

**OFFICE OF THE INFORMATION COMMISSIONER**  
**PROCEDURES MANUAL**  
(Last updated: May 2017)

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## **PROCEDURES FOR THE CONDUCT OF REVIEWS UNDER SECTION 22 OF THE FREEDOM OF INFORMATION ACT 2014<sup>1</sup>**

The purpose of this procedures manual is to provide guidance for staff in relation to the conduct of reviews by the Information Commissioner<sup>2</sup> under section 22 of the Freedom of Information (FOI) Act 2014. The manual was updated to reflect the process changes made in June 2014 following an organisational review that began in 2012 with the intention of improving case turnaround times and increasing case throughput, in order to reduce the backlog of cases on hand and to prepare for the increase in demand expected as a consequence of the enactment of the 2014 Act. It has been published for the benefit of the public and of all involved in the use of the FOI Act. The procedures are aimed at ensuring consistency and fairness in our approach to dealing with reviews. The procedures set out in this manual should, in the normal course of events, be adhered to insofar as is practicable. It should be noted, however, that the FOI Act provides that the Commissioner has discretion to adopt such procedures as are appropriate in all the circumstances of a case. In all circumstances, the Office will aim to ensure that the approach adopted by the Office is fair, and seen to be fair, to all the parties concerned.

### **1.0 Making review applications to the Office of the Information Commissioner**

One of the functions of the Information Commissioner is to review decisions made by public bodies on requests for information made under the FOI Act. If, following an internal review decision, the requester is still dissatisfied, s/he can then apply to the Information Commissioner for an independent review of the decision.

- 1.1** A person who wishes for the Commissioner to review a decision made by an FOI body under the FOI Act must make the application for review in writing and pay the appropriate fee. An online application facility is available on our website at [www.oic.ie](http://www.oic.ie).

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<sup>1</sup> The transitional provisions in section 55 of the 2014 Act provide that any action commenced under the Freedom of Information Act 1997 but not completed before the commencement of the 2014 Act shall continue to be performed and shall be completed as if the 1997 Act had not been repealed. Accordingly, in relation to cases that commenced under the Freedom of Information Act 1997 to 2003, references to the Act should be construed as referring to the Act of 1997 to 2003.

<sup>2</sup> It should be noted that a reference to the Commissioner may include an officer who has been duly authorised by the Commissioner to act on his behalf.

An application may also be submitted by email to [info@oic.ie](mailto:info@oic.ie), but it is important to note that the application is not deemed to have been made until the appropriate fee is paid (see chapters 2.0 & 3.0). Alternatively, an application may be made by post or hand-delivery to the Office at the following address:

Office of the Information Commissioner  
18 Lower Leeson Street  
Dublin 2

The application should:

- state the applicant's name, address, telephone number and any other contact details, including an email address (if available),
- include the appropriate fee for application to the Information Commissioner (see chapter 2.0),
- include the relevant supporting information if it is claimed that no fee or a reduced fee is applicable (see chapter 2.0),
- state the name of the FOI body to which the FOI request was made,
- include the reference number of the FOI body's decision (if available),
- include a copy of the decision making records (i.e. the original request, original decision, internal review request, and internal review decision) insofar as available, and
- identify any particular aspect of the FOI body's decision that the applicant is unhappy with.

1.1.1 A standard application form is also available on request from the Office or by calling to the Office in person (see Appendix 5).

1.1.2 Applications should be made **not later than 6 months** after the notification of the decision. However, the application must be made **not later than 2 weeks** after the notification of the decision:

- (i) if the decision is a decision on a request to which section 38 applies (see Appendix 4) or
- (ii) if the decision is made to extend the time limit taken for considering the request under section 21 (see paragraph 5.5 for further information).

1.1.3 An application to the Commissioner, irrespective of the means by which it is submitted, is deemed not to have been made until it is received by the Office and, if applicable, the appropriate payment has been made (see chapter 2.0).

1.1.4 Applications can be made either by the individual concerned or by another person on behalf of the individual (e.g., a solicitor or relative). In the latter case, written authorisation to act on the applicant's behalf will be requested. The written authorisation should include the applicant's original signature and contact details (unless the contact details are otherwise available). The person making the application will be informed that the review will not be processed until receipt of such authorisation.

*Note: Applications made on behalf of a person other than an individual (e.g., applications made on behalf of a body such as a newspaper, private company, etc.) will be regarded as being made by that body or organisation. If, for example, at the conclusion of the Commissioner's review the individual who made the application on behalf of the body no longer acts on behalf of that body, then all correspondence will be addressed to an appropriate individual in that body or organisation.*

## **1.2 Recording the date of applications**

All post received in the Office will be date-stamped immediately on receipt to enable compliance with the time limits set out in the Act to be monitored.

1.2.1 Where a written application for review is received by the Office outside of office hours, i.e. outside the hours of 9.15 a.m. and 5.30 p.m. Monday to Thursday and 9.15 a.m. to

5.15 p.m. Friday, it will be deemed to have been received on the next day on which the Office is open.

## **2.0 Application fees to the Office of the Information Commissioner**

While the 2014 FOI Act abolished application fees in relation to requests to public bodies, a charge applies for making an application for review to the Information Commissioner concerning access to non-personal records.

2.0.1 In certain cases, a fee, normally €50, must be paid at the time of the making of an application for review to the Commissioner. Where a fee, which is required to be paid, is not paid, the Commissioner is obliged to refuse to accept the application and the application is deemed not to have been made. Further information regarding the fees payable is provided below:

### **Category A - Applications for review where NO FEE is payable:**

- The records sought contain only personal information relating to the applicant (including applications made by an individual to whom regulations made under section 37(8) apply, e.g., the parents of a minor or next of kin of the deceased)
- The review relates to a decision by an FOI body following an application for the amendment of personal information in a record (section 9 application) or for a statement of reasons for an act of an FOI body (section 10 application)
- The review relates to a decision by an FOI body to charge a fee
- The application relates to a decision by an FOI body to grant access to records containing only personal information relating to a third party and the application is made by the third party

- Where an FOI body has failed to respond to an application for 'internal review' within the necessary time limit, including where the applicant seeks a review following notification of the FOI body's revised position on the request
- The application relates to a decision by an FOI body to refuse to grant access to additional records located during the course of a previous review by this Office that was brought to closure without a determination on the question of access to those records

**Category B - Applications for review where a REDUCED FEE of €15 is payable:**

- The applicant is a medical card holder or dependant of a medical card holder and the request is not made on behalf of another person who is seeking to avoid payment of the full fee
- The application relates to a decision by an FOI body to grant access to records relating to a third party (other than records containing only the personal information relating to the third party) and the application is made by the third party

**Category C - Application for review where the FULL FEE of €50 is payable:**

- All other applications

2.0.2 Payment of the appropriate amount should be made to the Office at the time of the making of the application for review.

2.0.3 Where the FOI body handling the original FOI request has accepted that no fee is payable or that the applicant holds a medical card (or is the dependant of a medical card holder), evidence of this should be provided to the Office. Otherwise, where applicants for review are of the view that a fee is not payable or a reduced fee is payable, the relevant supporting information should be provided to the Office with the appropriate fee (if any) at the time of the making of the application for review. This will enable this Office to

make a determination about the fee payable. For example, if it is considered that the application falls within Category A, a copy of the request / relevant decision should be furnished; if it is considered that the application falls within Category B, a copy of the medical card should be furnished.

2.0.4 An application is deemed not to have been made to this Office if the correct fee has not been paid. The person making the application will be informed and no further action will be taken by the Office pending determination of the fee payable.

2.0.5 Where a question arises as to whether or not a fee is due on an application for review, the application will be accepted as valid on the date when (a) the fee has been paid, (b) the applicant has confirmed that only personal information is being sought, or (c) it has been decided to accept the application on the understanding that only personal information is sought, having received no reply within the timeframe given (currently 2 weeks).

## 2.1 **Payment of fees**

Fees can be paid using any of the following methods:

**Online:** <https://www.oic.ie/en/Apply-for-Review/Fees-Payable/>

**Cheque / Bank Draft / Postal Order:** crossed and made payable to the Office of the Information Commissioner.

**Cash:** Fees in cash may be paid in person at the Office of the Information Commissioner, 18 Lr Leeson Street, Dublin 2, between the hours of 9.15 a.m. and 5.30 p.m. Monday to Thursday and 9.15 a.m. to 5.15 p.m. Friday.

NOTE: Cash should not be sent by post.

2.1.1 Regulations made under the FOI Act provide that an application fee will be refunded, if at any time prior to the conclusion of the review the applicant withdraws the application.

### **3.0 Applications by email or fax**

The Office of the Information Commissioner will endeavour to facilitate applicants in applying for reviews by email or fax. However, in processing such applications, the following conditions will apply:

- 3.1 Where a fee is payable** the Office does not recommend the making of applications for review by fax or email. As mentioned earlier, an application for review is deemed not to have been made until the correct fee has been paid in full. The Office does not at present accept payment by electronic means other than through the online application facility.
- 3.2 Where no fee is payable**, applications for review may be made by fax or by email subject to the following conditions:
- 3.3** ALL applications should make clear the basis upon which no fee is payable (see information on fees payable above).
- 3.4** Where a review application by fax is received by the Office outside of office hours, it will be deemed to have been received on the next day on which the Office is open. For example, a review application by fax actually arriving at the Office's fax machine on a Friday evening at 7.30 p.m. will be treated as having been received on the following Monday morning (except where the Monday is a Bank Holiday in which case it will be treated as having been received on the Tuesday morning).
- 3.5** Applications for review which are made by email are valid only if made in plain text format to [info@oic.ie](mailto:info@oic.ie) – applications sent to the email addresses of individual staff members are not valid.
- 3.6** Applications for review sent by email should be entitled “Application for Review” and should identify the FOI body in question.

- 3.7** Email applications will only be deemed to have been received by this Office when the email has been actually opened in the Office and has been acknowledged to the sender. Until the email has been acknowledged, the email is not deemed to have been received by the Office. (Emails received in the Office are accessed on a daily basis.)
- 3.8** Where an email application for review is received by the Office outside of office hours, it will be opened on the next working day and will be acknowledged to the sender on that day. The application will be deemed to have been received only when the acknowledgement has been made to the sender.
- 3.9** Please note that a notification to the sender of an email application via the “return receipt” or “delivery report” system does not guarantee that the e mail application has been actually received in this Office.
- 3.10** This Office cannot guarantee the confidentiality of any communications sent by email.

**4.0** **Registering review applications**

The following are instructions for Office staff dealing with review applications to the Office of the Information Commissioner.

- 4.1** The application should be acknowledged immediately and the applicant informed that he/she will be notified as soon as the Commissioner has decided whether or not to accept the application for review.
- 4.2** The FOI Liaison Officer of the FOI body concerned should be contacted by telephone or email. Generic email addresses should be used for written communications with the Liaison Officer wherever possible. In the case of applications for review, other than cases where section 38 applies, the Liaison Officer should be asked, where necessary, to forward by email to [info@oic.ie](mailto:info@oic.ie), within 3 working days, copies of:

- the original FOI request,
- the initial decision of the FOI body,
- the request for internal review, and
- the decision on internal review by the FOI body

unless these documents have already been submitted by the applicant (see Appendix 5).

**4.3** If the Liaison Officer indicates that the request has not been through the process of internal review, then the FOI body should be asked to confirm this in writing and to forward a copy of the original request and the FOI body's initial decision.

**4.4** If the request which gave rise to the application for review appears to be one to which section 38 applies (see paragraph 5.2), the FOI Liaison Officer should be contacted and asked to forward by email to [info@oic.ie](mailto:info@oic.ie), again within 3 working days, copies of:

- the original FOI request
- the notification letters to third parties
- the replies to the notification letters
- the letter(s) of decision issued to third parties
- the letter of decision issued to the requester.

**4.5** If the application for review is from a person to whom section 38(2) applies and who objects to a proposed grant of access by the FOI body to the requester, the FOI Liaison Officer's attention should be immediately drawn to the provisions of section 26 of the Act. This requires the FOI body not to give effect to its decision to release the records pending the determination or withdrawal of the application for review. The Liaison Officer should be contacted by telephone and confirmation should issue by email. *(Where a fee for the section 38 application has not been received, the FOI Liaison Officer should also be contacted).*

**4.6** A separate file for each application for review should be opened.

## **5.0 Initial screening of applications**

The purpose of the initial screening is to ensure both that applications are valid, that there is no reason why the Commissioner should exercise his discretion under section 22(9) to refuse to accept the application, and to deal with other relevant administrative matters.

5.0.1 Section 22(9) permits the Commissioner to refuse to accept an application if he is of the opinion that:

- the application is frivolous or vexatious,
- the application does not relate to a decision which he is empowered to review under section 22,
- the matter to which the application relates is, has been or will be, the subject of another review,
- the applicant has failed to provide him with sufficient information or particulars, or otherwise has failed to co-operate,
- there is no longer any issue requiring adjudication, as access to the records in question has been granted by the FOI body,
- the application forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who appear to have made the requests acting in concert, or
- accepting the application would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of work of his Office.

5.0.2 The initial screening should be carried out using the checklists at Appendices 1 and 2.

5.0.3 Following the initial screening, the file should be referred to the head of the Support Unit if:

- it appears that the application is invalid, or
- the applicant has or had other reviews (in case the application is related), or
- the application appears to relate to a matter which is or has been the subject of another review by the Commissioner, or
- the request is one to which section 38 applies and a decision on the request has been made on internal review.

Otherwise the application for review should be accepted (see paragraph 5.9).

### **5.1 Deemed refusals**

In cases where the application for review has been accepted on the basis of a “deemed refusal” of an internal review request under section 19 of the FOI Act (i.e. on the basis of the FOI body having failed to issue a decision on a request for internal review within the statutory period required), the Support Unit should immediately instruct the FOI body to notify the applicant of its position on the request. Once the FOI body notifies the applicant of its position on the request, the case file relating to the review accepted on the basis of the deemed refusal of the request should be closed and the parties notified that the Commissioner will review the revised position on the request if the applicant notifies the Office within a specified period (normally 6 months) that s/he remains dissatisfied. Where the applicant seeks a review of the revised position within the specified period, a new case file will be opened.

### **5.2 Applications for review of decisions on requests to which section 38 applies**

Section 38 is a statutory notification requirement which FOI bodies are required to observe in relation to the exemptions contained in section 35 (information obtained in confidence), section 36 (commercially sensitive information) and section 37 (personal information about a third party). In the case of each of these exemptions, the FOI body may grant a request if it is considered that the public interest is better served by granting than by refusing the request. However, any proposal to release such otherwise exempt material is expressed by the Act to be subject to the provisions of section 38. That

section requires the FOI body to notify certain third parties that it is proposed to grant the request in the public interest and that the FOI body will consider any submissions from the third parties before deciding whether to grant or refuse the request. Detailed instructions are contained in Appendix 4 on how to decide whether a decision is one to which section 38 applies. However, where it appears that the statutory time limits for notification have not been complied with by the FOI Body, the matter should be referred to an AP/Investigator or Senior Investigator for appropriate action.

### **5.3 Invalid applications for review**

In some cases, it will be found that applicants apply to the Commissioner for review of a refusal to grant access to records which were not sought in the original request. For example, an applicant, as a result of his/her request, may become aware of the existence of further records which were not requested originally and ask for access to these when applying for internal review.

- 5.3.1 If the records which are the subject of the application to the Commissioner were not included in the original request, then technically the review is invalid and both the FOI body and the applicant should be informed accordingly. Prior approval of a Higher Executive Officer, Administrative Officer, or higher grade, must be sought before rejecting the application.
- 5.3.2 Where some of the records were included in the original request, then (provided all the other requirements of the Act have been fulfilled) the application for review should be accepted. However, the applicant should be informed in writing of the scope of the review and that a fresh application may be made to the FOI body for the records which were not included in the original request.
- 5.3.3 Similar considerations apply in the case of an application, by a person claiming to be affected by an act of an FOI body, for a review of a decision on an application made under section 10 for a statement of the reasons for the act and of any material findings of fact. If the applicant raises a new question, not raised in the original request to the FOI body, then the approach outlined above in relation to requests under section 12 for access

to records should be followed. Once again, an application for a review should only be rejected after clearance by a Higher Executive Officer, Administrative Officer, or higher grade.

#### **5.4 Discretion to admit invalid applications**

Where an application for review is totally invalid, in that it relates to a decision in respect of which the Commissioner has no jurisdiction, a Higher Executive Officer, Administrative Officer, or higher grade, should reject it under section 22(9)(a)(ii). Where the application is valid in part, the normal approach should be to only accept the application to the extent that it is valid. However, in exceptional cases of the kind described below, it may be decided at the discretion of an AP/Investigator to admit the application in full. In the case of requests under section 12, the approach to be adopted is that the application may be admitted in full where it appears that no useful purpose would be served by insisting that the applicant make a fresh application to the FOI body. Examples of such situations are requests for records to which section 31(1)(a) or section 42 clearly apply. In such situations, subject to the agreement of the FOI body, it is better to accept the application for review in full, although the applicant should be informed that, technically, a review of the refusal of access could be refused or a challenge to the validity of the Commissioner's review could subsequently be made.

- 5.4.1 Similar considerations apply in the case of an application, by a person claiming to be affected by an act of an FOI body, for review of a decision on an application made under section 10 for a statement of the reasons for the act and of any material findings of fact. However, some care is needed in deciding whether such applications are invalid. In practice, applicants may appear to be raising new matters at internal review or in the course of a review by the Information Commissioner, when all they are really doing is questioning the adequacy of the original section 10 decision. However, cases where the matter raised bears little or no relationship to the original request to the FOI body should not be accepted. Similarly, cases where the section 10 request arose first at internal review stage, prompted, perhaps, by access to records obtained in an original request, should normally be rejected.

## **5.5 Admission of late applications for review**

Section 22(4) provides that applications for review must be made within the following time limits:

- In the case of decisions under section 14 to extend the time taken for consideration of a request - not later than 2 weeks after the notification of the decision to the relevant person concerned
- In the case of a decision on a request to which section 38 applies - not later than 2 weeks after the notification of the decision to the relevant person concerned, and
- not later than 6 months after the notification of the decision in other cases.

5.5.1 However, in all three cases the Commissioner may extend this period if he is of the opinion that there are reasonable grounds for doing so.

5.5.2 This means that late applications should not be admitted as a matter of course. Apart from the clear provisions of the Act, there may well be good reasons why an application should be refused. For example, in the intervening period the views of the FOI body may have changed and it is possible that a fresh FOI request will yield a different result. In other cases, the requirements of certainty suggest that an FOI body should not continue to be at risk of review of its decision after the elapse of a reasonable period of time.

5.5.3 Among the grounds which might be considered reasonable in some cases are 'force majeure' situations, e.g. illness, absence from home, failure by the FOI body to give the applicant details of his/her right of appeal to this Office, or evidence of genuine confusion by the applicant(s) in relation to the appeal process. However, the Commissioner will decide each case on its merits and it is not possible to set out in advance a comprehensive set of grounds that will be considered reasonable.

5.5.4 In cases where the application is made outside the deadline, the applicant should be informed in writing that the application is out of time and that the Commissioner will only admit a late application if there are reasonable grounds for doing so. The applicant will be invited to make a submission regarding any reasonable grounds for extending the application deadline.

5.5.5 If the applicant requests the Commissioner to exercise his discretion and puts forward grounds for doing so, the matter should be discussed with a Senior Investigator prior to making a decision to accept or reject the application for review. In certain cases, the Commissioner may invite the FOI body's comments on a late application.

## **5.6 Late 'section 38' applications**

In cases where the applicant is an objector under section 38, it may be impractical to admit late applications because the FOI body may have already released the information. Where the applicant is the original requester, any attempt to admit a late application could be challenged by a third party objector. In such cases, both the applicant and the FOI body should be informed in writing that the application cannot be accepted unless the Commissioner is of the opinion that there are reasonable grounds for doing so (see paragraph 5.5).

5.6.1 Before rejecting a late application by the original requester where it appears that the decision is on a request to which section 38 applies, it should be established that the request to the FOI body was, indeed, one to which that section applies. This will normally involve an examination of the FOI body's decision making file. The key concern here is whether the FOI body, prior to notifying a person to whom section 38(2) applies, had come to the view that the record was exempt by virtue of section 35(1), 36(1) or 37(1), but that by virtue of section 35(3), 36(3) or 37(5)(a), it should be released because, on balance, the public interest was better served by doing so. Normally, Investigating Officers should not seek to go behind a purported section 38 notification. However, where the evidence clearly indicates that the FOI body had already decided prior to the section 38 notification that some exemption (other than section 35, 36 or 37) applied to

the record or had already concluded that the public interest would not, on balance, be better served by release, then the request should not be treated as one to which section 38 applies. In such cases, if the application for review concerns an initial decision made by the FOI body, then the application should be rejected as invalid. The applicant should be invited to apply to the FOI body for internal review and, if necessary, the FOI body should be invited to consider the admission of a late application under section 21(7). If the application for review concerns a decision made on internal review then the application may be treated as valid and accepted if it is within the 6 months time limit. (See also Appendix 4)

## **5.7 Multiple reviews**

Where the applicant already has one or more reviews before the Commissioner, the head of the Support Unit should check whether the application for review relates to a matter which is already the subject of another such review. If it does, then the applicant should be informed that it is not intended to accept the application, but that the matter will be considered in the context of the earlier review. In such a case, the file should be passed to the Investigating Officer dealing with the earlier review.

- 5.7.1 It may sometimes occur that an application for review relates loosely to matters which are the subject of a separate application for review by the same party. Such applications should not be refused, but they should normally be allocated to the Investigating Officer dealing with the earlier review and brought to his/her attention.

## **5.8 Applications where the matter is, has been or will be the subject of another review**

Section 22(9)(a)(iii) provides that the Commissioner may, at his discretion, refuse to grant an application for a review where the matter to which the application relates is, has been or will be the subject of another review under that section.

- 5.8.1 In cases where applications relate to matters which have already been the subject of a completed review, the applicant (and the FOI body, if necessary) should be informed in writing of the outcome of the earlier review and given a copy of the earlier decision. The

applicant should be informed that, unless it is shown to the satisfaction of the Commissioner that the new application is distinguishable from the earlier one, he is likely to exercise his discretion to refuse to accept the application for review. The applicant should be asked to forward any such evidence within 2 weeks, failing which a recommendation will be made to the Commissioner not to accept the application. If a submission is made by the applicant within the time permitted, then the file should be passed to an AP/Investigator or a Senior Investigator for further action.

5.8.2 It is also open to the Commissioner to refuse to grant an application if the application relates to matters which are the subject of a current review. In practice, the Commissioner is unlikely to reject such an application unless there are compelling grounds for doing so.

## **5.9 Notification of acceptance of application**

As soon as it has been decided to accept an application for review, it is necessary to notify:

- the FOI body
- the applicant
- in the case of a decision in respect of a request to which section 38 relates, the original requester if the application is made by the third party who gave the information concerned or to whom the information relates; otherwise any person to whom section 38(2) applies (see paragraphs 5.9.4 to 5.9.7).

5.9.1 The notification to the FOI body should include a request for a numbered copy of the subject records to be forwarded to this Office together with a schedule within 2 weeks of the date of acceptance (see Appendix 6). The request for a schedule should specify that the schedule should list the records sequentially by number and include the following information:

- the date of the record,
- the title of the document or the name of its author or addressee,

- a brief description,
- the exemption claimed.

5.9.2 In the case of released records, it is sufficient for the schedule to show the number of the record (provided numbered copies of the records are provided) and indicate that it has been released.

5.9.3 The notification of acceptance to a party other than the FOI body should include an invitation to make submissions within 2 weeks of the date of acceptance.

5.9.4 A decision in respect of a request to which section 38 relates means a decision in respect of a request for access to records which contain information obtained in confidence, commercially sensitive information or personal information where the FOI body has formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or a party to whom the information relates) that the public interest would, on balance, be better served by granting than by refusing to grant the request. A person to whom section 38(2) applies means:

- in the case of a request to which section 35(3) applies, the person who gave the information to the FOI body and, if the FOI body considers it appropriate, the person to whom the information relates, and
- in the case of a request to which section 36(3) or 37(5)(a) applies, the person to whom the information relates.

5.9.5 The key concern here is whether the FOI body, prior to notifying a person to whom section 38(2) applies, had come to the view that the record was exempt by virtue of section 35(1), 36(1) or 37(1), but that by virtue of section 35(3), 36(3) or 37(5)(a), it should be released because, on balance, the public interest was better served by doing so.

- 5.9.6 If, on the other hand, the consultation was undertaken for some other reason, for example, with a view to seeking the consent of the party concerned or with a view to putting the party on notice that information about them was about to be released, then any application by a third party objector should be refused.
- 5.9.7 In practice, determining why a consultation was undertaken is not always straightforward and even a perusal of the correspondence may not resolve the matter but the following guidelines should be followed. If the FOI body decides to release the record and bases that decision on the provisions of section 35(3), 36(3) or 37(5)(a) then it can be assumed that the FOI body had formed this view prior to any consultation and, hence, that the decision is a decision on a request to which section 38 applies. In cases where the rationale for the decision is not apparent from the decision letter, the FOI body should be asked to confirm whether or not it is based on the provisions of section 35(3), 36(3) or 37(5)(a). (See also Appendix 4)

## **6.0 Assessment & assignment**

When the subject records have been received from the FOI body, the case file will be transferred to the Assessment Unit for screening. The screening should include a preliminary assessment as to whether a section 23 notice is warranted (see below).

### **6.1 Assessment Unit screening for immediate processing**

The Assessment Unit will screen all cases for suitability for immediate processing, subject to capacity, by the Unit. Cases may be deemed suitable for immediate processing if the matters at issue are relatively straightforward, if few records are involved, or if the request concerned has been refused solely on administrative grounds under section 15 of the FOI Act.

- 6.1.1 Administrative grounds for refusal include a claim that section 15(1)(c) of the FOI Act applies on the basis that the request relates to a voluminous number of records. Where an FOI body has relied on section 15(1)(c) in its decision and the applicant offers to narrow the scope of the request following the acceptance of the review, the Assessment Unit

should invite the applicant to withdraw the application for review and to submit a revised FOI request to the FOI body. If the applicant declines to withdraw the application for review, the review should proceed to a decision on the question of whether section 15(1)(c) applies or not. If it is determined that section 15(1)(c) does not apply, the decision of the FOI body should be annulled with a direction to the FOI body to deal with the request on its merits.

6.1.2 Cases involving more complex issues or a large number of records will be transferred to the Investigations Unit for processing in “date of receipt” order.

## **6.2 Notice under section 23**

Upon assignment, the Investigating Officer, whether an Assessment Unit caseworker or an AP/Investigator, should give further consideration to whether the reasons given by the FOI body in its decision are adequate or not.

6.2.1 Both section 13 and section 21 of the Act oblige an FOI body which is refusing a request, whether wholly or partly, to give the requester a statement of the reasons for the refusal and, other than in cases where the provisions which permit a refusal to confirm or deny the existence of a record are being invoked, to specify:

- any provision of the Act pursuant to which the request is refused,
- the findings on any material issues relevant to the decision, and
- particulars of any matter relating to the public interest taken into consideration for the purposes of the decision.

6.2.2 To comply with the terms of these sections, it is not sufficient for an FOI body to simply paraphrase the words of the particular exemption. A statement of reasons should show a connection, supported by a chain of reasoning, between the decision and the decision maker’s findings on material issues. Where the Commissioner considers that the statement of reasons is inadequate, section 23 of the Act requires that he direct the head of the FOI body to furnish a statement, both to the requester and to the Commissioner,

containing any further information in relation to the above matters that is in the power or control of the head. If the statement of reasons is determined by the Investigating Officer to be inadequate, the case should be referred to a Senior Investigator for approval to issue a section 23 notice.

- 6.2.3 If the proposed section 23 notice is approved by the Senior Investigator, the notice should issue immediately. The case should then be dealt with as in the normal course following assignment.

### **6.3 Request for focused submissions**

As soon as possible following assignment (and, where warranted, the issuance of a section 23 notice), the Investigating Officer, whether an Assessment Unit caseworker or an AP/Investigator, will invite FOI bodies to make focused submissions in all cases. (As submissions serve a different purpose than a section 23 statement, a request for submissions is required regardless of whether a section 23 notice has issued, and the request should not be delayed pending receipt of a section 23 statement.) The request for submissions may identify specific or key questions for the FOI body to answer, but should in any event refer to and follow, as succinctly as possible, the format of the Sample Questions for FOI Bodies document that is available on our Intranet and website. Where appropriate, relevant Questions may be appended to the request. A period of 2 weeks should normally be allowed for the making of such submissions. As the opportunity to make focused submissions generally represents the FOI body's "last chance" to justify its decision, the request for submissions should explain that failure to justify an exemption claimed may lead to a decision to release the record(s) at issue without further contact with the body.

### **7.0 Appraisal for best resolution**

Following receipt of the focused submissions requested or the expiration of the deadline for making such submissions, the Investigating Officer should carry out an appraisal of the case, in consultation with his/her Manager where needed, to decide on the best approach for resolving the case.

- 7.0.1 A substantial proportion of reviews are resolvable otherwise than by way of a binding decision under section 22(2). In many cases, reviews may be completed by way of settlement between the parties (as contemplated by section 22(7)), by withdrawal of the application for review or by discontinuance. In such cases, usually one or other of the parties or both modify their positions. Cases assigned to the Assessment Unit for immediate processing should especially be considered for resolution without a binding decision. It is relevant to note that application fees are refundable in cases where a binding decision is not required because of a settlement of the review or withdrawal of the review application.
- 7.0.2 As part of the appraisal, the Investigating Officer should attempt to:
- assess whether any party, other than those referred to in paragraph 5.9, needs to be notified (see instructions in paragraphs 7.1 to 7.1.7),
  - identify cases which may be capable of being resolved without a binding decision,
  - identify, in particular, cases which may be suitable for settlement, and
  - assess what, if any, further information is needed from the parties.
- 7.0.3 Following the appraisal, progress on the review should be monitored through weekly/fortnightly case reviews with the Investigating Officer's Manager.
- 7.0.4 In each case, the Investigating Officer should check at the outset of the appraisal whether the point at issue has been decided already in another case or is currently under consideration in another case. The form of research is at the discretion of the Investigating Officer, but will normally involve, as a first step, reference to the relevant Guidance Notes that are available on the Intranet. It may also involve a search of the Reference Database or discussion with a more experienced Investigating Officer and/or a Senior Investigator.

## **7.1 Notification of other affected persons**

Section 22(6) requires the Commissioner to notify the following parties of his proposal to review a decision of an FOI body:

- the head of the FOI body,
- the applicant
- in the case of a decision in respect of a request to which section 38 relates, the original requester if the application is made by the third party who gave the information concerned or to whom the information relates; otherwise any person to whom section 38(2) applies, and
- any other person who, in his opinion, should be notified.

7.1.1 The instructions in paragraphs 7.1.2 to 7.1.7 should be followed in deciding whether to notify a party other than the FOI body, the applicant, the requester or a person to whom section 38(2) relates, of the proposal by the Commissioner to review a decision of an FOI body. It is desirable that such notification be given as early as possible in the review.

7.1.2 Section 24 provides that a party to a review or any other person affected by a decision of the Commissioner may appeal against that decision to the High Court on a point of law. Section 22(10) requires the Commissioner to notify his decision, *inter alia*, to any person to whom, in his opinion, it should be notified. Clearly, any person who might be affected by his decision should be notified, thus giving the person an opportunity to exercise his/her rights under section 24. Thus, a guideline for deciding whether or not to notify a third party under section 22(6) is whether that person is likely to be affected by the decision of the Commissioner.

7.1.3 This means that, having accepted an application to review a decision to refuse access to a record which may contain third party information, it is necessary to:

- identify all third party information,

- decide whether it is necessary to notify any third party other than a person to whom section 38(2) applies (the latter must be informed in accordance with the instructions in paragraph 5.9 above).

7.1.4 As a general rule, it would not be desirable for the Commissioner to decide to release information which might affect someone's interests without that person's knowledge.

7.1.5 In large measure, the decision as to whether to notify a third party must be based on the Investigating Officer's initial judgement as to the likely outcome of the review insofar as it concerns third party information. If the decision of the FOI body appears to be justified on the face of it, there is no need to notify the third party at the start of the review. If in doubt, however, the Investigating Officer should consult with a Senior Investigator.

7.1.6 In some cases, it will not be apparent at the outset that the records contain information furnished by a third party or about a third party who may need to be notified of the review by the Commissioner. Where this comes to an Investigating Officer's attention at a later stage in the review, the party should be notified without further delay.

7.1.7 The Commissioner's attention should be drawn to cases where third parties are mentioned and it is decided that they are not affected by a decision.

## **7.2 Form of notification of affected parties.**

Unlike section 38, which specifies certain matters which have to be conveyed to the party being consulted, section 22(6) merely requires that the party be notified of the proposal to review the decision of the FOI body concerned.

7.2.1 The content of a notice under section 22(6) will vary from case to case. Typically, it should contain the following:

- some details of the request made and what records pertaining to the third party were encompassed by the request,

- an explanation of how the matter has come before the Commissioner and his role,
- some details of the FOI body's decision, the exemptions relied on and any other relevant exemptions,
- notification of other material issues for consideration,
- an invitation to consent to release (in suitable cases), and an invitation to make submissions (which need not be confined to the matters raised by the Investigating Officer) if the party objects to release.

## **8.0 Notification of material issues**

As discussed below, the policy of this Office is that, in general, submissions will not be exchanged between parties to a review. However, the parties should be notified of material issues arising for consideration.

**8.1** As submissions made by one or more parties to a review are likely to contain sensitive information that may not be appropriate for disclosure to others, submissions are not exchanged as a general rule. In particular, care must be taken that the provisions of section 25(3) of the FOI Act are fully observed. Section 25(3) requires the Commissioner to take all reasonable precautions to prevent the disclosure of information contained in an exempt record or information which if included in a record would cause the record to be an exempt record, or information as to whether a record does or does not exist where the FOI body is required by the Act not to disclose this information. Any exception to the rule against the exchange of submissions requires the consent of the relevant parties and the prior approval of the relevant Senior Investigator.

**8.2** Formal preliminary view letters should not be used in the normal course of a review. The use of formal preliminary view letters in exceptional circumstances (e.g., cases remitted by the Courts) must be agreed with the relevant line manager in advance.

**8.3** However, an Investigating Officer may set out his or her view of the likely outcome of the review on an informal basis, e.g., by telephone followed by a brief email, in the following circumstances:

- when seeking to narrow the scope of the review,
- when endeavouring to effect a settlement in accordance with section 22(7) of the FOI Act or similar resolution (i.e. a withdrawal or discontinuance) without a binding decision (see paragraphs 9.0 to 9.3), and
- when seeking further information from an FOI body or other relevant party.

**8.4** An Investigating Officer should notify the relevant party or parties to a review, preferably by email, of new material issues arising for consideration. Such issues would include applicable exemptions not previously raised, pertinent search details not previously disclosed to the applicant, and new court judgments which are likely to have a significant bearing on the outcome of the review.

**8.5** Parties notified of an Investigating Officer's views on the likely outcome of the review, or of material issues arising for consideration should be given an appropriate opportunity to comment, usually no longer than 2 weeks. Where a party fails to respond within the timeframe specified, the Commissioner may proceed to issue a decision without further reference to the party concerned.

## **9.0 Settlements & withdrawals**

As part of the appraisal for best resolution, the Investigating Officer should consider whether there is a reasonable possibility of resolving the case without issuing a binding decision by endeavouring to reach a settlement pursuant to section 22(7) or by discussing with an applicant whether, in the circumstances of the case, they may wish to withdraw their application.

**9.1** A withdrawal may include a deemed withdrawal or discontinuance following a grant of access by the FOI body to some or all of the records in question where the applicant raises or pursues no further issue for review. Resolving cases through settlement or withdrawal has a number of advantages. From an applicant's point of view, settlement or withdrawal can result in a speedier resolution of the matter and a refund of the application

fee. From the point of view of the FOI body, granting access to the records in question can avoid the need for any further time consuming written submissions; for instance, where consideration of the request for focused submissions reveals that the body had misdirected itself in its decision.

**9.2** In endeavouring to reach a settlement, Investigating Officers should make it clear that settlement is not an exercise designed to reduce the rights of applicants in any way. Rather, it is a process which is aimed at narrowing the differences between the sides. In some cases, a point is reached at which the applicant is happy to accept the decision of the FOI body as modified in the course of the settlement procedure. In other cases, differences remain which can only be resolved by way of a binding decision of the Commissioner. Even if a binding decision is required, the settlement process can help to ensure that the decision concentrates only on the essentials of the dispute between the parties.

**9.3** In any case where the Investigating Officer considers that there is a possibility of settling the case or narrowing the differences between the parties, s/he should contact the parties concerned, using informal methods of communication wherever possible (e.g., telephone call followed by brief email), and outline the possible basis of the settlement. In considering the possibility for settlement, regard should be had not alone to granting access to the records at issue, but also to the possibilities that a different form of access might be acceptable to the parties or that a deferral of access for a specified period might be acceptable. It should be noted that the possibility of settlement should be considered in section 38 cases, section 9 cases and section 10 cases, as well as in straightforward access cases.

## **10.0 Cases requiring further investigation**

In many cases, especially older cases where focused submissions may not have been requested, the Investigating Officer will have insufficient information to enable a reasonable judgement to be made as to the likely outcome of the review.

- 10.1** In such cases, the Investigating Officer should consider whether a request should be made to the FOI body, or other parties as appropriate, for further information that may be relevant to the review. Normally, a period of no longer than 2 weeks should be given for making a response. Progress on the matter should be closely monitored in case reviews with the Investigating Officer's Manager.
- 10.2** In contacting the FOI body or a third party, attention should be drawn to section 22(12)(b), which provides that a decision of an FOI body to refuse to grant access shall be presumed not to have been justified unless the FOI body concerned shows to the satisfaction of the Commissioner that the decision was justified. It should also be noted that, where the FOI body or third party fails to respond within the timeframe specified, the Commissioner may proceed to issue a decision without further reference to the parties.
- 10.3** Before proceeding to make a recommendation to the Commissioner, the Investigating Officer should consider whether or not it is necessary to notify the applicant of any new issues which may have arisen out of his or her investigations. New issues may arise as a result of the FOI body raising a matter for the first time or where the Investigating Officer identifies an issue that had not previously been raised by the parties. There are many ways in which a new issue may arise. For example, the FOI body may wish to rely on exemptions not previously cited in its earlier decisions. Alternatively, an Investigating Officer may consider that an FOI body has not justified a decision to refuse access to a record but that a different mandatory exemption applies to some or all of the information at issue (e.g. personal information relating to third parties).
- 10.4** In deciding whether to issue such a notification, the Investigating Officer should consider whether the FOI body has raised a matter for the first time which might be influential in persuading the Commissioner to uphold the decision of the FOI body make a particular decision. Where such material issues are identified, the applicant should be given an adequate opportunity to comment on those matters identified by the Investigating Officer or on any other matters which he/she considers relevant to the review. Where an Investigating Officer is satisfied that no new issues arise, or that the applicant has had an

adequate opportunity to make submissions addressing the material issues arising in the case, s/he may make a recommendation to the Commissioner, without further reference to the applicant.

**10.5** Where the review is of a decision to grant a request to which section 38 applies, the applicant's attention should be drawn to section 22(12)(a) which provides that such a decision is presumed to have been justified unless the applicant shows to the satisfaction of the Commissioner that the decision was not justified. It should also be noted that, where the applicant fails to respond within the timeframe specified, the Commissioner may proceed to issue a decision without further reference to the applicant.

**10.6** Further submissions may give rise to further queries. However, it is not the role of the Investigating Officer to determine beyond a reasonable doubt whether the decision of the FOI body was correct or not. Rather, the question for determination is whether it has been shown to the satisfaction of the Commissioner that the decision of the FOI body was justified or not. Section 22(3)(b) requires the Commissioner to determine this question as soon as may be and, in so far as practicable, not later than 4 months after the receipt of the application for the review concerned. Therefore, further enquiries should be made only where necessary and with the approval of the Investigating Officer's Manager.

**10.7** In conducting reviews, Investigating Officers must adhere to fair procedures. However, the requirements of procedural fairness will depend upon the particular circumstances of the case. Where a question arises as to whether procedural fairness requires further engagement with a party or parties, the Investigating Officer should consult with his or her Manager so as to determine the appropriate course of action.

**11.0** **Search cases**

Search issues arise where a request is refused, in full or in part, on the basis that the records concerned do not exist or cannot be found.

- 11.1** In cases where the FOI body refuses the request on the grounds that records cannot be found after all reasonable steps to ascertain their whereabouts have been taken, the guidelines in Appendix 3 should be followed.
- 11.2** As a general rule, where an FOI body locates additional records during the course of a review, the review should be brought to closure without a determination on the question of access to those records. The FOI body should then make a new decision under section 13 of the FOI Act on the question of access to the records concerned (which in turn will be subject to right of review). Where access is refused, no application fees will apply for internal review or, where necessary, a further review by the Commissioner on the matter, since any such review would indirectly relate to a decision that was untimely in the first instances.
- 11.3** However, the Investigating Officer has the discretion to include the additional records in the review already underway where consideration of the additional records would not unduly delay the completion of the review. It would be appropriate for the Investigating Officer to exercise his/her discretion to include the records in the current review where the additional records are few in number, third party notification would not be necessary, and the question of whether or not to release is otherwise straightforward.
- 12.0** **Conclusion of the review**  
Following investigation, the review should be ready to be brought to conclusion by way of settlement or binding decision.
- 12.1** Having considered all the relevant facts and arguments contained in the submissions of all parties, along with any legal advice and any directions of the Commissioner, the Investigating Officer should review the status of the case. The Investigating Officer may conclude at this stage that the case is one which is capable of being settled as a result of a modification of the position of the FOI body or a modification of the request or both.

**12.2** On the other hand, the Investigating Officer may come to the conclusion that neither party is likely to further modify its position in a way which will lead to settlement of the case. In such cases, the Investigating Officer should prepare a submission and draft decision for transmission to the Commissioner, or, where appropriate, his delegate, along with the full file.

**12.3** In drafting the decision, the OIC Decision Style Guide should be followed (Appendix 7). Where appropriate, the decision should specify the period in which the Commissioner's decision is required to be implemented. If the decision is to grant access to any of the records at issue, the attention of the FOI body should be drawn to the provisions of section 26 of the FOI Act if the release of the records would affect the interests of any third parties who have been notified of the review.

**12.4** The purpose of a submission is to ensure that the Commissioner is fully informed as to the relevant facts of the case, arguments presented and any legal advice, and to explain the approach taken in the case to the extent that this is not apparent from the decision. The submission directs the Commissioner's attention to any documents in the file which the Investigating Officer considers will be of particular assistance to her in reviewing the case. A detailed submission is normally not required, however.

### **13.0** Closing cases

This section sets out the applicable procedures for closing a case file once the review has been brought to its conclusion.

**13.1** A review can be brought to a conclusion in a number of ways, viz:

- the application for review of the decision of the FOI body is withdrawn,
- the review is discontinued,
- a settlement is agreed between the parties,
- the Commissioner completes his review of the decision of the FOI body under section 22(2) of the Act.

**13.2** At the conclusion of a review the Investigating Officer must:

- arrange for all parties to be notified of the outcome of the review in writing;
- if the decision is to grant access to any of the records at issue, the attention of the FOI body should be drawn to the provisions of section 26 of the FOI Act, especially if the release of the records would affect the interests of any third parties who have been notified of the review;
- arrange for the return any original files or records supplied to the Office of the Information Commissioner by the FOI body to that body.

**13.3** In the case of reviews which are concluded by way of withdrawal of the application, the following instructions should be followed. If the applicant indicates orally that the application may be treated as having been withdrawn, then written confirmation should be sought, preferably by email. A copy of the written notice of withdrawal or other appropriate notification of the withdrawal should be sent to the FOI body and any other relevant parties. If the applicant does not furnish written confirmation within a reasonable period of time, or where it is not practical to obtain written confirmation from the applicant, the Office will note the applicant's oral instruction that the application be withdrawn, and will issue written confirmation by email to the FOI body and other relevant parties as appropriate.

**14.0** **Arrangements for dealing with review applications**

The Office will endeavour to deal with reviews as expeditiously as is practicable, having appropriate regard to the available resources.

**14.1** It is the Commissioner's objective that, to the greatest extent possible, review applications should be decided within the 4 month guideline timescale provided for at section 22(3)(b) of the FOI Act. Accordingly, all new cases are screened by the Assessment Unit for suitability for immediate processing, subject to capacity, by the Unit.

**14.2** Cases already on hand and new cases not deemed suitable for immediate processing, i.e. cases assigned to the Investigations Unit, will continue to be processed alongside the cases assigned to the Assessment Unit. In determining the order in which these older or more complex cases will be dealt with, the criteria set out below will apply.

**14.3** As a general rule, priority will be given to cases on the basis of age, i.e. older cases will generally be dealt with before more recent cases.

**14.4** Cases will not be dealt with solely by reference to age. In some circumstances, more recent cases may be dealt with before older cases. The circumstances where this may arise include:

- where it is more efficient to deal with a particular recent case alongside an older case (for example, a recent case is very similar to an older case and the same issues arise in both);
- where it is more efficient to deal with a particular group of cases together because they involve related issues;
- where, for staff development purposes, a particular case or category of case is allocated to a particular Investigating Officer;
- where the applicant seeks priority for a specific pressing reason; however, as most applicants will be anxious, understandably, to have their cases expedited, this ground will apply in exceptional circumstances only;
- where the Commissioner forms the view that a particular case should be expedited, for example, in order to give general guidance to FOI bodies on the processing of a particular request or category of request.

## Appendix 1

### Checklist for screening OIC applications for review

- ✓ The FOI body is within the remit of the FOI Act 2014. YES [  ] NO [  ]
  
- ✓ The applicant has availed of the appropriate review process of the FOI body. YES [  ] NO [  ]
  
- ✓ The application relates entirely to a matter contained in the original request. YES [  ] NO [  ]
  
- ✓ The application is made within 6 months of the internal review decision of the FOI body.

YES [  ] NO [  ]

- ✓ Is the application one to which section 14 or section 38 applies? YES [  ] NO [  ]  
If 'Yes', was the application made to this Office **within two weeks** of the decision of the FOI body? YES [  ] NO [  ] **If 'no' to this question, refer to the head of the support unit.**

**If this is an application about s38, use 'Screening checklist for s38 applications'**

#### Section 10

- ✓ Does the application concern a decision about section 10? YES [  ] NO [  ]  
If 'yes', did the applicant specify that the FOI request was being made under s10? YES [  ] NO [  ]

If 'no', did the FOI body assist, or offer to assist, the applicant in making a section 10 request? YES [  ] NO [  ] **If 'no' to this question, refer to the head of the support unit.**

## Delegated functions of the FOI body decision makers

- ✓ Is it clear that the original and internal review decisions have been made by decision makers to whom the relevant functions have been delegated? YES [ ] NO [ ]

If 'no' to this question, refer to the head of the support unit.

### Does a fee apply?

This application for review is about:

- personal information [ ]
- non-personal information [ ]
- a mix of personal & non-personal information [ ]
- a case concerning section 37(8) [ ]
- an application under section 9 [ ]
- an application under section 10 [ ]
- a decision to charge a fee [ ]

Does a 'deemed refusal' at the internal review stage apply to this application?

YES [ ] NO [ ] To be determined [ ] \* see end of next page

Does a fee apply to this application? YES [ ] NO [ ] To be determined [ ]

### Which fee applies?

€15 - Medical card holder [ ]

€50 - Review about a request for access to non-personal information, or mixed information [ ]

- ✓ Has the correct fee been paid? YES [ ] NO [ ]

### About the requester

- ✓ Does the applicant have other open reviews? YES [ ] NO [ ]

If 'yes', list the review reference number/s.

- ✓ Is the person making the request to this Office the original requester? YES [  ] NO [  ]
  
- ✓ Is the original requester represented by another person or body, i.e. acting on his/her behalf?  
YES [  ] NO [  ]
- ✓ If 'yes', to the above question, has the representative satisfied this Office that s/he has authority to act on behalf of the original requester? YES [  ] NO [  ]
  
- ✓ Can the Office accept this application for review? YES [  ] NO [  ]

Signed:

Date:

**Post-acceptance**

\*Has it been established to the satisfaction of this Office that this application concerns a 'deemed refusal' of the internal review request? YES [  ] NO [  ]

If the application concerns a deemed refusal of an internal review request, check if a fee has been paid and arrange for a refund, if appropriate.

## Appendix 2

### Screening of S38 applications for review to the Information Commissioner - Checklist

Section 38 is a requirement by the FOI body to notify the party who gave the information, or to whom the information relates, before making a decision.

1.

- ✓ This is an application relating to S38 only. YES [ ] NO [ ]
- ✓ This is an application relating to S38 and a decision on other records\*. YES [ ] NO [ ]
  - ✓ Should this application be split into two separate applications? YES [ ] NO [ ]

2.

- ✓ The s38 application is from the original requester to the FOI body. YES [ ] NO [ ]
- ✓ The s38 application is from a third party\*\*. YES [ ] NO [ ]
- ✓ If the application relates to a third party, was the party notified by the FOI body within 2 weeks of receipt of the FOI request? YES [ ] NO [ ]

**If 'no', seek clarification from the FOI body.**

3.

- ✓ The FOI body considered the provisions of section 38 at the  
Original decision stage only [ ] Internal review stage [ ]
- ✓ If 'Original decision stage only', was this S38 application made to this Office within two weeks of the FOI body's original decision? YES [ ] NO [ ]

**If 'no', contact the applicant for an explanation why the application was not made to this Office within two weeks.**

- ✓ If the decision was made at the internal review stage, **check with the head of the support unit on the status of the application.**
- ✓ Can this application for review be accepted by the Office?

YES [ ] NO [ ]

If 'No', please state the grounds. \_\_\_\_\_

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**\*Where some records are not subject to the notification procedure, the normal OIC review mechanism applies in relation to those records.**

**\*\*If this is an application from a third party, the FOI body must be informed as soon as possible (by phone) that it should not release the records at issue until it is advised by this Office.**

4.

**Does a fee apply?**

This application for review is about a:

S38 application from a third party [ ]

S38 application from the original requester (the applicant to this Office) [ ]

Did the FOI body make a decision within two weeks of receipt of a submission from the third party, or within two weeks of the expiration of the time available to the third party to make a submission (whichever is earlier)? YES [ ] NO [ ]

Does a fee apply to this application? YES [ ] NO [ ] To be determined [ ]

**Which fee applies?**

€15 – S38 application from a third party [ ]

€50 – S38 application from the original requester (the applicant to this Office) [ ]

€15 – S38 application - original requester is a medical card holder [ ]

Has the correct fee been paid? YES [ ] NO [ ]

Signed:

Date:

### **Appendix 3**

#### **Adequacy of search cases – guidelines**

From time to time cases arise where access is refused on the basis that records do not exist or cannot be found. The purpose of the following guidelines is:

- to explain the role of the Information Commissioner in such cases,
- to set out the steps which need to be taken in order to conduct a proper review, and
- to explain the basis for the Commissioner's decisions in this area and to give guidance on how such decisions should be drafted.

These guidelines cover hard copy records only. The FOI body's policy on electronic information management, including such matters as editor rights, security of data, back up procedures, offsite storage may all come into question if an electronic record cannot be found.

#### **The role of the Information Commissioner**

It is necessary to be clear at the outset that it is not, in the normal course, the Commissioner's function to search for records. The Commissioner's role is to review the decision of the FOI body to refuse access on the grounds that the record requested does not exist or cannot be found after all reasonable steps have been taken to ascertain its whereabouts. This means that, as in any other review, the Commissioner must have regard to the evidence available to the decision maker and the reasoning used by the decision maker in arriving at his/her decision. The evidence in "search" cases normally consists of the steps actually taken to search for the records along with miscellaneous other evidence about the record management practices of the FOI body on the basis of which the decision maker has concluded that the steps taken to search for the records were reasonable.

The role of the Commissioner is to decide whether the decision maker has had regard to all the relevant evidence and, if so, whether s/he was justified in coming to the decision that the record does not exist or cannot be found after all reasonable steps have been taken to ascertain its whereabouts.

The Commissioner's understanding of his role in such cases was approved by Mr Justice Quirke in the High Court case of *Matthew Ryan and Kathleen Ryan and the Information Commissioner (2002 No. 18 M.C.A.)* where he said:

"I am satisfied also that the [Commissioner's] understanding of his role, as outlined in evidence, was correct in that he was not required to search for records but was required rather to review the decision of the Department and in doing so to have regard to the evidence which was available to the decision-maker and to the reasoning used by the decision-maker in arriving or failing to arrive at a decision."

In such cases the Commissioner must:

- ascertain what evidence was available to the decision maker,
- ascertain whether, in the circumstances of the case, it was sufficient for the decision maker to rely on that evidence or whether further particular evidence should have been sought, and
- decide whether, based on the evidence available to him/her, the decision maker was justified in concluding that the records did not exist or could not be found after all reasonable steps had been taken to ascertain their whereabouts.

It should be noted that a decision of the Commissioner to affirm a decision by an FOI body, that access should be refused on the grounds that section 15(1)(a) applies, is open to challenge in the High Court and Supreme Court on a point of law. In the circumstances, it is essential that Investigating Officers establish whether the decision maker had regard to all the relevant evidence and whether the conclusions based on that evidence were justified.

## **Procedures in "search" cases**

It should be explained to FOI bodies what the Commissioner's role is in this kind of case and what the requirements of the Office are likely to be. FOI bodies should be reminded, where appropriate, that it is open to staff of the Commissioner's Office to visit their Offices to establish the nature and extent of the search carried out and/or to examine their record management practices. It is not possible to be definitive about these requirements because, having reviewed the evidence available to the decision maker, it may be decided that further explanations are required. It is important that FOI bodies understand that the onus is on the FOI body to satisfy the Commissioner that all reasonable steps have been taken and that, if the Commissioner is not satisfied, he will require further steps to be taken.

At the same time, FOI bodies should not be left with the impression that the Commissioner will require further steps in all cases where records cannot be found or that he will require searches to continue until such time as the records are found. This is because it is possible - and this is clearly envisaged by the Act - that records may exist but still may not be found after all reasonable steps have been taken to ascertain their whereabouts. As part of the review in such cases the Commissioner will usually need to:

(1) Ascertain the record management practices of the FOI body as they pertain to the record or records in question.

This means that matters such as the following may need to be known:

- how and when records of the kind at issue were created or received,
- how such records are or were used,
- what sections of the FOI body would normally consult such records,
- where are or were the records kept while in active use,
- in the case of "dormant" files (i.e. files no longer in active use) who is responsible for them,
- whether there is a register of files and, if so, what it discloses,
- the FOI body's practice as regards destruction of records.

What is being sought here is information about the record management practices of the FOI body insofar as those practices are relevant. The degree of detail which will be required will vary according to the type of records being sought. An exhaustive description of the FOI body's record management practices will not normally be needed, nor in many cases will it be useful.

(2) Ascertain what steps were taken to find the record(s).

The steps taken by the FOI body should be established in detail including, how and by whom searches were carried out and what records were actually searched for. For example, ascertaining that a general e mail or memorandum was circulated, even if it has been responded to by all recipients, is not sufficient. It is necessary to know what the recipients of the e mail or memorandum did. Part of the difficulty here can be that all reasonable steps have been taken but the FOI body did not properly record the steps. This situation is less likely to arise where, for example, the FOI body circulates a form (e mail or hard copy, as appropriate), which each recipient is obliged to return certifying that he/she has searched the areas under his/her control (and giving details of how the search was conducted) and that the file(s)/record(s) have not been found.

(3) Decide in the light of (1) and (2) above whether all reasonable steps have been taken.

Deciding whether all reasonable steps have been taken requires the exercise of judgement and each case must be considered on its merits. One useful benchmark is to ascertain what additional steps, if any, the FOI body would take if it had to find the record urgently for a senior official such as the Secretary General or CEO.

A second useful benchmark is to consider whether a search has been conducted of locations where the record might be as opposed to should be. The point here is that the misfiling or misplacing of records is a common enough occurrence. Given that this is so, if the FOI body has confined its search to the places where the records ought to be then it can hardly be said to have

taken all reasonable steps. The following two examples refer to whole files, but similar steps could be devised for individual records, depending on the type of records being sought.

Consider whether the file was misfiled (i.e. placed in the wrong order in a series of files which are ordered by name or number). Misfilings are common but experienced record keepers have techniques for finding such files e.g. where filed by numbers, look at half a dozen files either side of the number, look at transposed numbers, dropped digits etc. It may be necessary to obtain evidence from the record keeper.

Consider whether the file was misplaced (i.e. associated with another unrelated file or filed in the wrong series altogether). Once again, if there is someone who has overall responsibility for the files they will know the common causes of files "going missing" and may be able to suggest further ways of locating such files.

If a file is missing or destroyed, then it may be possible to reconstruct it either wholly or partially, if its contents were generated within the FOI body. Whether this is necessary or useful (from the requester's point of view) depends on the circumstances of the case. If there has been correspondence with another FOI body, it may be possible either to obtain copies of some records or to identify reference numbers which could help in the search.

(4) Consider if there has been a deliberate removal of records.

If there is any suspicion that records have been deliberately interfered with, the case should be referred to the Senior Investigator before the point is taken up with the FOI body. In such cases the Senior Investigator may recommend to the Commissioner that further action be taken in relation to the matter.

(5) Consult the requester

In some cases it may be appropriate at an early stage to consult the requester. This is particularly so where it is alleged that records exist but are being concealed. A requester could be asked why

precisely he/she thinks records exist or for a history of his/her dealings with the FOI body or any other evidence such as reference numbers, dates etc. which might help in the search. It should be explained that the purpose of such questions is to better enable the Office to pursue the matter with the FOI body.

(6) Require further steps

Having taken the steps outlined at (1) to (5) above, the conclusion may be arrived at that all reasonable steps have not been taken by the FOI body and that it should be asked to take further steps. This should be done in writing and any response should be in writing. Staff should avoid asking for further searches until they are in possession of the full facts, ascertained as a result of steps (1) to (5) above.

Ideally, the outcome of those further steps should be either that the records will be found or that the position may be reached to conclude that the records cannot be found after all reasonable steps have been taken. On occasion, it may be necessary to go back to the FOI body a second time (for example, if new evidence emerges during the course of the further searches). If, having completed the work at (1) to (6) above, the record(s) cannot be found and the Office is satisfied that all reasonable steps have been taken, the staff member dealing with the request may, before recommending a final decision, write to the requester explaining in some detail what steps were undertaken by the FOI body and why it is considered that all reasonable steps have been taken. This course of action might be appropriate where the staff member considers that there is some prospect that the requester might agree to settle the case on the basis, for example, that a more thorough search had been undertaken or that there was evidence that the record(s) did not exist.

Whether the steps outlined at (1) to (3) above are undertaken in correspondence or through meeting the officials of the FOI body is left to the discretion of the Investigating Officer in each case. However, in all cases, Investigating Officers should ensure that written confirmation is obtained from the FOI body of what steps were undertaken and of any relevant facts put to them before recommending a decision to the Commissioner.

## **Drafting of decisions**

Section 15(1)(a) permits refusal if the record concerned does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken. The Commissioner will not normally make a composite finding to the effect that a record does not exist or cannot be found. In some cases he may find that a record does not exist but such a finding would have to be supported by direct and compelling evidence. For example, a record may have existed at one stage but the body might claim that it had been destroyed. A contemporaneous note that particular records, of which the requested record was one, had been destroyed would normally be acceptable as evidence.

Where there is evidence of the existence of the record at one stage but it cannot be found now and the FOI body does not claim that it was destroyed or offers no evidence that it was destroyed, then a different approach is necessary. In such cases the finding must be that the record cannot be found. Where a particular identifiable file is at issue it is necessary to address the matter of that file in particular. However, depending on the circumstances of the case, a finding that no other records can be found may also be appropriate.

## **Appendix 4**

### **Requests to which section 38 applies – guidelines**

#### **Background**

The purpose of this note is to give guidance to Office staff on how to deal with applications for review involving requests to which section 38 of the Act applies.

Section 38 is a statutory notification requirement which FOI bodies are required to observe in relation to the exemptions contained in section 35 (information obtained in confidence), section 36 (commercially sensitive information) and section 37 (personal information about a third party). In each of these cases the FOI body may grant a request if it is considered that the public interest is better served by granting than by refusing the request. However, any proposal to release such otherwise exempt material is expressed by the Act to be subject to the provisions of section 38. That section requires the FOI body to notify certain third parties that it is proposed to grant the request in the public interest and that the FOI body will consider any submissions from the third parties before deciding whether to grant or refuse the request.

#### **What is a request to which section 38 applies?**

The term "request to which section 38 applies" is defined in section 2(1) as meaning "an FOI request to which section 35(3), 36(3) or 37(5) applies and which, apart from section 38, would fall to be granted". Taking section 35(3) as an example, such a request is one where, at some stage in the decision making process, the FOI body has formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or a party to whom the information relates) that the public interest would, on balance, be better served by granting than by refusing to grant the request.

#### **Review by the Commissioner of decisions on requests to which section 38 applies**

Section 22(1)(g) of the Act provides that one of the categories of decisions which the Commissioner may review on application to him by a relevant person, is "a decision on a request

to which section 38 applies". Generally speaking, section 22(4)(a) provides that any such application for review must be made "not later than 2 weeks after the notification of the decision to the relevant person concerned". It follows that there are two requirements which must be met before the Commissioner can review a decision on a request to which section 38 applies. The first is that the application for review must be made by a relevant person (see below). The second is that the application must be made within the 2 week time limit. *(The Commissioner may extend the 2 week time limit if he is of the opinion that there are reasonable grounds for doing so. Among the grounds which might be considered reasonable in some cases are force majeure situations, e.g. : prolonged illness or absence from home, but the Commissioner will decide each case on its merits and it is not possible to set out in advance a comprehensive set of grounds that will be considered reasonable).*

A "relevant person" is defined in section 22(16) as the requester and, if the decision is in respect of a request to which section 38 relates, a person to whom section 38(2) applies.

Section 38(2) applies to:

- the person who gave the information to the FOI body and, if the FOI body considers it appropriate, the person to whom the information relates, in the case of a request to which section 35(3) applies, and
- the person to whom the information relates, in the case of a request to which section 36(3) or 37(5) applies.

### **Decisions where the full requirements of section 38 have been met**

Section 21(1)(a) makes it clear that an initial decision ( i.e. a decision under section 13 of the Act) to refuse, wholly or partly, a request to which section 38 applies, should not be reviewed internally by the FOI body under that section (see section below headed 'Cases which have gone to internal review').

If, in making the initial decision, the provisions of section 38 have been properly applied by the FOI body then there are three possible outcomes, any one of which can arise in an application to the Commissioner:

**The First Outcome (refusal of the request on public interest grounds)**

The first possible outcome of an initial decision is a refusal of the request on the grounds, inter alia, that the records are exempt under section 35, section 36 or section 37 and that the public interest would not be better served by granting than by refusing the request. What will have happened in such a case is that the FOI body initially took the view that the records were exempt under section 35, section 36 or section 37 but that, on balance, the public interest would be better served by release; following notification to some party under section 38(2), the FOI body changed its mind.

In such cases, the requester does not have any right to internal review under section 21 of the Act. If dissatisfied with the decision, the requester must apply for a review by the Information Commissioner within the 2 week time limit. As noted earlier the Commissioner may extend the 2 week time limit if he is of the opinion that there are reasonable grounds for doing so. (See paragraph 5.6).

Since the decision is to refuse access, it may be expected that no party consulted by the FOI body under section 38 will want to have the decision reviewed by the Commissioner. However, in the event of an application by the requester for a review by the Commissioner, the parties consulted under section 38 are to be treated as relevant persons for the purposes of section 22(16) and notified of the review in accordance with section 22(6).

In relation to requests to which section 35 applies, it may happen that the FOI body will not have consulted with a person to whom the information relates (it has a discretion not to consult). Such persons are not to be treated as relevant persons for the purposes of section 22. However, they are potentially affected parties, and the instructions at paragraphs 7.1 and 7.2 are to be followed in considering whether to notify them of the review.

### **The Second Outcome (refusal of the request under other exemptions)**

The second possible outcome is a decision to refuse the request on grounds other than section 35, 36, or 37. This may happen if, at some stage after it commenced the notification process required by section 38, the FOI body decided that some other exemption applies (regardless of whether section 35, 36 or 37 also apply). Such a decision is not a decision on a request to which section 38 applies. While it is true to say that, in this case the FOI body has formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or a party to whom the information relates) that the public interest would, on balance, be better served by granting than by refusing to grant the request, such a decision is not a decision on a request to which section 38 applies. This is because it cannot be said that, apart from section 38, the request would fall to be granted.

Such a decision, if made initially, should not be accepted for review by the Information Commissioner. Instead, the requester should be advised to seek an internal review.

### **The Third Outcome (grant the request in public interest / grant the request as no exemption applies)**

The third possible outcome is a decision to grant the request. The basis for such a decision will usually be that the record qualifies for exemption under section 35(1), 36(1) or 37(1), but that the public interest is better served by release. However, it could also happen that, in the course of the section 38 notification procedure, the FOI body may reconsider the matter and decide that the record does not qualify for exemption. In either case, the decision is one on a request to which section 38 applies. Any party consulted by the FOI body may apply to the Commissioner for a review of the decision within the 2 week time limit. In such cases, the requester is to be treated as a relevant person and notified in accordance with section 22(6).

In relation to requests to which section 35 applies, it may happen, as with the first outcome, that the FOI body will not have consulted with a person to whom the information relates (it has a discretion not to consult). Such persons are not to be treated as relevant persons for the purposes of section 22. However, they are potentially affected parties, and the instructions at paragraphs 7.1 and 7.2 are to be followed in considering whether to notify them of the review.

It is also possible that a requester could apply to the Information Commissioner for a review of a decision to grant access because s/he disagreed with the reasoning of an FOI body. For example, the FOI body might decide that section 35(1)(a) applied but that access should be granted in the public interest. The requester might not agree that section 35(1)(a) applied. The Information Commissioner will not normally accept applications of this kind since there is no dispute between the requester and the FOI body as to the right of access. If a third party's application for a review is accepted, the requester should be informed under section 22(6), and should be told that any submissions about the grounds of the decision will be considered in the course of that review.

### **Cases where the provisions of the Act have not been followed**

Cases may arise in which the initial decision (i.e. the decision under section 13) is to grant access in the public interest to records considered exempt under section 35(1), 36(1) or 37(1), but the purported consultation under section 38 is deficient in some way. For example, the time limits in section 38 may not have been met or the basis of the consultation may not have been properly explained to the third parties. In line with the principles outlined above, the key concern is whether the FOI body, at some stage in the decision making process, formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or a party to whom the information relates) that the public interest would, on balance, be better served by granting than by refusing to grant the request.

Normally, Investigating Officers should not seek to go behind a purported section 38 notification. However, where the evidence clearly indicates that the FOI body had already decided prior to the section 38 notification that some exemption (other than section 35, 36 or 37) applied to the record or had already concluded that the public interest would not, on balance, be better served by release, then the request should not be treated as one to which section 38 applies.

### **Cases where statutory time limits have not been adhered to**

Where it appears that the section 38 process followed by the FOI body is defective as a result of non-compliance with the timelines provided for in the FOI Act, the application for review should be forwarded to the Support Unit Manager as soon as possible.

If the Support Unit Manager is satisfied that the section 38 process was defective due to non-compliance with the statutory timelines, arrangements should be made for the application to be accepted and for a decision annulling the FOI body's decision to issue without delay. The decision should explain the consequences of same; i.e. that the original decision has been annulled and the request requires a new decision. Arrangements should be made for the application fee to be refunded.

### **Consultations outside section 38**

In some cases, an FOI body may have contacted a third party 'informally', for example, with a view to seeking the consent of the party concerned or with a view to putting the party on notice that information about them was about to be released. If the evidence clearly indicates that the only consultation undertaken was for such a reason, then any application by a third party objector should be refused.

In practice, determining why a consultation was undertaken is not always straightforward and even a perusal of the correspondence may not resolve the matter. Where a question arises as to the basis for consultation, the following guidelines should be followed. If the decision maker decides to release the record and bases that decision on the provisions of section 35(3), 36(3) or 37(5) then, in the absence of any other evidence to the contrary, it can be assumed that the decision maker had formed this view prior to any consultation and, hence, that the decision is a decision on a request to which section 38 applies. In cases where the rationale for the decision is not apparent from the decision letter, the FOI body should be asked to state whether or not it is based on the provisions of section 35(3), 36(3) or 37(5).

### **Cases which have gone to internal review**

As indicated above, section 21(1)(a) makes it clear that an initial decision to refuse, wholly or partly, a request to which section 38 applies, should not be reviewed internally by the FOI body under that section. Cases in which an FOI body has wrongly accepted decisions for internal review are dealt with later in this note.

It can happen that, in arriving at its initial decision, the FOI body does not consider that section 35(3), 36(3) or 37(5) applies and, hence, does not consult any third parties under section 38. In such a situation, the refusal of the request may give rise to an internal review. It is possible that the internal reviewer may consider that section 35, 36 or 37 applies but that access should be granted in the public interest. In such a situation, the Act does not envisage a formal consultation under section 38. In practice, FOI bodies may consult informally at this stage.

If, following such a consultation, the FOI body decides to grant access, the Commissioner may receive an application, from a third party who has been consulted, asking for the decision to be reviewed. Whether such an application is accepted depends on why the consultation was undertaken by the FOI body. If the consultation was undertaken because the internal reviewer took the view that the record was otherwise exempt but that the provisions of section 35(3), 36(3) or 37(5) required its release then the decision is one on a request to which section 38 applies and the application may be accepted. If, on the other hand, the consultation was undertaken for some other reason, for example, with a view to seeking the consent of the party concerned or with a view to putting the party on notice that information about them was about to be released, then any application by a third party objector should be refused.

As stated above, determining why a consultation was undertaken is not always straightforward and even a perusal of the correspondence may not resolve the matter. The following guidelines apply where a question arises as to the basis for consultation in cases that have gone to internal review. If the internal reviewer decides to release the record and bases that decision on the provisions of section 35(3), 36(3) or 37(5) then, in the absence of any other evidence to the contrary, it can be assumed that the internal reviewer had formed this view prior to any consultation and, hence, that the decision is a decision on a request to which section 38 applies.

In cases where the rationale for the decision is not apparent from the decision letter, the FOI body should be asked to state whether or not it is based on the provisions of section 35(3), 36(3) or 37(5).

If the internal reviewer decides to refuse the request then regard should be had to the time limit for making an application to the Information Commissioner mentioned in the internal reviewer's decision letter. If the requester is informed that the time limit is 2 weeks then, in the absence of any evidence to the contrary, it should be assumed that the decision is one on a request to which section 38 applies. On the other hand, if the decision letter informs the requester that the time limit for an application to the Commissioner is six months then, in the absence of any evidence to the contrary, it should be assumed that the decision is not one on a request to which section 38 applies.

#### **Cases wrongly accepted for internal review**

As indicated above, an initial decision to refuse, wholly or partly, a request to which section 38 applies, should not be reviewed internally by the FOI body under section 21. However, it can happen that, in such cases, the requester is granted an internal review, in error, instead of being referred to the Information Commissioner. Normally such a matter will only come to the attention of this Office by way of an application by the requester for a review of the internal review decision. In the unlikely event that such an application is made within 2 weeks of the original decision, it may be accepted as an application for a review of the original decision. Where the application is made outside that period it could fall to be refused as the internal review decision in such cases is not a decision under section 21. However, in these circumstances, the Commissioner will normally exercise his discretion to admit such 'late' applications.

#### **Request involving records to which section 38 applies and other 'non-section 38' records**

Most requests involve more than one record. Cases will arise where some of the records contain information relating to a third party and will be subject to section 38 consultations, while other records within the scope of the request may not contain any information to which section 35, 36 or 37 apply. However, the FOI body may decide that these latter records are exempt under other section(s) of the FOI Act. In such cases the requester should be advised that they have a right to

internal review of these latter records. Therefore, it may arise that an FOI body's decision on the 'section 38' records is appealed directly to this Office within 2 weeks while the decision on remaining exempt records is appealed to this Office within six months thereof on internal review.

**Appendix 5**

**Request for review by the Information Commissioner  
under section 22(2) of the Freedom of Information Act 2014**

**Return completed form to :**

**Office of the Information Commissioner, 18 Lower Leeson Street, Dublin 2.**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Telephone Number: \_\_\_\_\_ E Mail : \_\_\_\_\_

Name of public body to which original FOI request was submitted:

\_\_\_\_\_

Public body's case reference number if available: \_\_\_\_\_

Details of FOI request submitted to public body:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Have you requested an internal review of the original decision made by the public body?\_\_\_\_\_

If so, has a decision issued to you by the public body in relation to your request for internal review? \_\_\_\_\_

\*I enclose a fee of : € 15\_\_\_\_\_ € 50\_\_\_\_\_ No Fee Applicable \_\_\_\_\_

Signed : \_\_\_\_\_ Date : \_\_\_\_\_

**\*Fees**

In certain cases a fee must be paid at the time of the making of an application for review to the Information Commissioner. Where a fee, which is required to be paid, is not paid, the Commissioner is obliged to refuse to accept the application and the application is deemed not to have been made. Further information regarding the fees payable is provided in the attached leaflet.

## **Appendix 6**

### **Liaison arrangements with FOI Bodies for the purposes of the Freedom of Information Act 2014**

#### **Introduction**

The purpose of this document is to set out, in a general way, the type of liaison arrangements which the Information Commissioner's Office will operate in its dealings with FOI bodies following the process changes implemented in June 2014. As time limits are a factor in all FOI decisions, including those of the Commissioner, it is very important that all contacts between the Commissioner and FOI bodies are conducted efficiently and speedily. For this reason, it is essential that clear liaison arrangements are set out to ensure efficient communication between the Commissioner and FOI bodies. The Office may agree individual arrangements with individual bodies but these will always be within the context of the broad arrangements described below.

#### **Liaison Arrangements**

The central feature of the liaison arrangement is the appointment, by each relevant FOI body, of a staff member to act as liaison officer in all dealings with the Commissioner's Office. The following observations apply to the role of the liaison officer:

#### **Functions of Liaison Officer**

The liaison officer's main functions in relation to the Office of the Information Commissioner are:

- to act as the initial point of contact in all transactions / reviews / investigations / mediations / publication of information between the Commissioner's Office and the body;

- to ensure that any written or oral enquiries from the Commissioner's Office are immediately directed to the appropriate person within the body for attention;
- to ensure that all time limits applying to requests for information, from the Commissioner's Office, are met;
- to ensure that all relevant files and documents are readily available for inspection when requested by the Commissioner's Office;
- to ensure that the Commissioner's staff are provided with suitable facilities on their visits to the body;
- to ensure that any actions required to implement decisions of the Commissioner are taken;
- to ensure that, where relevant, the reports required under section 22(11), (specifying the certificates issued by a Minister) and section 41(4) (in relation to the secrecy provisions in other enactments).

### **Reviews by the Commissioner**

As provided for at section 45(6) of the FOI Act, the Commissioner sets such procedures for the conduct of reviews (and of investigations) as he considers appropriate. These may be as informal as is consistent with the due performance of the functions of the Commissioner. In determining appropriate procedures in any particular case, however, the Commissioner must have regard to section 22(3) of the FOI Act, which sets a 4-month deadline for completion of reviews, in so far as practicable.

When an application for a review has been received, and the Commissioner is satisfied that the case is one which, on the face of it, should be considered, the liaison officer of the body will be contacted. Generic email addresses will be used for written communications with the liaison

officer wherever possible. The liaison officer should inform the officials who took the initial and review decisions that an application for a review has been received.

The liaison officer should ensure that no actions are taken which would prejudice the review, e.g., release of information where a third party seeks a review of the decision to release that information, destruction or removal of any relevant records.

If the liaison officer indicates that the request has not been through the process of internal review, then written confirmation of this will be required along with a copy of the original request and the FOI body's initial decision.

It is the Commissioner's intention that, to the greatest extent possible, he will decide these review cases within the 4 month timeframe laid down by the Oireachtas. Achieving this objective requires a high level of co-operation from FOI bodies. It should be noted that, following the process changes implemented in June 2014, this Office no longer issues written reminders. Instead, missed deadlines for the provision of documentation or records will result in one follow-up telephone call or email followed by a section 45 notice. Where two or more section 45 notices are issued to the same FOI body within a period of 6 months, the Commissioner may correspond directly with the head of the FOI body on the matter.

### **Documentation on requests**

Before we can decide whether a review application may be accepted, it is necessary to see the four basic decision-making documents relating to the request, i.e.:

- the letter of request,
- the initial decision,
- the application for internal review, and
- the internal review decision.

In cases which appear to involve section 38, the following are required:

- the original FOI request
- the notification letters to third parties
- the replies to the notification letters
- the letter(s) of decision issued to third parties
- the letter of decision issued to the requester.

We will encourage the submission of any available decision-making documents by applicants. However, where necessary, the decision-making documents will be requested from the FOI body by email to a generic email address. In this event, these documents should be emailed to this Office at [info@oic.ie](mailto:info@oic.ie) within 3 working days of the request. If the documents have not been received by the fourth day after our request, we will make one follow-up telephone call/email requiring immediate action, which will in turn be followed within 3 working days by a notice to the head of the FOI body under section 45 of the FOI Act. Details of section 45 notices are published in the Commissioner's Annual Report.

### **Provision of records**

In the majority of cases it will be necessary for this Office to inspect the records the subject of the FOI request. In practical terms, this requires the provision to this Office of the relevant records, whether in the original or by way of copies (depending on the case). In requesting records, this Office will allow a period of 2 weeks for the FOI Body to provide same.

Where this deadline is not met, we will make one follow-up telephone call/email requiring immediate action. Where the records are not provided within 3 working days of the follow-up telephone call/email, the Commissioner will issue a notice under section 45 of the FOI Act, to the head of the FOI body, requiring the provision of the records. Again, details of section 45 notices are published in the Commissioner's Annual Report.

**In providing these records, it is very important that they be properly scheduled and that it is clear which records or parts of records have been withheld and which released (e.g. by the use of a highlighter marker).** The schedule should list the records sequentially by number and include the following information for each withheld record:

- the date of the record,
- the title of the document or the name of its author or addressee,
- a brief description,
- the exemption claimed.

In the case of released records it is sufficient for the schedule to show the number of the record (provided numbered copies of the records are provided) and indicate that it has been released.

### **Submissions**

This Office generally takes a “last chance” approach when conducting reviews, whereby the FOI body is given one final opportunity, by way of submission, to justify its decision. The FOI body will be invited by our Assessment Unit to make focused submissions addressing the particular issues arising. The request for focused submissions may ask specific questions which should be answered if the FOI body wishes to justify its decision. A period of 2 weeks will normally be allowed for the making of such submissions. **Failure to justify an exemption claimed within this timeframe may lead to a decision to release records without further contact with the FOI body.** In this context, it is worth bearing in mind that where a request for records (made under section 12 of the FOI Act) has been refused, there is a presumption that the refusal is not justified unless the FOI body shows "to the satisfaction of the Commissioner" that it is justified.

### **Conclusion of review**

Following the review, the Commissioner may affirm or vary the decision of the FOI body, or annul the decision and, possibly, make another decision.

A decision of the Commissioner, arising from a review application, does not have effect until the expiry of the time limits which apply for the making of a High Court appeal on a point of law. Where such an appeal is made, the Commissioner's decision does not have effect unless and until the appeal has been decided in the Commissioner's favour or withdrawn.

Given the expense and resources involved in participating in Court cases, it is the policy of the Office to seek to recover costs in all cases where the Courts have found in the Commissioner's favour.

### **Section 38(5)**

Where cases arise under section 38(5) of the Act and the head is unable to comply with the consultation requirements of subsection (2), the consent of the Commissioner is required before the head may proceed with a decision. The body's liaison officer should write to the Commissioner seeking his consent to the setting aside of the consultation requirement. In order to facilitate the Commissioner's decision, details of all attempts to contact the individual, otherwise required to be consulted, should be given.

Where possible, the Commissioner will make a decision (in relation to cases referred to in the preceding paragraph) within 2 weeks and inform the liaison officer if consent is being granted. Where the Commissioner does not consent, the liaison officer will be advised of the steps to be taken to comply with section 38(5) and should ensure that these steps are taken within the period specified in the Commissioner's reply. If further information is required in these cases, the Commissioner's Office will contact the liaison officer in the first instance.

### **Production of documents, witnesses, etc.**

The Commissioner may, for the purposes of a review or investigation, require that any information or record relevant to his review or investigation should be furnished to him. Where appropriate, the Commissioner may require any person who, in his opinion is in possession of any such information or record to attend before him for the purpose of furnishing it to him.

Bodies must comply with the Commissioner's requirements in this respect. Subject to the Commissioner's agreement, and at the request of the official concerned, the liaison officer may attend any interview between the Commissioner (or his staff) and a relevant official of the FOI body.

### **Liaison Officer to be informed by Commissioner's Office**

As the liaison officer is the primary channel of communication between the Commissioner's Office and the FOI body, the Commissioner's Office will seek to ensure that the liaison officer is kept fully informed by, for example, routing queries through the liaison officer, by sending the liaison officer copies of all significant correspondence, and by informal contacts. A generic email addresses will be used for written communications with the liaison officer wherever possible. The level of such contact will vary from body to body depending on the nature of the case and the structure of the FOI body.

The liaison officer will be advised when a review has been completed and will be notified of the decision. Depending on the nature of the decision, the liaison officer will be expected to communicate this decision within the body and to ensure that any actions required to implement it are undertaken. The liaison officer will also be informed if a review application is withdrawn.

Any files or papers returned to the FOI body must be acknowledged by the body concerned and the receipt placed on the case file.

## Appendix 7

### OIC Decision Style Guide

In order to maintain consistency in the decisions issuing from the OIC, the following style guide should be used when drafting decisions.

#### FRONT PAGE OF DECISION

(A sample front page is set out at Page four of this guide for ease of reference.)

- The front page of the decision should be in Times New Roman 12pt font.
- **Do not** use full stops at the end of text under the first five headings (Case Number, Applicant, Public Body, Issue and Review).
- Use full stops at the end of text under the remaining headings (Decision and Right of Appeal), as the text should comprise full sentences.
- **Applicant:** do not use (the applicant) or “the applicant” after the applicant’s name and address as this is denoted by the heading.
- **Public Body:** if you intend to use a shortened version/acronym of the public body’s name in the decision put it in brackets (no inverted commas) after the full name, e.g. The Department of Justice and Equality (the Department)
- Use **Double Spacing** between text and next heading.

#### BODY OF DECISION: FORMATTING

- Use Times New Roman 12pt font throughout the remainder of the decision.
- Text should be left justified.
- **Headings** should be as follows:
  - Section Heading: **12pt Bold Underlined**
  - Level 1 Subheadings: **Bold**
  - Level 2 Subheadings: Plain, underlined
  - Level 3 Subheadings: Plain.
- **Use bold:** where necessary, to add **emphasis** to a quote or comment.

## **BODY OF DECISION: REFERENCING**

- **References to OIC Cases:** use Case Number (Name), not in bold or italics, e.g. Case 090131 (Ms. C & Department of Health and Children)
- **References to Court Cases:** Case name in italics, rest of citation in standard font, e.g. *Deely v. Information Commissioner* [2001] I.R. 439
- **Quotations** from previous decisions and court cases: place the quote in inverted commas, indented, on a new line with a line's space between the quote and the preceding paragraph. Do not use italics.
- **References to sections of the Act**
  - Paraphrasing should be done in the body of the paragraph, with no italics or inverted commas.
  - Direct citations should be placed in inverted commas, indented, on a new line with a line's space between the quote and the preceding paragraph. Do not use italics.

## **BODY OF DECISION: LANGUAGE**

- **Date style:** use 18 June 2014, not 18<sup>th</sup> June 2014, 18 of June 2014, 18/06/14, etc
- **References to a public body:** use "it" not "they",
- **References to the Commissioner:** refer to the Commissioner, not the Information Commissioner.
- **References to the Office of the Information Commissioner** should refer to "the Office", not "the office".
- **References to the name of the public body** (e.g. the Department, the Council, etc) should be in upper case. References to **public bodies in general** should be lower case.
- **References to Judges:** Surname followed by J., e.g. McKechnie J., Carney J., etc.
- **References** to the applicant, decision maker, sections (of the Act) should all be in lower case.
- **Bullet points:** use single indent bullet points, not numbered lists.

- **Numbers:** spell cardinal numbers up to nine, from 10 on use figures: i.e. one record, 11 records, etc.
- **Latin legal phrases** should be used only when necessary and should be in italics e.g. *ultra vires*
- Keep the **verb tenses** consistent. For example, “The Department argued” followed later by “the Department contended” is fine. “The Department argued”, followed later by “the Department contends”, is not. Saying that “the Department originally argued” but that “It now contends” is fine
- Use **plain language** where possible.

**STANDARD PARAGRAPH FOR USE IN DECISIONS TAKEN UNDER 1997-2003 ACTS**  
**To be inserted at end of Background Section**

- In the interests of clarity, I should point out that this review was carried out under the provisions of the FOI Acts 1997-2003 notwithstanding the fact that the FOI Act 2014 has now been enacted. The transitional provisions in section 55 of the 2014 Act provide that any action commenced under the 1997 Act but not completed before the commencement of the 2014 Act shall continue to be performed and shall be completed as if the 1997 Act had not been repealed.

## SAMPLE FRONT PAGE OF DECISION

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

**Case Number:** 140500

**Applicant:** John Murphy, 12 Alphabet Street, Coolock, Dublin 5

**Public Body:** The Department of Justice and Equality (the Department)

**Issue:** Whether the Department was justified in deciding to refuse access to records relating to the applicant on the ground that they do not exist or cannot be found

**Review:** Conducted in accordance with section 34(2) of the FOI Act by Stephen Rafferty, Senior Investigator, who is authorised by the Information Commissioner to conduct this review

**Decision:** The Senior Investigator found that the Department was justified in deciding to refuse access to records relating to the applicant on the ground that they do not exist or cannot be found. He affirmed the decision of the Department.

**Right of Appeal:**

**Wording to be used when OIC decision is that access to all records is fully granted or refused.**

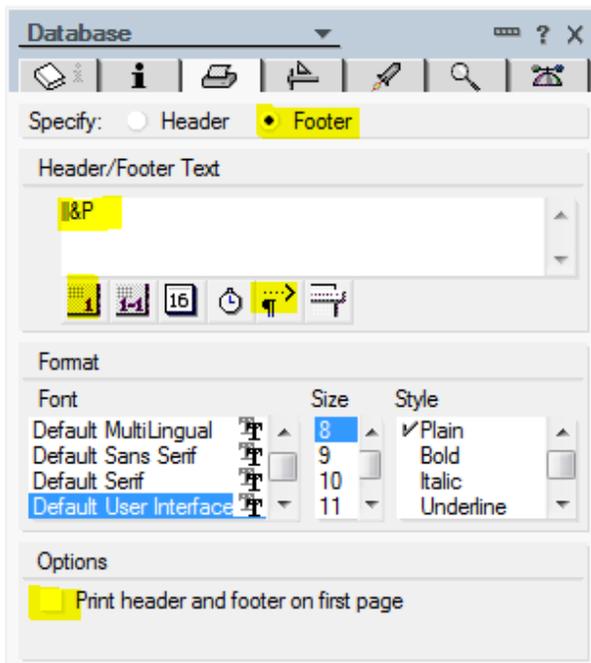
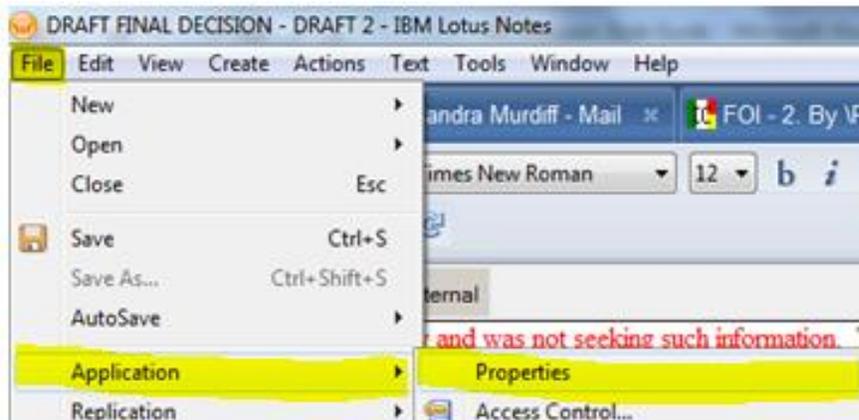
Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated not later than four weeks after notice of the decision was given to the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

**Wording where OIC directs that some records (in whole or in part), but not all records requested, should be released:**

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.

## ADDING PAGE NUMBERS TO DECISIONS IN LOTUS NOTES

To add page numbers in Lotus Notes, click anywhere in the body of the decision (while editing it). Click File, Application, Properties (see below)



A Database window will open (see left), click on the printer tab (third tab from left)

As highlighted on the left, click Footer, then click the tab button twice  to ensure the page number is on the bottom right hand side of the page. Then click the page number button 

Finally make sure the “Print header and footer on first page” box on the bottom of the popup window is unticked. Click Save and Yes to save these changes.

Reopen the document and you can click File and Print Preview to see the page numbers before printing. Alternatively, use the attached decision template which has the page numbers already inserted. **NB This will add page numbers to all documents you print in Lotus until you change it.** To undo follow the instructions above, then delete the entry in the Header/Footer Text box (  ) and Save.

To avoid printing errors click View, Show, Page Breaks before printing to see how the finished document will appear when printed.

## Appendix 8

### Glossary of Terms

**Applicant** - A person who has applied to the Information Commissioner for a review of a decision of an FOI body. The term covers both a person who has made a request to an FOI body under the FOI Act and a person who has objected to the granting of a request by some other party for access to information either about the applicant or which the applicant gave to the FOI body.

**Assessment Unit** – A unit staffed by Administrative Officers and Higher Executive Officers that is managed by an Investigator at Assistant Principal Officer level. The unit screens all newly accepted cases for suitability for immediate processing, subject to capacity, by the unit.

**Internal review** - The review of an initial decision on a request conducted by a member of staff of the FOI body of higher rank than the person who made the initial decision. This contrasts with reviews by the Information Commissioner which are external to the FOI body.

**Investigations Unit** – A unit staffed by AP/Investigators who report directly to a Senior Investigator. The unit processes cases, generally in “date of receipt” order, which are not deemed suitable for immediate processing by the Assessment Unit, usually because of the complex issues or large number of records involved.

**Person to whom section 38(2) applies** - In the case of a request for records which contain information obtained in confidence, the person who gave the information to the FOI body, and, if the head considers it appropriate, the person to whom the information relates. In the case of a request for records which contain personal information or commercially sensitive information, the person to whom the information relates.

**Policy Section** – Established to develop guidance for Investigating Officers on the provisions of the FOI Act.

**Request to which section 38 relates** - A request for access to records which contain information obtained in confidence, commercially sensitive information or personal information where the FOI body has formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or a party to whom the information relates) that the public interest would, on balance, be better served by granting than by refusing to grant the request.

**Requester** - A person who makes a request to an FOI body under the FOI Act. A requester to an FOI body may become an applicant to the Office of the Information Commissioner.

**Section 9 application** - Section 9 of the FOI Act provides a right of amendment of personal information relating to an individual contained in a record held by an FOI body where the information is incomplete, incorrect or misleading.

**Section 10 application** - Section 10 of the FOI Act entitles a person who is affected by an act of an FOI body and who has a material interest in a matter either affected by that act or to which that act relates to request a statement of the reasons for the act and any findings on any material issues of fact made for the purpose of the act.

**Section 38** - Section 38 provides for a formal notification procedure whenever an FOI body is considering the release of information obtained in confidence, commercially sensitive information or personal information in the public interest. It requires the FOI body to notify the person who gave the information to the FOI body, and, if the FOI body considers it appropriate, the person to whom the information relates, of the request and that the request falls to be granted in the public interest. Any person so notified may then make submissions to the FOI body which must be considered before deciding whether to grant or refuse access.

**Support Unit** - The unit which provides administrative support to Investigating Officers and Senior Investigators in the Office of the Information Commissioner. This unit is headed by a Higher Executive Officer.