

THE HIGH COURT

[2023] IEHC 108

Record No. 2021/344MCA

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 24 OF THAT ACT

AND ORDER 84C OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

Ms. T

APPELLANT

- and -

INFORMATION COMMISSIONER

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 24 February 2023

Introduction

1. This case, although coming under the Freedom of Information Act 2014 (the “2014 Act”), concerns not access to records but rather an amendment to records. Section 9 of the 2014 Act provides that where personal information in a record held by an FOI body is incomplete, incorrect, or misleading, the head of the body shall, on application by the individual to whom the information relates, amend the record. The record may be amended in three alternative ways – by altering it, by adding a statement specifying the respects in which the information is incomplete, incorrect or misleading, or by deleting

information from it. Where a record is amended, the FOI body shall take steps to give notice of the amendment to identified persons.

2. It may immediately be seen that this section goes way beyond simply providing access to records in the possession of public bodies. Rather, as identified in the preamble to the 2014 Act, it enables persons to have personal information relating to them in the possession of public bodies corrected.
3. In this case the appellant, Ms. T, who represented herself, sought an amendment under s. 9 to a medical record of her deceased partner, Mr. PL. Both the FOI body in question, St. James's Hospital, and the Commissioner¹, refused her request. I have decided to quash the decision of the Commissioner for a very net reason: the Commissioner failed to take into account material information provided by the hospital as to why the record contained one set of information, but not other available information. This was because the information was provided by St. James's hospital in the context of an attempt by the Commissioner to settle the dispute under s. 22(7) of the 2014 Act.
4. Section 22(7) provides for a statutory mediation process whereby the Commissioner can endeavour to effect a settlement between the parties and for that purpose may suspend or discontinue his review. The Commissioner took the view that because the material was provided in a letter from St. James's explaining why it did not wish to settle the case, he would not take it into account. I should emphasise that the information in question was a substantive explanation by St. James's, not previously provided by it in its earlier submissions to the Commissioner, as to why it refused to amend the record. No evidence or explanation was provided in the context of these proceedings as to why the Commissioner considered he was precluded from considering this information, or

¹ It should be noted that the decision in this case was taken by Mr. Stephen Rafferty, Senior Investigator, to whom the Commissioner delegated the decision. For convenience, I refer throughout to the decision being the Commissioner's decision, excepting where, in context, I am discussing Mr. Rafferty specifically.

why it might be undesirable to consider information provided in the context of a settlement attempt under s.22(7).

5. Despite this lacuna in the evidence, I have nonetheless considered whether I should refuse to quash the decision on this ground on the basis that to do so would undermine settlement attempts by the Commissioner. However, given the nature of the statutory settlement scheme, it is not obvious to me why consideration of material information provided in this context by a party without any reservation as to use would have this effect. The Commissioner has not put forward any reasons justifying exclusion of such information. Therefore, given that the information provided in the context of an attempt to settle the dispute was material, and was not taken into account, I have decided to quash the decision of the Commissioner exclusively on this basis.

Factual background

6. The chronology of events underlying this statutory appeal is as follows. Ms. T's partner, PL, who suffered from liver cirrhosis, sadly died on 28 September 2017. On 17 January 2020 Ms. T made an application to St James's Hospital for amendment of what she described as inaccurate and misleading information in Mr. L's records. She identified a significant number of records and the basis upon which she was seeking amendments. She noted that some records incorrectly referred to excess alcohol intake on the part of Mr. L, referring in particular to a reference to Mr. L "admitting" an alcohol excess of about 40 units per week over a 15-year period in his younger years. That information appears to have originated in the clinical notes of 10 September 2014 of a consultation Mr. L had with a Dr. Margaret Walshe, Registrar, of St. James's hospital in September 2014 (exhibited to Ms. T's affidavit of 28 January 2022).
7. By letter of 4 February 2020 St. James's refused to amend Mr. L's records. Ms. Ann Dalton, Deputy CEO, identified that the information related to personal information

obtained from Mr. L in confidence during several consultations. She referred to s.9(2) of the 2014 Act, which states that an application must include appropriate information in support of the application and observed that the evidence provided did not meet the requirements of s.9(2).

8. On 3 March 2020 Ms. T submitted an internal review request to the hospital. On 11 September 2020 the original decision was affirmed by Cathal Kinsella, freedom of information reviewer for the hospital. Mr. Kinsella concluded that, following a review of the relevant records and his liaising with the medical personnel, that the notes on Mr. L's alcohol consumption levels were contemporaneously recorded at the relevant clinical visits. As such, he determined that the information provided by Ms. T was insufficient to warrant an amendment of the records pursuant to s.9(2) of the 2014 Act.
9. However, contrary to the requirements of the 2014 Act, this decision was not made by a more senior decision-maker than the original decision maker. Therefore, a second internal review decision was issued on 22 October 2020 by Mary Daly, CEO of St. James's hospital. Ms. Daly came to the same conclusion as Mr. Kinsella had done on 11 September 2020 for precisely the same reasons.
10. On 4 November 2020 Ms. T appealed the decision by St James's to the Commissioner, arguing that Mr. L's file was misleading, incomplete and inaccurate. Despite having originally sought amendments to a large number of documents, her appeal only related to the refusal of her request to amend one letter on Mr. L's files, being a letter of 18 March 2015 from Professor Suzanne Norris, Professor in Hepatology and Gastroenterology, of St. James's to Dr. Houlihan, Consultant Hepatologist, of St. Vincent's hospital, asking that St. Vincent's take over from St. James's the evaluation of whether Mr. L was suitable for a liver transplant. Rather than the record itself being

amended, she requested that an addendum/letter be added to the letter of 18 March 2015.

11. In support of her appeal to the Commissioner, she argued that the assertion in the letter of 18 March about Mr. L's history of alcohol consumption is made as if it were the definitive information about his personal history. She notes that the assertion is starkly at odds with the referral letter to St. James's from Mr. L's GP, Dr. Lombard, of 7 August 2014. She refers also to Mr. L correcting the false information by giving his true history including during an admission as an inpatient in February 2015, as recorded by Dr. Houlihan in his letter to Professor Norris of 15 April 2015. She also refers to the notes of the consultation Mr. L had with Professor Norris of January 2015, which she argues include a note about alcohol consumption levels that contradicts the level in the 18 March letter. She argues that the record by Dr. Walshe referring to Mr. L's consumption of 40 units per week in his younger days (which formed the basis for the inclusion of that information in the letter of 18 March 2015) contaminated other parts of the St. James's hospital file.

Arguments of the parties

12. In Ms. T's submissions in these proceedings, she complains of the following matters:

- The interpretation of s.22(7) of the 2014 Act in relation to settlements by the Commissioner;
- The failure to effect a settlement in accordance with fairness and natural justice;
- The interpretation of s.2 of the 2014 Act in relation to whether the impugned statement was a matter of opinion, arguing that it was not opinion;
- Unfairness/irrationality on the part of the Commissioner in not informing her of the explanation from St. James's in the letter of 26 February 2021 or giving her an opportunity to respond;

- Four administrative errors, in particular a delay in passing on her offer of settlement to St James's;
- Irrationality on the part of the investigator in concluding that no argument had been made by her that the opinion was flawed;
- Irrationality in that the letter of 26 February 2021 did not inform the senior investigators decision, including where it confirmed her assertion that the information about the units of alcohol was cherry picked;
- Irrationality in concluding that inconsistencies in the medical records would be obvious to any reader of the records;
- Irrationality in concluding there are inherent difficulties in altering contemporaneous medical notes given the possibility of an addendum, which will avoid contemporaneous notes being altered.

13. The Commissioner submits as a preliminary point that it is uncontested by Ms. T that s.9 of the 2014 Act is and must be interpreted as placing the onus of proof on the applicant. The Commissioner refers to the applicable test for an appeal under s.24 citing *Minister for Communications v Information Commissioner* [2021] 2 ILRM 81 (the “Enet” decision) and other associated caselaw.

14. In respect of Ms. T's s.22(7) ground, that the Commissioner cannot make a preliminary decision while in the process of settling and that the Commissioner delayed and as such failed to fulfil his obligations to facilitate settlement, the Commissioner submits first that these complaints do not fall under s.24 as they do not arise “*from the decision*” under appeal. Further, it is submitted that the settlement procedure under s.22(7) is entirely discretionary, there is no mandatory obligation contained in the section and that per *Grange v Information Commissioner* [2022] IECA 153, the procedure shall be

“such as the Commissioner considers appropriate in all the circumstances and...shall be as informal as is consistent with due performance” of his functions.

15. The Commissioner then turns to the Ms. T’s “opinion” point where she argues that part of the impugned statement in the 18 March 2015 letter is a statement of fact, not opinion. The Commissioner argues that no error of interpretation is evident and that on any objective interpretation of the syntax of the statement it must be construed as the opinion of Professor Norris. Further, it is submitted that this interpretation is not a pure question of law and must therefore attract significant deference. The Commissioner also submits that the decision reached by the Commissioner was predicated on the evidence of the hospital that the notes were records of attendances with Mr. L and as such there is some evidence upon which the Commissioner arrived at his conclusion for the purposes of *Enet* and *Sheedy v Information Commissioner* [2005] 2 IR 272. Further, he argues the fact/opinion distinction cannot amount to a “material” failing as identified in *Westwood v Information Commissioner* [2015] 1 IR 489.
16. In addressing Ms. T’s argument surrounding the letter of 26 February 2021, the Commissioner argues that it was written in the context of efforts to effect a settlement and it was therefore appropriate that it was not brought to Ms. T’s attention during the review. He argues that the sole purpose of exhibiting the letter was to show that an effort had been made to settle the matter by the Commissioner and Ms. T’s attempt to seize upon the letter for a different purpose is incorrect and inappropriate.
17. Further, he argues that even if the letter had not been issued in the context of the settlement, it would not follow that an error would ensue. In *Grange*, the Court of Appeal held the Commissioner was not obliged as a matter of fair procedures to share one party’s submissions with another.

18. Finally, it is argued that nothing is advanced by Ms. T which would give rise to an error, much less a material error in the decision, given that the hospital had indicated that the information had emanated from Mr. L.

Process before Commissioner

19. The Commissioner accepted Ms. T's request for review on 5 November 2020. On 16 February 2021 a preliminary views decision was issued by Ellen Whelan, investigator, the purpose of which was to give Ms. T an opportunity to make comments on same. Ms. Whelan summarises the hospital's submissions as follows:

"In essence, its position is that your original request was reviewed by the treating Consultant and that Consultant did not agree that the record should be amended as requested. The Hospital argued that the medical notes in this case were taken contemporaneously and there is no evidence that the patient did not make the statements at the time of the consultation."

20. Ms. Whelan noted that she intended to recommend that the senior investigator affirm the hospital's decision on the basis that there was no evidence that the patient did not make the statements in question in the consultation in question.

21. Ms. T replied the next day by email of 17 February 2021 stating, *inter alia*, that the letter was incomplete, incorrect, and misleading because it omitted information given by Mr. L to Professor Norris and other doctors and the letter from his GP. She asked for time to make further submissions and she also asked to see the hospital's submissions. In a replying email of the same day, Ms. Whelan stated that it was not the practice of the Commissioner to exchange submissions between parties to a review and that practice applied to both parties to the review. She went on to say that before any binding decision is reached the Commissioner takes care to ensure that the parties are notified of material issues arising from consideration and said that she was satisfied all

material points raised by the hospital had been brought to her attention in the usual matter.

22. On 22 March 2021, Ms. T provided a detailed 9-page submission, arguing that Professor Norris had relied on cherry picked information and ignored other significant information in her letter of 18 March. She argued that the letter of 18 March was incomplete, incorrect, and misleading because the personal information about Mr. L's history of alcohol was cherry picked from his healthcare record. She noted that the information about a history of alcohol consumption of 40 units a week for 15 years related to one clinical consultation only – the consultation that took place when Mr. L attended the hepatology clinic in St. James's on 10 September 2014 and met with Dr. Margaret Walshe. She identified other material health care records which, in her view, displayed a contrary history of Mr. L's alcohol consumption. She submitted that Professor Norris had omitted all the information available to her about Mr. L's history of alcohol consumption except that recorded by Dr. Walshe on 10 September 2014 and failed to qualify that information by referring to contradictory information in her possession about his alcohol consumption.

Nature of information available

23. Before proceeding further, it is important to identify the precise terms of the letter of 18 March 2015 from Professor Norris to Dr. Houlihan. She notes in relevant part:

“[PL] has attended my service since August 2014 when he was referred with decompensated liver disease and a new diagnosis of cirrhosis. The aetiology of cirrhosis is fatty liver disease as a consequence of NIDDM [non-insulin-dependent diabetes] and contributed to by a history of alcohol consumption of 40 units per week for 15 years when he was a younger man. He has been abstinent from alcohol consumption since August 2014”

24. As noted above, that information appears to have come from the clinical notes of Dr. Walshe of September 2014. That information is repeated in a range of other medical records relating to Mr. L. However, there were also records before the Commissioner from the hospital identifying other information relevant to Mr. L's alcohol consumption, including: the referral letter from his GP of 7 August 2014 to Professor Norris that mentions his mother's history of cirrhosis of the liver, who was a teetotaler, and the fact that Mr. L had no history of excess alcohol; the letter of 14 August 2014 from Dr. Naimimohasses, Registrar to Professor Norris, to Mr. L's GP which refers to his weekly alcohol intake being between 12 – 20 units; the clinical notes of 28 January 2015 of Professor Norris which appear to refer to 20 units of alcohol per week; and the clinical notes from his inpatient admission in St. James's referring to his consumption of 14 units of alcohol per week prior to his becoming abstinent.

Decision of the Commissioner

25. At page 5 of the Decision of 10 November 2021, the Commissioner notes that in deciding whether Ms. T has shown that the information is incorrect, incomplete or misleading, it is important to have regard to the context in which the information has been recorded. He refers to the purpose of the letter of 18 March having been to refer Mr. L to another hospital and the inclusion by the doctor of relevant background information concerning the patient's medical condition. The Commissioner summarises the information at issue as being "*the consultant's opinion that the patient's past alcohol consumption was a contributory factor to his condition and the information concerning alcohol consumption levels was apparently provided by the patient*". Criticism is made by Ms. T of the characterisation of the relevant passage of the letter as being the consultant's opinion. Ms. T argues that at least part of the passage is information rather than opinion.

26. The Commissioner notes that Ms. T argued the possibility that the clinical note of 10 September 2014 upon which the referral letter was based contained incorrect information about the alcohol consumption due to miscommunication between the patient and treating doctor. He goes on to say that he is not cannot categorically determine what either the patient or the doctor said at any point during the consultation and nor was he required to do so, observing:

“It is important to note that personal information in a record is not incomplete merely because the record does not contain all the information which an applicant might like it to contain. We take the view that the word incomplete in section 9 is used in the sense of imperfect or defective or lacking certain requisite items or details. In deciding whether the information can be so described, regard has to be had to the purpose for which the information is held”

27. On page 6, he refers to the hospital’s submission that the information in the case was provided by the patient and the notes were contemporaneously taken during the patient’s attendances. He refers to inconsistencies in respect of the recording of the amount of alcohol consumed but notes that Ms. T did not dispute that the information concerning his consumption was provided by the patient. He refers to the fact that Ms. T herself refers to records in which reference is made to Mr. L’s excess alcohol consumption and concludes that the consultant’s opinion could not to be said to be flawed by reason of the total inadequacy of the factual information underlying it. He concludes that Ms. T has not shown on the balance of probabilities that the information she is seeking to have amended is incomplete incorrect or misleading and therefore finds that the hospital was justified in refusing to amend the record. For those reasons,

he upheld the hospital's refusal to amend the records. He does not address the "cherry-picking" argument of Ms. T.

Settlement process

28. The 2014 Act contains a provision relating to the facilitation of settlement between the holder of the information and the requester. Section 22(7) provides:

(a) Where an application under subsection (2) is made, the Commissioner may at any time endeavour to effect a settlement between the parties concerned of the matter concerned and may for that purpose, notwithstanding subsection (3), suspend, for such period as may be agreed with the parties concerned and, if appropriate, discontinue, the review concerned.

(b) In determining whether to suspend a review under this section, the Commissioner shall act in accordance with his or her own discretion.

29. Attempts at settlement were made in this case. In her affidavit of 8 December 2021, Ms. T avers that on 18 December 2020 she received a phone call from Ms. Whelan, investigator, telling her there would be an attempt to reach a settlement in relation to her application. On 19 December 2020 Ms. T emailed the Commissioner with a letter making a proposal that an addendum to be added to the file acknowledging the letter was incomplete, incorrect, and misleading because it did not reflect all of the information available to the hospital at the time. Following the issuing of the preliminary views decision of 16 February 2021 referred to above by Ms. Whelan, Ms. T queried whether her proposal of 19 December had been put to the hospital. She received an email on 18 February 2021 from Ms. Whelan to say she would contact the

hospital with Ms. T's proposal. On 2 March 2021 Ms. Whelan emailed Ms. T indicating that she had approached the hospital to ascertain if it would add a statement to the record with a view to settling the case, but the hospital had declined to do so.

Proceedings

30. Following the rejection of her appeal by the Commissioner, Ms. T issued a Notice of Motion for an Order under s.24 of the 2014 Act on 8 December 2021 setting aside the decision of the Commissioner of 10 November 2021 and remitting the decision back to him. The motion was grounded on her affidavit sworn on the same date. On 23 February 2022, the Commissioner filed his Statement of Opposition, verified by an affidavit of Stephen Rafferty, Senior Investigator sworn 17 February 2022. Ms. T swore a replying affidavit on 6 April 2022. On 26 January 2023 Ms. T issued a Notice of Motion seeking to make an application under s.16 of the Mediation Act 2017 for the parties to be invited to consider mediation grounded on her affidavit sworn on the same date.

31. As part of the response of the Commissioner to Ms. T's averment that there was no serious effort by the Commissioner to effect a settlement, Mr. Rafferty in his affidavit sworn 17 February 2022 averred as follows at paragraph 28:

“In circumstances where the Appellant has put the matter of settlement in issue, and in which it is important to demonstrate that this Office acted properly at all times (as I say it did) I am advised that it is in order to put before the Court the proposal which was made to the Hospital regarding settlement (by email dated 19 February 2021) and the Hospital's response to same (by letter dated 26 February 2021)”

32. Those exhibits are instructive. The email of 19 February from the investigator to St. James's is in the following terms:

"The applicant has stated that the only record she is seeking to amend is the letter from Prof Norris to Dr Houlihan dated 18 March 2015. The applicant has stated that she wishes for a statement to be added to that record only, stating that at the time of its writing, there was information on the patient's file which contradicted the assertion that he had a history of alcohol consumption of 40 units per week.

The applicant has supplied clinical notes and other correspondence from the patient's medical file which note varying units of alcohol consumption. I note in particular clinical notes by Prof Norris dated 28 January 2015 which record "- 20 u/wk", presumably in relation to alcohol consumption.

In the circumstances, I am of the view that this case may be suitable for a settlement, should the Hospital be amenable to adding a statement to the record to the effect that at the time of its writing, there was information on the patient's medical file which contradicted the assertion that he had a history of alcohol consumption of 40 units per week."

33. The response from St. James's was provided on 26 February 2021. Because of its importance in this case, I will quote it *in extenso*:

"Thank you for your email 19/02/21 proposing a settlement solution in this case, where you ask the Hospital to consider adding a statement to the record on letter 18/03/15. A statement to the effect that "at the time of its writing there was information on the patient's file which contradicted the assertion that he had a history of alcohol consumption of 40 units a week".

The Consultant in this case has been updated on the matter, who has again confirmed that the patient himself provided the information relating to alcohol consumption. The alcohol consumption was provided by the patient at different attendance dates and was provided to different members of the medical team. Thus to alter a clinical record to state a contradiction occurred would be wholly incorrect and inappropriate in circumstances wherein no contradiction arises as [Mr. L] of course provided this information verbatim at his time of attendance on that specific date.

The letter dated 10/03/15 was a referral for consideration for liver transplantation. The higher level of alcohol consumption recorded in the chart would be used in the referral process for transplantation as is accepted clinical practice referring a patient for transplantation assessment. However as outlined in the same letter Prof. Norris also noted that [Mr. L] was abstinent from alcohol consumption at the time of his referral.

Therefore and unfortunately we are not in a position to amend the clinical documents as the information was acquired from the patient at the time of his review. To try and provide some comfort and reassurance to [Ms. T], the medical file is closed and would not be opened again for any future purposes.”

34. There was no reservation by St. James’s as to the use this letter was to be put. It was only when Ms. T received the affidavit of Mr. Rafferty and its exhibits that she saw the letter from the hospital for the first time, as the hospital’s response had not been shared with her. She filed a replying affidavit on 6 April 2022 where she argued that the letter included a new material issue which, having regard to the “*Information Commissioner Summary Procedures*” she should have been informed about. She points out in her

affidavit that the explanation given in the letter of 26 February 2021 is substantially different to the explanations given by the hospital previously, noting that:

“15. ...In the Hospital decision about my application dated the 4 February 2020 it said “The information contained within the medical records relates to personal information obtained from [Mr. L] in confidence during several consultations” (Exhibit A). In the Hospital decision about my application dated 22 October 2020 it said “the alcohol consumption levels were contemporaneously recorded at the relevant clinical visits” (Exhibit SR1). In the Respondent’s Decision of 10 November 2021 (“the Decision”) it was stated that, in its submissions to the OIC, the Hospital said that “the notes were contemporaneously taken/recorded during the patient’s attendances” (Exhibit B).

16. In the OIC Summary procedures for settlement and withdrawals it says “even if a binding decision is required, the settlement process can help to ensure that the final decision concentrates only on the essential items that are in dispute”. The explanation from the Hospital, about use of the higher level of alcohol consumption from the chart, should have informed the Decision. It was an essential item. It is clear, because the Decision only refers to previous explanations by the Hospital, that this explanation did not inform the Decision.

17. In the OIC Summary Procedures under the heading “6. Requesting Submissions” it is stated that the relevant parties are notified of any new material issues which arise for consideration. It says that material issues are issues that are relevant to the outcome of the review and which are likely to influence the decision of the Commissioner will make. The explanation about

the use of the higher level of alcohol consumption from the chart was a material issue that should have been notified to me.”

35. At paragraph 20 she says that the explanation about the use of the “higher level” proves that she was right in making the argument to the Commissioner that the information in the letter of 18 March 2015 was cherry picked. She submits that the information Professor Norris selected was the outlier of all the information she available to her when she wrote the letter of 18 March 2015.
36. No replying affidavit was filed by the Commissioner in response to that affidavit. There was no evidence from the Commissioner before the Court identifying whether the letter of 26 February was considered by the senior investigator when arriving at his decision. However, that matter was clarified at the hearing when, in response to a request for clarification of that point, counsel for the Commissioner confirmed that the letter had not been taken into account by the investigator in arriving at his decision. This was not for reasons of timing– the letter was received in February 2021 and the decision was made in November 2021. There is no evidence before me as to why the Commissioner adopted this point of view, but it appears from counsel’s submissions that this approach was adopted because the letter was treated as part of the settlement process rather than a substantive response by the hospital.
37. On 26 January 2023 Ms. T issued a Notice of Motion identifying she would apply to the Court under s.16 of the Mediation Act 2017. In her affidavit grounding the motion of 26 January 2023, she identified that new information had come to light and that this was the first time she was given sight of the letter and made aware of its contents. In the circumstances, she sought for the matter to be sent to mediation No affidavit was filed in response by the Commissioner, but a letter was written refusing to mediate the appeal. At the hearing of this appeal, Ms. T requested that I adjourn the hearing for the

purpose of mediation and make an Order under s.16 of the Act. The Commissioner explained that he saw no benefit in the matter being sent to mediation where the hospital had already refused to amend the record in the context of the settlement process he had initiated. Given that I can only exercise my powers to adjourn proceedings under s.16 where the parties decide to engage in mediation, I refused Ms. T's application.

Discussion and Decision

38. Although Ms. T has raised a number of discrete arguments, I only need to deal with the alleged failure of the Commissioner to supply her with a copy of the letter of 26 February and the separate failure of the Commissioner to take it into account in his decision, as my decision on these arguments is dispositive of the appeal. The Commissioner accepts that he took neither of those steps.

39. The Commissioner has published a document entitled "*Information Commissioner Summary Procedures*", exhibited at Ms. T's affidavit of 6 April 2022. She relies upon paragraph 8 entitled "*Settlements & Withdrawals*". This provides as follows:

"In deciding how best to resolve a case, we consider if it is possible to settle the case without issuing a binding decision. Application fees are refundable when cases are settled or applications for review are withdrawn.

A settlement is not designed to reduce the rights of applicants. It is aimed at narrowing the differences between the sides. Even if a binding decision is required, the settlement process can help to ensure that the final decision concentrates only on the essential items that are in dispute.

If we consider that it is possible to settle the case or narrow the differences between the parties, we contact the parties concerned. We use informal methods of communication wherever possible and outline the possible basis of the settlement."

40. There is no consideration given in that document as to how to treat material provided in the context of the settlement process. Nor is there any case law identified in that respect by either party. Nor has the Commissioner chosen to put any evidence before the Court in that respect, although this argument was squarely raised in Ms. T's affidavit of April 2022.

Was the information material?

41. Given the Commissioner's commitment to notifying parties of any material issues raised by the other party, and the general administrative law requirement that a decision maker must have regard to all relevant matters, the first issue I should decide is whether the information in the letter of 26 February is material and/or relevant information. Material issues are defined in the "*Summary Procedure*" document as "*issues that are relevant to the outcome of the review and which are likely to influence the decision the Commissioner will make.*". The preliminary views decision of Ms. Whelan made it clear that the Commissioner will notify parties of any new material issues which arise for consideration.

42. I have no doubt that certain of the material contained in the letter of 26 February is new material information. In summary, the position of the hospital in the decisions it issued to Ms. T was that the impugned information was obtained from Mr. L in confidence during several consultations and that the alcohol consumption levels were contemporaneously recorded at the relevant clinical visits. In the Commissioner's decision the hospital's submissions were summarised as being that the notes were

contemporaneously taken/recorded during the patient's attendances. In other words, the focus of the hospital in defending its decision both to Ms. T and to the Commissioner prior to 26 February was that the impugned information was provided by Mr. L at the relevant clinical visit and there was no basis for doubting that information. No reference was made to any other information obtained on other occasions that might contradict or be inconsistent with that information. The hospital focused upon the accuracy of the information in that letter and did not refer to other information potentially relevant to the question of Mr. L's alcohol consumption.

43. The letter of 26 February took a markedly different approach. It still included the confirmation that Mr. L himself provided the information relating to alcohol consumption. However, an additional and important piece of information was included i.e. that the letter was a referral for consideration for liver transplantation and the higher level of alcohol consumption recorded in the chart would be used in the referral process for transplantation as is accepted clinical practice referring a patient for transplantation assessment. The reference to "higher" suggests that there was a suite of information in relation to Mr. L's alcohol consumption and that the higher level of consumption was intentionally taken. Moreover, it is suggested that this approach is a conscious one, being accepted clinical practice when referring a patient.

44. It is hard to imagine that, had this information been considered by the Commissioner, his decision would have been the same. He would have been required to consider not only the question of the accuracy of the information (as he did) but also whether information can be considered complete where other information potentially relevant to the issue i.e. the level of alcohol consumption during a given time period, is omitted, albeit intentionally for a stated clinical purpose. It may well be that the Commissioner would ultimately have arrived at the same decision but in my view his reasoning would

have followed quite a different line and would necessarily have included other considerations. For example, this information might have been relevant to his view that the consultant was expressing an opinion as opposed to recording information.

45. Interestingly, the approach adopted by Professor Norris had been anticipated by Ms. T. In her detailed submission following the preliminary views decision, she argued that the consultant had cherry picked the information available. That argument was not specifically addressed by the Commissioner. Had the material had been before him, it is difficult to avoid the conclusion that he would have had to engage with it. “Cherry picked” is a pejorative expression and the Commissioner may well have decided that the actions of the consultant in selecting the “higher limit” should not be described in that way. But the Commissioner would have been required to engage with the argument.
46. In summary, given the nature of the material, I cannot avoid the conclusion that, had this material been included by the hospital in its substantive submissions to the Commissioner, the gist of it would have been put to Ms. T to allow her to respond. Further, the Commissioner would have been obliged to address it in his decision. In the circumstances, the statement that the higher level of alcohol consumption recorded in the chart was used in the referral process for transplantation as per accepted clinical practice must be treated as material information given its centrality to the issues in this case.

Material information obtained in s. 22(7) process

47. My conclusion as to materiality requires me to consider whether the Commissioner is entitled to disregard material information where it arises in the context of the settlement process. I am seriously restricted in any analysis on this question given that I have no evidence before me from the Commissioner at all as to the implications of being required to include material information where it arises in the context of settlement. For

example, there is no evidence identifying that this would place an impossible administrative burden on the Commissioner or that it would undermine settlement. No reason is given as to why the Commissioner might be entitled to ignore material coming to his attention in a settlement process, apart from the bare assertion that he is not required to consider the material because it arose in the context of a s.22(7) settlement attempt.

48. Despite the lack of evidence or even legal arguments proffered by the Commissioner in this regard, when deciding whether the decision should be remitted for failure to consider the material information, I cannot ignore the fact that settlement is to be encouraged and that any decision I make should not undermine settlement of disputes under the 2014 Act. Here, the settlement process is part of a statutory framework. It is quite different to that in ordinary adversarial proceedings between parties before the courts. The Commissioner is a neutral third party, who is given a discretion to endeavour to effect a settlement. There is nothing in the statutory framework that refers to material exchanged in the course of settlement being privileged or excluded from consideration by the Commissioner. No such claim was made over the letter by the hospital here.

49. Nor is there any case law suggesting that material information provided in the context of s.22(7) should not be provided to the other party for comment. As noted above, the decision in *Grange* confirms that the Commissioner is not obliged to provide the submissions of the parties to other parties but rather should summarise the contents to allow parties to be heard on those submissions. No reason is provided by the Commissioner as to why a different rule should apply here.

50. Of course, there may be situations where parties may divulge information that the Commissioner might decide should not be shared in the context of settlement. But no

such argument was raised here. If such a justification is proffered in another case, it can be dealt with. But I should not absolve the Commissioner from considering material information for a reason that the Commissioner has not advanced.

51. I therefore conclude that the Commissioner ought to have conveyed the substance of the letter of 26 February 2021 to Ms. T to obtain her views on same, and ought to have taken that explanation into account when adjudicating on the appeal against the hospital's decision to refuse to amend the letter of 18 March by adding an addendum. By failing to observe fair procedures and by failing to take into account material information, the Commissioner erred in law. Because of my conclusion in this respect, it is unnecessary to consider Ms. T's other arguments in relation to the Commissioner's decision.

Conclusion

52. For the reasons set out above, I uphold Ms. T's appeal and quash the decision of the Commissioner of 10 November 2021.

53. I will put the matter in for submissions on costs and to consider whether the issue should be remitted to the Commissioner. No written submissions are required from the parties. The parties should agree a date for this hearing no more than two weeks from the delivery of this judgment and notify it to the Registrar for the purposes of fixing of a date.