



Ms. Eilis Fallon
Clerk to the Committee
Committee on Public Accounts

By email: PAC@oireachtas.ie

28th June 2021

Dear Ms. Fallon,

Thank you for your letter of 8 June. Please accept my apologies for the delay in responding to you as my Department was recently impacted by an unprecedented cyberattack.

I must outline again that the Department of Health did not gather sensitive medical and educational information on children involved in court cases in the manner portrayed in the RTE Investigates broadcast of 25 March.

As a matter of proper administration of legal proceedings, it is incumbent on the State where appropriate to ensure that cases do not remain dormant. It is in the interests of all parties that a conclusion is reached, either in the settlement of proceedings or, where settlement is not possible, in having the matter heard at court. This limits the exposure of all parties to legal costs and provides for more speedy resolution of litigation where possible.

You have requested detailed information on how this is co-ordinated. This matter is dealt with in detail in section 6 (pages 11-14) of the report that was published on 21 April and which I am attaching also with this letter.

Unfortunately, expenditure information is not available on costs associated with the co-ordination of the resources across the Office of the Attorney General, the Chief State Solicitor's Office, the Department of Education, the Department of Health and the HSE towards resolving the 29 open Special Educational Needs litigation cases that were the subject of allegations in the RTE Investigates broadcast of 25 March.

I hope that this information and the attached report is of assistance.

Yours sincerely,

Robert Watt
Secretary General



An Roinn Sláinte
Department of Health

Department of Health

Report to the Secretary General

Review conducted to establish the facts with regard to a set of allegations made by RTÉ Prime Time Programme regarding *Special Educational Needs ("SEN") Litigation*

Published 21st April 2021

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1. Glossary of terms

Affidavit	Written evidence sworn by a witness in the litigation
AGO	Office of the Attorney General
CHO	Community Health Area
CSSO	Office of the Chief State Solicitor
“Dormant cases”	Cases in which no step has been taken in the proceedings, and inactivity, for a lengthy period of time
DPO	Data Protection Officer
HSE	Health Service Executive
ICT	Information Communication Technology
Next friend	The person who brings a claim on behalf of a child or person who is unable to give instructions themselves
Plaintiff	The person who brings the claim
PO	Principal Officer
“Settled cases”	Case in which a compromise has been reached between the parties
HSE Service Updates	Updates on the provision of services to service users from the HSE
SEN cases	“Special Educational Needs” cases

2. Executive Summary

The Department's overall mission is to improve the health and wellbeing of people in Ireland. Our focus is to create a more responsive, integrated and person-centred health service promoting effective and efficient management of the health and social care services and ensuring best value from health system resources.

As part of its commitment to people with a disability the Department of Health sets policy in relation to specialist community disability services ensuring the delivery of person centred supports to enable those with a disability to live ordinary lives in their community.

The Minister for Health is named from time to time as a defendant¹ in cases taken against the State. These cases include those related to Special Educational Needs ("SEN"), many of which date back to the early 1990s and tend to have been taken against the Minister for Education, the Minister for Health, the Health Service Executive (HSE)², 'Ireland' and the Attorney General (AG). The Minister for Education and the Minister for Health are generally named as co-defendants in these cases and both Departments are jointly represented by the Office of the Chief State Solicitor (CSSO).

Government Departments regularly adopt a joint strategy in defending litigation. It is normal practice for defendants to litigation to co-operate and share appropriate information with each other, required for obtaining legal advice and/or defending the proceedings, where they have a common interest in the issues and outcome of the proceedings.

It is in the interests of all parties that a conclusion is reached; and both the Department of Health and the Department of Education are also very clear, regardless of litigation, that simultaneously, the primary duty of the HSE and the education system is to provide children and families with the required care and supports, in line with policy and legislation within existing resources. This policy intent to provide health and care supports is evidenced both through the level of resource and service delivery commitments in the HSE National Service Plans for disability services and specifically through the individual case HSE service updates.

Since the early 1990s the Department of Health has recorded approximately 230 cases against the State in relation to Special Educational Needs ("SEN") and 29 remain as active cases. The cases mostly

¹ For ease of reference in this Report references to 'Plaintiffs' may include references to 'Applicants' and reference to 'Defendants' may include references to 'Respondents'

² The HSE was established in 2005 and before this time the relevant Health Board would have been the named co-defendant.

involve claims relating to alleged inadequacy or inappropriateness of the provision of educational services and/or related health system supports or services to individual plaintiffs with special educational needs.

The RTÉ Investigations Unit broadcast a Prime Time Programme on 25th March 2021 on an alleged policy adopted by the Department of Health in relation to High Court cases, specifically those that were taken against the State on behalf of children with special educational needs and made very serious allegations as to conduct of the Department of Health within this context. These allegations are set out in Appendix 1 which includes direct quotes taken from the transcript of this broadcast.

Following a procurement process, a Senior Counsel, Mr Conleth Bradley SC, was engaged on 10 July 2020 to conduct an independent review of allegations raised through a protected disclosure in February 2020 and to provide a report of his findings and to make recommendations. This review assessed that there was no basis for a reasonable belief of wrongdoing as this term is defined in the Protected Disclosures Act 2014 in relation to: (a) correspondence dated 20 February 2015 from the Secretary General of the Department of Education to the Secretary General of the Department of Health and (b) summarising in a sample of Excel Charts and spreadsheets complex and detailed legal pleadings from historic court cases involving State defendants which addressed sensitive issues and which in some cases included updates from named defendants in those proceedings.

Following the allegations raised on the RTÉ Prime Time Programme on 25th March, the Secretary General directed a team to establish the facts in relation to the allegations made in the broadcast and associated articles published on the RTÉ news website. This team was supported by an external Documentary Counsel Review Team.

The review scope was focused on the 29 'open' "SEN" cases where the Department of Health was named as a defendant and which have not come to a final conclusion (i.e. settled, determined by a court or discontinued by the plaintiff).

It should be noted that the Department, and this report, does not discuss the details of any ongoing litigation cases which are subject to legal professional privilege/confidentially. Nor is this report intended to review the legal strategy or the broader policy context within which this litigation sits.

An overview of the review findings is set out in the table below:

	Allegations	Findings
1	<p>Department of Health compiled secret dossiers on children with autism.</p>	<p>Having reviewed the relevant files, there is no evidence that the Department of Health was secretly compiling dossiers on children with autism involved in SEN litigation as alleged.</p> <p>As a co-defendant in litigation cases, the Department of Health may have documents on file that form part of the proceedings. Such files contain information provided to the Department in the course of the proceedings which may include the pleadings, correspondence and/or reports received via the plaintiff's solicitor in the course of the litigation. In addition, in the course of its defence of the litigation the Department of Health sought service updates from the HSE (co-defendant) from time to time. In circumstances where the litigation taken against the Department pertains to an alleged failure in the provision of service, it is appropriate for the Department to establish the actual level of service being provided to the particular plaintiff in question. Service updates are retained on the litigation files. The Department had been advised that in the absence of service updates, it would be difficult to advise on the settlement of cases.</p>
2	<p>This information gathering exercise [by the Department of Health] was beyond the taking of instructions.</p>	<p>Having reviewed the relevant files, there is no evidence that the Department of Health gathered information that was beyond instructions as part of the normal defence of a litigation case.</p> <p>In the course of its defence of the litigation the Department of Health sought service updates from the HSE (co-defendant) from time to time. In circumstances where the litigation taken against the Department pertains to an alleged failure in the provision of service, it is appropriate for the Department to establish the actual level of service being provided to the particular plaintiff in question. Service updates are retained on the litigation files.</p> <p>The Department had been advised that in the absence of service updates, it would be difficult to advise on the settlement of cases.</p>

3	<p>Department of Health is prying into families who took high court cases for the handling of its defence.</p>	<p>Having reviewed the relevant files, there is no evidence that the Department of Health is prying into families who took high court cases for the handling of its defence. There is no evidence that the Department of Health has directly sought medical reports and/or other updates from clinicians. Furthermore, there is no evidence that the Department of Health has requested more broadly any information on the family of a plaintiff.</p> <p>As a co-defendant in litigation cases, the Department of Health may have documents on file that form part of the proceedings. Such files contain information provided to the Department in the course of the proceedings which may include the pleadings, correspondence and/or reports received in the course of the litigation. This may include medical reports provided by the plaintiff's solicitor in the course of the litigation and which said reports would be furnished in support of the claim in the normal way.</p>
4	<p>Department of Health is holding video recordings of children with disabilities.</p>	<p>Having reviewed the relevant files, the Department of Health has identified a <u>single video recording</u>.</p> <p>The examination of the file has confirmed that the video file was provided by the plaintiff as an exhibit in a supplemental affidavit.</p> <p>The video content was not viewed in the course of the review however the Department is satisfied that this is the video referred to in the Prime Time broadcast.</p>
5	<p>Provision of school reports to the Department of Health by the Department of Education.</p>	<p>Having reviewed the relevant files, there is no evidence that the Department of Health sought updates or reports on plaintiffs directly from Schools or the Department of Education.</p>
6	<p>The Department of Health obtained clinical reports directly from clinicians.</p>	<p>Having reviewed the relevant files, there is no evidence that the Department sought clinical reports on plaintiffs directly from clinicians. In the course of its defence of the litigation the Department of Health sought service updates from the HSE (co-defendant) from time to time. The</p>

		<p>Department had been advised that in the absence of service updates, it would be difficult to advise on the settlement of cases.</p> <p>In circumstances where the litigation taken against the Department pertains to an alleged failure in the provision of service, it is appropriate for the Department to establish the actual level of service being provided to the particular plaintiff in question. Service updates are retained on the litigation files.</p> <p>The Department has identified a single case file where in the context of the defence of a litigation case it inadvertently received a clinical report directly from a clinician.</p> <p>This report once received was retained on the litigation file however the Department is satisfied from the review that it is not the practice of the Department to seek reports directly from clinicians.</p> <p><u>Learning:</u> Should the Department inadvertently receive a clinical report this should always be returned and not held on the file.</p>
7	<p>Clinical, and other reports were requested without the consent of children and parents for the material.</p>	<p>Having reviewed the relevant files, there is no evidence that the Department sought clinical reports on plaintiffs directly from clinicians.</p> <p>In the course of the litigation the Department as a co-defendant sought updates from the other co-defendants on the services being provided to plaintiffs as part of its defence of the litigation taken. This is normal and appropriate in the context of the defence of legal proceedings.</p>
8	<p>Information shared and stored in the Department, was of the most personal nature and could be accessed, searched and viewed by anybody working in the</p>	<p>As a co-defendant in litigation cases, the Department of Health may have documents on file that form part of the proceedings. Such files contain information arising in the course of the proceedings including the pleadings and correspondence received from all parties including the plaintiff taking the case.</p>

	<p>Department’s division dealing with the likes of older people, social care, and disability policies.</p>	<p>In 2020, electronic access to the relevant files was not available to all working across the division. It was restricted to a ‘security group’ of approximately 25.</p> <p>Having reviewed the access controls in place at the time of the initial disclosure in 2020, further restrictions were put in place and it is the finding of this review that these further restrictions are appropriate for the level of sensitivity of the files.</p>
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3. Introduction

The Department’s overall mission is to improve the health and wellbeing of people in Ireland. Our focus is to create a more responsive, integrated and person centred health service promoting effective and efficient management of the health and social care services and ensuring best value from health system resources.

As part of its commitment to people with a disability the Department of Health sets policy in relation to specialist community disability services ensuring the delivery of person centred supports to enable those with a disability to live ordinary lives in their community. The HSE is responsible for service implementation.

The Minister for Health is named from time to time as a defendant in cases taken against the State. These cases include those related to Special Educational Needs (“SEN”), many of which date back to the early 1990s and tend to have been taken against the Minister for Education, the Minister for Health, the Health Service Executive (HSE), ‘Ireland’ and the Attorney General (AG). The Minister for Education and the Minister for Health are generally named as co-defendants in these cases and both Departments are jointly represented by the Chief State Solicitor’s Office (CSSO).

The Department of Education and the Department of Health are also very clear, regardless of litigation, that, simultaneously, the primary duty of the Health Service Executive (HSE) and the education system is to children and families in order to provide the required care and supports, in line with policy and legislation within existing resources.

The Department of Health was informed on the 11th March 2021 that RTÉ was compiling a report on an alleged policy adopted by the Department of Health in relation to High Court cases, specifically those that were taken against the State on behalf of children with special educational needs.

A substantive response to RTÉ was provided on the 19th March 2021. [Appendix 2]. A follow up response was provided on 25th March following publication of information that morning. [Appendix 3]. Similar, related queries were raised with the Department of Education and the Health Service Executive.

The RTÉ Investigations Unit broadcast a Prime Time Programme on 25th March 2021 on an alleged policy adopted by the Department of Health in relation to High Court cases, specifically those that were taken against the State on behalf of children with special educational needs.

4. Protected Disclosure - Senior Counsel Report

Following a procurement process, a Senior Counsel, Mr Conleth Bradley SC, was engaged on 10 July 2020 to conduct an independent review of allegations raised through a protected disclosure in February 2020 and to provide a report of his findings and to make recommendations. The review was undertaken in line with the provisions of the Protected Disclosures Act 2014, and the Department of Health's *Protected Disclosures Policy and Procedures*, which set out the procedures for the making of and dealing with protected disclosures by workers who are or were employed by the Department.

Mr Bradley submitted his Report to the Department in November 2020. The review referred to issues related to the allegation '*Gathering & Sharing of information*' regarding "SEN" to the Department on the 9th November 2020.

This review assessed that there was no basis for a reasonable belief of wrongdoing as this term is defined in the Protected Disclosures Act 2014 in relation to: (a) correspondence dated 20 February 2015 from the Secretary General of the Department of Education to the Secretary General of the Department of Health and (b) summarising in a sample of Excel Charts and spreadsheets complex and detailed legal pleadings from historic court cases involving State defendants which addressed sensitive issues and which in some cases included updates from named defendants in those proceedings.

The disclosure raised an issue in relation to correspondence between the Department and a medically qualified person. Senior Counsel clarified and set out the context and details of a single e-mail

exchange over a 2 day period, only part of which was referred to by the Discloser as part of the review, and which subsequently formed part of allegations aired on the Primetime Investigates Programme on 25th March 2021. Senior counsel recommended that the Department of Health check and confirm whether it had at the time received legal advice from its legal advisers regarding matters including certain provisions of the Data Protection Acts 1998 & 2003 which were referred to in that e-mail exchange. Legal advice which was received in August 2017 confirmed that the Department was entitled to rely on the relevant sections of the Data Protection Acts 1988-2003.

Review process

Following the allegations on the Prime Time programme on 25th March 2021, the Department of Health set up a team to conduct a review into matters relating to these allegations and report to the Secretary General. This team was supported by three independent Barristers who acted as external Documentary Review Counsel.

Scope of review

Since the early 1990s the Department has recorded approximately 230 cases against the State in relation to Special Education Needs (“SEN”) and 29 remain as ‘open’ cases. The review scope was focused on the ‘open’ “SEN” cases where the Department of Health was named as a defendant which have not come to a final conclusion (i.e. settled, determined by a court or discontinued by the plaintiff).

Objective of the review

Within the scope noted above, the objective of this review was to establish the facts in relation to:

- The nature of the information held by the Department of Health and whether this information is consistent with what would normally be held on litigation files.
- The nature of the information sought by the Department of Health from the HSE and the reason for seeking this information.
- Whether the Department of Health sought clinical patient/service user material and if so whether that material contained records of clinical examinations; videos; images or other.

5. State Management of Litigation

The mission of the Attorney General's Office (AGO) is to provide the highest standard of professional legal services to the Government, its Departments and Offices, as economically and efficiently as possible and to support adherence to the rule of law. The principal functions of the Attorney General are to advise the Government in matters of law and legal opinion and to provide the State with both drafting and litigation services. The Office of the Chief State Solicitor (CSSO) is a constituent element of the AGO. The CSSO provides litigation services to Government Departments, and regularly jointly represents State defendants in litigation.

6. Special Educational Needs (SEN) Litigation

The approach of both the Department of Education and the Department of Health to students with special educational and health needs is to seek to ensure the provision, along with other relevant public bodies, of the appropriate services for those students as best it can. It is only where the suitability of such services is contested that litigation ensues.

Legal Strategy for "SENS" Litigation

It is in the public interest that State parties to litigation manage those proceedings as efficiently as possible. In pursuing a well-managed approach to litigation in the public interest, Government Departments regularly adopt a joint strategy in defending litigation. Indeed, it is normal practice for defendants to litigation to co-operate and share appropriate information with each other required for obtaining legal advice and/or defending the proceedings, where they have a common interest in the issues and outcome of the proceedings. Such an approach is necessary to protect the State's legal rights, facilitates effective engagement between all parties to the litigation, including the plaintiff, and ultimately serves the public interest.

Special Educational Needs ("SENS") litigation concerns the provision of appropriate services to meet the needs of students with specific educational and health needs. The cases mostly involve claims relating to alleged inadequacy or inappropriateness of the provision of educational services and/or related health system supports or services to individual plaintiffs with special education needs. The proceedings typically include claims for damages against each of the State parties.

Where such litigation is taken, the State parties named by plaintiffs are frequently the Department of Education, the Department of Health and the HSE. By necessity, such litigation involves and refers to sensitive health matters of the plaintiffs, as the plaintiff is required to set out their case, which will

involve detailing why their needs arise, what their needs are, and how, in their view, those needs can and should be met by the State parties.

Given the complexities of “SENS” litigation, the time necessary to either settle or defend these cases, and in recognition that the plaintiffs require coordinated responses in education and health, it was agreed a number of years ago between senior management in the Department of Education, the Department of Health, and the HSE, that valuable and limited State resources should be concentrated on resolving the cases, where it is possible to do so. This is not always possible, due to the demands made.

Should the State parties not act in coordination, it would not be possible to either provide a resolution to the plaintiff that is appropriate and complete, or otherwise, where necessary, to defend proceedings in a proper fashion. This also ensures a consistent approach and that applicants in similar positions are treated in similar fashion and limits the possibility of some plaintiffs being treated more favourably than others, due to lack of knowledge as to how other plaintiffs in similar circumstances have had their cases dealt with.

In order to facilitate the coordination, and where possible, resolution, of any legal proceedings, it is necessary to understand the full nature of the claim, the level of facilities and/or care presently available to the individual plaintiff, the level of facilities and/or care required by the individual plaintiff, and, finally, whether, and to what extent, the State is in a position to meet those care needs.

In that context, it was agreed by the two Departments, the AGO and the CSSO to develop, populate and regularly review and update an agreed template form for a subset of cases.

In 2017, a revised case management template was agreed. This template was updated by the Department of Education, the Department of Health and the CSSO, respectively. It was considered that this template, with updated service information, would assist in identifying cases suitable for settlement as, in the absence of service updates, it would be difficult to advise on the settlement of those cases.

The template is maintained by the responsible Unit in the Department, as are the associated litigation files. They collate case-related information that has been obtained or sought in the context of this litigation.

Following the entry into force of the GDPR, the Department and the Department of Education were advised, in respect of any difficulties arising on the HSE side in relation to possible GDPR issues, to check with the HSE in the first instance. Where the HSE was of the view that it is not appropriate or

lawful for the HSE or its agents to share the information with the Department of Health in any particular case, the Department was advised to log this on the spreadsheet, setting out the grounds upon which the HSE said that it cannot release information. Where the HSE or its employees/agents indicated that information cannot be released without contacting a party to litigation to seek their consent, the Department was to make it clear that it is not requesting that such contact be made. The advice noted that this was the approach being taken. The advice concluded that when the spreadsheet is otherwise completed, the matter of any missing information as a result of the application of the GDPR could subsequently be reviewed. The HSE did not raise any such issues.

The Department within its service updates was not seeking the release of clinical information for which consent would be required.

The report of the senior counsel engaged to review the protected disclosures in relation to the management of these cases found that, given the nature of issues involved in such cases, and having regard to the parties to the litigation, the information shared between the parties is consistent with, and typical of, the sort of information which arises in such litigation.

In addition, as a matter of proper administration of legal proceedings, it is incumbent on the State to ensure that cases do not remain dormant. It is in the interests of all parties that a conclusion is reached, either in the settlement of proceedings or, where settlement is not possible, in having the matter heard at court. This limits the exposure of all parties to legal costs and provides for more speedy resolution of litigation where possible.

Service updates

Service updates relate to updates from the HSE on the provision of services to service users. Such service updates were sought approximately every two years from the HSE service manager in line with the template format in box below.

Template format

This query relates to several historic cases against the HSE, this Department, the Department of Education and Skills and the Attorney General which have been dormant in the High Court for some time. In considering how best to manage these cases, we require, at the request of our legal team, a brief service update from the HSE. This update should please either confirm no change to the details provided at the last update or include a brief up to date description of:

- Current service provision if any provided by/via the HSE;
- Plans, if any for future health related/ therapeutic services provision;
- Most recently reported levels of family satisfaction or otherwise with service provision/service plans or generally;
- Any other issues HSE feels worth mentioning.

This is not a request to contact any of the plaintiffs involved in the litigation or their families or legal advisors and indeed we would request you not to do so in connection with this request.

7. Specific allegations and Department’s response

Appendix 1 to this report sets out the full list of allegations made as part of the RTÉ Prime Time broadcast and associated press articles, and the table below sets out the 8 primary allegations.

Allegations RTÉ Prime Time broadcast and associated RTÉ Investigates articles	
1.	Department of Health secretly compiled secret dossiers on children with autism.
2.	This information gathering exercise [by the Department of Health] was beyond the taking of instructions.
3.	Department of Health is prying into families who took high court cases for the handling of its defence.
4.	Department of Health is holding video recordings of children with disabilities.
5.	Provision of school reports to the Department of Health by the Department of Education.
6.	Clinical reports on children obtained by the Department from clinicians, including from private doctor consultations.
7.	Clinical, and other reports were requested without the consent of children and parents for the material.
8.	Information shared and stored in the Department, was of the most personal nature and could be accessed, searched and viewed by anybody working in the Department’s division dealing with the likes of older people, social care, and disability policies.

Each of these primary allegations will be dealt with in this section of the report setting out the findings from the outcome of review of files by the external documentary counsel team and the finding of the review team.

Allegation 1-3:

- 1. Department of Health secretly compiled secret dossiers on children with autism.**
- 2. This information gathering exercise [by the Department of Health] was beyond the taking of instructions.**
- 3. Department of Health is prying into families who took high court cases for the handling of its defence.**

Each set of proceeding issued against the Minister generates the opening of a file within the Department. The files, which may be both electronic and paper, contain all information arising in the course of the set of proceedings including the pleadings and correspondence received from all parties including the plaintiff and his/her Solicitor taking the case. In every case the Department instructs the Office of the Chief State Solicitor (CSSO), which is the office responsible for providing litigation services to Government Departments, to act for the Minister. The correspondence between the plaintiff and State defendants takes place Solicitor to Solicitor with the CSSO seeking instructions from the Department as necessary. As the client, the Department of Health receives copies of documentation from the CSSO. Occasionally the Department of Health is also copied into correspondence that the Department of Education is providing to the CSSO, in the context of both Departments being represented by CSSO in the case as co-defendants.

The Department is represented by Counsel instructed by the CSSO following nomination by the Attorney General. The Department receives legal advice from the AGO, CSSO, Counsel and its internal legal advisors. In addition, the Department of Health and the HSE have a Legal Protocol in place covering:

- (i) Communications between the Department of Health and the HSE in relation to legal matters;
- (ii) The matter of joint representation of the Minister for Health and the HSE in appropriate cases;
- (iii) The matter of conducting regular meetings to discuss any matters arising from the above.

The documents held by the Department in relation to these cases comprise of the individual case files which may be both electronic and paper versions and the case management spreadsheets. External documentary counsel team examined the files identified as falling within the scope of this review. The following was found:

- The material held on file was deemed consistent with the type of documentation one would expect to see in a litigation file.
- Documents and exhibits to affidavits shared by plaintiffs do contain clinician reports and educational reports, which is expected however, any such document is only held in the Department of Health as part of the legal case documentation, and not for any other purposes.
- In the course of the litigation the Department seeks and receives HSE service updates, as a relevant state body under the aegis of the Department of Health and as a co-defendant in cases. These updates were sought in the context of legal advice that in the absence of service updates it would be difficult to advise on the settlement of cases.
- There is no evidence that the Department has directly sought medical reports and other updates from clinicians, nor was the Department seeking more broadly information on the family of a defendant.

Finding:

Having reviewed the relevant files, there is no evidence that the Department of Health was secretly compiling dossiers on children with autism involved in SEN litigation as alleged.

As a co-defendant in litigation cases, the Department of Health may have documents on file that form part of the proceedings. Such files contain information provided to the Department in the course of the proceedings which may include the pleadings, correspondence and/or reports received via the plaintiff's solicitor in the course of the litigation. In addition, in the course of its defence of the litigation the Department of Health sought service updates from the HSE (co-defendant) from time to time. In circumstances where the litigation taken against the Department pertains to an alleged failure in the provision of service, it is appropriate for the Department to establish the actual level of service being provided to the particular plaintiff in question. Service updates are retained on the litigation files. The Department had been advised that in the absence of service updates, it would be difficult to advise on the settlement of cases.

Furthermore, having reviewed the relevant files, there is no evidence that the Department of Health is prying into families who took high court cases for the handling of its defence.

Allegation 4: Video recordings held in the Department of Health.

Following a search by Department of Health's IT Unit **one** video was located within the "SEN" litigation files. The external documentary counsel team also reviewed the 29 cases and only identified the single video.

Documentary Counsel identified that the video was provided by the plaintiff's Solicitor to the CSSO as an exhibit to a Supplemental Affidavit in 2017 sworn by the mother on behalf of the child. Once received from the CSSO it was filed by the Department as a co-defendant in the proceedings. Images that accompany the video formed part of the Supplementary Affidavit provided by the plaintiff's Solicitor and were filed accordingly.

Finding:

Having reviewed the relevant files, the Department of Health has identified a **single video recording.**

The examination of the file has confirmed that the video file was provided by the plaintiff as an exhibit in a supplemental affidavit.

The video content was not viewed in the course of the review however the Department is satisfied that this is the video referred to in the Prime Time broadcast.

Allegation 5: Provision of School Reports to the Department of Health from the Department of Education.

As a co-defendant in litigation cases, the Department of Health may have documents on file that form part of the proceedings. Such files contain information provided to the Department in the course of the proceedings which may include the pleadings, correspondence and/or reports received in the course of the litigation e.g. as exhibits to affidavits.

The external documentary review has noted that there is some educational information on the files however this was not sought by the Department of Health rather this was received through information provided by the Department of Education to the CSSO and copied to the Department of Health, as a co-defendant in litigation cases in the normal way.

Finding:

Having reviewed the relevant files, there is no evidence that the Department of Health sought updates or reports on plaintiffs directly from Schools or the Department of Education.

Allegation 6-7:

6. The Department of Health obtained clinical reports directly from clinicians.

7. Clinical, and other reports were requested without the consent of children and parents for the material.

External documentary review counsel has examined the files. The review by the documentary review counsel of the files concluded that all material examined were deemed consistent with the type of documentation one would expect to see in a litigation file. It should be noted that exhibits to affidavits from the plaintiffs may contain clinician reports which is not unexpected.

The review identifies no evidence that the Department has directly sought medical or clinical reports from clinicians. Service updates were sought from service managers in the HSE in circumstances as outlined here to fore.

There have been six cases identified by external documentary review counsel in which medical reports from a clinician were found on files not provided by plaintiff. These cases can be divided into 2 categories as outlined below.

Category 1

Five cases have been identified which hold medical reports dating back to the early 2000s. These files are paper files only and not on the electronic filing system. The paper files are marked “restricted and personal” providing for very limited access. The five files relate to a small cohort of cases in one geographic location all of which related to the seeking of access to special education needs classes. During this period the Health Board and the Department of Education were working closely to assess and provide the required health and education support in relation to ensuring appropriate special education provision. The reports held pertained to those efforts by the Health Board and Department of Education and were furnished to the Department of Health as a co-defendant.

Category 2

An individual case was identified whereby an email containing clinical information and history was sent to the Department inadvertently directly from a medically qualified HSE employee in 2017 after a service update was sought from the HSE. In the interests of transparency, the details of this single instance is set out below:

- 15th June 2017: On 15th June 2017 the Department requested a service update from the service management in the relevant Community Health Organisation (CHO) (2017 template letter).
- 23rd June 2017: The CHO replied on 23rd June 2017 to the Department of Health and provided a short service update as requested.
- 26th June 2017: On the morning of the 26th June 2017 an email was received by the Department from a medically qualified HSE employee indicating that they have been asked by their managers to provide the Department with clinical information about a patient and asks *“is [the patient] and [their] parents aware of this and has consent to release details been given?”*.
- 26th June 2017: On the afternoon of the 26th June 2017 the Department responded to the medically qualified HSE employee to:
 - Confirm that the Department had not contacted the patient or their parent.
 - The Department states that a significant reason for the request to the HSE *“an update on services received/planned and the family’s degree of satisfaction/dissatisfaction with same”* was to help the Department decide whether it would be advisable *“to initiate the type of contact in the context of long dormant legal proceedings”*.
 - The Department indicates further that this approach is *“standard - and legally-supported - practice for the HSE, in the context of litigation [...] to confidentially update the Department”* on service provision and family satisfaction³.
- 26th June 2017: That evening the Department responded to the medically qualified HSE employee stating that it was unclear what if any legal issues might still exist from the family’s perspective and goes on to state that it is *“happy to withdraw our request for information for the moment and to revert in about a years’ time”* explaining that this was because, having discussed the matter with HSE management on the disability side, the patient was due to transition to adult services over the next 12 months.
- 27th June 2017: On the 27th June 2017 the medically qualified HSE employee responded with an email setting out a detailed outline of the patient’s/plaintiff’s clinical history, current status

³ Following this legal advice was sought and received August 2017 which confirmed that the Department was entitled to rely on the relevant sections of the Data Protection Acts 1988-2003.

and family circumstances. The patient's/plaintiff's transition to adult services and associated challenges are noted.

Finding:

Having reviewed the relevant files, there is no evidence that the Department sought clinical reports on plaintiffs directly from clinicians. In the course of its defence of the litigation the Department of Health sought service updates from the HSE (co-defendant) from time to time. In circumstances where the litigation taken against the Department pertains to an alleged failure in the provision of service, it is appropriate for the Department to establish the actual level of service being provided to the particular plaintiff in question. Service updates are retained on the litigation files.

The Department has identified a single case file where in the context of the defence of a litigation case it inadvertently received a clinical report directly from a clinician.

This report once received was retained on the litigation file however the Department is satisfied from the review that it is not the practice of the Department to seek reports directly from clinicians.

Learning: Should the Department inadvertently receive a clinical report this should always be returned and not held on the file.

Allegation 8: Information shared and stored in the Department, was of the most personal nature and could be accessed, searched and viewed by anybody working in the Department's division dealing with the likes of older people, social care, and disability policies.

The Department of Health's responsibilities and work is structured into divisional work areas. Each division, in line with its particular responsibilities may be subdivided into various units, each of which is responsible for specified areas of work. Units typically consist of a team of staff headed by a Principal Officer. Each unit maintains files, records and documents relevant to its work both electronically and, where relevant in hardcopy format. Increasingly, the majority of files and documents are maintained electronically. Generally, each unit has a dedicated electronic folder on the Department's shared network, wherein its files are stored. Access to that folder is normally restricted to members of that unit and where necessary, other parties, such as, for example, the relevant head of division. Members of staff from other units of the Department would not usually be able to access files, records or

documents of another Unit. Folder permissions are usually controlled by the Department's ICT division.

In relation to the files that are the subject of this review, the following was found during the period that the allegations refer to:

- Access to these electronic files and folders on the Department's shared drive was restricted to an IT security group (this was confirmed as 25 individuals at a point in time in June 2020) who worked within Older Persons service units (the 'xx' group.), as well as permissions for appropriate access by ICT.
- There was no password protection on any of these records.
- Paper folders in relation to resolved cases were held in off-site, secure storage.
- Paper folders in relation to unresolved cases were held either in off-site, secure storage or on-site in cabinets within the relevant service area of the Department of Health.

However, at the time of writing this report, the measures in place to restrict access to these litigation files have been enhanced and the following is in place:

- Access to electronic folders and files on the Department's shared network is restricted to the members of the relevant unit who are directly involved in this litigation, as well as permissions for appropriate access by ICT.
- Access to the two primary spreadsheets currently used to manage these cases is password-restricted to the same individuals as above.
- Paper folders in relation to these matters are held in off-site, secure storage in the case of resolved cases.
- Paper folders relating to unresolved cases are held in secure storage in the Department of Health, with one key that is held by an appropriate senior member of staff.

To note in addition on the 29th October 2020 the Acting Secretary General sent a reminder of staff obligations to all staff. This email is set out in Appendix 4 to this report.

Furthermore, the Department of Health operates strict data protection policies which are regularly reviewed by its Data Protection Officer. All civil servants engaged by the Department of Health are

expected to meet the highest standards with regard to conduct and behaviour and they must certify in writing that they have received and read all relevant policies. In addition, in relation to the processing (including storage and access) of personal data, the following should be noted:

- (i) The Department has a Data Protection Officer and a dedicated Data Protection Unit to support Business Units and the Management Board in meeting data protection obligations as set out in legislation. Any person who processes personal data on behalf of the Department has a responsibility to comply with the Department's data protection policy and ensure compliance with the principles of data protection. All staff are required to complete data protection awareness training. The Department takes compliance with this policy very seriously. If a staff member knowingly or wilfully fails to comply with any requirements, action may be considered under the Civil Service Disciplinary Code.
- (ii) The *Civil Service Code of Standards and Behaviours* sets out a clear framework within which civil servants must work, including the principles which govern the behaviour of civil servants and the values which the Civil Service espouses. This Code forms part of the terms of employment of all civil servants who are expected to apply it at all times. The code informs civil servants that under the Official Secrets Act 1963 they are required to avoid improper disclosure of information gained in the course of their official work. Breaches of the Code will constitute a breach of the terms of employment of a civil servant and may result in disciplinary action.
- (iii) Under the Official Secrets Act, 1963 each civil servant is prohibited from communicating official information unless he/she is authorised to do so in the course of, and in accordance with, his/her official duties, or where it is his/her duty in the interest of the State to communicate it. It is also an offence under the Official Secrets Act 1963 for anyone to obtain official information otherwise than in accordance with that Act and to retain any official document or anything which constitutes or contains official information when that person has no right to retain it. Any doubt which may arise as to whether a civil servant is authorised to communicate information in the course of and in accordance with his/her duties should be referred for decision to the head of his/her Department, through the appropriate official channel. It is his/her duty not to make unauthorised communications directly or indirectly, about matters which come to his/her knowledge in the course of his/her official duties and to refrain from mentioning such matters to anyone other than in the course of such duties. This instruction applies to decisions already taken as well as to matters which may still be under consideration or discussion. Civil Servants are periodically reminded of their duties in this regard.

Finding:

As a co-defendant in litigation cases, the Department of Health may have documents on file that form part of the proceedings. Such files contain information arising in the course of the proceedings including the pleadings and correspondence received from all parties including the plaintiff taking the case.

In 2020, electronic access to the relevant files was not available to all working across the division. It was restricted to a 'security group' of approximately 25.

Having reviewed the access controls in place at the time of the initial disclosure in 2020, further restrictions were put in place and it is the finding of this review that these further restrictions are appropriate for the level of sensitivity of the files.

8. Appendix 1 RTÉ Allegations (quotations from transcript and website)

	Prime Time / RTÉ Investigates 25 th March 2021	RTÉ Website
<p><u>Allegation 1:</u></p> <p>Department of Health compiling secret dossiers as a covert strategy</p>	<ul style="list-style-type: none"> • The Department of Health has been secretly using information to build and maintain dossier on children with autism, who were involved in legal actions against the State - gathered without the knowledge or consent of parents. • The Department of Health’s legal strategy was to covertly gather confidential information on children who took High Court cases against the state. Extensive computer files hold the most detailed, sensitive information on their families. Building that database required the cooperation of other state agencies, and a disregard for doctor-patient confidentiality. And all this was done without the knowledge or consent of the families involved. • The covert gathering and sharing of information in the SENS cases, did not sit easy with him. • Instead, it secretly collected as much information on the families as it could. • Where a case is dormant it should be dormant. But what the plaintiffs didn’t understand and were not informed of, was that the other side continued effectively to work on the case, in terms of gathering 	<ul style="list-style-type: none"> • The Department of Health has been secretly using information from private doctor consultations to build and maintain dossiers on children with autism who were involved in legal actions against the State, RTÉ Investigates has learned.

	Prime Time / RTÉ Investigates 25 th March 2021	RTÉ Website
	<p>information and did that in a deliberately surreptitious way by specifically, when they were asked by a clinician should we be doing this, do the family know? Were specifically told, don't tell them. And that to my mind is a serious ethical breach.</p>	
<p><u>Allegation 2:</u></p> <p>This information gathering exercise [by the Department of Health] was beyond the taking of instructions</p>	<ul style="list-style-type: none"> • Information was gathered on at least four dozen cases taken by the parents of autistic children seeking appropriate education. The Department of Health sought regular service updates to keep tabs on the outstanding cases, without the families knowing this was happening. • This is an information gathering exercise, beyond the taking of instructions. It seems to be very clearly that they are looking for collateral information beyond that, to try and build a picture of families, which may be useful as they refer to tactically in the litigation. • There was a deliberate process of soliciting specific information, and asking for information that would not have been traditionally within the scope or sphere of the Department. 	<ul style="list-style-type: none"> • The files kept on the children were detailed, extensive and involved material sourced directly from consultations with psychiatrists and other medical professionals, the whistleblower said
<p><u>Allegation 3:</u></p>	<ul style="list-style-type: none"> • Prying into families who took high court cases remained critical to the Department of Health's handling of its defence. 	<ul style="list-style-type: none"> • The work was done with the cooperation of the Health Service Executive and the Department of

	Prime Time / RTÉ Investigates 25th March 2021	RTÉ Website
Department of Health is prying into families who took high court cases for the handling of its defence	<ul style="list-style-type: none"> • Extensive computer files hold the most detailed, sensitive information on their families. • They were doing this informally – and specifically, even worse, specifically telling clinicians, don't be telling families that we're gathering this information, that we're going to be storing it. 	Education, and involves detailed information sourced directly from confidential consultations that the children and their families had with doctors and other professionals.
<u>Allegation 4:</u> Department of Health is holding video recordings of children with disabilities	<ul style="list-style-type: none"> • In one of the records on one child, there is a video from the HSE with a child in an extremely distressed state. This information should not be there. I suppose the word meltdown would be used. But it's one of the most distressing things I've ever seen. It's a child literally breaking down, a video of a child and it's in the folders of this litigation unit. 	<ul style="list-style-type: none"> • The files include medical and social care reports and involve original documents, images and video files
<u>Allegation 5:</u> Provision of school reports to the Department of Health by the Department of Education	<ul style="list-style-type: none"> • It is not reasonable for someone to presume that the Department of Health will have a copy of a school report • Finally, Conor, I suppose your investigation, it's really about vulnerable children and who gets access to their school reports, to doctor's visits. Where does this all go from here, what's next? 	<ul style="list-style-type: none"> • In instances where the Department of Education was listed as a co-defendant, annual school reports from class teachers were supplied in their original form to the Department of Health • In these types of cases, the Department of Health was usually sued alongside other State bodies who answered for different services. The HSE dealt with medical and disability supports, and the Department of Education oversaw schooling.

	Prime Time / RTÉ Investigates 25 th March 2021	RTÉ Website
		<ul style="list-style-type: none"> • This meant that school records were also kept – but not just summaries. These were the actual classroom reports every student in the country could expect to get home each summer. • "As in, a child takes home its report – Maths A, Science B, you know, Irish C – and then a written note by the schoolteacher about the child. That, a copy of that. And a sequence of them."
<p><u>Allegation 6:</u></p> <p>Clinical reports on children obtained by the Department from clinicians, including from private doctor consultations</p>	<ul style="list-style-type: none"> • They were doing this informally – and specifically, even worse, specifically telling clinicians, don't be telling families that we're gathering this information, that we're going to be storing it. • Some of them in situations that they couldn't handle and they'd put their faith in the State and they'd brought their children to see psychologists and psychiatrists and other doctors and that faith was not rewarded. It was used against them. • A day later, the Department received a lengthy clinical evaluation from the psychiatrist, who saw the child that day. Detailing their struggles, the impact it was having on siblings, and the parents' fears 	<ul style="list-style-type: none"> • In one instance, evidence suggests that a detailed report was sent to the department following a psychiatric consultation with a child. • "I saw something that, frankly, I can only describe as shocking. I saw an e-mail from an official at the Department of Health to a doctor who is working for the HSE, explaining that they were involved in litigation with one of her patients and asking for information from this doctor." • But the Department of Health had reached across to the HSE and contacted the doctor directly to

	Prime Time / RTÉ Investigates 25 th March 2021	RTÉ Website
	<p>for the future. The families underlying legal action had been dormant for ten years. (case 2)</p> <ul style="list-style-type: none"> • Everything that you would not want to know about the family living beside you, was there. It was drawn from speaking to doctors, it was transcribed and put into Excel sheets, and shared with the Department of Education and Science, and the HSE. 	<p>look for details of what was happening with the family.</p> <ul style="list-style-type: none"> • A day later, after the psychiatrist had just seen the child, a lengthy clinical evaluation was sent to the Department. • It was not deleted. We know this because, three years later, Mr Corr was able to discover it simply by typing in keywords such as "litigation" or "disability" into the internal computer search facility for the Department's social care division.
<p><u>Allegation 7:</u></p> <p>Clinical, and other reports were requested without the consent of children and parents for the material</p>	<ul style="list-style-type: none"> • Information was gathered on at least four dozen cases taken by the parents of autistic children seeking appropriate education. The Department of Health sought regular service updates to keep tabs on the outstanding cases, without the families knowing this was happening. • In 2017, when the medical professional raised questions about the legality of sharing confidential doctor-patient information, senior civil servants became concerned they might have to stop this practice. In an internal memo, seen by RTÉ Investigates, a senior civil servant 	<ul style="list-style-type: none"> • The dossiers, which include the sensitive medical and educational information of children involved in long-dormant court cases, were built and maintained over a number of years by the Department of Health without the knowledge or consent of parents.

	Prime Time / RTÉ Investigates 25 th March 2021	RTÉ Website
	<p>says: “Where to be determined that there are legal obstacles to requesting such information from the HSE, in those circumstances, it would probably drive significant change. We might have to stop liaising in the background with HSE officials and providing the State’s legal team and other departments with information that might be useful in developing the State’s defence legal strategy”.</p> <ul style="list-style-type: none"> • There was no way once I saw a piece of correspondence from the Department saying we’re asking for information from you about a child, but we’re not going to ask for consent to get it. There's no way I was ever going to let that lie. 	
<p><u>Allegation 8:</u></p> <p>Information shared and stored in the Department, was of the most personal nature and could be accessed, searched and viewed by anybody working in the Department’s</p>	<ul style="list-style-type: none"> • Information shared and stored in the Department, was of the most personal nature. The files were not part of ... work. But they could be accessed, searched and viewed by anybody working in the Department’s division dealing with the likes of older people, social care, and disability policies. • All of this information was contained on a folder within the Department filing system. I had my own password to get into the system, my own account, after that I went on WinExplorer, I typed in the key words that I was looking for, which would be generally, children, disabilities, maybe litigation, and all of these documents 	<ul style="list-style-type: none"> •

	Prime Time / RTÉ Investigates 25 th March 2021	RTÉ Website
<p>division dealing with the likes of older people, social care, and disability policies.</p>	<p>were there. I mean, they were just as available as if they had of been paper documents sitting in a file beside me.</p>	

9. Appendix 2 Department of Health correspondence to RTÉ 11/03/2021

I refer to your letter of 11/03/2021 with regard to a report being compiled by RTÉ Investigations Unit regarding the policy being adopted by Department of Health with regard to High Court cases being taken against the State on behalf of children with special education needs.

Your research appears to refer to internal Department of Health documents. Should you believe that a data breach has taken place, you should notify the Department immediately. While the Department is not aware of any data breach having taken place, I would like to assure you that it takes matters of data protection very seriously and should RTÉ be in possession of information or documentation which it considers to constitute a data breach, it is imperative that this information is provided to the Department in order for it to notify the Data Protection Commissioner and, if necessary, any affected data subjects, in accordance with its requirements under the General Data Protection Regulation (“GDPR”).

State Management of Litigation

I can confirm that State bodies including the Minister/Department of Health are named from time to time as defendants in cases taken against the State. The Department does not propose to comment on any individual or pending cases.

It is in the public interest that State parties to litigation manage those proceedings as economically and efficiently as possible. In pursuing a well-managed, cost effective, approach to litigation in the public interest, Government Departments regularly adopt a joint strategy in defending litigation. Indeed, it is normal practice for defendants to litigation to co-operate and share appropriate information with each other required for obtaining legal advice and/or defending the proceedings, where they have a common interest in the issues and outcome of the proceedings. Such an approach is necessary to protect the State’s legal rights, facilitates effective engagement between all parties to the litigation, including the plaintiff, and ultimately ensures the best value for money for the public. This is specifically permitted by data protection law.

Information Sharing and Independent Expert Report

In relation to the allegation concerning “information sharing”, in 2020, in response to a concern raised internally the Department commissioned an independent, expert report by Senior Counsel. That report, which was delivered to the Department in November 2020, examined the issues raised by you in your correspondence and determined that the Department had acted appropriately and lawfully in relation to these matters. No breach of the Data Protection Acts was identified by the report.

Accordingly, the report did not make any recommendations which required the Department to change its approach.

The Department takes its duties under the General Data Protection Regulation very seriously. Pursuant to section 47 of the Data Protection Act 2018, and Article 9(1)(f) of the GDPR, there is a lawful basis for processing special categories of personal data in the context of its defence of legal claims. Prior to May 2018, section 8(f) of the Data Protection Acts 1988-2003 provided that any restrictions in that Act on the processing of personal data did not apply if the processing was required for the purposes of obtaining legal advice or for the purposes of, or in the course of, legal proceedings in which the person carrying out the processing was a party.

The Department therefore rejects the suggestion in your letter that the obtaining, provision or sharing of personal information in question was improper or unlawful. On the contrary, the information sharing referred to in your letter has been found by an independent, expert review to be entirely lawful, proper and appropriate.

Staff obligations

Your letter raises issues concerning information storage and access. The Department operates strict data protection policies which are regularly reviewed by its Data Protection Officer. In addition, all Civil Servants employed by the Department of Health are expected to meet the highest standards with regard to conduct and behaviour and they must certify in writing that they have received and read all relevant policies. In addition, in relation to the processing (including storage and access) of personal data, the following should be noted:

- (iv) The Department has a Data Protection Officer and a dedicated Data Protection Unit to support Business Units and the Management Board in meeting data protection obligations as set out in legislation. Any person who processes personal data on behalf of the Department has a responsibility to comply with the Department's data protection policy and ensure compliance with the principles of data protection. All staff are required to complete data protection awareness training. The Department takes compliance with this policy very seriously. If a staff member knowingly or wilfully fails to comply with any requirements, action may be considered under the Civil Service Disciplinary Code.
- (v) The *Civil Service Code of Standards and Behaviours* sets out a clear framework within which civil servants must work, including the principles which govern the behaviour of civil servants and the values which the Civil Service espouses. This Code forms part of the terms of employment of all civil servants who are expected to apply it at all times. The

code informs civil servants that under the Official Secrets Act 1963 they are required to avoid improper disclosure of information gained in the course of their official work. Breaches of the Code will constitute a breach of the terms of employment of a civil servant and may result in disciplinary action.

- (vi) Under the Official Secrets Act, 1963 each civil servant is prohibited from communicating official information unless he/she is authorised to do so in the course of, and in accordance with, his/her official duties, or where it is his/her duty in the interest of the State to communicate it (It is also an offence under the Official Secrets Act 1963 for anyone to obtain official information otherwise than in accordance with that Act and to retain any official document or anything which constitutes or contains official information when that person has no right to retain it.). Any doubt which may arise as to whether a civil servant is authorised to communicate information in the course of and in accordance with his/her duties should be referred for decision to the Head of his/her Department, through the appropriate official channel. It is his/her duty not to make unauthorised communications directly or indirectly, about matters which come to his/her knowledge in the course of his/her official duties and to refrain from mentioning such matters to anyone other than in the course of such duties. This instruction applies to decisions already taken as well as to matters which may still be under consideration or discussion. Civil Servants are periodically reminded of their duties in this regard.

Finally, it is important to note that the Department of Health supports the continuity and enhancement of all health and social care services. This includes disability health and social care services delivered through a whole-of-government approach to improving the access to and quality of health services for people with a disability. The *Transforming Lives* programme underpins this approach and at its core is the principle of supporting people with disabilities to live ordinary lives within their own communities. The HSE National Service Plan 2021 includes €100m additional new disability development funding and overall commits over €2.2bn to a range of community focused supports and services for those with a disability. The Department is fully committed to progressing the continued development of disability health and social care services.

10. Appendix 3 Department of Health correspondence to RTÉ 25/03/2021

I refer to recent correspondence and in particular to an article published today, on the RTÉ website, entitled “*Department of Health built secret dossiers on children with autism*”. As stated previously the information sharing referred to in the article has been found by an independent, expert review by senior counsel to be entirely lawful, proper and appropriate.

The article contains factual inaccuracies and information has been presented in an imbalanced manner, without providing appropriate context. For example:

- The presentation of the article, particularly the headline, implying that the Department of Health built secret dossiers on children with autism, is inflammatory, lacks appropriate context and is a misleading representation of normal litigation management.
- The article states: *There has been no active litigation in these cases, nor any indication that proceedings were likely to be reactivated.* This is not factually accurate.

As noted in previous correspondence, State parties, including the Department of Health are involved in litigation from time to time. In the public interest, such litigation against the State is managed in consultation and collaboration with relevant State parties to the litigation and the State’s legal advisors.

Where the State is a defendant or notice party to litigation, and where the case has not been formally concluded, such as through a judgment of the court, withdrawal by the plaintiff of the case or through agreed resolution, the relevant State parties must defend those proceedings and that requires the relevant State parties to continue to oversee, manage and review them from time to time. Any such management and review necessarily involves the assessing of information relevant to the claims. This is necessary to protect the public interest and is a normal practice for the management of litigation. As such, the use of terminology such as “long-dormant cases” in the referenced article to describe cases which have not been discontinued does not accurately reflect the realities of litigation management. The fact that a plaintiff has not progressed a case does not infer that a case may not be legitimately actively pursued in due course.

In the Department’s previous correspondence, it outlined the normal practice for defendants to litigation to co-operate and share appropriate information with each other required for obtaining legal advice and/or defending the proceedings, where they have a common interest in the issues and outcome of the proceedings. Such an approach is necessary to protect the State’s legal rights. This is specifically permitted by data protection law. In that regard, I would further draw your attention to

the fact that the matters raised in your article have been subject to independent legal examination by external senior counsel which *inter alia* found that information contained on relevant files managed by the Department is consistent with, and typical of, the sort of information which arises in such litigation. The examination also found no basis to suggest wrongdoing arising from the information contained.

Unfortunately, it may be the case that the issues raised in the published article are based on an interpretation of information that lacks an understanding and familiarity of the nature and conduct of such litigation.

11. Appendix 4 Letter from Acting Secretary General to all staff - Thursday 29 October 2020

To: All Users DoH

Subject: How we work

High importance

Colleagues

At this time of unprecedented challenge when people all across the Department have worked tirelessly and diligently in the public interest, it is important to remind ourselves of the standards, behaviours and values which we all as Civil Servants and employees of the Department share. The work we do as a Department has never been more important, and the way in which we do our work is equally important.

Around the Department, copies of our [Statement of Values and Behaviours](#) are on display since we developed them collaboratively last year. At the core of these values and behaviours is the concept of Respect – for each other, for the roles we occupy and for the critical work we are privileged to undertake on behalf of the State in the best interests of the Irish public.

Alongside our own *Statement of our Values and Behaviours*, we are all subject to the highest standards of honesty, impartiality, integrity and probity, as set out in the [Civil Service Code of Standards and Behaviours](#), developed by the Standards in Public Office Commission (www.sipo.ie). The Code is fundamental to how we operate, forming part of the terms of our employment as Civil Servants. The Code must be applied at all times. Each person who joins as a new entrant to the Department is given a copy of the Code and every person who is promoted within the Department is also given a copy of the Code, to remind us of its importance. Included in the Code are important details on how we act impartially, with integrity and with respect for the law. The Code sets out the standards of integrity requiring us to disclose any conflict of interest and to avoid any undue influence in how we undertake our work.

The *Civil Service Code of Standards and Behaviours* also sets out important issues around **confidentiality** – our absolute duty to respect the law in this regard and to safeguard confidential information. The Code notes that *“it remains a requirement under the Official Secrets Act 1963 that all civil servants, including those who are retired or on a career break, avoid improper disclosure of information gained in the course of their official work. For example, disclosure of information would be likely to be improper where a person has not been given responsibility to provide information to the public under the FOI Acts, or is not otherwise authorised to do so.”* These issues are critically

important given the nature of our work, providing key guidance and advices to our Ministers and to the Government on all aspects of the policy areas for which we hold responsibility.

I encourage each of you to read again the Civil Service Code of Standards and Behaviours and to abide by it as you continue to undertake your work with the highest standards of professionalism of which we can all be very proud, and in line with the long-standing traditions of all those who have worked in the Department of Health.