to allow the submissions  
9 and the authorities in. Counsel has an obligation to help the Court with relevant  
10 authorities and the legal submissions in any event. So, whether he has the written  
11 document before the Court or not, he could stand up and read it out and you couldn't  
12 object. That's just the way the procedure goes --

13 MR LANDERS: I accept that your honour, I accept that.

14 JUDGE: And you do -- you have had a chance to consider them and I get the sense  
15 that you're well prepared for today's application.

16 MR LANDERS: Yes, your honour. May I just ask so that I may have some  
17 additional exhibits that I have not sent a copy to the Information Commissioner.  
18 They're only exhibits. They're not affidavits. So, I request that if I do have to refer  
19 to these exhibits that are not in the respondent's book of pleadings, that I be allowed  
20 admit those exhibits?

21 JUDGE: Yes, well look, what I want you to do Mr Landers is present your case.  
22 You've made the point you've already -- you've complied with all deadlines. It's  
23 important when it comes to evidence, whatever about legal submissions, that all of  
24 the evidence is properly before the Court and is closed in good time before the  
25 hearing. So, let's see how we get on Mr Landers --

26 MR LANDERS: Okay your honour.

27 JUDGE: -- but I'm not inclined to be allowing new evidence into the case during the  
28 course of the hearing. That's not what the purpose of all of the matter -- up to date  
29 has been but let's see how we get on with that.

30 MR LANDERS: Okay your honour. So ...

31 MR BROWNE: Judge, just before we go any further, I want to formally object to  
32 any new evidence being put in at this stage, yes.

33 JUDGE: Yes, okay. I appreciate that and we'll deal with that.

1 MR LANDERS: Well, I understand that. I believe it's a bit of double standard but  
2 nevertheless --

3 JUDGE: Yes.

4 MR LANDERS: -- I'll go ahead your honour.

5 JUDGE: We'll get on with the appeal yes.

6 MR LANDERS: Okay, your honour, let me get straight into this. Your honour, I'm  
7 unable to respond to the Information Commissioner's points of opposition and  
8 affidavit of Stephen Rafferty received on May 2nd 2020, with the benefit of legal  
9 guidance as I cannot find one solicitor or lawyer in Ireland including those who are  
10 meant to take cases against the State, who will take my case. Therefore, I have to  
11 represent myself, not out of choice, but rather out of necessity. I do include an  
12 exhibit 1(a), a sample, approximately over 400 emails that I sent to Irish solicitors  
13 back in 2014/15. Wherein I requested from them an expert opinion on my case. I  
14 received about 10 replies, none of which accepted my case. If this honourable Court  
15 wants all 1,000 I'll gladly provide them to this honourable Court.

16

17 Additionally as recent as the second part of last year, 2019, I made another request to  
18 some of the 10 Irish solicitors mentioned above, including those that according to  
19 transparency international Ireland are listed as solicitors who do take actions against  
20 the state. I requested an expert opinion for my case from them and none got back to  
21 me. That's part of exhibit 1, specifically exhibit 1(b). I also sent my request for  
22 assistance to Irish law organisations including repeatedly to the Bar Council and the  
23 Law Society of Ireland. I didn't receive a response from either.

24

25 So, your honour, my case today I am seeking an internal audit plan that was  
26 prepared by Price Waterhouse Coopers on behalf of the National Pensions Reserve  
27 Fund.

28 JUDGE: Yes.

29 MR LANDERS: I will refer to it as the NTMA going forward since the National  
30 Pensions Reserve Fund is no longer operational or it has changed its form. They will  
31 not give me this document. What's mind boggling to me, your honour, is that the  
32 Information Commissioner Ireland is against doing everything possible to get this  
33 document in its public interest role. Why wouldn't he just request this document in  
34 the normal course of business. His job is certainly not to protect the Price

1 Waterhouse Coopers and the Chartered Accountants Ireland of this world or any  
2 specific corporations or organisations.

3

4 So, any type of argument against getting this document is moot in my opinion. I  
5 believe there is no defence to not releasing this document if the Information  
6 Commissioner's defence is such that it puts the Irish government and two other  
7 organisations namely, Price Waterhouse Coopers and Chartered Accountants Ireland  
8 above the public interest then his defence is inappropriate. If his defence was  
9 because he was supporting the public interest then that's fine, but I believe it's not.

10

11 The Information Commissioner's role is a public interest role, not a point of law role.  
12 Anything that is in the public interest in the context of this case is the job of the  
13 Information Commissioner. And that is why he has significant powers. I will refer  
14 to these powers later on. The question therefore that needs to be asked here today  
15 and answered is, how is the Information Commissioner's defence in the public  
16 interest. If he was acting in the public interest, I believe he would not be putting up  
17 this defence. This question therefore has to be answered first before the Information  
18 Commissioner's defence is to be given any credibility as ultimately, if he wins this  
19 case, the only beneficiaries here will be Price Waterhouse Coopers, Chartered  
20 Accountants Ireland and certain members of the Irish government. I ask you, your  
21 honour, how is this in the public interest. The public is completely left out of the  
22 picture. How does the public benefit from this; I'm just asking for the release of a  
23 document, that's very pertinent to my case. Additionally, I believe if there is any  
24 case where a merits based appeal is applicable, it's in the case of the Information  
25 Commissioner and his public interest role, although I believe my responses is to the  
26 points of opposition and affidavit of Stephen Rafferty subscribe to an appeal on a  
27 point of law.

28

29 Your honour, over these years I've been trying to hold the Irish government  
30 accountable. It must be going on seven or eight years now. And I'm beginning to  
31 believe that my efforts over all these years to hold the Irish government accountable  
32 have been a senseless pursuit. A fool's errand, to try and change something that can  
33 never be changed. The oversight of institutions in Ireland seem to practise the very

1 opposite of what they were originally intended to practise when it comes to holding  
2 the Irish government accountable.

3  
4 Now, your honour, I've gone through some of -- I've gone through the legal  
5 submissions as best as I can and I've scanned through the case law. I didn't have  
6 much time. But, I do notice a pattern, it seems to be as if the Information  
7 Commissioner is doing everything possible to pigeonhole himself into not providing  
8 this document. And that's not the purpose of the statute your honour. For example,  
9 the Information Commissioner denies it was necessary for him to use his powers  
10 under section 45 of this case -- in this case. These are his significant powers, to  
11 quote the Information Commissioner, his significant powers. He also says during his  
12 legal submissions -- or should I say, his affidavit, that his powers do not extend to  
13 compelling third parties to provide documents that are relevant to a case. He also  
14 says that the right of access under the act is limited to documents held by public  
15 bodies. He also said that it is settled law that this is not generally the role of the  
16 Information Commissioner to search for records in this case. They're just four  
17 examples of where he's using the statute, the FOI 2014, to limit his ability to give  
18 this document even though he has significant powers and it's in the public interest,  
19 his particular role.

20  
21 So, your honour, just to finish on my introduction, I ask this honourable Court to  
22 consider not only the technical merits of my argument below, but to also equally  
23 consider and invoke the spirit of the law in this case, to compensate for my lack of  
24 the requisite legal knowledge and support necessary to fully defend my case. I'm just  
25 asking for the release of a document that's very pertinent to my case, that's easily  
26 accessible and is critical to getting to the bottom of this case. And either giving the  
27 public confidence in our oversight system if I am wrong, or if I'm right, justice for  
28 what I believe has been fraud and deception on the part of the Irish government and  
29 possibly others in this case.

30  
31 You know, your honour, this is a --I understand that I have to respond under a point  
32 of law. Well yes, it's a point of law, it's not a point of words. And you know point  
33 of law still has the word, "law" in it and, "law" means the spirit of the law. Words  
34 themselves are used to describe the spirit of the law and they oftentimes fall very



1 short. And, I just believe there's a lot of word games going on today when it comes  
2 to statutes and the implementation, the real spirit behind these statutes that are very  
3 important for the integrity of our justice system.

4  
5 Okay, your honour, I just want to move on to my notice of motion and the specific  
6 orders within. You see in my orders, your honour, in my first order that I'm directing  
7 the Information Commissioner to compel the release of the internal audit plan. I  
8 mentioned that earlier, the internal audit plan. Between price Waterhouse Coopers  
9 and the NTMA.

10 JUDGE: Yes.

11 MR LANDERS: Now, just very briefly, just to give you an idea of what's  
12 underlying my request. You may see in some of my affidavits, reference to a  
13 website, Failte32.org. Just to be clear Failte32.org is my own community website in  
14 the US. We set it up, we cofounded it back during the financial crisis to assist many  
15 of the Irish coming to the US on J1 visas and other visas, to help them find jobs your  
16 honour. So I'm just using that website since I have it up, to platform this particular  
17 case but it has nothing really got to do with the case.

18  
19 This case has got to do with investment groups I set up in the US. I set up about  
20 three different investment groups over the years and that was to bring inward  
21 investment and jobs to Ireland. Now, one of these particular investment groups is at  
22 the -- is what my case is about. It refers to that one particular investment group.  
23 And we had applied for government funding through a programme called Innovation  
24 Fund Ireland. It was co-managed by Enterprise Ireland and the National Pensions  
25 Reserve Fund. To cut a long story short, although I have written three reports over  
26 seven to eight years trying to investigate the matter, I allege that the funds were  
27 awarded from this programme, Innovation Fund Ireland by the National Pensions  
28 Reserve Fund, without following the correct tendering procedure and evaluation  
29 process.

30  
31 I made a second allegation that the National Pensions Reserve Fund in its annual  
32 reports and financial statements of 2010, misrepresented a transfer of funds from the  
33 National Pensions Reserve Fund to Innovation Fund Ireland as being an investment  
34 in a private entity under the national pensions reserve's private equity mandate. That

1 was my second allegation but it's linked into the first allegation, your honour.  
2 Anyhow, after a lot of back and forth trying to hold the particular agency  
3 accountable, I am now at a stage where I'm making a final attempt to get a document  
4 that, I believe, will at least corroborate the allegations I made in my reports. Okay,  
5 so your honour.

6

7 JUDGE: Yes.

8 MR LANDERS: The first order, an order directing the Information Commissioner to  
9 compel the release of this document. I'm going to firstly prove that it exists your  
10 honour, this audit plan. The Information Commissioner and the NTMA claim that it  
11 didn't exist. I'm going to prove that it does exist and the Information Commissioner  
12 knew it existed before he made his final decision, and the NTMA knew existed  
13 before they made their final decision. As regards my second order, your honour, the  
14 internal audit plan I believe is in the possession of price Waterhouse Coopers and  
15 Chartered Accountants Ireland, both organisations can provide this document. Yes, I  
16 did request the document from Price Waterhouse Coopers and Chartered  
17 Accountants Ireland and they refused it, on the basis that my allegations where  
18 outside the scope of their work with the NTMA.

19

20 So, effectively on the one hand, your honour, just to summarise the orders, you have  
21 the NTMA and the Information Commissioner, refusing the document because they  
22 stated it didn't exist. And on the other hand you have Price Waterhouse Coopers and  
23 Chartered Accountants Ireland claiming it exists but not providing it because it's  
24 outside the scope of their mandate. The third order, your honour, if this document is  
25 -- if I do -- if I am successful in getting this honourable Court to compel the  
26 Information Commissioner to provide this document, I would ask that a more serious  
27 procedure is taken as regards the verification of this document. I have very little  
28 trust that any document that would be provided at this stage may not be accurate and,  
29 I think, just a more serious enforcement approach be taken to ensure definitively that  
30 whatever document is provided, it is authentic.

31

32 And fourthly, your honour, I put in such further orders as this honourable Court may  
33 deem fit, well it may not be relevant, as I understand some of what I say may not be  
34 directly relevant but, I think during my investigation on this matter I did prove fraud

1 on the part of Chartered Accountants Ireland, in that they omitted material  
2 information from their final decision that was included in my earlier appeal. But  
3 anyhow, if that's something this honourable Court can address, well and good. Okay,  
4 so your honour, I said firstly my first order I would prove that this document exists.  
5 So, I'm going to refer you in the respondent's book of pleadings to page 2, that's my  
6 first affidavit -- sorry -- beginning Page 3. And within that there are a number of  
7 exhibits. And if you go to exhibit 3 your honour, I beg your pardon, exhibit C --  
8 JUDGE: What page is that do you know?

9 MR LANDERS: Exhibit C, yes your honour, I'll tell you now. On page 20 your  
10 honour.

11 JUDGE: Yes, thank you.

12 MR LANDERS: Exhibit C is part of my updated report, page 181 of my updated  
13 report. And you'll see on page 23 -- I beg your pardon page 22, a letter I received  
14 from Price Waterhouse Coopers where they referred to the engagement letter, which  
15 is the internal audit plan, which proves that it exists your honour. It exists. They  
16 have a copy of the internal audit turn. Additionally, your honour, if you go to page  
17 24 -- now let me see, page 24 yes, you will see a letter from Chartered Accountants  
18 Ireland and the 4th paragraph down, I quote: "The scope of the internal audit work  
19 undertaken by the member firms, the specific scope and the scope was agreed with  
20 and approved with the audit committee of the National Treasury Management  
21 Agency and the NPFR each year. The member firm provided us with a copy of the  
22 internal audit plan for the NPFR as presented to and subsequently agreed with the  
23 National Pensions Reserve Fund Commission and NTMA. And the matter  
24 complained appears to have been outside the scope of the internal audit work  
25 undertaken by the member firm ..." -- so, it exists your honour. The document  
26 exists. Price Waterhouse Coopers has referred to it and so has Chartered  
27 Accountants Ireland. Additionally, if you go to page 27 your honour?

28 JUDGE: Yes.

29 MR LANDERS: Well actually page 27 is the exhibit -- specifically page 30, this is  
30 a decision I received from Chartered Accountants Ireland. And you'll see under the  
31 heading, "decision and reasons", the second paragraph: "A query has been raised as  
32 to whether the audit plan provided to the executive by the member firm related to the  
33 correct period and in this regard I am satisfied ..." -- so, it exists your honour. This  
34 is an appeal I made and Chartered Accountants still referred specifically to the

1 correct period in this audit plan. Additionally if you go to page 39, your honour, the  
2 final decision by Chartered Accountants Ireland on my complaint, the conduct  
3 committee affirms the decision of the earlier appeal to the head professional conduct.  
4 They quote from the head of professional conduct and they affirm that decision. So,  
5 clearly the audit plan exists your honour. It exists. I just have to show now that the  
6 Information Commissioner knew it existed before he made his final decision. And I  
7 will do that your honour. Firstly, I will just go back to page 15, your honour, before  
8 I move forward?

9 JUDGE: Yes?

10 MR LANDERS: And let's see, in this exhibit your honour, this -- powers of the  
11 Information Commissioner -- I've taken this from the Information Commissioner's  
12 website. They've got rid of it now your honour, they updated their website and they  
13 removed this but to quote the Information Commissioner, he said: "The FOI Act of  
14 2014 provides the Information Commissioner with significant powers ..." --  
15 significant powers -- "... to allow him to carry out his function of reviewing the  
16 decisions of FOI bodies. If he considers a decision to be inadequate, he may under  
17 section 23, require that a new one be issued ..." Additionally, he says under section  
18 45 -- okay, I don't have to read this out but again he's referring to section 45 of the  
19 act: " Anyone who hinders the Commissioner in the performance of his review or  
20 investigative functions is guilty of an offence, in accordance with section 45 may  
21 have a fine imposed or be imprisoned for a term of not more than six months ..." --  
22 that's pretty serious.

23  
24 I may not have to, although I do show -- I believe I prove that section 45 allows the  
25 Information Commissioner to seek a relevant document from third parties. I may not  
26 have to refer to it, your honour, but I will refer to section 23, the inadequacy of the  
27 Information Commissioner's response. Okay, your honour, so having proved that the  
28 actual internal audit plan does exist, it is somewhere. I now want to prove, if you  
29 can bear with me here your honour, that the Information Commissioner was aware  
30 that it existed. And hence, the inadequacy of his decision. So, I refer you your  
31 honour, to page 256 --

32 JUDGE: Page 256?

33 MR LANDERS: Yes your honour. This is my application to the Information  
34 Commissioner your honour. You'll see in that application, I refer the Information

1 Commissioner to my updated reports and my final report, you'll see the attachment at  
2 the bottom. There's link in the middle to my updated report and an attachment at the  
3 end to my final report. This is part of my application. So, your honour, as I showed  
4 you earlier two pages over, page 259 or 260, on my update report I provided a copy  
5 of the Price Waterhouse Coopers's letter to me where it referred to the internal audit  
6 plan. So as you can see from my application, they received my update report  
7 document within which was reference to Price Waterhouse Cooper and the internal  
8 audit plan. So clearly, if the Information Commissioner reviewed my documents  
9 that I provided in my application, he would have seen this letter and he would have  
10 known that the internal audit plan exists, the engagement letter, it exists. Okay, your  
11 honour, in addition if I can refer you to exhibit 2 which is on page 180 --

12 JUDGE: 180?

13 MR LANDERS: Yes, your honour, 180.

14 JUDGE: Okay. Thank you.

15 MR LANDERS: This is the introduction of my final report. I had three reports, I  
16 had my first report, my update report and my final. I just referred to my update  
17 report and the engagement letter and internal audit plan mentioned within. In my  
18 final report, a copy of which the Information Commissioner was given in my  
19 application, and you will see on the second page of the introduction, page 182, I refer  
20 the reader to attachment one on the first page of my report. If you go to the next  
21 page, 183, this is attachment one. It's actually -- I've only two pages of the actual  
22 five page letter, it's a five page letter that I sent to the Taoiseach, Garda  
23 Commissioner and the DPP. On The second page, I refer specifically to the internal  
24 audit plan and I highlight -- you'll see it at the end of 184 your honour?

25 JUDGE: Yes.

26 MR LANDERS: The third last paragraph, I highlight Price Waterhouse Coopers's --  
27 well specifically, Price Waterhouse Cooper's ICA EW, I'm only going to refer to  
28 Price Waterhouse Coopers, Chartered Accountants Ireland and the NTMA, those  
29 three highlighted attachments. So, the first highlighted attachment is PWC, your  
30 honour, and that is on page 262, this exhibit shows you a communication between  
31 myself and Price Waterhouse Coopers. It begins if you turn over the page to 264, I  
32 ask: " Could you please provide me with a copy of the internal audit plan for the  
33 financial years ..." -- I follow it up on page 263 -- "Dear Kate, just to be clear when I  
34 state that ..." -- etc., etc. But down at the end I quote from a decision I received

1 from Chartered Accountants Ireland: "The scope of the internal audit work ... " -- I  
2 just read out that quote earlier -- "... the member firm provided us with a copy of the  
3 internal audit plan ..." -- etc., etc.

4

5 So, the Information Commissioner got that attachment, so not only did he see them  
6 in my update report, the engagement letter, the internal audit plan existed, he saw it  
7 in my final report referenced, at least a red flag, although it's not specific proof yet  
8 cause I'm just quoting from the email, I haven't shown you the email yet. He knows  
9 -- oh hold on a second here -- Chartered Accountants Ireland, they have -- they've  
10 said they have a copy of this plan. Why's the NTMA telling us we don't have this  
11 plan, it was prepared for the NTMA by Price Waterhouse Coopers. And why would  
12 Chartered Accountants Ireland have a copy of it and not the NTMA, so of course it  
13 exists. Okay, so I go back to exhibit 2, page 180 --

14 JUDGE: Mr Landers, isn't it the case -- you originally made an application to the  
15 NTMA, the National Pension Reserve Fund for the audit plan and they did give you  
16 originally some power point presentation; was it?

17 MR LANDERS: They did. And I will get to that, yes they did.

18 JUDGE: Yes.

19 MR LANDERS: They did, your honour.

20 JUDGE: And is the upshot of what they're saying that, well that was -- we made  
21 audit committee presentations, that consisted effectively of the audit plan. We don't  
22 have anything beyond that, is that not what they're ultimately saying?

23 MR LANDERS: No, your honour, they refer specifically to the audit, internal audit  
24 plan. They don't refer to presentations. Now, if the NTMA, when I made my FOI  
25 appeal to the NTMA, they could clearly state, sorry we didn't have an internal audit  
26 plan, we just had presentations, that's all. Well then clearly earlier, Chartered  
27 Accountants Ireland and Price Waterhouse Coopers would refer to it as presentation  
28 documents. They would not refer to it as an engagement letter. Power point  
29 presentations are not known as engagement letters and they're not known as internal  
30 audit plans. And if they are, we're in trouble because any Power point presentation  
31 out there now as part of a contract could be used in lieu of a contract and that's not  
32 something that we can -- okay, so I go back again to my exhibit 2 on page 180,  
33 where I have these links. I'll do the second link. I've already done the first link for

1 Price Waterhouse Coopers. Page 184 specifically. And now, I'll refer you to my  
2 communications with the NTMA. Okay, now that's on page 312 your honour.

3 JUDGE: 312, yes.

4 MR LANDERS: Yes, your honour. These are my communications with the NTMA.  
5 Now, if you go to page -- within this string of emails, if you go to page 318, 3-1-8.  
6 The first email on the top, June the 5th 2019, this was a request for the internal audit  
7 plan I made to the NTMA. I again, in this attachment that the Information  
8 Commissioner received --

9 JUDGE: Sorry, I just to make sure I have the right -- you mentioned June 2015?

10 MR LANDERS: Sorry, June 5th 2019, I beg your pardon, your honour.

11 JUDGE: And what page is that on?

12 MR LANDERS: That's on page 318, 3-1-8 your honour.

13 JUDGE: Oh 318, sorry I was on 316.

14 MR LANDERS: Yes your honour, I apologise.

15 JUDGE: Yes, okay, thank you. Yes, I have that, thank you.

16 MR LANDERS: Okay your honour, so right there in that email also, as I showed  
17 you the Price Waterhouse Coopers communications, I refer to the same decision by  
18 Chartered Accountants Ireland and the end of that email, the scope of the internal  
19 audit work undertaken by the member firm was specific. So, that's the second time  
20 now the Information Commissioner saw reference to the audit plan. He's seen it in  
21 my up -- well the 3rd, he's seen it in my update report, he's seen the actual Price  
22 Waterhouse Coopers Letter. He's seen in the first attachments on my final report, the  
23 same quote, the Chartered Accountants of Ireland. And again, he sees it here. The  
24 same quote of Chartered Accountants Ireland. So, at this stage, the Information  
25 Commissioner is saying to himself, I can't say this plan doesn't exist, of course it  
26 exists. But he may want further proof of my quote, just in case I might've forged it  
27 or something your honour. So, therefore the third, if I send you back to 180 again  
28 your honour --

29 JUDGE: Yes?

30 MR LANDERS: And again back -- I beg your pardon, 184 specifically. And I refer  
31 you to the third link, ICAI, Chartered Accountants Ireland, highlighted in bold.  
32 That's actually just the page next to it is that attachment. When you click on that  
33 ICAI, this is what you get on page 185. And there is the actual same quote that I've  
34 quoted on two occasions right there in the email from Chartered Accountants Ireland.

- 1 Derek D from Chartered Accountants Ireland replied to an email of mine and he  
2 said: "The member firm provided with a copy of the internal audit plan for the  
3 NTMA as presented to and subsequently agreed with the National Pensions Reserved  
4 Fund Commission and the matter appears to be outside the scope ..." So, the  
5 Information Commissioner got those three links in my final report that he was  
6 directed to and he saw right there an email from Chartered Accountants Ireland  
7 mentioning the internal audit plan and he saw that Price Waterhouse Coopers also  
8 specifically referred to the engagement letter. There is no way he could have, in any  
9 way, affirmed the decision by the NTMA. It was completely inadequate the  
10 Information Commissioner's decision. Your honour, how am I on time, it's 12.30?  
11 JUDGE: You've another half an hour, yes.  
12 MR LANDERS: Okay.  
13 JUDGE: Sorry, so your key point really so far anyway, so long as I'm understanding  
14 you right is that you say the Information Commissioner effectively erred  
15 fundamentally in ruling on your appeal that the NTMA was correct to say that it  
16 didn't have any internal audit plans, in circumstances where you say evidence exists  
17 which should've been known to Information Commissioner that there was in fact an  
18 internal audit plan. That's the nub of your point; isn't it?  
19 MR LANDERS: Yes, your honour. And erred, I would add maybe a few other  
20 adjectives, but erred at the very least, your honour.  
21 JUDGE: Yes, okay.  
22 MR LANDERS: Now, I can also continue to show that the NTMA knew that the  
23 plan existed before it's decision but I don't know if that's necessary in the Court. It's  
24 really about the Information Commissioner. But if you want me to show you that the  
25 NTMA knew about the existence of this plan before it made the decision that it didn't  
26 exist, I can run through that too your honour. Okay, I'll refer you to again, to page --  
27 JUDGE: You probably need only do that briefly but I'm going to let you do that  
28 certainly, Mr Landers, yes.  
29 MR LANDERS: Well effectively the same thing applies here your honour. If you  
30 go to exhibit 21 on page 303 your honour.  
31 JUDGE: 303, yes?  
32 MR LANDERS: And specifically, oh let me see now, is that the right -- exhibit 21 --  
33 yes. This was my communication, although the photocopying has been cut off --  
34 JUDGE: Yes, but we get the gist of it now yes.



1 MR LANDERS: But effectively I'll read to you here, your honour, very quickly --

2 JUDGE: So, which -- are you on 304; is it or 305?

3 MR LANDERS: I beg your pardon, your honour?

4 JUDGE: What page number are you -- 303 is the start of the exhibit but which page  
5 would the letter --

6 MR LANDERS: I'll go to 304 first and foremost.

7 JUDGE: 304?

8 MR LANDERS: Yes, because this applies here. I said: "Dear Orla, I'd like to  
9 appeal the decision, request a review ... " -- this was of the internal -- in other words  
10 they had -- at this stage they had provided me with the presentations and I said I'd  
11 like to request a review and I request the copy of the internal audit plan -- "... it is  
12 not acceptable that you would tell me that ..." -- to quote -- "... searches were  
13 conducted and the only records located were three audit plan presentations which  
14 were released you in full in the email dated September 2019 ... " -- I said -- "...  
15 okay, you are not being truthful and nobody will believe that you don't have a copy  
16 ... " -- okay, and I'm being a bit opinionated. And then attaches my final report.

17

18 So, I also attach my final report before the NTMA made their decision as part of my  
19 application. And again, therefore, I can say ditto to the same argument I just made  
20 about the Information Commissioner, he got the exact same attachments and  
21 therefore they were quite aware of the quotations -- or the reference I made to  
22 Chartered Accountants Ireland and Price Waterhouse Coopers. So, your honour to  
23 summarise here, I believe under section 23, the Information Commissioner's decision  
24 was completely inadequate.

25 JUDGE: Yes?

26 MR LANDERS: He knew it existed. The NTMA knew it existed. In fact, the  
27 Information Commissioner, I believe, knew that the NTMA knew it existed. But  
28 that's not necessary here. I'll just take the NTMA, putting aside what I believe is a  
29 troubling decision by the Information Commissioner, that he would see that a  
30 document exists and yet he would affirm a decision that it didn't exist --that's  
31 troubling to me. But putting that aside, just focusing on the NTMA, the Information  
32 Commissioner could've gone back to the NTMA and ask for a new decision. He's  
33 allowed do that. You can call it compelling but he's allowed go back, he did it  
34 already with one of my appeals. If you go back -- if you go back to page 294?

1 JUDGE: Yes.

2 MR LANDERS: He says here, again it's cut off, but: "The Information  
3 Commissioner has accepted your application solely on the basis of a non-reply by the  
4 NTMA. This office has asked the NTMA to forward a copy of that letter to this  
5 office ..." -- so, he can go back to the NTMA, he's the Information Commissioner of  
6 course, he's the highest level FOI unit. He's above all the lower level units. He's  
7 there to verify the accuracy of these lower level units for lack of a better word. He's  
8 the Information Commissioner, he's got significant powers and he can use them  
9 anyway he wants in the public interest. He's not there to use them against the public  
10 interest. It's almost like a glass half full, glass half empty scenario for lack of a better  
11 analogy. He's using the glass half empty analogy instead of glass half full. You  
12 have to err on the side of the public interest. In fact your honour, in my documents,  
13 just to quickly refer you to page --to exhibit, "O", page 400.

14 JUDGE: Page 400, Yes?

15 MR LANDERS: If you go specifically again on page 402, that's a copy -- I copied  
16 and paste from the information commissioner's website, his powers, before he took it  
17 down and removed his evidence. But additionally, if you move on to the next page,  
18 page 405: "Roles, functions and powers ..." -- again this was copied and pasted into  
19 my Gmail in 2016. The reason I copied and pasted it was I knew the chance of it  
20 being deleted from the website once I published it so I copied and pasted it. And it  
21 says under, "roles, functions and powers ..." -- there's a number of them there -- "...  
22 the main functions of the Commissioner can be summarised as ..." -- and if you go  
23 to point 3, it says: "Fostering of an attitude of openness among FOI bodies by  
24 encouraging the voluntary publication of information above and beyond the  
25 minimum requirements of the act ..." So, not only is role significant -- or are his  
26 powers significant, and his role is in the public interest, he should go above and  
27 beyond his public interest role. Not pigeonhole himself hiding behind statutes, oh  
28 we don't have to give you that because of this statute, this section, this section, this  
29 section -- I don't have to give because ... you're meant to use the sections in the  
30 public interest.

31

32 At most your honour, just getting back to my point here, at most the Information  
33 Commissioner could've claimed under section 15(1)(a), he could only have chosen  
34 the option of cannot be found. He could not have chosen the do not exist option. It

1 either exists, or it doesn't exist, there's no it exists here but it doesn't exist here. If it  
2 exists here, that means it cannot be found here. Playing semantics and word games  
3 is not how the statute should be treated. So, at most he could have said, no well the  
4 NTMA should've said it cannot be found, you can't say it doesn't exist and had gone  
5 back to the NTMA to tell them to change their decision. He could have told the  
6 NTMA, just like he told them before in an earlier -- I just demonstrated in an earlier  
7 appeal I made -- he could've told the NTMA to get a copy from Price Waterhouse  
8 Coopers and Chartered Accountants Ireland. I mean the NTMA doesn't operate in a  
9 bubble, in isolation. It operates -- it's got service providers like Price Waterhouse  
10 Coopers, it's a member of Chartered Accountants Ireland, I'm sure in good standing.

11  
12 And this document in particular, your honour, it's not a third party document in the  
13 sense of it's being a different type of document. All I'm looking for is a copy of a  
14 document that the NTMA asked the Price Waterhouse Coopers to prepare for it, its  
15 internal audit plan. So this is just a copy I'm asking for. He could have just called up  
16 Price Waterhouse Coopers and said, listen guys, we can't find --we've only got the  
17 presentations here. We can't find the actual internal audit plan, you must have done  
18 it for us. I can see on Maurice Landers's website that there is an engagement letter,  
19 will you just send it to me and we will send it on to Maurice Landers. He could have  
20 gone to Chartered Accountants Ireland, I'm sure they're a big member firm, they're a  
21 big client of Chartered Accountants Ireland and say, hey guys, you've got a copy of  
22 that plan that we should have. Obviously if you have it, it must have been given to  
23 us cause Price Waterhouse Coopers wasn't charged with preparing it for you, it was  
24 for us, so you must have got it off of us or off Price Waterhouse Coopers. Give it to  
25 us, we can give it to Maurice Landers. And then the Information Commissioner can  
26 in his public interest role give it to me.

27  
28 So while I do argue that he can use his significant powers under section 45, I do  
29 argue that in my case, in this case I don't even think I have to refer to them to be  
30 honest with you, your honour, I think under section 23 it's clear, his decision was  
31 completely inadequate. Personally, just aside, I think whenever a section like section  
32 15(1)(a) is being used by any FOI unit, I think it's incumbent upon the Information  
33 Commissioner to use his significant powers, because then it's open to abuse.  
34 Everybody, every FOI unit could become compromised if companies knew that they

1 could just use section 15(a) not to give a document and they're open to compromise.  
2 So I think in this case, the Information Commissioner says, oh whoa whoa, they're  
3 using section 15(1)(a); all right, if they're using that section we've got to verify. We  
4 trust but we've got to verify. All the Information Commissioner did in this case  
5 which I'll show you further on, is he trusted. He didn't verify. That's his job, he's to  
6 verify. He's the highest level, Information Commissioner, that's why he has these  
7 significant powers.

8  
9 So I think it's serious subsequent procedure should be implemented by the  
10 Information Commissioner whenever this option is used or else it'll be abused. I'll  
11 give you some examples, just very briefly to diverge, to digress a little bit. The  
12 Department Of Jobs, Enterprise And Innovation back in I believe 2016, refused a  
13 document to me on the basis of section 15(1)(a), the same one that the Information  
14 Commissioner is using.

15  
16 When I appealed it to the Information Commissioner, he also refused it under section  
17 15(1)(a). In actual fact, he refused the Enterprise Ireland decision also under  
18 15(1)(a). That's three cases where 15(1)(a) was used in one case. And now in my  
19 case here, this particular case today, I have two further cases where the NTMA  
20 refused it on 15(1)(a) and the OSC. So, that's five cases in my case where they've  
21 used section 15(1)(a). That's a lot for one case. And they never verified, they just  
22 accepted it was given to them by the lower FOI unit. I'm just giving an example  
23 here. Additionally, there are some other things that you pick up when you are doing  
24 these types of investigations. You know, as I mentioned earlier, Chartered  
25 Accountants Ireland omitted material information from their final decision that they  
26 had included in my earlier appeal. Likewise, when I appealed to the NTMA,  
27 originally back in 2015, over another matter, they also left out the first line of my  
28 appeal. They deleted it, and they just took a certain section. This is just aside. But  
29 these are just sort of maybe possibly tricks of the trade, I don't know. But certainly  
30 they do raise a red flag of the possibility of a pattern of abuse of this particular  
31 section. Anyhow your honour, what I'm going to do now --

32 JUDGE: Okay, so in terms of -- is there anything else that you want to say as  
33 regards the particular facts of this case Mr Landers?

1 MR LANDERS: Yes, I'm getting back to that now, your honour. If I could refer  
2 you to page 4 -- let's see -- page 422, your honour?

3 JUDGE: 422?

4 MR LANDERS: Yes your honour.

5 JUDGE: Yes?

6 MR LANDERS: Now, if you read there on no. 5, this is the -- just quickly -- this is  
7 the submission. Those three pages from 419 to 422 -- this is the submission that the  
8 NTMA gave to the Information Commissioner when the Information Commissioner  
9 asked about my case. They gave -- they answered -- they were asked six questions  
10 and they answered them in three pages. This is it. This is their evidence. This is  
11 their submission. They just wrote down, we did this, we searched here, we searched  
12 here and the Information Commissioner said oh that's great, that's great evidence,  
13 thank you. We affirm your decision. No evidence. Anybody could've written that  
14 down.

15

16 But anyhow, specifically on point five, the response the NTMA gave, the second  
17 line: "As mentioned at no. 4 above, the NTMA's understanding is that Price  
18 Waterhouse Coopers did not submit final or formal audit plans once the audit plan  
19 presentation was agreed at audit committee level ..." That definitively means that it  
20 did not exist. Not that it existed somewhere else. That says it does not exist,  
21 because it can't exist somewhere else if their belief is that they did not submit final or  
22 formal. But we know it does exist. Now I'll also refer you to page 439 -- you can  
23 stay -- I'm going to reference 422 and 439. These were the legal submissions from  
24 the Information Commissioner. And if you go to point 57, your honour --

25 JUDGE: Sorry, just give me the page reference again, 4 --

26 MR LANDERS: Yes, 439.

27 JUDGE: -- 39, yes, thank you.

28 MR LANDERS: Yes, so I'm cross referencing 439 with 422.

29 JUDGE: Yes?

30 MR LANDERS: And right here, the Information Commissioner says thirdly -- the  
31 Information Commissioner -- the Commissioner's decision was not that the  
32 document never existed or is not held by some other party. That's wrong. That's  
33 totally untruthful, because right there in the submissions that the NTMA gave the  
34 Information Commissioner, the NTMA states clearly they did not submit final or

1 formal audit plans once the presentation was agreed at audit level and yet the  
2 Information Commissioner says the decision was not that the document never  
3 existed. Yes, it was. It was that it never existed because you're affirming those  
4 submission answers. He says: "@hile the decision affirm the NTMA decision ..." --  
5 now this is where wordplay really comes into play -- "... while the decision affirm  
6 that the NTMA decision that the particular records could not be found or do not exist  
7 ..." Wrong, keep out the, "cannot be found", you didn't that option, you just choose,  
8 "do not exist". This was in the context of the request made to the NTMA. Now  
9 that's semantics if I ever heard it. This is having your cake and eating it too, your  
10 honour. So, basically, what he's saying is, I know it is exists but I'm agreeing with  
11 the NTMA that it doesn't exist, because that's what they told us in their submission. I  
12 mean that's a complete abuse of the law. Anyhow, on the next page --

13 JUDGE: Yes?

14 MR LANDERS: I've --

15 JUDGE: You've 10 minutes or so to go now Mr Landers, just so you know that.

16 MR LANDERS: Okay, your honour, I'll speed it up. Okay. I made my point on  
17 that.

18 Your honour --

19 JUDGE: Yes?

20 MR LANDERS: -- based on what I've demonstrated so far that the audit plan exists,  
21 the Information Commissioner knew it existed before he made his final decision and  
22 that he contradicted himself in section -- or point -- 57 of his legal submissions. This  
23 flies in the face of fundamental reason and common sense at the very least. It flies in  
24 the face of fundamental reason and common sense. In fact, I'd add irrationality to it  
25 to be soft on the Information Commissioner, I'd add irrationality. How anybody in  
26 the Information Commissioner's position with his significant powers and his  
27 important role, critical role in the public interest, that he could affirm a decision by  
28 the NTMA that it didn't exist when it did exist and he knew it existed and that he  
29 accepted three pages of submissions from the NTMA, nothing else. You can see my  
30 documents here your honour, while they're not overly voluminous, they're certainly  
31 more than three pages of evidence than the NTMA. And even me as a novice, I'm  
32 not a legal person. I can see the holes in this. Now your honour, I could -- I will  
33 hold off the rebuttal part for the 20 minutes I believe I have at the end --

34 JUDGE: Yes, you have at the end, yes.

1 MR LANDERS: -- but I do have one point to make here further on my second  
2 notice of motion, your honour, which I'd better to refer to here --

3 JUDGE: What's your second notice of motion?

4 MR LANDERS: My second one, your honour, is where Price Waterhouse Coopers  
5 and Chartered Accountants Ireland --

6 JUDGE: Oh the second order, you seek, is it on your motion, yes?

7 MR LANDERS: I beg your pardon, yes. The second order, your honour. As  
8 regards the second order --

9 JUDGE: Well, you've taken me to the material that you say demonstrates that it's in  
10 their possession?

11 MR LANDERS: I beg your pardon, your honour?

12 JUDGE: Your second order is that the internal audit plan is in the possession of  
13 PWC and CAI?

14 MR LANDERS: Yes that's correct.

15 JUDGE: And have you already taken me to the documents you say demonstrate that  
16 you say they have the audit plans?

17 MR LANDERS: Well, what I want to demonstrate with my second order, I know  
18 they have the documents. They've admitted that. But what I want to demonstrate,  
19 your honour, is that they claimed it was outside the scope. Now --

20 JUDGE: Well, we have to be very careful here now Mr Landers --

21 MR LANDERS: Okay.

22 JUDGE: That is -- you made a complaint to Chartered Accountants Ireland and  
23 Chartered Accountants Ireland ruled that it was outside the scope of their rules.  
24 That's nothing to do with what's before the Court today?

25 MR LANDERS: Well they -- yes -- well they ruled that it was outside the scope of  
26 my request for an investigation --

27 JUDGE: Yes?

28 MR LANDERS: Based on the documents I provided them.

29 JUDGE: And that's not a freedom of information act matter. That's --

30 MR LANDERS: Oh I see.

31 JUDGE: You were invoking the mechanisms available for complaints to the  
32 Chartered Accountants Ireland under their disciplinary procedures --

33 MR LANDERS: Okay.

1 JUDGE: -- and that's not a matter that I can get into because it's not before the  
2 Court.

3 MR LANDERS: I understand.

4 JUDGE: Well what I did your honour was, I went to -- perhaps this will be relevant  
5 on page 322 your honour --

6 JUDGE: 322 yes?

7 MR LANDERS: This is my second affidavit, supplementary affidavit. And your  
8 honour, if you go to 355 within that exhibit, 355 is the presentation. One of the  
9 presentations they gave me in lieu of the audit plan. This was 2010, the --

10 JUDGE: Yes?

11 MR LANDERS: -- year relevant to my case. Now I looked through this, this  
12 document was also provided to the Information Commissioner. I provided it to him  
13 in my final plan. He received the final plan, as I mentioned earlier, your honour. So,  
14 he received this presentation and I referred to specifically my final plan and I said,  
15 instead of the internal audit plan, I said: "The NTMA provided me with  
16 presentations ..." -- I was confused as to what these were. So what I did your honour  
17 was, I said well, I went through this myself, I did my own analysis. And I came to  
18 the conclusion after my analysis that there is no way anybody could conclude that  
19 the internal audit plan was outside the scope of the allegations I made. So had the  
20 Information Commissioner looked at this plan, done his verification, looked at my  
21 application properly. He would have gone through this audit plan presentation at the  
22 very least since he believed it didn't exist. He'd look at this.

23

24 And there's no way rationally or reasonably you could conclude that while it's not  
25 definitive proof that it's outside the scope -- it's within the scope, I beg your pardon,  
26 of Price Waterhouse Coopers's internal audit plan. You can certainly conclude from  
27 it, that their internal audit work was certainly within the scope of my allegations.  
28 And I did do an analysis on it, your honour, if you go to page --well specifically it  
29 begins at 378 -- well actually I refer you to 377, very quickly your honour. And I  
30 will just read from here, I -- this was an analysis I did for a different body but it still  
31 applies to the analysis. It's the actual analysis of the internal audit plan presentation  
32 and it proves that it was not outside of the scope of Price Waterhouse Coopers  
33 internal audit. It was well within their internal audit scope and therefore, they



1 should've investigated this matter or my complaints as opposed to claiming it was  
2 outside the scope --

3 JUDGE: That's not a matter before me now, Mr Landers, I think we just need to  
4 keep focused on -- you've an appeal before me and the net issue --

5 MR LANDERS: Okay.

6 JUDGE: -- you say, there's an error of law. You contend it was irrational of the  
7 Information Commissioner to have refused to allow your appeal against the final  
8 review by the NTMA. That's the only issue in front me. We're not here to discuss  
9 whether or not you've got a basis to complain that the Chartered Accountants Ireland  
10 should have ruled your complaint to them --

11 MR LANDERS: I fully understand.

12 JUDGE: -- was within scope, so I can't let you get into that.

13 MR LANDERS: Okay, your honour, I just thought since I had given the Information  
14 Commissioner this presentation plan and he had seen that, they had claimed it was  
15 outside the scope, at least him in his own analysis would say, hold on a second, this  
16 presentation is not outside the scope as they have claimed in their letters. So, I was  
17 just trying to prove my analysis that indeed that was the case.

18 JUDGE: Yes, okay. Well look I think I have your --

19 MR LANDERS: Okay your honour.

20 JUDGE: -- case fairly clearly, Mr Landers. In fairness, you've been clear in relation  
21 to it. Is there anything final you want to say -- you will have a --

22 MR LANDERS: A rebuttal, yes.

23 JUDGE: -- minutes to reply in any event, but ...

24 MR LANDERS: No, I will wait for the rebuttal, your honour --

25 JUDGE: Yes?

26 MR LANDERS: -- and I'll finish my case.

27 JUDGE: Okay.

28 MR LANDERS: But I've got the main part of it completed.

29 JUDGE: Yes, yes, okay. Thank you very much.

30 MR LANDERS: Thank you your honour.

31 JUDGE: It is one to one, but if you wanted to briefly start Mr Browne, I'm just --  
32 I'm conscious of -- I'm happy for you to do that -- or would you prefer to wait until 2  
33 o'clock?

34 MR BROWNE: I don't mind waiting but I'm happy to make a couple of extra ...

1 JUDGE: Yes, if you want to do that, perhaps to use the five minutes we have and  
2 then just to be -- because there are other matters which are backing up in the list as  
3 well so...

4 MR BROWNE: Of course Judge. May it please the Court, Judge, what I propose to  
5 do Judge, with the couple of minutes available to me, it just according to the  
6 jurisdiction of the Court --

7 JUDGE: Yes?

8 MR BROWNE: -- and the Information Commissioner. As the Court will be aware  
9 the Information Commissioner has breached its statutory powers and everything  
10 combined from the 2014 acts and the appeal before the Court, it is an appeal on a  
11 point of law and I have authorities, Judge, a book of authorities which the Court  
12 might be familiar with such as David Sheehy. I will go through it very briefly, Judge  
13 --

14 JUDGE: Yes, I'd be broadly familiar with the terms --

15 MR BROWNE: I think the Court knows -- just the jurisdiction in terms of an appeal  
16 on a point of law. So, that that ... Judge, will obviously arise under section 24 of the  
17 act --

18 JUDGE: Yes?

19 MR BROWNE: And that's at page 34 of the booklet of authorities and any party  
20 may appeal to the High Court on a point of law upon those decisions. So, there is  
21 obviously, there are decisions, Judge, which have discussed what's does that mean in  
22 terms of a point of law from their decisions so ...

23 JUDGE: And the decision in question here -- you can sit down Mr Landers now  
24 while Mr Browne is -- the decision issue here is a decision under section 23.1(a), is  
25 that right?

26 MR BROWNE: I think that's a decision -- well I think Mr Landers refers to that --  
27 that's a request for further information by the Commissioner --

28 JUDGE: Sorry, I just know -- pursuant to what section did the ...?

29 MR BROWNE: Section 22 I would've thought, Judge.

30 MR LANDERS: No, section 23, I referred to in the significant powers, your honour.

31 JUDGE: Mr Landers, you'll get a chance to reply now --

32 MR BROWNE: Yes.

33 MR LANDERS: Oh sorry.

34 JUDGE: -- Mr Browne just gets to speak now at the moment.

1 MR BROWNE: Section 22, Judge, I think is the provision --

2 JUDGE: Is the provision that --

3 MR BROWNE: That's the general power when the Commissioner obviously  
4 reviews --

5 JUDGE: And here it was reviewed, so Mr Landers makes an application to the  
6 NTMA, so the National Pension Reserve Fund, that's dealt with internally and he's  
7 given power point presentations but told there's nothing more.

8 MR BROWNE: Yes.

9 JUDGE: He appeals that internally within the NTMA and they uphold that decision.  
10 And then it that's decision -- is appealed to the Information Commissioner?

11 MR BROWNE: Yes, I think the chronology, Judge, there was deemed a refusal so  
12 he had to have sought a review. There was crossover between the response by the  
13 NTMA but I think he had lodged an appeal. I'm going to check that Judge. I think  
14 he had lodged an appeal with the Commissioner but in effect, that's what happened.  
15 It was just that you make your request to the public body, there's an internal review  
16 process and it's actually then appealed to the Information Commissioner, under  
17 section 22, which is the general jurisdiction, Judge. So --

18 JUDGE: Okay, but are we dealing with the general jurisdiction here?

19 MR BROWNE: We are Judge, yes.

20 JUDGE: Yes okay, yes.

21 MR BROWNE: Under section 22 so I think -- and the Court will see section 22(2)  
22 is: "The Commissioner may on application by relevant person, (a) review the  
23 decision to which section applies and (b), following the review --

24 JUDGE: Yes?

25 MR BROWNE: -- that it may either affirm or vary a decision, or uphold the decision  
26 as appropriate in accordance with the act ... " -- so, I think that's the jurisdiction --

27 JUDGE: Okay, okay.

28 MR BROWNE: I think what the Commissioner is doing is looking at the decision,  
29 made by the NTMA in this particular case and then affirming that, Judge, and really  
30 what the essence of the case boils down to is section 15(1)(a) which Mr Landers had  
31 referred to and if I could just very, very briefly --

32 JUDGE: Yes, sure?

33 MR BROWNE: -- point you to that. It is the, so the gravel in the case is in effect  
34 where the request was refused, because the record doesn't exist or cannot be found

1 after all reasonable steps have been ascertained where best ... And that's on page 28,  
2 Judge, of the book of authorities.

3 JUDGE: Yes?

4 MR BROWNE: So, what the Commissioner is doing, is said to be reviewing that  
5 decision and to see does section 15(1)(a), whether the NTMA was correct to decide  
6 on the face of evidence before the Commissioner that the record --

7 JUDGE: And of the Commissioner's review, is that just a de novo review, where the  
8 Commissioner is reviewing the FOI body's decision to refuse?

9 MR BROWNE: I think it is, Judge. Yes it is Judge. But what happens here then is  
10 obviously the Commissioner asks, in this particular case, the NTMA to make a  
11 submission to it.

12 JUDGE: Yes?

13 MR BROWNE: He'll ask a series of questions, the NTMA responds to the questions  
14 --

15 JUDGE: Yes.

16 MR BROWNE: The NTMA responds to the questions. They basically respond is --

17 JUDGE: Yes, and Mr Landers opened question 5 of that, is that document; is it?

18 MR BROWNE: Yes --

19 JUDGE: Okay.

20 MR BROWNE: But there's -- I think it goes into a little bit more detail, Judge,  
21 because there was a series of --

22 JUDGE: You might just give me a brief tour --

23 MR BROWNE: That's very helpful, Judge, yes.

24 JUDGE: -- if you don't mind, after -- I just want to make sure that I have the  
25 relevant documents in sequence. Obviously, Mr Landers, has brought me through a  
26 number of them but in terms of the chain of events?

27 MR BROWNE: Yes, Judge. I will try to organise --

28 JUDGE: Because obviously Mr Landers's key point is that it was irrational of the  
29 Commissioner to uphold the decision of the NTMA, that there was nothing beyond  
30 the power point presentation slides, where he says there was evidence that was so.

31 MR BROWNE: Yes.

32 JUDGE: And it would be useful just to see where that's tracked in the decisions  
33 because certainly on --

34 MR BROWNE: I will do that Judge yes.

1 JUDGE: -- the face of the NTMA's submission document and a quick read of it, it  
2 seems to explain it why it didn't have documents beyond the power point  
3 presentation.

4 MR BROWNE: Exactly Judge. And I suppose the real legal issue is did the  
5 Commissioner err --

6 JUDGE: Yes?

7 MR BROWNE: -- with the interpretation of 15(1)(a), is really the question the Court  
8 has to decide. In other words, could the Commissioner decide on the evidence in the  
9 submission by the NTMA, that the NTMA could conclude that the document didn't  
10 exist.

11 JUDGE: Yes, yes. Okay, well look, that's -- we might leave it there. That's useful  
12 just to get some sense of the lie of the land. Okay so, we'll take it back up at 2  
13 o'clock then --

14 MR BROWNE: May it please the Court.

15 JUDGE: -- and we will need to finish by 3 o'clock so --

16 MR BROWNE: Very good.

17 JUDGE: If you could go to perhaps 20 to 3, a quarter to 3 and I think 15 minutes  
18 should be sufficient Mr Landers. It's a net point and I have your point I think. So,  
19 we'll deal with it on that basis at 2 o'clock. Thank you both very much.

20 MR LANDERS: Thank you your honour.

21

22 Luncheon adjournment (13.01 pm - 2.00 pm)

23

24 REGISTRAR: Good afternoon Judge.

25 JUDGE: Good afternoon.

26 REGISTRAR: Starting at two today, we are resuming -- Maurice Landers v. The  
27 Information Commissioner.

28 MR BROWNE: Good afternoon, Judge --

29 JUDGE: Just to say Mr Browne, I had a chance over the course of lunch just to read  
30 through the affidavits and to read the decision, the Information Commissioner's  
31 decision which is the subject of Mr Lander's appeal and the NTMA internal review  
32 decision --

33 MR BROWNE: I see.

34 JUDGE: -- so I've a better sense of the sequence of events from those, yes.

1 MR BROWNE: Thank you, Judge. Thank you.

2 JUDGE: So, there's no need for you -- if you want to make reference to anything  
3 obviously, feel free, but there's no need for you to open those --

4 MR BROWNE: May it please the Court. I mean I might just -- I might just join the  
5 chronology, Judge, just to --

6 JUDGE: Yes sure, yes.

7 MR BROWNE: -- just for the purposes of -- but I hear what the Court is saying.  
8 Judge, I was just making the jurisdictional point of this section for -- section 24 of  
9 the 2014 act. It's an appeal to the High Court on a point of law and to that extent is  
10 distinguishable from the review from the FOI to the Commissioner. And obviously  
11 that jurisdictional point is also in the 1997 act which preceded it. And equally the  
12 provision of section 15(1)(a) which is the adequacy of searches within the '97 act.  
13 And I say that, Judge, because the Notice of Motion in fact I would respectfully say,  
14 doesn't disclose a point of law as such. There's no identifiable point of law to make  
15 that point in the submissions. Mr Landers doesn't say, in terms that the  
16 Commissioner's has erred in its construction of the 2014 act. He has raised in the  
17 motion two particular queries, which first -- the first one is tantamount to an order  
18 mandamus directing the Information Commissioner to compel release of a particular  
19 plan and the second one which he's addressed in his submissions.

20

21 He says in particular that PWC and Chartered Accountants -- so, having said that,  
22 Judge, I think it's fair to say that the law -- that the issues that Mr Landers is raising  
23 really do boil down to the question of, did the Commissioner act irrationally in his  
24 review of the NTMA's response submitted. And therefore did the Commissioner  
25 breach section 15(1)(a) or indeed did the NTMA, and that's what it really comes  
26 down to. And there's a second ancillary argument made that the Commissioner has a  
27 power under section 45 of the act and the Commissioner could -- I think Mr Landers  
28 seemed to suggest this morning that he wasn't really as such pressing that point  
29 because he said, if the finding of the Commissioner was meant to be irrational it even  
30 put --

31 JUDGE: Yes.

32 MR BROWNE: And he used the language: "From ... here in Court," that he's  
33 familiar with, so I will have to make my submission on that Judge --

34 JUDGE: Yes.

1 MR BROWNE: -- because my secondary argument under section 45 is --

2 JUDGE: I've read your submissions in that, yes.

3 MR BROWNE: Yes, which it does of course have that power but it's in with the  
4 Commissioner -- the Commissioner on the facts here didn't, you know, need to  
5 invoke the power, Judge. If I could just very quickly just go through some of the  
6 authorities. I know the Court will be familiar with some of them --

7 JUDGE: Yes, no please.

8 MR BROWNE: -- ... the Deely case, Judge, which I think gives a ... judgment  
9 which summarises the principles to be applied and the Court can see on page 51 of  
10 the book of authorities and its internal page 452 of the Irish Report judgment --

11 JUDGE: I'll just get that here, yes.

12 MR BROWNE: Judge McKechnie summarised the principles, I don't really need to  
13 read them out Judge, but in effect --

14 JUDGE: Yes?

15 MR BROWNE: -- there's four aspects to it and we're not --

16 JUDGE: I'm familiar with those. It's the -- Deely is the error of law,; isn't it?

17 MR BROWNE: I believe it is Judge, and the conclusions probably show: "Have  
18 taken an erroneous view of the law, then that also is a ground for setting aside the  
19 resulting decision ..." -- and it quotes the realm of authorities of Mar v.

20 Hummingbird and

21 JUDGE: And Hummingbird, yes?

22 MR BROWNE: -- Henry Denny & Sons (Ireland) Limited. And there's another  
23 passage on the following page, Judge, where Judge Quirke says: "It seems to be that  
24 under section 37 of the act, the respondent conducting the review has an extensive  
25 discretion as to the procedure that she may adopt or follow ..." -- so, the Court just  
26 notices the discretionary powers available to the Commissioner. Alternatively,  
27 Judge, I think the statutory provisions --

28 JUDGE: So, where were you?

29 MR BROWNE: It's the opposite page, Judge, page 52?

30 JUDGE: Yes?

31 MR BROWNE: And about half way down Judge, and just the Court will see --

32 JUDGE: Yes, it seems to be under section 36, yes?

33 MR BROWNE: Yes, yes, those sections refer to the 1997 act, Judge. And that  
34 decision indeed of course has been adopted in a number of cases. The next one I

1 want to turn to, Judge, is the case of Sheehy. And that's starts at page at 78. It's an  
2 Irish report judgment --

3 JUDGE: Yes?

4 MR BROWNE: -- and again the Court will see at page 99 internally, Judge Kearns,  
5 I think he was at the time --

6 JUDGE: Page 99?

7 MR BROWNE: Page 99, Judge, and very, very finally, Judge Kearns refers to the  
8 decision before the ... opened. He said at least they had some helpful remedy --  
9 resume but he wasn't correct to advise judicial review principles to matters of  
10 statutory interpretation in way that might be appropriate to issue the facts. As the  
11 one there, Judge, in the Gannon case which starts at page 107. Again, the Court can  
12 see from the Irish Report at page 1, about half way down --

13 JUDGE: Sorry, just give me one second?

14 MR BROWNE: I'm terribly sorry, Judge.

15 JUDGE: So, the next authority, so you're bringing me to ...?

16 MR BROWNE: It's on page 108, Judge.

17 JUDGE: 1-0-8?

18 MR BROWNE: Just the reference of the Irish Report is very helpful, again adopting  
19 the jurisdiction of the High Court.

20 JUDGE: This is Gannon, is it, yes?

21 MR BROWNE: Exactly, Judge. And indeed in pages 114 to 115, the Courts looked  
22 at the principles to be applied but also consider the rationality argument. And the  
23 Court said it was accurate material before the respondent to enable her to make the  
24 determination that she made. That determination cannot be described as a decision  
25 which flies in the face of -- for reason and common sense. I feel like Mr Landers  
26 used that language which in fairness is the language from State v. Keegan --

27 JUDGE: Yes?

28 MR BROWNE: -- but perhaps when the Court found the decision wasn't irrational  
29 or unreasonable, so in the context of Mr Landers making sort of a secondary point to  
30 this being a rash decision by the Commissioner, they have principles to be applied,  
31 Judge, from Keegan and indeed O'Keeffe v. An Bord Pleanala. And again, Judge, in  
32 Westwood Club on page 142 internally, paragraph 88 --

33 JUDGE: Page 142, is it?

34 MR BROWNE: It is, Judge, internally following --



1 JUDGE: Was that decision appealed, not Westwood now, I might be thinking of old  
2 ones?

3 MR BROWNE: I don't believe so, Judge, that it was, and the Court, you can see at  
4 paragraph 88, at the very, very, top: "The issue that the Appellant will have to  
5 satisfy is whether the Respondent has erred in law or failed the long established tests  
6 in the O'Keeffe v. An Board Pleanala ... " -- so, sitting that down, Judge, I say the  
7 issue for the Court is whether there's been a pure error of law, it's ... official, or  
8 indeed the Commissioner acted irrationally and I say Mr Landers hasn't identified the  
9 point of law but it's surprising he's making a rationale effort. It comes down to the  
10 information that comes before the Commissioner. If I could then just turn to a case  
11 that's in fact on point with the issue here before the Court. And it's a case called  
12 Ryan v. Information Commissioner. It's at page 61 of the book of authorities?

13 JUDGE: Yes?

14 MR BROWNE: And I might just open it open to you, Judge, just background facts  
15 here, Judge. This does go to the authority of section 15(1)(a).

16 JUDGE: I don't think I'm familiar with this one?

17 MR BROWNE: No, no. And this was an appeal by the appellant pursuant to section  
18 42 of the '97 act, Judge, which is the equivalent to section 24 of the 2014 act. It's  
19 kind of ... of the fact, but it's the same principles apply, there's no change in statutory  
20 language. And, the appellants appealed a decision of the respondent, whereby there  
21 the respondent carried out a review pursuant to the provisions of section 34.2 of the  
22 1997 act, which affirmed a decision of the department to include reference to any  
23 further records, the Court can see the facts there; there was reassignment of the  
24 second named appellant, from remedial teacher to a regular class teacher. There was  
25 issue, Judge, in respect of ... the Court can see the facts of the case. There was  
26 issues in respect of the communication between the Commissioner and ultimately,  
27 Justice Quirke, held that the Commissioner had in fact communicated with the  
28 appellant. So, if the Court can see at paragraph 8 -- I beg your pardon, paragraph 7:  
29 "The respondent through his officials carried out a comprehensive review of the  
30 decision of the department ..." --

31 JUDGE: Is it on -- it is on page 4 --

32 MR BROWNE: It's on page 64, Judge, yes.

33 JUDGE: 64 of the book, yes. Yes.

1 MR BROWNE: So, in fact the Court will see at the start of page 64: "He therefore  
2 treated the department's response for refusal pursuant to section 10.1(a) ..." -- and  
3 that's the exact same language --

4 JUDGE: Where this is 15.1 of the act, is it?

5 MR BROWNE: -- where on the record it doesn't exist or cannot be found. Then  
6 Judge Quirke said: "The respondent through his officials carried out a  
7 comprehensive review of the decision of the department in the process and reviewed  
8 all copies and correspondence between the department and the appellant including  
9 that a number of assertions had made in different sections of the department and then  
10 various records had been provided to the appellants, manual and electronic searches  
11 disclosed no additional records, either in the legal services section or any other  
12 section and the appellant have indicated they're not interested in records relating to  
13 the second defendant's salary review. A variety of different officials in the  
14 department were contacted by way of correspondence and email and telephone and  
15 no further record were discovered. In the circumstances, and having taken into  
16 consideration, the documentation already released to the appellants and the fact that  
17 further searches had been made in the appropriate sections of the department, the  
18 respondent concluded the department was justified in deciding that no further records  
19 existed or could be found after all reasonable searches had been taken ..." -- so, it's  
20 all automatic, it's here where there was the presentation, the Court identified earlier  
21 on had been disclosed.

22

23 And then NTMA, which I'll come to, had in its submissions and said we've  
24 conducted searches and we can't find the plan for Mr Landers. And, at paragraph 9  
25 then, Judge, just what the Court said earlier in relation to it, it was requested by the  
26 accountants. The respondent had drawn the attention of the various provisions of  
27 section seven and eight of the '97 act and in the light of those, made submissions  
28 thereon: "During telephone conversations with Ms Dolan of the respondent's office  
29 discussed with the second named appellant, the review which was then being  
30 undertaken by the respondent and which was nearing completion. The respondent in  
31 making his decision, took into account the correspondence between the appellants  
32 and the respondent including a nine page submission made by the appellants, in  
33 response to a letter from the respondent's Mr Fee dated ..." -- and you'll see the  
34 letter by way background Judge.

1

2 The Court can see on page 6 then, the grounds of an appeal were that the section 42  
3 provides again, go over to section 24 and the Court will see that there at the very  
4 bottom of that page and again in terms of section 42 of the '97 act, the appeal of the  
5 appellant seems to be confined to an appeal on a point of law and the Court  
6 identified the point of law when in fact it had been identified and had been phrased  
7 inaccurately because the Commissioner had failed to regard the -- I do make this  
8 other technical point, Judge, the notice of motion doesn't identify the legal error, but  
9 I think -- think the Court knows the legal issue here --

10 JUDGE: Yes, I know, I think it might be more sensible to deal with the substance of  
11 it, yes.

12 MR BROWNE: -- Mr Landers might take more -- I'm not really, yes, yes. So, in  
13 summary then, Judge, the Court can see at the bottom of page 67 the appellants  
14 contended the respondent is incorrect in terms and provision of section 10.1(a) of the  
15 '97 act by: "Applying that incorrect and restrictive interpretation of the section, acted  
16 to the disadvantage of the appellants ..." -- and that's the sort of key that of Mr  
17 Landers was making this morning, Judge, that in effect, it should be full disclosure.  
18 The Commissioner should give effect to the principle, the preamble of the act but  
19 some similar item was made here. And indeed, I think there were a couple of points  
20 made by Mr Landers and his motivation for seeking the documents and I'd just say in  
21 passing, Judge, that's not a factor and the Commission must exclude that for those  
22 reasons. And the conclusion section, Judge, page 68. Judge Quirke says: "The act  
23 provides for a review by the respondent of decisions to which the section applies  
24 including decisions of the kind which is subject to this appeal ..." -- he identified the  
25 Deely decision. And extended his question as, "the procedures which he may adopt  
26 or follow ..." -- and that's about half way down that page, Judge, on page 68.

27 JUDGE: Yes?

28 MR BROWNE: And he adopts that stance. He goes on then to say: "Section 34(6)  
29 of the act provides for the notification by the respondent ..." -- in fact this is clearly  
30 an issue about how to work the procedural act, Judge so I can probably skip over that  
31 --

32 JUDGE: Yes?

1 MR BROWNE: -- because that was a first ground then ... ways. If I could then turn  
2 to the second ground, there's one element for today's purposes, Judge, and it's at the  
3 bottom of page 73 of that judgment.

4 JUDGE: Yes, I have that.

5 MR BROWNE: The Court can see that, Justice Quirke, quoted that in 10(1)(a) and  
6 he said: "Since the ..." -- towards the end of that page at page 74, he said -- "... in  
7 conducting the review requested by the appellants, the respondents treated the  
8 decision of the department as a decision made on the grounds that the record  
9 concerned does not exist or cannot be found after all reasonable searches to ascertain  
10 its whereabouts have been taken. The appellants claim that this treatment  
11 demonstrated an incorrect interpretation of the section and of section 41 of the act  
12 which deems the decision to have been made when the requester has not been given  
13 due notice of a decision within the time limited by the act. Section 34 ..." -- he's  
14 saying -- "... empowers the respondent to review a decision to which the section  
15 applies ..." And Judge Quirke endorsed again the Deely decision. He said: "The  
16 respondent, in complying with the appellants request undertook an investigation of a  
17 large amount of documentation and concluded that the decision deemed to have been  
18 made could be treated as a decision made pursuant to and for the reasons ..." -- I  
19 think that was more of a technical issue, Judge, in respect of --

20 JUDGE: Sure, yes.

21 MR BROWNE: -- what does he do, and what has been raised.

22 JUDGE: Whether yes, whether a decision has been made or not, yes.

23 MR BROWNE: And does he know the answers -- but anyways at the bottom of 75,  
24 Judge Quirke said in Deely, that Judge McKechnie: "Considered submissions to the  
25 effect that findings made by the respondent on questions of primary fact should not  
26 be reviewed by this Court as part of the appeal process ..." -- and he said he  
27 observed and the Court will be familiar with the passage there that follows on page  
28 16. They were asking, Judge, in the decision I respectfully submitted, it's at the  
29 bottom of 76, where Mr Justice Quirke says: "I am satisfied that in this case there  
30 was a very substantial amount of material before the respondent upon which he could  
31 reasonably find the facts which he found. I am quite satisfied that there was before  
32 him sufficient evidence to enable him to reasonably conclude that he could treat, 'the  
33 decision' and deemed it to have been made pursuant to the provisions of section 4. I  
34 am satisfied that he was empowered by the provisions of the act to conduct the

1 review as he did ..." -- he also goes on to say: "I am satisfied also that the  
2 respondent's understanding of his role was correct in that he was not required to  
3 search for records himself but was required rather to review the decision of the  
4 department and in doing so, to have regard to the evidence which was available to  
5 the decision maker and to the reasoning used by the decision maker in arriving or  
6 failing to arrive at a decision. The role of this Court is expressly confined to the  
7 hearing of the appeals from the respondent on points of law. Whilst it's true that, if  
8 the respondent had taken an erroneous view of the law in making his decision, then  
9 the appellants might have been entitled to relief. Furthermore it was a very large  
10 volume of evidence and material before the respondent, which could reasonably have  
11 given rise to the decision that was made."

12  
13 So I would submit, Judge, that judgments, high court judgments have ... work on the  
14 principles still and all even though it was referred to in the '97 act, there's no change  
15 in the statutory wording in section 15(1)(a) of the '14 act so by analogy of it, Judge,  
16 the second judgment would apply. And indeed even though the Court has identified  
17 the jurisdiction on a point of law. The Court does seem to have probed the issue of  
18 section 15(1)(a) review on the basis of reasoned principles because on the face and  
19 you can see the Court statements --

20 JUDGE: Well the rationality is a ground of law --

21 MR BROWNE: Yes Judge, it is indeed. Exactly.

22 JUDGE: The rationality would amount to a legal error; isn't that right?

23 MR BROWNE: That's right. I think someone else sort of looked at it as pure  
24 statutory construction and I think the Courts have incorporated rationality as being a  
25 point of law --

26 JUDGE: Yes?

27 MR BROWNE: -- so I think that that's where Mr Justice Quirke --

28 JUDGE: I think Justice Clarke in the --

29 MR BROWNE: It's a Law Society case, Judge, is it?

30 JUDGE: It's a Law Society case --

31 MR BROWNE: Yes, yes.

32 JUDGE: I think he expressly says that, doesn't he?

33 MR BROWNE: He does, Judge, he does yes. And so, the basis of Mr Landers's  
34 argument, Judge, really what it comes down to is was the Commissioner -- was there

1 sufficient evidence before the Commissioner to decide and to uphold the NTMA's  
2 decision and I say there was, Judge, when I turn to evidence. I just want to go over  
3 one more point, Judge, on the authority before I turn to that evidence, Judge. As it  
4 arises to say -- at page 168 to 169 --

5 JUDGE: These are the authorities to say there was a --

6 MR BROWNE: Of the authority, Judge, exactly. And just to --

7 JUDGE: This is McKillen, is it?

8 MR BROWNE: It started on page 22 of the judgment, page 168. And indeed the  
9 Court can see the preceding pages it refers to D E Sheehy, Killilea and Gannon.

10 JUDGE: Yes?

11 MR BROWNE: And the onus of proof rests upon the appellant and indeed on page  
12 167, the Judge said: "The onus of proof in section 42 appeal rests on the appellant  
13 who had to satisfy the test in O'Keeffe ..." -- which I think is a self-evident  
14 proposition for Mr Landers to prove that the Commissioner's approach --

15 JUDGE: Sorry, where were you reading from?

16 MR BROWNE: I'm sorry, Judge, it's on page 167.

17 JUDGE: Yes; and which paragraph?

18 MR BROWNE: It's in paragraph 55.

19 JUDGE: 55 yes?

20 MR BROWNE: At the very last line of that paragraph.

21 JUDGE: Yes, okay.

22 MR BROWNE: Mr Justice Cross is asking ... test and the onus of proof being on  
23 the appellant. And then in paragraph 57, the Court says: "The scope of a section 42  
24 appeal is further limited by reference to the materials that were before the  
25 Commissioner and the submissions made by her ..." -- so again, it's the prohibition  
26 of bringing in new information, new evidence and the High Court isn't a de novo  
27 appeal, it's ... Commissioner and the Court makes that argument in paragraph 59 and  
28 the Court confirms that: "The section 42 appeal is not a de novo hearing where the  
29 appellant is at large to advance new arguments or evidence not put before the  
30 respondent. It's an appeal of the point of law which was considered and dealt with by  
31 the respondent ..." -- the Court asked the question is there review before the  
32 Commissioner, de novo. Certainly the Commissioner is certainly carrying out the  
33 review of the FOI body's decision but that's in the High Court -- isn't a -- is not a de  
34 novo appeal --

1 JUDGE: It is different, yes, yes.

2 MR BROWNE: And Mr Landers has, you know, a number of affidavits with a huge  
3 number of exhibits, Judge, before this Court and I respectfully submit that only the  
4 appeals that went into the Commissioner and indeed the Commissioner .... were  
5 before the Commissioner and indeed Mr Landers made the point, Judge, in passing  
6 to object at the time when he referred to section 15(1)(a) being relied upon by other  
7 corporate bodies, that isn't in evidence before the Court, Judge. And I'd the Court --

8 JUDGE: Yes well yes, we're concerned with the facts of this case.

9 MR BROWNE: Exactly, Judge. If I could just turn then to the chronology, Judge.  
10 And the Court has reviewed the decision submitted by the NTMA. I think the  
11 process here started on the 5th of June 2019, Judge?

12 JUDGE: Yes.

13 MR BROWNE: And if I could just --

14 JUDGE: In the background section of the decision, the subject of this appeal --

15 MR BROWNE: Yes?

16 JUDGE: -- there's a page 76 --

17 MR BROWNE: Yes?

18 JUDGE: It seems to recite the chronology there?

19 MR BROWNE: Exactly, Judge, in fact the actual initial request that he made is at  
20 page 318 of the book?

21 JUDGE: Page 318. Yes?

22 MR BROWNE: And there's an email of Mr Landers to Conal Kelly, Chief  
23 Executive of the NTMA and he specifically asked for a copy of the internal audit  
24 plan for the financial years --

25 JUDGE: Yes, I think Mr Landers has already opened this ...?

26 MR BROWNE: Yes, that's what triggers the initial request. And so, for the  
27 purposes of this FOI, it does seem that there's a back drop because his email is there  
28 from 2017. But, for the purposes of the issue before the Court, the request here was  
29 made on the 5th of June 2019 --

30 JUDGE: Yes?

31 MR BROWNE: -- and the Court can see if you go backwards, Judge, in page  
32 number --

33 JUDGE: Yes?

1 MR BROWNE: -- then there's an email from Mr Landers of the 1st of July 2019,  
2 which I think is a follow up email looking for a request --

3 JUDGE: Yes?

4 MR BROWNE: -- and then an email of the 4th of July 2019, from Lorraine Sibley  
5 of the NTMA saying: "The NTMA is not required to publish its internal audit plans  
6 ..." -- I think it's more -- this email was more about if you want to make a request  
7 under the FOI, to be treated as such --

8 JUDGE: Yes?

9 MR BROWNE: -- and she then proceeds with an FOI request. And then on page  
10 315 there's an email from Mr Landers of the 9th of July 2019, and it was sent to a  
11 number of individuals in the NTMA and that's -- the Court can see the content of  
12 that. First as ... copy of the audit plan, if we're required to do so, just because you're  
13 not required to do something, Judge, doesn't mean you shouldn't do it. In this case  
14 the document is critical authority ... NPRF and Mr Landers asked for a second time,  
15 if the NTMA would provide --

16 JUDGE: Yes?

17 MR BROWNE: -- a copy. And then on the page 314, there's an email by Orla  
18 Yates, who in fact is an FOI officer in the NTMA. Ms Yates is the person who made  
19 the submission known to the Commissioner, Judge, and it says: "Dear Mr Landers,  
20 I've been asked to pass on the NTMA request. The NTMA strongly rejects the  
21 allegations made in your email of the 9th July 2019. As indicated ..." -- she says --  
22 "... to you previously, we are satisfied that the particular investment was made in  
23 accordance with the legislation which governs the NPRF. We also rejected the  
24 suggestion of any practices or wrongdoing on the part of the NTMA or the NPRF or  
25 the Commissioner. In relation to your request, you are entitled to request records  
26 from the NTMA under the FOI act and you might confirm by email that it will be  
27 treated or considered as a request under that act to enable the NTMA to process your  
28 request in accordance with the terms of that act." And then Mr Landers on the 17th  
29 of July and I think some of these emails, Judge, the chronology are summarised in  
30 the Commissioner's decision. But this in effect is the --

31 JUDGE: Yes?

32 MR BROWNE: Yes. The 17th of July, Judge: "I would like to respond ..." --  
33 sorry, starts on page 315: "Now that I've informed you I believe ICA ..." -- is the  
34 English equivalent of the ICAI in England and Wales, likely to ... in all accounts ...



1 -- "... I'd like to know what you're going to do about it. According to PWC which  
2 reports to the NTMA as a ... audit ... aware whether the internal audit plan is  
3 legitimate ..." -- and this is the correspondence, Judge, as exchanged between the  
4 July and ultimately resulted, Judge, in the release of the power point presentation  
5 which the Court will see --

6 JUDGE: Yes?

7 MR BROWNE: -- so, on page 313 then there's an email the 6th of September 2019  
8 --

9 JUDGE: Yes?

10 MR BROWNE: "Dear Orla, not having heard back from you ..." -- it's at page 313,  
11 Judge -- "do the NTMA have to give ... allegation ... okay, to your record, not  
12 possible at the time but I'd like it processed in ... cost ... event ..." -- so then  
13 proceeds as an FOI request -- "otherwise I'll issue my final report without it in order  
14 to make your own determination based on the report's contents ..." -- and Judge, then  
15 on next -- on the sequence. There's the power point presentation, Judge, which starts  
16 at 324, Judge.

17 JUDGE: Yes?

18 MR BROWNE: And this is what's made available by the NTMA on the 8th of --  
19 sorry -- released on the 25th of September 2019. So, page 325, I have a letter from  
20 NTMA to Mr Landers in black and in this --- and this was released -- this is a letter  
21 that followed the attorney rule: "I, ... Black refer to repeat and additional request ...  
22 decision letter, your original request sought access to the file ..." --

23 JUDGE: Yes. Sorry, what page are you again?

24 MR BROWNE: Oh sorry, Judge, page 325.

25 JUDGE: Page 325?

26 MR BROWNE: 325.

27 JUDGE: Yes. Thank you.

28 MR BROWNE: And, then Mr Black says: "I note the issues the decision maker  
29 advised you that the PWC audit plan presentations were located for 2009, 2010 and  
30 2011 and at least those usually emailed on the 25th of September 2019. Your  
31 request for an initial interim review requested copies of the internal audit plans for  
32 the reasons below and the internal review ... constitute a variation of the original  
33 decision made, I confirm that upon receipt of your internal review application  
34 additional searches were carried out for PWC audit plans for the years in question

1 ... " -- so this letter is confirming that the presentations had already been disclosed to  
2 Mr Landers and on foot of an internal review, the NTMA conducted additional  
3 searches and that Mr Black had been advised that no audit plans had been located is  
4 evidenced in the searches that were carried out both at the initial decision stage and  
5 the internal review stage: "That the presentations ... in relation to -- released to you  
6 are the only records held by the NTMA in that regard. These documents were  
7 presented by PWC to the NPRF or their committee for approval. There was no  
8 indication from searches conducted that these documents were subsequently  
9 developed into separate internal audit plans. Accordingly, I'm refusing your request  
10 on an administrative grounds pursuant to section 15(1)(a) on the basis the records do  
11 not exist and the records most relevant have been released to you in full already  
12 namely the internal audit plan presentation." So, that's the ultimate internal ...  
13 review decision --

14 JUDGE: Yes.

15 MR BROWNE: ... last ... be about, was it the Commissioner's appeal on foot of  
16 that. It seemed, Judge, that I think on the 6th of November 2019 --

17 JUDGE: Yes, there was --

18 MR BROWNE: -- from page 329, I'd --

19 JUDGE: Where Mr Landers had already effectively written to the Commissioner --

20 MR BROWNE: Yes.

21 JUDGE: -- and the Commissioner and the Commissioner was going to look at that  
22 as a deemed request but it seems the Commissioner then just deals with the  
23 substance of --

24 MR BROWNE: Exactly. And it sought a submission from -- by the NTMA, in fact  
25 I'll take the Court through that. But I just wanted to kind of clarify that that seems to  
26 be the sequence of what happened and indeed, Mr Landers, in his email of the 6th of  
27 November --

28 JUDGE: Where's that email now?

29 MR BROWNE: It's on page 329, Judge.

30 JUDGE: 329, yes, thank you.

31 MR BROWNE: I would think it -- whilst he calls it an appeal, I think it's probably  
32 more correctly a request for a review by the Information Commissioner under  
33 section 2 of the act. And says: "Dear Information Commissioner, I'm writing to  
34 appeal the decision and therefore request a review of the matter by you. I'm

1 appealing with a ... decision was not made within the time permitted. The NTMA  
2 for some peculiar reason couldn't provide the final decision on my appeal preferring  
3 instead to pass the buck to you but I'll play along, as I have from the beginning. Also  
4 attached is my final report for context. Additionally I refer you to page 24 of that...  
5 report where I quote from your own website ..." -- and he refers, Judge --

6 JUDGE: Yes?

7 MR BROWNE: -- to the powers of the Commissioner under section 45 of the act.  
8 And I didn't open that provision, Judge, but in my submission, Judge, section 45 the  
9 Court will see the way it's raised ... in the commission. The section 45(1)(a): "The  
10 Commissioner may require any person who, in the opinion of the Commissioner, is  
11 in possession of information ... " -- so it's a classic discretionary provision, I would  
12 suggest that, Judge, if the Commissioner doesn't appeal leave to invoke, there's no  
13 obligation for the official to do so. There's no freestanding or statutory obligation of  
14 the Commissioner to invoke that power. It's up to the Commissioner basically to  
15 commission for it.. So, Mr Landers, towards the end of that then says: "Although I  
16 note such powers will allow you to compel at least the audit plan unredacted. I've no  
17 doubt you will find some excuse not to provide it. Or to provide it in redacted form  
18 as to make it impossible for anyone to determine PWC's scope and services."

19  
20 So, that's just before the Commissioner, Judge. That's the ... jurisdiction of the  
21 Commissioner and then what happens on page 331, is there's an email from Mr  
22 Landers on the 18th of November 2019, where he says: "Dear Commissioner, I'd  
23 like to forward you a decision letter I received from the NTMA on the 8th of  
24 November 2019 ... " -- so I think that team decision, that Mr Black's letter is then  
25 sent directly by Mr Landers to the Information Commissioner, which is a variation to  
26 the original decision.

27

28 "I think the response ..." -- he says -- "... was blatant lie as the review decision was  
29 not made by then in the time permitted and they waited until I requested a review of  
30 the matter by you, and to subsequent response, perhaps your ... lying?" Question: "  
31 Regarding the ... quote, would you please let me know when this condition is  
32 included". Additionally, the ... safety part, there was no indication on the searches  
33 conducted, these documents were subsequently developed into separate internal audit  
34 plans and Mr Landers says, this is a blatant lie, it contradicts ... so far as each ...

1        what my client ... And then, Judge, I think the issue criticised I think in terms of the  
2        submission, may I take the Court to the submission by the NTMA, I'm just conscious  
3        of the time, Judge?

4        JUDGE: Yes?

5        MR BROWNE: Page 419 is a letter from Ms Yates, who I did identify earlier was  
6        the FOI officer, sent a submission to the NTMA addressing the specific query that  
7        the NTMA had raised. So, on foot of the request and review by the Commissioner,  
8        submitted by Mr Landers, where the Commissioner is clearly aware that the certain  
9        documents ... had been released but other documents the NTMA says can't be  
10       located. The Commissioner identifies a number of questions which he raises with  
11       the NTMA and they are -- there's six questions in total. So, in effect what the  
12       Commissioner is doing is asking the NTMA to confirm what searches it's carried out  
13       for the purposes of the corroborating section 15(1)(a) exercise which the NTMA  
14       itself has said that records didn't exist. And the NTMA come back with a response  
15       that I quote: "It is the NTMA's position that no further records within the scope of  
16       the request exist ..." -- it gives a background to the case --

17       JUDGE: Yes, yes I had a chance to read through that, yes.

18       MR BROWNE: -- and the Court will see that and -- yes -- and there's quite specific  
19       questions asked, Judge. It isn't just a general query. The Commissioner's clearly  
20       phrased the questions because it wants to be satisfied that the NTMA has indeed  
21       conducted the searches and Court can see ... in that section 2 -- or rather the question  
22       2. Whether the search -- can the NTMA outline whether this was manually or by the  
23       computer and there's a response, a specific response to that. Three, were the  
24       remedies which was consulted; yes. See no. 2 above. No. 4, the PWC submit audit  
25       plans ... presentation; as detailed above the ultimate ... commissioner's secretary had  
26       yet to ... understanding, is that the PWC was to submit formal or final audit plans,  
27       once the plan presentation which is the PowerPoint was agreed with all the  
28       committee members.

29  
30       Question five, section 11.9 of the FOI act provides the records held by a service  
31       provider can yet to be confirm to say they were redacted or consulted. And the  
32       response then; the NTMA contacted PWC via email prior to the issuing of its final  
33       decision, notifying with ... the intention, and as I've mentioned above, the NTMA's  
34       understanding is that PWC did not submit a final form of the minutes. And the filing

1 isn't possible ... records destroyed in accordance with policy or otherwise. And the  
2 Commissioner -- the NTMA, gives the response that the NTMA does not believe that  
3 the internal audit plans were received and subsequently destroyed. It's understanding  
4 is that PWC did not submit final and formal audit plans ... presentation ...  
5 committee level.

6  
7 So, in terms of the Commissioner responding to all this, it's raised questions. It's  
8 raised questions to the NTMA -- the NTMA has come back with their response and  
9 the Commissioner has accepted the validity of that. If the Commissioner didn't do  
10 so, there would be questions bone fides of I suppose of every response and  
11 submission and it is decided and accepted that the searches that were carried out by  
12 the NTMA were appropriate in the circumstances. And, at the end of that the  
13 submission says: "For the reasons outlined above, the NTMA is satisfied with the ...  
14 undertaken to locate any and all relevant records within the scope of the request were  
15 appropriate and adequate in the circumstances. Yet in ... satisfied, ... at the internal  
16 plans exhibited for the years in question and the only records to be provided to Mr  
17 Landers." So, the Commissioner then weighed up the issue how the submissions by  
18 the NTMA, how did Mr Landers's submission and then, Judge, on the 17th of  
19 January 2020, Ms ... in the Commissioner's office emailed Mr Landers and says: "I  
20 refer to the review why you ..." --

21 JUDGE: So what page are you going on now?

22 MR BROWNE: Page 424, Judge.

23 JUDGE: 424, yes.

24 MR BROWNE: Yes. And expressly refers to section 15(1)(a) of the act and also  
25 says: "This means the Commissioner must have regard to the evidence available to  
26 the decision maker, the Commissioner's role is to review the decision of the FOI  
27 body and to decide whether the decision is justified. The evidence in so called  
28 search cases generally consists of steps which have to be taken to search for the  
29 records, along with miscellaneous and other information. It's important to note that  
30 the FOI does not require absolute certainty as to the location of the records because it  
31 means they're lost or simply cannot be found, which is indeed what 15(1)(a)  
32 acknowledges. Furthermore, it's also confirmed that an FOI body has satisfied the  
33 requirements of 15(1)(a) even where records an applicant believes ought to exist

1 have not been located. Please also be advised this office should not examine the  
2 manner in which the public body ... generally in order to investigate complaints".

3

4 And it summarises the NTMA's position there, Judge. And the officer then says:  
5 "Having carefully examined the submissions it would appear that no records exist or  
6 can be found in relation to the FOI request." Personally, I'm of the view that the  
7 NTMA has conducted all reasonable searches to locate the relevant records under  
8 section 15(1)(a) of the FOI act plans. And the officer said she taken up the ...  
9 investigator and he affirmed the decision of the NTMA under section 15(1)(a),  
10 Judge. And that's in effect the rationale of the Commissioner and that follows  
11 through then to the decision of the Commissioner which is at page 76 and 77.

12 JUDGE: Yes.

13 MR BROWNE: And the Court can see then that the Mr ... is the investigator,  
14 concludes that -- he said: "The NTMA was justified in refusing access to the records  
15 sought on the grounds that the records cannot be found or do not exist ..." -- and he  
16 said -- ".. I hereby affirm the decision of the NTMA to refuse access to the internal  
17 audit plans on the grounds that the records sought do not exist". So, I suppose,  
18 Judge, just to wrap it up, Judge --

19 JUDGE: Yes.

20 MR BROWNE: That's the jurisdiction in my respectful submission, when it comes  
21 down to the pure question of law. The Commissioner has -- certainly hasn't breached  
22 section 15(1)(a) at least insofar as the Commissioner reviewing the decision made by  
23 the NTMA itself. It was open, Judge, I say Judge, in the evidence to the Court to  
24 conclude that the NTMA had carried out all reasonable searches based on the  
25 decision of the NTMA, Judge.

26 JUDGE: Okay so, okay.

27 MR BROWNE: Thank you, Judge, unless I can be of any further assistance, Judge?

28 JUDGE: No. That's very helpful, thank you Mr Browne. So, Mr Landers, do you  
29 want to respond briefly then to that?

30 MR LANDERS: Okay your honour. Thank you your honour. Well your honour,  
31 that's a lot to respond to. You know, earlier, I proved that the internal audit plan  
32 existed and I proved that the Information Commissioner knew that it existed before  
33 he affirmed the decision of the NTMA that it didn't exist. Going through some of  
34 these legal submissions, unfortunately I can't address the case law. I'm not qualified

1 to. But I'm sure case law being case law, everything is done on a case by case basis.  
2 What applies here doesn't apply here. You know, for example, in section -- even  
3 though you mentioned that I'm not applying section 45 here -- I didn't say I wasn't  
4 applying it, just paraphrasing you, I'm saying that I still argue it can be used and it  
5 should've been used perhaps.

6  
7 But I said, it does not need to be used because I proved inadequacy on the part of the  
8 Information Commissioner under 23. The only case law -- you know I scanned  
9 through some of the case law before I came here. I didn't have much time to do it  
10 since I received these at the end of January and they were late. And when I scanned  
11 through some of the case law I just scanned for section 45 to see what's in the case  
12 law under section 45. I went through maybe 15/16 cases. And pretty much nowhere  
13 did I see section 45 being mentioned in a case law. I saw it in one in actual fact. It  
14 was a case, Michael Grange and the Information Commissioner and Minister for  
15 Foreign Affairs and Trade. And they used section 45(6), discretion of the  
16 Information Commissioner. So, one place in all of those cases I saw section 45,  
17 these great powers that the Information Commissioner has, not being used. It's just  
18 amazing. I would've thought it would be peppered throughout the case law in his  
19 public interest role. But anyhow, that said, having proved that the document does  
20 exist and that the Information Commissioner knew it existed in the judicial -- I'm  
21 sorry -- in the legal submissions of the respondent on page --

22 JUDGE: Yes.

23 MR LANDERS: You have those your honour; 427?

24 JUDGE: 427

25 MR LANDERS: I'm going to through these and point 20 --

26 JUDGE: 427 is it?

27 MR LANDERS: 427. Actually if you go to point 20 which is on 431 --

28 JUDGE: Yes?

29 MR LANDERS: Referring to the case law, the Information Commissioner has used,  
30 first it cannot set aside -- this refers to a case Deely and the Information  
31 Commissioner.

32 JUDGE: Yes?

33 MR LANDERS: "It cannot set aside findings of primary fact unless there is no  
34 evidence to support such findings ..." -- well I referred to it and so did the

1 Information Commissioner, the submissions by the NTMA to the Information  
2 Commissioner on page four, starting on 419 I believe.

3 JUDGE: Yes?

4 MR LANDERS: And I said you had three pages of submissions, that to me does not  
5 represent evidence. In actual fact, the Information Commissioner referred to in the  
6 High Court book of authorities, page 64. He referred to a case, a new case I believe  
7 of Anthony Ryan and Kathleen Ryan.

8 JUDGE: Yes?

9 MR LANDERS: And point 7, it said: "The respondents through his offices, carried  
10 out a comprehensive review ..." --

11 JUDGE: Just give me one second, Mr Landers, I'll just get so I have it in front of  
12 me. So what page you say?

13 MR LANDERS: Page 64.

14 JUDGE: Yes, I have that, yes.

15 MR LANDERS: He said: "The respondent ..." -- at no. 7 --

16 JUDGE: Yes?

17 MR LANDERS: "... the respondent, through his officials, carried out a  
18 comprehensive review of the decision of the department and in the process reviewed  
19 all copies of correspondence between the department and the appellants concluding a  
20 number of searches had been made ..." -- not, that's a lot of different than calling up  
21 the NTMA and saying, hey listen, we've got six questions for you. Just answer the  
22 questions and then basing his decision on this as if it's evidence. Now I'll even refer  
23 you to -- if you go back to page 422 in the book of pleadings, 422, the question no. 5  
24 for example. The question the Information Commissioner asked the NTMA was, he  
25 said: "Section 11.9 of the FOI act provides that a record held by a service provider  
26 insofar as it relates to the service shall be deemed to be held by the FOI body."

27

28 Now that's also in line with section 45(1) where you know, if a third party provides  
29 or a third party has a document that's pertinent to a case. It's deemed to be held by the  
30 FOI. But then he goes on to say: "Can the NTMA confirm if PWC were consulted  
31 about the records in this case?" And their response was: "The NTMA contacted  
32 PWC via email prior to issuing its original decision on September 2019, notifying  
33 PWC of its intentions to release of the audit plan presentations in full". That's not  
34 what was asked. That's not answering the question. He said: "Can the NTMA



1 confirm if PWC were consulted about the records in this case?" That means the  
2 NTMA calls up PWC and says, PWC we're missing our internal audit that you did  
3 for us in 2010. Have you got it, it's simple as that your honour. They reply -- you'd  
4 almost think it was sort of subtle language they were communicating to PWC: "The  
5 NTMA contacted PWC via email prior to its original decision notifying PWC of its  
6 intention ..." -- it's at the very least a very stupid response to that question.

7  
8 Why would PWC notify or why would the NTMA notify PWC of its intention to  
9 release audit plan presentations in full when it was asking, can you confirm were  
10 PWC consulted about the records in this case. That sounds to me like NTMA is  
11 saying, hey listen PWC, this is what we're doing, I hope you're on the same page, this  
12 is what we're doing. That's my opinion. Anyhow, if I was reading that as the  
13 information commissioner I would say, that's not the right response to that question.  
14 That's nonsense. Again, the adequacy of the Information Commissioner's decision.  
15 Anyhow, as regards the legal submissions on page 4, I was up to I believe point 20  
16 on page 431 --

17 JUDGE: Yes?

18 MR LANDERS: -- of the -- what is it -- book of pleadings. First as I said, there was  
19 no evidence. These submissions by the NTMA, that's not evidence. So, I believe I  
20 do -- I have proved that criteria or at least I've eliminated that criteria. So, secondly,  
21 it ought not to set aside inferences drawn from such facts, unless such inferences  
22 were ones which no reasonable decision making body could draw. Well, they  
23 claimed the document didn't exist. The Information Commissioner knew it existed  
24 so I can't see how reasonable that is how you could draw such decision. Thirdly, you  
25 can reverse such inferences if the same were based on the interpretation of  
26 documents and should do so if incorrect.

27  
28 But yes, it was based on documents. All it was, was based on submissions, three  
29 page submissions, it was based on documents. Of course, you can reverse such  
30 inferences, if the same were same based on the interpretation of documents. He  
31 didn't go to like in this case on page 64 of the book of authorities, he didn't carry out:  
32 "A comprehensive review of the decision of the department and in the process  
33 reviewed all copies of correspondence ..." -- and then it says finally -- "... if the  
34 conclusion reached by such body shows that they have taken an erroneous view of

1 the law then it is also grounds for setting for aside the decision ..." -- well it was  
2 clearly an erroneous view of the law, your honour, when you affirm a decision that it  
3 didn't exist when you know it did exist, that's clearly at the very least as I've said  
4 earlier, an erroneous view. Anyhow, just moving on these legal submissions to point  
5 no. -- the approach adopted by the Commissioner on page --

6 JUDGE: 435 is it?

7 MR LANDERS: Yes, 437.

8 JUDGE: 437 yes?

9 MR LANDERS: Point 38: "Mr Landers sought a review by the Commissioner on  
10 November the 6th 2019, which was some two days from NTMA reviewed the  
11 decision." Now, I don't know what they're trying to say here, perhaps they're trying  
12 to imply I made a mistake. I actually sent it on the -- a review to the Commissioner  
13 because the NTMA did not respond --

14 JUDGE: Yes, you said they were -- they hadn't given a decision within time so --

15 MR LANDERS: That's right.

16 JUDGE: -- that's what you were complaining about them; wasn't it?

17 MR LANDERS: But the only thing about that your honour is, that can be abused  
18 too, because the Information -- I questioned the Information Commissioner on that.  
19 And the Information Commissioner told me that: "Please note that the offices  
20 require under section 22(6) of the FOI act to give a copy of your application to the  
21 FOI body." So this could be a front running scenario, the NTMA doesn't respond. It  
22 lets me appeal to the Information Commissioner and the Information Commissioner  
23 has to give a copy of my appeal to the NTMA before it makes its decision on my  
24 case. That to me is front running. That's abusing that section.

25

26 They should not have been allowed make a decision. If they were late. They were  
27 late. Sorry, too late. We're giving you a copy now of his application to us. You  
28 can't then use that to later form a decision. That's nonsense. Anyhow, that was my  
29 only point on that. On point 38 in the legal submissions, he continues: "The NTMA  
30 review decision was subsequently sent to the Commissioner on the 18th of  
31 November." Just to clarify, that was sent by me. Not by the NTMA. And very  
32 quickly adequacy of searches. Okay, adequacy of searches.

33 JUDGE: Yes?

1 MR LANDERS: Your honour, again point 45, adequacy of searches, a few on.  
2 Adequacy of search, he says, before looking at the Commissioner insofar it is  
3 submitted that the duty of the FOI body, while searching for records on foot of  
4 request, is to take reasonable steps. Well yes. It is to take reasonable steps but as I  
5 mentioned earlier, it's to go above and beyond. That's his role. To go above and  
6 beyond. It's not just reasonable steps. If he's stated that his role is to go above and  
7 beyond then reasonable isn't the same standard. Now, he does refer to the leading  
8 academic text on point 48 where an FOI body and the Commissioner's decision, was  
9 that the Commissioner took the view that because misfiling or misplacing of records  
10 is a common enough occurrence, well that was a big surprise to me. These are  
11 freedom of information units. This is information commissioner. Information and  
12 commissioner. And you're saying that it's a common enough practice that records  
13 sought exist but cannot be located or I beg your pardon, common enough that there's  
14 misfiling and misplacing of records.

15  
16 But nevertheless, it does support my case because he goes to say: "Where an FOI  
17 accepts that the records sought exist but cannot be located. He would normally  
18 expect the search to be extend to locations where the records might be as opposed to  
19 should be." That's one of the reasons I believe why the Information Commissioner  
20 affirms the fact that it didn't exist because if he had chosen the, "cannot be found"  
21 option, he would normally expect the search to extend to locations where the records  
22 might be as opposed to should be, in which case he could've gone to Price  
23 Waterhouse Coopers or Chartered Accountants Ireland. I believe they show the, "do  
24 not exist" option to just put an end to this. If it doesn't exist, it doesn't exist. If they  
25 chose the, "cannot be found" option, they could be possibly compelled to go  
26 somewhere else and find it. But anyhow. Now, I'll just refer you your honour to my  
27 -- the book of pleadings --

28 JUDGE: Yes?

29 MR LANDERS: One moment now your honour, where's the documents, now -- yes  
30 your honour on page 87.

31 JUDGE: Yes?

32 MR LANDERS: Here it says in point 12, it's referring to -- this is my reply to points  
33 of opposition and affidavit of Stephen Rafferty. In point 12, it says: "The

1 Information Commissioner states in part ..." -- oh sorry, I beg your pardon, it's point  
2 11 your honour, point 11 on page 86.

3 JUDGE: Yes?

4 MR LANDERS: The Information Commissioner states in part: "It is settled law and  
5 it is generate the role of Commissioner in such an appeal to search for records". So, I  
6 replied, I said: "So, 'generally' applies in this case ..." -- generally in quotations --  
7 "... applies in this case or any other case the Information Commissioner deems as  
8 appropriate. My question is how does settled law and why does, 'generally' apply  
9 here. Aside, how it is it settled law that the Information Commissioner generally  
10 should not have to search for records in this case is beyond me. His title is,  
11 'Information Commissioner', which includes the words 'information' and  
12 'commissioner' ..." -- I carry on by saying -- "... first, where in the Information  
13 Commissioner's decision does he show proof that the Commissioner was required to  
14 review the decision of the public body and in doing so have regard to the evidence  
15 which was available to the decision maker and to the reasoning used by the decision  
16 maker in arriving or failing to arrive at the decision. Secondly, where does it ..." --  
17 I'm just referring to the Information Commissioner's decision which seemed very  
18 limited -- "... secondly, where does it say that this is all the Information  
19 Commissioner has to do in my case. This is direct contrast to, according to his  
20 website, his significant powers under the 2004 act."

21  
22 "The Information Commissioner seems to believe in whatever the other side tells  
23 him. Where's the objectivity in that. Is this the standard by which the Information  
24 Commissioner concludes, the records sought do not exist or cannot be found. My  
25 question is did he go to the location and do a search as per his significant powers.  
26 According to the Information Commissioner's website, he can enter any premises  
27 occupied by an FOI body and require any person found on the premises to provide  
28 him with records and documents which he may copy and retain ..." Yes, he does  
29 have discretion but of course discretion isn't always used not to give a document. I  
30 would think that discretion is used for positive action and if your role is a public  
31 interest role, well it's part of the positive action for words giving the documents.  
32 You would think in a case where it is claimed that the document cannot be found or  
33 does not, that it would be incumbent upon the Information Commissioner to use his  
34 significant powers to come to a more definitive conclusion.

1

2       Anyhow, I do make some comments on this: "Unfortunately, I do not trust the  
3       Information Commissioner where he told by honour court to now use such  
4       significant powers, however I do respect he asked this honourable court as part of the  
5       orders I applied for in my notice of motion, to insist that the Information  
6       Commissioner compel the release of a copy of the internal audit plan from PWC and  
7       ICAI and time stamped and verified by this honourable Court." In addition, although  
8       mentioned, I know -- okay -- I believe ...

9       JUDGE: Yes, I've read the rest of that there.

10       MR LANDERS: I'll move on to that. I will just go on to my second part on searches  
11       and that's on page -- let me get that page for you very quickly. Yes, point 7. Okay,  
12       regarding the exhibit 5 under the heading: "Internal review" --

13       JUDGE: So, what page are we on Mr ...

14       MR LANDERS: Yes, that's on ...

15       JUDGE: Because to keep an eye on the clock Mr Landers --

16       MR LANDERS: Yes, your honour.

17       JUDGE: You've 5 minutes left now.

18       MR LANDERS: Okay. If you go to page 228, I say regarding --

19       JUDGE: Page -- which page?

20       MR LANDERS: Okay page 227.

21       JUDGE: 227, yes, thank you.

22       MR LANDERS: What were areas were searched and can the NTMA outline  
23       whether this was done manually or by computer. So regarding this particular point  
24       no. 2, my question is why didn't he search words like PWC audits, as you can see it  
25       says in the last paragraph: "In relation to the above electronic searches, each staff  
26       member was advised to use key words when conducting their searches such as,  
27       'internal audit 2009', 'internal audit 2010', 'internal audit 2011' ..." -- nowhere in that  
28       is the word PWC mentioned. PWC for example, key words like PWC audit, PWC  
29       internal audit plan, PWC internal audit 2010 etc. Nowhere in the search key words  
30       did the NTMA include PWC which you would think would be the first keyword used  
31       to make such a search. If the NTMA -- okay that's fine. So, why is the most critical  
32       word missing, PWC. Okay your honour, so just to finish --

33       JUDGE: Yes?

1 MR LANDERS: -- I won't get all my points in but I do refer you to point 7 on page  
2 94 for your reference.

3 JUDGE: Page -- point seven on page 94?

4 MR LANDERS: Yes. That's what I was just reading out.

5 JUDGE: That's what you just talked about, the key words is it yes?

6 MR LANDERS: I haven't had really much time to complete it.

7 JUDGE: Yes.

8 MR LANDERS: Well I've pretty much made my other points your honour.

9 JUDGE: Yes okay.

10 MR LANDERS: I believe and I suppose with that your honour, I'll rest my case.

11 JUDGE: Great, okay. Well look thanks Mr Landers and thank you both and thank  
12 you for keeping to the -- very consistently to the allocated time. I would like to just  
13 reflect on the submissions that have been made, so I propose to reserve my judgment  
14 and the Court Service will be in touch with the parties when I have my judgment  
15 ready to deliver.

16 MR LANDERS: Thank you your honour.

17 MR BROWNE: Thank you.

18 JUDGE: Thank you very much.

19

20 Case adjourned

21

22

23

1       Certified to be a complete and correct transcript of the record of the proceedings  
2       herein\*:

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13       (\*The absence of a dedicated logger in court to provide a detailed log may result in  
14       speaker names being omitted or unconfirmed.)

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