

## THE HIGH COURT

[2005 No. 49 MCA]

## IN THE MATTER OF THE FREEDOM OF INFORMATION ACT, 1997, AS AMENDED, AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 42 (1) OF THE FREEDOM OF INFORMATION ACT, 1997

BETWEEN

THE NATIONAL MATERNITY HOSPITAL

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

PARENTS FOR JUSTICE LIMITED

NOTICE PARTY

**Judgment of Mr. Justice Quirke delivered on the 30th day of March, 2007**

This is an appeal on a point of law brought pursuant to the provisions of s. 42(1) of the Freedom of Information Act, 1997 by the National Maternity Hospital (hereafter "the Hospital"), against a decision of the Information Commissioner (hereafter "the Commissioner"), made on the 18th April, 2005. By her decision the Commissioner had varied earlier decisions made by the Hospital to refuse to provide the Notice Party (or persons associated with the Notice Party) with access to particular documents. Access had been sought pursuant to the provisions of s. 7 of the Freedom of Information Act, 1997 as amended, (hereafter "the Act").

**Relevant Facts**

1. On the 4th of April, 2000 the, (then), Minister for Health and Children announced the establishment of a non-statutory "Post Mortem Inquiry", (hereafter "the Inquiry").

Pursuant to its Terms of Reference the Inquiry was, *inter alia*, required "to review the post mortem examination policy, practice and procedure in this State since 1970 and in particular as it relates to organ removal, retention, storage and disposal by reference to prevailing standards both in and outside of the State."

2. After its establishment the Inquiry sought and received the co-operation of a number of hospitals and other public bodies and private persons in order to enable it to discharge its obligations.

The Inquiry wrote to the Hospital on the 27th February, 2001 advising that it had commenced its work and enclosing its Terms of Reference. The Hospital readily agreed to co-operate with the Inquiry

The Hospital provides obstetric and gynaecological services to a large population on the east coast. It was founded in 1894 and is the largest Maternity Hospital in the State.

3. "Parents for Justice" (hereafter called "PFJ"), is an unincorporated body comprised principally of parents of deceased children whose bodily organs may have been retained by hospitals within the State after the conclusion of post mortem procedures some years ago. Those same persons now appear to comprise the Notice Party's members. The Notice Party is a company limited by guarantee. It was incorporated on the 2nd January, 2003.

Mr. Raymond Bradley of Messrs Malcomson and Law is the solicitor for the Notice Party. He has averred that PFJ cooperated with the Inquiry until October 2002 when it announced that it was formally withdrawing its cooperation by reason of the uncertain nature of the Inquiry's powers and procedures.

4. On the 11th May, 2001 the Hospital received a draft memorandum on procedures from the Inquiry which provided (at para 7.6) that:

"Documents received by the Inquiry shall be treated as confidential and will only be released or disclosed to other persons pursuant to these procedures and/or by operation of law."

On the 3rd August, 2001 a "final memorandum on procedures" was issued by the Inquiry. That memorandum provided (at para 4) as follows:

"4.1 The Inquiry will require each person who contributes to its work to undertake in writing to treat as strictly private and confidential and not to disclose to any person, any information which the person contributing to the work of the Inquiry gives or receives relating to the work of the Inquiry either written or oral.

4.2 The Inquiry will require each person who receives documents or copies thereof, from the Inquiry to enter into a Confidentiality Agreement with the Inquiry. A draft Confidentiality Agreement is attached to this Memorandum on Procedures as appendix "A".

4.3 Where it is, in the view of the Inquiry, necessary in order to ensure fair procedures to furnish either documents or the contents of evidence to a third party and that third party declines to be bound by the Confidentiality Agreement the Inquiry will not furnish either the evidence or documents to that third party. The Inquiry will then further consider the matter."

On the 24th May, 2002 the Hospital signed a Confidentiality Agreement with the Inquiry. Its terms provided *inter alia* that in the document provided by the Inquiry to bodies such as the Hospital would remain confidential as between the Inquiry and the body receiving the documents and would not be given or disclosed to any other person or body and would be returned to the Inquiry when required.

On the 4th November, 2002 the Hospital sent a written submission to the Inquiry.

In an affidavit sworn in these proceedings Ms Claire Callanan solicitor on behalf of the Hospital averred that when, on the 4th November, 2002 the Hospital sent its written submission to the Inquiry, it did so "in reliance on" the existence of the Confidentiality Agreement.

She continued "The submissions contains highly confidential and sensitive information. It provides information on post mortem practices and procedures, the reasons for the carrying out of post mortems, and (it) explained the Hospital's approach to its patients (at what is a very difficult time) in relation to consent, what happens at an autopsy and how burial is addressed."

5. Section 7 of the Act provides *inter alia* as follows:

"A person who wishes to exercise...the right of access shall make a request, in writing or in such other form as may be determined, addressed to the head of the public body concerned for access to the record concerned".

On the 9th of December, 2002 an initial application pursuant to s 7 of the Act was made by PFJ to the Hospital for access to the following categories of documents:

1. "Copies of any formal submissions delivered or intended to be delivered by your Hospital to the Post Mortem Inquiry, otherwise know as the Dunne Inquiry.
2. Copies of all correspondence between your Hospital and the said Inquiry.
3. Copies of all correspondence between your Hospital and the Department of Health pertaining to the said Inquiry.
4. Copies of all correspondence between your Hospital and other relevant parties pertaining to the said Dunne Inquiry".

The request, was refused by the Hospital by letter dated the 23rd December, 2002. The grounds for refusal relied upon by the Hospital included the contention that all of the documents sought were documents which related to the Inquiry including documents which were prepared and provided to the Inquiry in confidence on the understanding that they would be treated as confidential within the meaning ascribed to that term by the provisions of s. 26(1)(a) and 26(1)(b) of the Act of 1997.

6. Decisions made pursuant to the provisions of s. 7 of the Act may be reviewed in accordance with the provisions of s. 14 of the Act which provides *inter alia* that:

"(2), Subject to the provisions of this section, the head of the public body concerned, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person—

(a) may review a decision to which this section applies, and

(b) following the review, may, as he or she considers appropriate—

(i) affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter as he or she considers proper,

in accordance with this Act."

On the application of PFJ an internal review of the Hospital's decision was conducted under s.14 of the Act. On the 27th January, 2003 the Hospital affirmed its initial decision. The grounds for refusal of access were those identified in the earlier decision.

7. By letter dated the 21st day of July, 2003 the solicitors on behalf of PFJ sought a review of the Hospital's decisions by the Information Commissioner pursuant to the provisions of s. 34(2) of the Act which applies to decisions made pursuant to the provisions of S 14 of the Act and provides *inter alia* that:

"(2) Subject to the provisions of this Act, the Commissioner may, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person—

(a) review a decision to which this section applies, and

(b) following the review, may, as he or she considers appropriate—

(i), affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper, in accordance with this Act."

8. On the 1st April, 2005, the (then), Tanaiste and Minister for Health and Children, (hereinafter "the Minister"), issued a press release in which she announced that she had received a report from the Inquiry.

Indicating that the work of the Inquiry "...has now officially ended as of March, 31st" the press release continued "It will take some considerable time to examine this report in detail. It is the Minister's intention to publish the report, subject to legal advice. However the immediate focus at this time is on the examination of all the received material and consultations with the Attorney General. The report will be brought to Cabinet for consideration."

9. On the 18th April, 2005, the Commissioner made a decision whereby she varied the decision of the Hospital by, (a), annulling the Hospital's decision in relation to certain documents, (directing the Hospital to release some documents in full and other documents in part), and, (b), affirming the decision of the Hospital in relation to certain other documents, (finding that they were exempt under the Act).

10. On the 4th May, 2005, the Minister announced the appointment of Dr. Deirdre Madden B.L. "...to complete a final report on post mortem practice and procedures".

Indicating that she had received "strong legal advice" which suggested that the earlier report could not be published in its "present state" the Minister stated that "It is now necessary to appoint a relevant expert to examine the key points raised and findings in it in order to provide Government with a final report on post mortem policy and practice by the end of year."

In a press release the Minister expressly appealed to PFJ. She "...asked for their support for the work of Dr. Madden." She said "the overall objective of the Post Mortem Inquiry is to establish the facts, to report on them and provide recommendations for the future, so that closure may be put on the matter for all concerned. Dr. Madden will be appointed immediately and after examination of the documentation gathered to date, she will agree terms of reference to provide a final report and recommendation by the end of the year which will be published.

11. By Notice of Motion dated the 10th day of June, 2005 the Hospital sought the relief which has been sought herein.

### Issues

Section 6 (1) of the Act of 1997 provides *inter alia* as follows:

"6. —(1) Subject to the provisions of this Act, every person has a right to and shall, on request therefore, be offered access to any record held by a public body and the right so conferred is referred to in this Act as the right of access.

(2) It shall be the duty of a public body to give reasonable assistance to a person who is seeking a record under this Act

(a) in relation to the making of the request under section 7 for access to the record,...."

In *Sheedy v. Information Commissioner* [2005] 2 I.R. 272 the Supreme

Court (Fennelly J.) recited the long title to the Act of 1997 and pointed out that section 6 (1) of the Act "... gives effect to the general principle thus proclaimed of public access to documents "to the greatest extent possible consistent with the public interest and the right to privacy...".

In the instant case it is acknowledged on behalf of the parties that the Hospital is a "public body" within the meaning ascribed that term by the Act. It follows that, when on 9th December, 2002, PFJ applied to the Hospital for access to certain documents there was *prima facie*, an obligation upon the Hospital to provide PJF with access to those documents, provided that they comprised "records" held by the Hospital and provided that the Hospital was not entitled, under the terms of the Act, (or otherwise by operation of law), to refuse to provide PFJ with such access.

The principles applicable to appeals such as this have been identified by the High Court (McKechnie J.) in *Deely v. Information Commissioner* [2002] 3 I.R. 439 at p. 452 and adopted by the Supreme Court (Fennelly.J.), in *Sheedy v. Information Commissioner*.

Applying those principles to the facts of this case I am satisfied that in order to sustain its appeal it will be necessary for the Hospital to discharge the onus of proving on the facts which came before the Commissioner, either, (a), that the Hospital is entitled, pursuant to express provisions of the Act to refuse to provide PFJ with the access which it seeks or, (b), that the Hospital is entitled to refuse to provide PFJ with access to the documents pursuant to some other statutory, constitutional or lawful provision or, (c), that in making her decision the Commissioner either

- (i) made findings of primary fact which were unsupported by evidence or
- (ii) drew inferences from such facts which no reasonable decision-maker could rationally draw or,
- (iii) reached conclusions based upon an erroneous view of the law or,
- (iv) drew inferences by way of an incorrect interpretation of documents.

The grounds relied upon by the Hospital in support of its appeal can be summarised as follows:

- (1) It is contended that the Notice Party does not have *locus standi* in these proceedings.
- (2) It is contended that the documents sought came within the category of document or "record" identified in s. 22(1A) and (1B) of the Act and that the Inquiry was, at all material times a Tribunal within the meaning of that section. It is argued that the Commissioner erred in law in finding that the Inquiry had been completed when she made her decision.
- (3) It is contended that the documents sought come within a category of records which are exempt from production in proceedings in court on the grounds of legal professional privilege. It is claimed that the Commissioner erred in law in failing to refuse access to them as required by the provisions of s. 22(1)(a) of the Act.
- (4) It is contended that the Commissioner erred in law in her interpretation of ss 26(1)(a) and (b) of the Act and in her interpretation of s. 26(2) of the Act.
- (5) It is contended that the Commissioner erred in law in her interpretation of the provisions of ss. 20, 21 and 23(1)(a)(iv) of the Act.
- (6) It is contended that the Commissioner failed to provide the Hospital with fair procedures because she considered and relied upon submissions made to her by the Inquiry and by the Department of Health without first giving the Hospital the opportunity to see, consider and comment upon those submissions.

### (1). *Locus Standi*

It is contended that the Notice Party does not have *locus standi* in these proceedings. Whilst I accept that contention I do not believe that the status of the Notice Party in these proceedings fundamentally alters the nature of the issues to be determined in this case or the determination of those issues.

The application made on 9th December, 2002, for access under s. 7 of the Act was made by PFJ which was an unincorporated body. PFJ comprised a number of individual persons, most or all of whom were parents of deceased children whose bodily organs were, (or might have been), retained by hospitals or State bodies after the conclusion of post mortem procedures. The subsequent application

made under s. 14 of the Act, (for a review of the earlier decision), was also made by PFJ.

The application for a review by the Commissioner under s 34(2), of the Act was made by letter dated the 21st July, 2003 from Messrs. Malcomson Law Solicitors for PFJ. The letter provided *inter alia* as follows:-

"Re: Parents for Justice –Request under the Freedom of Information Act, 1997.

Dear Ms. O'Reilly,

We wish to advise that we act on behalf of Parents for Justice and have been requested to forward their Freedom of Information request (as enclosed), to the National Maternity Hospital, Holles Street. Following a refusal from the Freedom of Information Officer, an independent internal review was similarly unsuccessful.

We wish to make a further review application, to appeal the Hospital's decision within the required six month period..."

In her decision dated the 18th April, 2005 the Commissioner stated that:

"...I consider that, for the purposes of the FOI Act, the legal person to whom the decision under s. 14 issued is the person who made the application to my Office. I accept also that the Chairperson of the group was identified at all stages in the process and it is clear that, since the making of the initial request, you represent a group of persons affected by post mortem practices."

It has been suggested that the application made by letter dated 21st day of July 2003 for a review by the Commissioner under s 34(2), of the Act was made by or on behalf of the Notice Party. Had that been the case then it is unlikely that the Commissioner would have been empowered to conduct the review because the application would not have been an application made by the "requester" within the meaning ascribed to that term by s. 7 of the Act or a "relevant person" within the meaning ascribed to that term by s. 14(11) of the Act and s. 34(15) of the Act.

No provision within the Act confers jurisdiction upon the Commissioner to conduct a review of a decision made under s. 14 of the Act on the application of a person or party who had previously no connection with the decision to be reviewed.

On the evidence the Commissioner was entitled to find, (as she did), that the application for review under s. 14 of the Act, was made by PFJ. She was, accordingly, entitled to conduct the review under s 34(2), which was sought on behalf of PFJ. She was entitled also to deliver her decision to the solicitors for PFJ. She did so by letter dated the 18th April, 2005.

The status of the Notice Party within these proceedings is an entirely different matter. Persons seeking access to records under the Act of 1997 need not show any particular interest in the records sought in order to be entitled to access. There was nothing to prevent the Notice Party from seeking access to the relevant records under s. 7 of the Act. However it did not do so. The Notice Party was incorporated on the 2nd January, 2003. It was not in existence on the 9th December, 2002 when the initial application under s. 7 of the Act was made by PFJ to the Hospital.

The Commissioner has found that the review under s. 14 of the Act and the subsequent review under s. 34(2) of the Act were each made upon the application of PFJ. That finding was reasonably open to the Commissioner on the evidence before her.

It is not entirely clear how or why the Notice Party was joined as a party to these proceedings. The Notice Party was neither "requester" under s. 7 of the Act nor a "relevant person" within the meaning of s. 14(11) and s. 34(15) of the Act.

The Notice Party was not entitled to appeal the decision made by the Commissioner under s. 34 of the Act.

Section 42(1) of the Act of 1997 provides *inter alia* that:

"A party to a review under section 34 or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision."

The Notice Party was not a party to the application made to the Commissioner and was not a "person affected" by the Commissioner's decision within the meaning of s. 42(1) of the Act.

In *Construction Industry Federation v. Dublin City Council* [2005] 2 I.R. 496 the Supreme Court (McCracken J.) considered the status of an unincorporated trade association which sought, on behalf of its constituent members, to challenge a decision of Dublin City Council to make a development contribution scheme.

The court held that, whilst there were circumstances in which it would be appropriate for a representative body to be entitled to bring judicial review proceedings on behalf of its constituent members, the court should never be asked to deal with what was in effect a hypothetical question and the applicant trade association could not point any damage to itself which might result from the decision complained of.

McCracken J. observed, (at p. 527), that:

"...it appears to me that to allow the applicant to argue this point without relating to any particular application and without showing any damage to the applicant itself means that the court is being asked to deal with a hypothetical situation which is always undesirable. This is a challenge which could be brought by any of the members of the applicant who are affected and would then be related to the particular circumstances of that member"

He continued "...I can see no justification for departing from the normal rule which requires that an applicant for judicial review must have a "sufficient interest" in the outcome of the application and I cannot see any justifiable basis upon which it can be said that the applicant had any interest other than that of its individual members. In the circumstances of this case, where there is no reason why one or more of such individual members should not have made this application I would refuse to allow the application and dismiss this appeal on the basis that the applicant does not have *locus standi*."

Acknowledging that the position might differ where the individual constituent members of an association were financially incapable of mounting a challenge in their own right, he pointed out however that no evidence had been adduced in that case of such financial

difficulty. No evidence has been adduced in this appeal either which would justify the Court departing from the "normal rule" identified by McCracken J. The Notice Party is a company limited by guarantee. It is not a representative body for constituent members who are financially incapable individually of financing the costs associated with this appeal.

I am, accordingly, satisfied that the Notice Party does not have locus standi in this appeal. I am satisfied, however that its participation has not affected the outcome of the appeal in any respect. The parties to the appeal have been the Hospital and the Commissioner. The submissions relied upon by this Court in its determination have been those of the Hospital and the Commissioner.

### **S 22 (1a) and (1b) of the Act**

S.22 of the Act of 1997 was amended by the Freedom of Information (Amendment) Act 2003 *inter alia* by inserting the following subsections after subsection (1);

"(1A) A head may refuse to grant a request under section 7 if the record concerned relates to the appointment or proposed appointment, or the business or proceedings, of—

(a) a tribunal to which the Tribunals of Inquiry (Evidence) Act 1921 applies,

(b) any other tribunal or other body or individual appointed by the Government or a Minister of the Government to inquire into specified matters at least one member, or the sole member, of which holds or has held judicial office or is a barrister or a solicitor, or

(c) any tribunal or other body or individual appointed by either or both of the Houses of the Oireachtas to inquire into specified matters,

and the request is made at a time when it is proposed to appoint the tribunal, body or individual or at a time when the performance of the functions of the tribunal, body or individual has not been completed.

(1B) Subsection (1A) does not apply to a record in so far as it relates to the general administration of, or of any offices of, a tribunal or other body or an individual specified in that subsection."

At the commencement of her decision the Commissioner observed *inter alia* that:

"My consideration of the case was well advanced some weeks ago when it was announced that the Inquiry to which the records relate would cease to exist on the 31st March, 2005. Where in the course of the review additional facts come to light on whether the claim in the circumstances is relevant to the review, it is my practice to take these into account for the purposes of completing the review. That means that, for reasons which will become clear in the course of my consideration of the matter below, I consider that I must have regard to the current status of the Inquiry."

In her decision the Commissioner observed that "...s. 22(1A)...is designed to protect the interest of a particular Tribunal/Inquiry."

She found that the Inquiry had been completed and had ceased to exist after the 31st March, 2005.

She continued "I take the view that s. 22(1A) is potentially relevant only in circumstances where, at the time of the making of the decision, (inclusive of my review decision), the performances and functions of the tribunal, body or individual has not been completed. I consider that the possibility of a "new" Inquiry being set up is an entirely separate matter and I have no knowledge of proposals in that regard."

She went on to find that "I do not think that the s. 22,(1A) exemption has any application to this case and I do not find it necessary to examine it further in my decision."

When the Commissioner made her decision on the 13th April, 2005, she had before her the following material which was relevant to the provisions of s. 22(1A) of the Act:

(1). A press release dated the 1st April, 2005 in which the, (then), Tanaiste and Minister for Health and Children announced that she had received a report from the Inquiry and that the work of the Inquiry "... has now officially ended as of March, 31st". The release continued "I will take some considerable time to examine this report in detail. It is the Minister's intention to publish the report, subject to legal advice. However the immediate focus at this time is on the examination of all the received material and a consultation with the Attorney General. The report will be brought to the Cabinet for consideration."

(2). Correspondence between Ms. Dolan from the office of the Commissioner and Ms. Mary Jackson from the Department of Health and Children including a letter from Ms. Jackson to Ms. Dolan dated the 8th April which advised *inter alia* that:

"I wish to confirm that on the 1st September, 2004 the Government decided that the Dunne Post Mortem Inquiry should furnish its final report not later than the 31st March, 2005 and that the Inquiry would then cease to exist.

Ms. Dunne furnished her report to the Tanaiste on the 31st of March.

However the Tanaiste has sought legal advice on the contents of the Report and following the examination of this advice and consideration of Government on it in the coming weeks, she will decide on what the next steps regarding the Inquiry are."

(3). A document entitled "Post Mortem Inquiry Public Notice" which was signed by the chairman of the Inquiry Ms. Anne Dunne, Senior Counsel and published in national newspapers. The notice advised as follows:

"The Post Mortem Inquiry provided its Report to the Tanaiste and Minister for Health and Children on the 31st March, 2005 in accordance with its third deadline.

By Government decision the Inquiry ceased to exist on the 31st March, 2005. All communications should therefore be addressed to:

(4). Oral information from Ms. Dolan in relation to a telephone conversation which she had with Ms. Jackson on the 4th April, 2005, in which Ms Jackson confirmed to Ms Dolan that the Dunne Inquiry had terminated with effect from the 31st March, 2005.

Many of the powers conferred upon the Commissioner by the Act are, necessarily, wide. In general, they require the exercise of discretion rather than the application of strict legal standards. The courts will not interfere with the exercise by the Commissioner of her discretion where it has been exercised lawfully.

In conducting a review under s 34(2), of the Act the Commissioner is not confined, as this Court is, to the determination of whether mistakes of law have been made by the earlier decision-maker and to interfere only where decisions of the Commissioner are based upon an erroneous view of the law or are unlawful for one of the reasons identified earlier herein.

The Commissioner correctly found that the Inquiry was a "tribunal" for the purposes of s 22(1A), of the Act. That was a finding of law by the Commissioner.

She found that the Inquiry had been completed when she made her decision on the 13th April, 2005. That was a finding of fact. The Court will not interfere with that finding. There was considerable material before the Commissioner which could reasonably have given rise to her conclusion. The Court is not concerned to discover whether it would have reached the same conclusions or made the same findings of fact as those of the Commissioner.

The Court is concerned with the legality of the Commissioner's decision applying the principles identified by High Court in *Deely v. Information Commissioner*.

Having conducted a review of the earlier decision of the Hospital, (made under s. 14 of the Act), the Commissioner, when conducting her review, was exercising the wide discretion conferred upon her by s. 34(2)(b)(ii) of the Act to "...make such decision in relation to the matter concerned as ...she considers proper in accordance with this Act.

Nothing within the provisions of the Act required that the review should be conducted on the facts as they existed on 27th January, 2003, when the Hospital made its decision under s. 14 of the Act.

The Commissioner was entitled to consider all of the material before her on the date on which she made her decision and to make her decision having regard to the circumstances which existed on the 18th April, 2005.

On the evidence in this case there was ample material before the Commissioner upon which she could reasonably have concluded that on the 18th April, 2005 the documents to which PFJ sought access no longer related to the business or proceedings of a tribunal within the meaning ascribed to that word by s. 22(1A) of the Act.

She was, accordingly, entitled to find, as she did, that the exemption provided by s 22(1A), of the Act did not apply to the documents sought.

#### **S. 22(1)(a) of the Act**

S 22 (1), (a), of the Act provides as follows.

"(1) A head shall refuse to grant a request under section 7 if the record concerned—

(a) would be exempt from production in proceedings in a court on the ground of legal professional privilege,"

The Commissioner refused access to a number of records on the grounds that they would be exempt from production in proceedings in a court on the grounds of legal professional privilege and therefore came within the provisions of s. 22(1)(a) of the Act.

She found that "many of the records contain neither confidential legal advice nor communications created with the dominant purposes of preparation for litigation." She permitted access to those documents. .

She gave detailed reasons for her decision distinguishing correctly between the concepts of "legal advice" and "legal assistance". She also found correctly that "any correspondence which is of an administrative nature and does not involve the seeking or giving of legal advice is not privileged."

She continued "neither do I accept that the dominant purpose in creating these records was the Hospital's preparation for litigation. Clearly, the records were prepared in connection with the investigations being carried out by the Inquiry and for the purpose of the Hospital's engagement to that process."

It is contended by the Hospital that the relevant records come within the category of documents to which access should be denied by reason of s. 22(1)(a) of the Act. The onus rests upon the Hospital to prove that the records come within that category. That onus has not been discharged by the Hospital in these proceedings.

It has not been alleged that access has been provided by the Commissioner to any identified record or document which was created in the course of actual or contemplated litigation by or against the Hospital. It has not been alleged that access has been provided by the Commissioner to a record or document which contained legal advice given to the Hospital by a lawyer acting in the capacity of legal adviser to the Hospital. In summary, no relevant record which would be exempt from production in court proceedings on grounds of legal professional privilege has been identified by the Hospital.

The relevant records were made available for examination by the Court. The Court declined to examine them. The tests outlined above and applied by the Commissioner were the correct tests.

Accordingly, the Court will not interfere with the decision of the Commissioner in relation to the application of s. 22(1)(a) of the Act to the records which came before her.

#### **SS. 26(1)(a) and (b) and S. 26(2) of the Act**

Section 26 of the Act provides as follows:

"(1) Subject to the provisions of this section, a head shall refuse to grant a request under section 7 if—

(a) the record concerned contains information given to the public body concerned in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or

(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) of the Third Schedule of an enactment specified in that Schedule) or otherwise by law.

(2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, a public body or a person who is providing a service for a public body under a contract for services) in the course of the performance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than a public body or head or a director, or member of the staff of, a public body or a person who is providing or provided a service for a public body under a contract for services."

The Commissioner decided that:

"Before looking at the application of the s. 26 exemption it is necessary to apply s. 26(2) to the records because the exemption does not apply where the records fall within s. 26, (2)."

She refused access to certain documents which she found "...could not be regarded as being prepared..(by their author) ..in the performance of his duties"

Pointing out that the Hospital "...has not identified any records.." which came within the provisions of the section she concluded that it was:

"...reasonable to assume, having examined the contents of the records, that those prepared by or on behalf of the Hospital were prepared by its staff and/or by its legal team or others who were providing a service for the Hospital under a contract for services".

The Hospital has challenged her conclusion claiming that the relevant documents could not be categorised as documents which were prepared in the course of the performance of the functions of the persons concerned.

The documents identified to the Court on behalf of the Hospital which, it was claimed, came within the relevant category, were the Hospital's written submission to the Inquiry and the documents appended thereto.

The Court was invited to review the relevant records for the purpose of discovering whether they were, (or were not), prepared by persons on behalf of the Hospital who were, then, acting in the course of the performance of their functions. The Court declined to do so. It is not the function of the court to oversee or supervise the discharge by the Commissioner of her functions or the exercise of the discretion vested in her by the provisions of the Act.

The relevant documents were prepared by the Hospital's legal advisers and were amongst the records which the Commissioner found "were prepared by its staff and/or by its legal team or others who were providing a service for the Hospital under a contract for services".

It has been contended that the Commissioner's finding was "irrational" and, therefore, unlawful having regard to the principles identified in *Deely v. Information Commissioner*.. I do not accept that the Commissioner's finding was irrational.

S 26 (2) of the Act was enacted with the intention of distinguishing between, (i) records given to or created by public bodies in the course of its functions and, (ii) records given to or created by staff members, (or contractors), of a public body, whilst they were acting in another capacity, (e.g. documents written by staff members or contractors in a private or personal capacity). The application of the exemption provided by s 26(1)(a), is limited to records which either, (1), were given to a public body or, (2), come within (ii), above.

It was open to the Commissioner, having examined the relevant records, to find that some or all did not come within that latter category. There was ample material before her upon which she could reasonably do so. The functions of the Hospital's legal advisers may well have included the regular preparation of submissions and other documents for delivery to various tribunals, to professional organisations and State bodies and for the purposes of civil and criminal court proceedings. The Court will, therefore, not interfere with her finding.

The Commissioner also found that:

"Any duty of confidence which may be owed by the Hospital in respect of records which it has prepared must be owed to a person other than a public body or a member of its staff or a person providing a service for it under a contract for service".

This Court is satisfied that there has been no mistake of law on the part of the Commissioner in respect of her findings, (a) that the relevant documents were prepared by persons on behalf of the Hospital who were then acting in the course of the performance of their functions, (b) that the exemption created by s. 26(1) of the Act applies only where a duty of confidence is owed by the Hospital to a person other than the Hospital itself (or its staff or persons providing contractual services for the Hospital), and, (c), that s. 26(1)(b) was intended to protect the interests of persons to whom a duty of confidence was owed by the Hospital.

**Section 26(1)(b) of the Act.**

Access to relevant records held or prepared by the hospital must be refused pursuant to s. 26(1)(b) of the Act if;

"Disclosure of information..[contained within the documents]... would constitute a breach of duty of confidence provided for by a provision of an agreement...or otherwise by law."

The sub-section may not be relied upon to refuse access to records if the alleged breach of duty of confidence is owed to the Hospital itself or to its staff or advisors.

It has been strongly contended on behalf of the Hospital that access to the records sought should be refused on the ground that disclosure of the information contained in the records would constitute a breach of a duty of confidence created, (a) by the terms of the Hospital's confidentiality agreement with the Inquiry and (b) by law.

Undeniably the Hospital owed a duty of confidence to the Inquiry under the terms of its confidentiality agreement with the Inquiry. It also owed a duty of confidence by law to other persons, including parents and next-of-kin of the deceased children who were the subject of the Inquiry.

Citizens and persons living lawfully within the State enjoy a constitutional right to privacy. The right is not absolute. It is qualified by "...the constitutional rights of others ...the requirements of the common good and...the requirements of public order and morality..." - (See *Kennedy v. Ireland* [1987] I.R. 587).

It has also been qualified by a number of statutory provisions. The right to privacy is explicitly recognised in the long title to the Act. However, the need to balance that right with the public interest is also recognised.

The State itself has a general obligation to respect the right to privacy of its citizens. Public bodies and other State agencies entrusted with private sensitive information affecting the rights and interests of individual members of the public are, in general, required to keep that information confidential.

Circumstances may arise where the disclosure of sensitive information, which is held by a public body and which concerns and affects the interests of individual citizens, may be required in the public interest. The legislature, for instance, has expressly authorised the public disclosure by the Revenue Commissioners of certain private and potentially embarrassing financial information concerning members of the public because that disclosure has been deemed to be in the public interest.

It has, by the terms of the Act, authorised the disclosure of certain private sensitive information entrusted to public bodies and other State agencies by members of the public subject to express exceptions identified within the Act. The State's duty of confidence to members of the public in respect of that private sensitive information has thus been qualified *inter alia* by the terms of the Act.

A separate contractual duty of confidence in respect of the relevant records was also imposed upon the Hospital and upon the Inquiry by the terms of the confidentiality agreement.

The vulnerability of the persons affected by the Inquiry has been recognised by the Hospital, by the Inquiry, by the Department of Health and Children and by the Commissioner. It has also been implicitly recognised by the fact that the Inquiry and the Hospital entered into the confidentiality agreement.

The terms of the confidentiality agreement required *inter alia* that the documents provided by the Inquiry to the Hospital should remain confidential as between the Inquiry and the Hospital and should not be given or disclosed to any other person and should be returned to the Inquiry when required.

The agreement must be deemed to have included the terms of the "Final

Memorandum on Procedures" issued by the Inquiry on the 3rd August, 2001, which required "each person who contributes to its work to undertake in writing to treat as strictly private and confidential and not to disclose to any person, any information which the person contributing to the work of the Inquiry gives or receives relating to the work of the Inquiry either written or oral."

On the evidence of its solicitor, Ms. Callanan, the Hospital's written submission, (i), was delivered to the Inquiry "in reliance on" the existence of that agreement and, (ii), "...contained highly confidential and sensitive information. It provides information on post mortem practices and procedures, the reasons for the carrying out of post mortems and (it) explained the Hospital's approach to its patients (at what is a very difficult time) in relation to consent, what happened at an autopsy and how burial is addressed."

The Inquiry, in its submission to the Commissioner dated the 21st May, 2004 advised the Commissioner that the Inquiry's work was proceeding in private *inter alia* because of "...the need to protect the parents and next-of-kin from unnecessary grief...any parents and next-of-kin have advised the Inquiry that they become distressed every time the issue of organ retention appears in the media... the Inquiry believes that parents and next-of-kin should be protected from this distress until the Inquiry have had an opportunity to come to conclusive decisions...the Inquiry believes that the interests of the parents and next-of-kin who are affected by organ retention must be placed higher than any public interest in making the documentation public."

A detailed and scrupulous examination of all of the relevant records was conducted on behalf of the Commissioner. It has been contended on behalf of the Hospital that her detailed analysis of the provisions of the Act and her application of those provisions to the review was inappropriate. It was argued that the Hospital's submission, together with all of the documents appended thereto, should have been dealt with as one "record" by the Commissioner who should then have adopted a "common sense" approach to the review and sought to establish whether a "reasonable man" would regard the relevant "record" as being confidential in character.

I do not accept that contention. The Act confers upon "... every person" a general right of access to relevant records. The right is qualified by precise exceptions identified within the Act. It was appropriate for the Commissioner, when conducting her review, to carefully consider the precise exceptions within the Act which qualified the general right of access which applied to the relevant records. It was within the jurisdiction of the Commissioner to decide whether the documents appended to the Hospital's submission should be dealt with as separate "records" for the purposes of the Act.

The Commissioner found that;

"...where the entity to which a duty of confidence might be owed no longer exists, and where I have already found that the written confidentiality agreement no longer applies, I find that a duty of confidence based on equity does not apply.



This finding takes account, amongst other things the fact that the now defunct Inquiry would not be in a position to sustain an action for breach of confidence.”

Although that particular finding may be questionable, the Commissioner, in her decision, acknowledged, recognised and respected the existence of the duty of confidence owed by the Hospital to “patients and their next of kin” in the following express terms:

“I agree that patients and their next of kin would potentially be a class of persons in respect of whom the disclosure of information might constitute a breach of duty of confidence.....if any of the records contained information which would enable an individual patient or next of kin to be identified, that record or part of record will not be considered for relief. I accept the Hospital's position that patient confidentiality and the requirement for patient's consent to release medical records is important with both in the context of the Inquiry and in the wider context”.

She refused access to those records and continued, “.....I can only apply the relevant exemptions to actual records and in this case where it would appear that records contain references to potentially identifiable individuals, I intend to direct that references be removed from any records that I find not to be exempt under the Act”.

This Court can find no mistake of law or “irrationality” in that finding. Indeed, it would appear to comprise a “common sense” approach to the review of the type contended for by the Hospital.

The only records otherwise referred to by the Hospital as imposing the requisite duty of confidence were unidentified documents which provided “.information on post mortem practices and procedures, the reasons for the carrying out of post mortems ....the Hospital's approach to its patients (at what is a very difficult time) in relation to consent, what happened at an autopsy and how burial is addressed.”

The Commissioner, having examined the relevant records, referred to the principles of law identified (a), by Megarry.J in *Coco v A.N. Clarke Engineers Ltd* [1969] R.P.C. 41 and by Costello.J. in *House of Spring Gardens v Point Blank Ltd* [1984 I.R. 611 and concluded that:

“I consider, having examined the records at issue and having regard to the context of their creation and their communication to the Inquiry, that they do not contain information having the necessary quality of confidence...”

She gave detailed reasons for that conclusion. I can find no mistake of law in the reasons which she gave. There was sufficient material before her to enable her to reasonably reach the conclusion which she reached.

### **Section 20(1) of the Act**

Section 20(1) of the Act provides as follows:

“20. —(1) A head may refuse to grant a request under section 7—

(a) if the record concerned contains matter relating to the deliberative processes of the public body concerned (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and

(b) the granting of the request would, in the opinion of the head, be contrary to the public interest,”

It has been contended that the Hospital's submission to the Inquiry comprised a record which “.contains matter relating to the deliberative processes of” the Hospital. I do not accept that contention. The preparation of the Hospital's submission cannot be characterised as a “deliberative process”. There may have been a “deliberative process” which resulted in a decision on behalf of the Hospital to co-operate with the Inquiry. However the preparation of the Hospital's submission was not such a process.

The Shorter Oxford English Dictionary defines “deliberation” as “ the act of deliberation; careful consideration with a view to a decision”.

The Commissioner found that “. these records relate to positions adopted by the Hospital following its deliberations as opposed to material disclosing the internal thinking process within the Hospital or the weighing up of options ... I do not find that opinions, advice or recommendations contributing towards this deliberative process are disclosed in these records. The exceptions to this are those records containing the legal advice which I have already found to be exempt under s. 22(1)(a)”.

This Court will not interfere with the finding of the Commissioner on this issue because it demonstrates no mistake of law.

### **Section 21 of the Act – Functions and Negotiations of Public Bodies**

Section 21 of the Act provides as follows:

“21. —(1) A head may refuse to grant a request under section 7 if access to the record concerned could, in the opinion of the head, reasonably be expected to—

(a) prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of the public body concerned or the procedures or methods employed for the conduct thereof,

(b) have a significant, adverse effect on the performance by the body of any of its functions relating to management (including industrial relations and management of its staff), or

(c) disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the Government or a public body.”

The Commissioner found that s. 21(1)(a) did not apply to the Inquiry's own investigations since it was not a public body under the Act. She found that the only records relating to the investigations and inquiries which the Hospital or any other public body had to conduct were those concerning pharmaceutical companies.

She examined those documents and found that their release would not prejudice the effectiveness any investigations or cause harm

to any function identified in s. 21(1)(a) of the Act. She was entitled to reach that conclusion. She had sufficient material before her upon which she could reasonably do so.

In relation to s. 21(1)(b) the Commissioner would not accept that a significant or adverse effect on the performance of the Hospital functions relating to management would occur if access was provided to the relevant records. Again I am satisfied that the Commissioner was entitled to reach that conclusion. She made no mistake in law in so doing. She made one exception to her decision to provide access. She did not disclose her grounds for that exception having regard to the provisions of s. 43 of the Act. She was empowered under that section to make that exception and to refuse to disclose her grounds. She made no mistake of law in so doing.

The Commissioner declined to apply any exemption under the provision of s. 21(1)(c). She found that the Inquiry's engagement with the Hospital and with other parties could not be characterised as "negotiations carried on or being, or to be, carried to on behalf of the Government or a public body." That finding discloses no mistake of law.

Having examined the relevant records in the context of existing or possible future litigation involving the Hospital she was of the opinion that none of them contained "fall-back positions, an opening position taken or a position taken with a view to further negotiation". For that reason and for other identified reasons she was of the opinion that the records did not come within the provisions of s 21, (1), (c), of the Act. There is no reason why this Court should conclude that her opinion was not reasonable and therefore lawful. There is no reason why this Court should interfere with the exercise by the Commissioner of the discretion conferred upon her by the Act.

### **Section 23(1)(a)(iv) of the Act**

Section 23(1)(a)(iv) of the Act provides as follows:

"A head may refuse to grant a request under s. 7 if access to the record concerned could, in the opinion of the head, reasonably be expected to -

(a) prejudice or impair...

(iv) the fairness of...civil proceedings in a court or other tribunal".

The Hospital argued that it had advised the Commissioner that civil proceedings were in contemplation or were pending against the Hospital arising out of its post mortem practices. It was contended that disclosure of the relevant records might well impair or prejudice the capacity of the Hospital to adequately represent itself in such proceedings and that access to the documents should be refused on that ground.

The Commissioner found that:

"No records have been identified in the context of the "harm" envisaged; nor is it clear to me that any particular legal strategy, the disclosure of which might result in prejudice or unfairness, is evident from the records".

I am satisfied that it was within the jurisdiction of the Commissioner, having examined the relevant records, to make that finding. The Court will not interfere with it.

### **Fair Procedures**

It is contended that the Commissioner failed to provide the Hospital with fair procedures because she considered and relied upon submissions made to her by the Inquiry and by the Department of Health and Children without first giving the Hospital the opportunity to see, consider and comment upon those submissions.

It was argued on behalf of the Hospital that the Commissioner's decision was made "in an adversarial context". That is an incorrect contention.

At s. 37 of the Act provides that:

"(6) Subject to the provisions of this Act, the procedure for conducting a review under section 34 or an investigation under section 36 shall be such as the Commissioner considers appropriate in all the circumstances of the case and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Commissioner."

The review required by the revisions of s. 34 of the Act was intended to be inquisitorial rather than adversarial in nature. The procedures to be adopted by the Commissioner in respect of such reviews are entirely within her discretion provided that they do not offend recognised principles of natural and constitutional justice. The procedures which she adopted in the review under appeal permitted all of the parties with an interest in the review to make full and detailed written submissions on every relevant aspect which affected their respective interests. Each of the parties who participated in the review was provided with full and equal access to the Commissioner and to her officials.

I know of no principle of natural or constitutional law or justice which confers upon parties who make submissions to a decision-making body the right to respond to the submissions made by every other party who participates in the process. The review undertaken by the Commissioner was a statutory process which expressly envisaged and permitted the adoption of informal procedures.

The Commissioner provided the Hospital with extensive opportunities to be heard. It made submissions to the Commissioner on five separate occasions. On the 17th June, 2004 the Hospital was permitted to respond to the "preliminary review" conducted by the Commissioner. It is argued that the Hospital should be entitled to respond to any submissions made by any other party. Should those parties then be entitled to respond to the Hospital's response and where would all of this end?

It has not been contended on behalf of the Hospital that any prejudice has, (or indeed could have), resulted to the Hospital arising out of anything contained within the submissions from the Department of Health and the Inquiry to the Commissioner. It would appear that those submissions supported the submission made by the Hospital.

In summary, I am satisfied that the Hospital has not established any mistake of law by the Commissioner in the provision of fair provisions to the participants in the review or in any other respect.

It follows that the appeal must be dismissed.