

The correct text is in red italics.

**Review Application to the Information Commissioner  
under the Freedom of Information Act 2014 (the FOI Act)**

**Case Number:** 180181

**Applicant:** Ms. X

**FOI Body:** Health Service Executive (the HSE)

**Issue:** Whether the HSE was justified in its decision to refuse the applicant's request for access to health records of her late aunt under section 37(1) of the FOI Act

**Review:** Conducted in accordance with section 22(2) of the FOI Act by Elizabeth Dolan, Senior Investigator, who is authorised by the Information Commissioner to conduct this review

**Decision:** The Senior Investigator varied the decision of the HSE. She found that it was not justified in refusing to grant access to all of the records under section 37 of the FOI Act. Having considered the provisions of section 37(8)(a) and regulations made under that subsection and the applicant's status as executrix acting in the administration of the deceased's estate, she directed the release of the records subject to redaction of personal information relating to third parties which she found to be exempt under section 37(1).

**Right of Appeal:** Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated by the applicant not later than eight weeks after notice of the decision was given, and by any other party not later than four weeks after notice of the decision was given.

## **Background**

On 1 June 2017, the applicant made an FOI request to the HSE for access to her late aunt's mental health records. On 6 September 2017, the HSE refused access to 21 pages of records on the basis that they contain third party personal information and are exempt under section 37(1) of the FOI Act. On 28 September 2017, the applicant requested an internal review of the HSE's decision on the basis that she requires the records to carry out her legal responsibilities as the executor of her late aunt's estate. On 22 March 2018, the HSE affirmed its original decision to refuse access to the request under section 37(1) of the Act. On 3 May 2018, the applicant applied to this Office for a review of the HSE's decision.

I have decided to conclude this review by way of a formal binding decision. In conducting this review, I have had regard to correspondence between the applicant and the HSE, to correspondence between the applicant and this Office, to correspondence between the HSE and this Office, to the contents of the records at issue and to the provisions of the FOI Act.

## **Scope of the Review**

This review is concerned solely with the question of whether the HSE was justified in refusing the applicant's request for access to the mental health records of her deceased aunt under section 37(1) of the Act.

## **Preliminary Matter**

Section 22(12)(b) of the FOI Act provides that when the Commissioner reviews a decision to refuse a request, there is a presumption that the refusal is not justified unless the public body "shows to the satisfaction of the Commissioner that the decision was justified". Therefore in this case, the onus is on the HSE to satisfy this Office that its decision to refuse the applicant's request was justified.

## **Analysis and Findings**

### **Section 37 - Personal Information**

It is not in dispute that all of the information in the records is the personal information of individuals other than the requester, apart from a few mentions of her name. Subsection (1) of section 37 requires, subject to the other provisions of the section, an FOI body to refuse a request where access to the records would involve the disclosure of personal information, including personal information relating to a deceased individual. However, under subsection (8), Regulations have been made by the Minister for Public Expenditure and Reform which provide for access by certain third parties to records of a deceased individual. The Freedom of Information Act 2014 (Section 37(8)) Regulations 2016 (S.I. 53218 of 2016) provide for the grant of access to the records of a deceased individual where:

"87(a) the applicant *requester* belongs to one of the following classes:

- (i) a personal representative of the individual acting in due course of administration of the individual's estate or any person acting with the consent of a personal representative so acting, or
- (ii) a person on whom a function is conferred by law in relation to the individual or his or her estate acting in the course of the performance of the function, or

"(b) the applicant *requester* is the spouse or the next of kin of the individual and, in the opinion of the head having regard to all the circumstances, the confidentiality of personal information, would on balance be better served by granting than by refusing to grant the application."

Pursuant to section 48(1) of the Act, the Minister for Public Expenditure and Reform published guidance concerning access to records relating to deceased persons in May 2017. Under section 48(3) public bodies must have regard to such guidance in the performance of their functions under the Act. The guidance states that the three categories of requester who may be given access to records of a deceased person are (1) the personal representative, (2) a person appointed by the courts or by statute, and (3) the spouse/ former spouse/ partner/ former partner and next of kin. The guidance states that the persons set out in categories 1 and 2 have the same right of access as the deceased person enjoyed when living, in respect of records relating to the performance of the functions specified in the regulations. The guidance states that category 1 only covers people who have taken out a grant of probate in the case of testacy. It states that as release of records for the administration of the estate will readily apply to this category of requester and the public body should take care of the following:

- a. Require the requester to produce a copy of the grant of probate;
- b. Have the requester confirm that the grant of probate is still in force;
- c. Require evidence of identity of the requester;
- d. Require evidence of identity of any person acting with the consent of the personal representative;
- e. Check that the grant covers the class of records being sought;
- f. Be satisfied that the records sought are required for the administration of the estate e.g. records relating to land, property, finance, pensions, social welfare payments, grants etc. In the normal course of administration, the personal representative would not require access to sensitive medical records or such like. If in doubt, the decision maker should ask the requester how he/she is acting "in due course of administration" of the estate in requesting the particular records.

#### Applicant's Submissions

According to the applicant, the estate of her late aunt is faced with a claim of pension overpayment. The applicant states that as executrix, she is contesting this claim on the basis that the deceased did not have the capacity to understand official correspondence as she suffered a psychiatric illness throughout her life. The applicant states that in order to make an effective appeal in the pension issue, she requires documentary evidence of her late aunt's medical condition. She submitted to this Office a copy of the High Court probate document granting the administration of the deceased's estate to the applicant and a second executrix. The second executrix contacted this Office to confirm that she is aware of the FOI request and consents to it being dealt with on the basis that they both require access to the records of the deceased in the course of acting in the joint administration of the estate. The second executrix provided this Office with written confirmation to this effect.

#### HSE's Submissions

The HSE states that the records it holds in respect of the applicant's late aunt contain information which is private and confidential and it states that the applicant's late aunt has a right of privacy concerning her sensitive personal information. The HSE states that it has a statutory obligation as a public body to protect and uphold the right of privacy regarding an individual's records even after their death. Furthermore, the HSE says that there is no

evidence within any of the information it reviewed which indicates that the deceased had given her consent for her personal information to be shared.

*This paragraph is incorrect:* The HSE referred to the 2016 Regulations (S.I. No. 218 of 2016) in its internal review decision. The 2016 Regulations were revoked on 17 February 2017 by S.I. 53 of 2017; this request was made on 1 June 2017. Therefore, the 2017 Regulations apply.

The Guidance Notes published by the Minister purport to offer guidance as to the types of requester covered by category one and the steps to be taken by a decision maker when considering such requests. It is important that the Guidance Notes are not interpreted by FOI Bodies so as to impose additional requirements on requesters that are not contained in the Regulations themselves. The HSE states that there is no evidence that the deceased had given her consent for her personal information to be shared, there is no requirement under Regulation 78(a)(i) that the requester provide evidence that the deceased gave consent for her information to be shared, neither is it necessary to show that, on balance, the public interest favours release of the records.

Point (f) above states that "in the normal course of administration, the personal representative would not require access to sensitive medical records or such like. If in doubt, the decision maker should ask the requester how he/she is acting in due course of administration of the estate in requesting the particular records." While the HSE referred to the (2016) Regulations in its internal review decision, there is no evidence that it considered whether the applicant required the records for the administration of the estate. It seems to me that, if it had a doubt, the HSE should have asked the applicant how she was acting in due course of administration of the estate. I accept the applicant's explanation that access to the mental health records are required by her as executrix in the course of administering the estate in relation to financial and pension matters. I am satisfied that the applicant is the personal representative of the deceased acting in due course of administration of her estate and I find that Regulation 78(a)(i) applies in this case.

### **Personal Information relating to other parties**

Personal information of individuals other than the applicant's late aunt is contained on pages 1, 5, 7, 8, 9, 15 and 17 of the records. The Regulations do not provide for a right of access to such information. I am satisfied that section 37(1) applies to this information.

However, as I have outlined above, subsection (1) is subject to the other provisions of the section. Subsections (2) and (5) essentially serve to dis-apply subsection (1). Subsection (2) sets out various circumstances where subsection (1) does not apply while subsection (5) provides for the release of records to which subsection (1) applies where the body considers that on balance (a) the public interest in granting the request outweighs the public interest in protecting the right to privacy of the individual to whom the information relates, or (b) the grant of the request would benefit the individual to whom the information relates.

I am satisfied that none of the circumstances set out in subsection (2) arise in this case, nor do I consider that the release of the information would benefit the individuals concerned. It therefore remains for me to consider whether the public interest in granting access to the information would, on balance, outweigh the public interest in protecting the privacy rights of those individuals.

The FOI Act itself recognises the public interest in ensuring the transparency and accountability of public bodies. On the other hand, however, the language of section 37 and the Long Title to the FOI Act recognise a very strong public interest in protecting the right to privacy, which has a Constitutional dimension, as one of the un-enumerated personal rights under the Constitution. Accordingly, when considering section 37(5)(a), privacy rights will be set aside only where the public interest served by granting the request (and breaching those rights) is sufficiently strong to outweigh the public interest in protecting privacy.

The question I must consider is whether the public interest in further enhancing the transparency and accountability of the HSE is sufficient to outweigh, on balance, the privacy rights of the third parties concerned. In my view, it is not. I fail to see how the disclosure of the information at issue would serve to enhance the transparency and accountability of the HSE in relation to the services it provided. I find, therefore, that section 37(1) applies to that information.

### **Decision**

Having carried out a review under Section 22(2) of the FOI Act, I hereby annul the decision of the HSE to refuse the applicant's request for access to the mental health records of her late aunt under section 37(1). I direct the release of all records subject to the following specific redactions:

- Page 1 - Line 2 of "History" from "Her..." to "She was started by..."
- Page 5 - Line 6 of letter from "Patient feels" to "Ten years ago" and last line of page 5
- Page 7 - Line 3 of "Presenting" from "Her..." to "She was seen..."
- Page 8 - Line 2 of "Current" from "alone..." to end of sentence
- Page 9 - Section headed "Presenting" from "Her..." to "She was seen..."
- Page 15 - Section headed "Additional Information"
- Page 17 - Line 3 from "unable..." to "Seen and..."

### **Right of Appeal**

Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated by the applicant not later than eight weeks after notice of the decision was given, and by any other party not later than four weeks after notice of the decision was given.

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**Elizabeth Dolan**  
**Senior Investigator**  
**23 July 2018**