

Office of the Information Commissioner

# Guidance Note

Freedom of Information Act 2014  
– Section 37: Personal  
Information

August 2017

## Contents

Introduction .....	1
1.0 Section 37 – Personal Information – Overview .....	2
Third Parties.....	2
Personal Information - section 37(1).....	2
Circumstances where the Exemption does not Apply - Section 37(2).....	2
Medical, Psychiatric or Social Work Records - Section 37(3), (4) & (9) .....	2
The Public Interest and Benefit to the Individual - Section 37(5).....	2
Neither Confirm nor Deny – Section 37(6).....	3
Joint Personal Information – Section 37(7).....	3
Minors, Incapacitated Individuals and Deceased Persons – Section 37(8).....	3
Handling an FOI Request where the Records Disclose Personal Information .....	3
Section 37 in Context .....	4
- Motive .....	4
- ‘Dissecting’ Records.....	4
- Release ‘to the World at Large’ .....	4
- Identity of the Requester .....	4
FOI History and Warning regarding Commissioner’s Decisions.....	5
2.0 Personal Information Defined .....	6
Known Only to the Individual, his/her Family or Friends or Held as Confidential .....	8
Categories (i) to (xiv) .....	8
Information Not Included in Personal Information .....	8
- (I) Staff Members of, and Individuals Holding Certain Other Positions in, FOI Bodies ....	8
- (II) Service Providers.....	10
- (III) Views or Opinions in relation to an FOI body etc.....	11
An Identifiable Individual .....	11
Whether the Record is Exempt.....	12
3.0 Section 37(1) The Disclosure of Personal Information.....	13
Disclosure “to the world at large” .....	13
Private Aspect of the Individual’s Life .....	14
4.0 Section 37(2) – Where the Exemption Does not Apply .....	15
(a) Information Relates to the Requester.....	16
(b) The Individual to whom the Information Relates Consents.....	16
(c) Information of the Same Kind is Available to the General Public .....	17
(d) Individual Informed regarding the Information Being Made Available .....	17
(e) Serious and Imminent Danger to Life or Health.....	18
5.0 Section 37(3), (4) & (9) – Medical, Psychiatric or Social Work Records.....	19
Prejudicial to Physical or Mental Health, Well-being or Emotional Condition .....	19
Access to be Offered to a Health Professional .....	20
“Health Professional” .....	20
6.0 Section 37(5) – the Public Interest & Benefit to the Individual.....	21
The Public Interest Test – section 37(5)(a).....	21
- The Right to Privacy .....	21
- A True Public Interest.....	22
- Privacy Rights and the Need for Protection .....	23
- Seeking a Remedy or Issues of Procedural Fairness .....	25
Benefit the Individual – Section 37(5)(b).....	25
Third Parties and Section 37(5).....	26

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7.0 Section 37(6) – Neither Confirm nor Deny.....	27
Records of a Type which Would Disclose Personal Information & section 37(1) .....	28
Exceptions to section 37(1) - sub-sections (2) or (5) .....	29
Stating Whether or not Records Exist Would Disclose Personal Information.....	29
8.0 Section 37(7) – Joint Personal Information.....	30
Part of a Record .....	30
Subject to 37(2)(b) to (e), 37(5) and 37(8) .....	31
9.0 Section 37(8) – Request by a Parent or Guardian or where the Individual is Dead.....	32
Relevant Regulations .....	32
- Freedom of Information Act 2014 (Section 37(8)) Regulations 2016 .....	32
- Actions commenced under the 2009 Regulations.....	32
- Consideration of the Relevant Regulations.....	33
Warning Regarding Previous Regulations .....	33
Guidance.....	33
Subject to the Other Provisions of the FOI Act .....	33
Minors or Incapacitated Individuals .....	34
- Minors .....	35
- Incapacitated Individuals .....	38
- The Best Interests of the Individual .....	39
The Individual to whom the Information Relates is Dead .....	39
- Personal Representative – Regulation 7(a)(i) .....	40
- Function Conferred by Law – Regulation 7(a)(ii) .....	40
- Spouse or Next of Kin – Regulation 7(b) .....	40
10.0 Records of a Particular Nature - Complaints, Allegations and Investigations.....	43
Information Known to the Requester .....	43
Fair Procedures.....	44
Malice.....	44
Identity of Person who Provided Information in Confidence .....	44



## **Introduction**

The Information Commissioner has prepared this Guidance Note in relation to section 37 of the Freedom of Information (FOI) Act 2014.

The Note is a commentary on the interpretation and application of section 37 of the Act by the Commissioner. It is intended to provide a summary of the relevant issues relating to this provision.

This Note is intended to provide general guidance only and is not legally binding. The application of the provision in any particular case will always depend on the particular record(s) and the relevant facts and circumstances.

## **1.0 Section 37 – Personal Information – Overview**

1.1.1 This Note explains the Commissioner’s approach to the application of section 37 of the FOI Act. Section 37 protects personal information. This is a mandatory exemption.

### **Third Parties**

1.2.1 Section 37 is one of three exemptions in the FOI Act which specifically relate to third parties, either by relating to information given to an FOI body by the third party or to information which relates to the third party. The other exemptions are section 35 (which relates to information obtained in confidence) and section 36 (which relates to commercially sensitive information).

1.2.2 Depending on the circumstances, it may be necessary for the FOI body to consult the third party concerned. The consultation procedure is provided for in section 38 of the Act and is dealt with in a separate Guidance Note.

### **Personal Information - section 37(1)**

1.3.1 The effect of section 37 is that, generally speaking, access to a record shall be refused if it would involve the disclosure of personal information relating to individual(s) other than the requester. Under section 37(1), personal information cannot be released unless one of the other relevant provisions of section 37 applies.

### **Circumstances where the Exemption does not Apply - Section 37(2)**

1.4.1 There are certain situations where the exemption at section 37(1) does not apply. These are specified in section 37(2).

### **Medical, Psychiatric or Social Work Records - Section 37(3), (4) & (9)**

1.5.1 Where disclosure of information in a medical, psychiatric or social work record relating to the requester might be prejudicial to his or her health, well-being or emotional condition, a request relating to such a record may be refused under section 37(3).

1.5.2 Where a request is refused under section 37(3), access to the records must be offered to certain health professionals. The relevant requirements for such access, and for the notification to be provided to the requester in this regard, are set out in section 37(4). The term “health professional” is defined in section 37(9).

### **The Public Interest and Benefit to the Individual - Section 37(5)**

1.6.1 Where a request would otherwise be refused under section 37(1), it may still be granted where the public interest that it be granted outweighs the public interest that the right to privacy of the individual to whom the personal information relates should be upheld. This is provided for in section 37(5)(a). The grant of a request in these circumstances is subject to section 38 of the Act.

1.6.2 Where a request would otherwise be refused under section 37(1), it may also be granted where to do so would benefit the individual to whom the personal information relates. This is provided for in section 37(5)(b). Section 37(5) also states that this is subject to section 38 of the Act.

1.6.3 Section 38 requires the FOI body to notify certain parties that it is proposed to grant the request in the public interest, that the person may make submissions to the FOI body and that the FOI body will consider any such submissions before deciding whether to grant or refuse the request. As stated above, the section 38 consultation procedure is dealt with in a separate Guidance Note.

#### **Neither Confirm nor Deny – Section 37(6)**

1.7.1 Section 37(6) is a 'neither confirm nor deny' provision which applies in certain circumstances involving a request which relates to a record to which section 37(1) applies.

#### **Joint Personal Information – Section 37(7)**

1.8.1 Section 37(7) provides that, notwithstanding subsection (2)(a) (which provides that section 37(1) does not apply where the information relates to the requester), a request shall be refused where access to a record would, in addition to involving the disclosure of personal information relating to the requester, also involve the disclosure of personal information relating to individual(s) other than the requester. This is often referred to as 'joint personal information'. Section 37(7) is subject to section 37(2)(b) to (e) and to section 37(5) and 37(8).

#### **Minors, Incapacitated Individuals and Deceased Persons – Section 37(8)**

1.9.1 Section 37(8) states that the Minister may provide by regulations for the granting of FOI requests where the requester is the parent or guardian of the individual to whom the record relates or where that individual is dead. The Freedom of Information Act 2014 (Section 37(8)) Regulations 2016 (S.I. No. 218 of 2016), as amended by S.I. 558 of 2016, have been made by the Minister.

#### **Handling an FOI Request where the Records Disclose Personal Information**

1.10.1 The exemption at section 37(1) is subject to the other provisions of section 37. Where access to a record would involve the disclosure of personal information and would thereby fall within section 37(1), it is important to go on to consider the other relevant provisions of section 37 before reaching a conclusion on the application of the exemption. Section 37(2) and 37(5) are particularly relevant in this regard.

1.10.2 Where, in addition to disclosing personal information relating to the requester, the records also disclose personal information relating to individual(s) other than the requester, section 37(7) must be considered. Section 37(7) is subject to section 37(2)(b) to (e), section 37(5) and section 37(8). Thus, before reaching a conclusion on the application of section 37(7), it is important to consider whether sections 37(2)(b) to (e), 37(5) or 37(8) apply.

1.10.3 Where the requester is the parent or guardian of the individual to whom the record relates and the individual is a minor or is incapacitated (as defined in the Regulations, S.I. 218 of 2016), section 37(8) and the provisions of the Regulations should be considered. Section 37(8) and the relevant Regulations should also be considered where the individual to whom the record relates is dead.

## **Section 37 in Context**

1.11.1 A number of matters may be relevant in the general context of considering the application of section 37.

### Motive

1.11.2 Section 13(4) of the Act provides that, subject to the Act, in deciding whether to grant or refuse an FOI request, any reason that the requester gives for the request and any belief or opinion of the FOI body as to the reasons for the request shall be disregarded. Thus, while certain provisions of the Act implicitly render the motive of the requester relevant, as a general rule, the actual or perceived reasons for a request must be disregarded in deciding whether to grant or refuse an access request under the FOI Act.

### 'Dissecting' Records

1.11.3 Section 2 of the Act defines "record" as including "a copy or part" of any thing falling within the definition of a record. Section 18(1) provides, that "if it is practicable to do so", access to an otherwise exempt record shall be granted by preparing a copy, in such form as the head of the FOI body concerned considers appropriate, of the record with the exempt information removed. Section 18(1) does not apply, however, if the copy provided for thereby would be misleading (section 18(2) refers).

1.11.4 The Commissioner takes the view that neither the definition of a record under section 2 of the Act nor the provisions of section 18 envisage or require the extracting of particular sentences or occasional paragraphs from records for the purpose of granting access to those particular sentences or paragraphs. Generally speaking, he is not in favour of the cutting or "dissecting" of records to such an extent. He takes the view that, being "practicable" necessarily means taking a reasonable and proportionate approach in determining whether to grant access to parts of records

### Release 'to the World at Large'

1.11.5 Under FOI records are released without any restriction as to how they may be used and thus, FOI release is regarded, in effect, as release to the world at large. This contrasts with, for example, the position before the courts where an order for discovery has been made or where the *in camera* rule applies.

### Identity of the Requester

1.11.6 The identity of a requester making an FOI request is generally irrelevant. However, the identity of the requester is relevant for the purposes of section 37(2)(a) (where the personal information relates to the requester) and for the purpose of section 37(2)(b) (where any individual to whom the information relates consents to its disclosure to the requester).

1.11.7 The identity of the requester is also relevant for the purpose of section 37(8) – where the requester is the parent or guardian of the individual to whom the information relates or where the individual is dead.

## **FOI History and Warning regarding Commissioner's Decisions**

1.12.1 Section 37 is similar to, although not the same as, section 28 of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 28 was considered under the FOI Act 1997 (or under the FOI Act 1997 as amended) **in so far as they remain relevant**. To simplify matters for the reader, all references to section 28 in those decisions have been replaced by section 37 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (\*).

1.12.2 While references in this Note are made to previous decisions of the Commissioner **in so far as they remain relevant**, it is possible that other parts of these decisions no longer represent the current position – this could be due to factors such as a change in the legislation or decisions of the Courts. It should be noted, in particular, that the approach of the Commissioner to the application of this provision has changed since the decisions of the High Court and Supreme Court in case of *The Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v The Information Commissioner* ([2009] IEHC 315 and [2011] IESC 26 respectively), referred to further below as “the *Rotunda* case”. It should also be noted that the approach of the Commissioner regarding section 37(8) has changed since the decision of the Supreme Court in the case of *McK v The Information Commissioner* [2004] IEHC 4 (referred to as “the *McK* case”).

1.12.3 Caution should be exercised in referring to any decision of the Commissioner that was made under the FOI Act 1997, or under the FOI Acts 1997 & 2003, to ensure that all parts of the decision being referred to remain relevant (including such decisions as are published on the OIC website). In light of the change in the Commissioner's approach to this provision, **particular caution** should be taken when consulting or referring to any decision of the Commissioner which was made before the Supreme Court decisions of 14 January 2004 in the *McK* case and 19 July 2011 in the *Rotunda* case (referred to above).

1.12.4 Reference is also made in this Note to other provisions of the FOI Act 2014 which are relevant. Where reference is made to previous decisions of the Commissioner relating to such provisions under the FOI Act 1997 (or the FOI Act 1997 as amended), those provisions are replaced with the relevant, equivalent provision in the 2014 Act. Again, where this occurs, such references are denoted by an asterisk (\*).

1.12.5 It should be noted that a reference to the Commissioner in the context of the decisions referred to in this Guidance Note may include an officer to whom the function of making the decision had been delegated by the Commissioner.

1.12.6 The previous decisions of the Commissioner (or of the officer delegated to make the decision) are referred to in this Note by Case Number. The decisions in these Cases may be found on the Commissioner's website at [www.oic.ie](http://www.oic.ie).

## **2.0 Personal Information Defined**

### **What the Act states:**

#### **2. ...**

“personal information” means information about an identifiable individual that, either—

- (a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or
- (b) is held by an FOI body on the understanding that it would be treated by that body as confidential,

and, without prejudice to the generality of the foregoing, includes—

- (i) information relating to the educational, medical, psychiatric or psychological history of the individual,
- (ii) information relating to the financial affairs of the individual,
- (iii) information relating to the employment or employment history of the individual,
- (iv) information relating to the individual’s membership or former membership of a trade union,
- (v) information relating to the individual in a record falling within section 11(6)(a),
- (vi) information relating to any criminal history of, or the commission or alleged commission of any offence by, the individual,
- (vii) information relating to any proceedings for an offence committed, or alleged to have been committed, by the individual, the disposal of such proceedings or the sentence imposed by any court in such proceedings,
- (viii) information relating to the religion, age, racial or ethnic origin, sexual orientation or civil status (within the meaning of section 2(1) of the Civil Registration Act 2004) of, any disability of, or the political opinions or the religious or philosophical beliefs of, the individual,
- (ix) a number, letter, symbol, word, mark or other thing assigned to the individual by an FOI body for the purpose of identification or any mark or other thing used for that purpose,
- (x) information relating to the entitlements of the individual under the Social Welfare Acts as a beneficiary (within the meaning of the Social Welfare Acts) or required for the purpose of establishing whether the individual, being a claimant (within the meaning of those Acts), is such a beneficiary,
- (xi) information required for the purpose of assessing the liability of the individual in respect of a tax or duty or other payment owed or payable to the State or to a local authority, the Health Service Executive or other FOI body, or for the purpose of collecting an amount due from the individual in respect of such a tax or duty or other payment,
- (xii) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name would, or would be likely to, establish that any personal information held by the FOI body concerned relates to the individual,
- (xiii) information relating to property of the individual (including the nature of the individual’s title to any property), and
- (xiv) the views or opinions of another person about the individual,

Contd/

but does not include—

(I) in a case where the individual holds or held—

(A) office as a director of,

(B) a position as a member of the staff of, or

(C) any other office, or any other position, remunerated from public funds in,

an FOI body, the name of the individual or information relating to the office or position or its functions or the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid,

(II) in a case where the individual is or was a service provider, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service, or

(III) the views or opinions of the individual in relation to an FOI body, the staff of an FOI body or the business or the performance of the functions of an FOI body;

2.1.1 Section 2 of the FOI Act (see above) defines personal information.

Information which satisfies the requirements of paragraphs (a) or (b) above is personal information for the purposes of the Act. However, it is very important to note that, in addition, information which comes within any of the fourteen categories specified at paragraphs (i) to (xiv) is also personal information - there is no requirement for information falling within (i) to (xiv) to also meet the requirements of paragraphs (a) or (b).

2.1.2 The Commissioner's approach to the definition of personal information in this respect has changed since the decisions of the High Court and the Supreme Court in the *Rotunda* case, referred to above. The Supreme Court in the *Rotunda* case held that the Commissioner had erred when, having decided that the information at issue satisfied one of the then twelve (now fourteen) categories specified in the definition of personal information, she also decided that it was necessary for the information to come within the general definition at paragraphs (a) or (b). Fennelly J stated:

"In reaching that conclusion the Commissioner failed to have regard to the expression "without prejudice to the generality of the foregoing..." That expression, which occurs routinely in statutes, means that what goes before is a general statement, but that, as in this case, in any event, it will suffice for whatever is the relevant statutory purpose to comply with what follows. .... Thus, the Commissioner erred in imposing any additional requirement. The record in the present case contained personal information if any of it, such as the age of the patient, came within the terms of para.(vi)."

2.1.3 Considerable caution should be exercised when referring to any decision of the Commissioner prior to the decisions in the *Rotunda* case with regard to the definition of personal information as it may no longer reflect the Commissioner's approach.

\*\* (Note: para (vi) of the definition in the FOI Acts 1997 & 2003 was similar to what is now para (viii) of the 2014 Act.)

## **Known Only to the Individual, his/her Family or Friends or Held as Confidential**

2.2.1 Personal information means information about an identifiable individual that, either –

- (a) would ordinarily be known only to the individual or to members of his/her family or to his/her friends or
- (b) is held by an FOI body on the understanding that it would be treated by the FOI body as confidential.

2.2.2 In considering whether information falls within paragraphs (a) or (b), the Commissioner may consider the general facts and circumstances of the case and the circumstances in which the information was imparted to and received by the FOI body.

2.2.3 The Commissioner accepts that information may fall within (b) even in situations where the FOI body has not given explicit assurances of confidentiality in relation to the information. He has accepted, for example, that in certain circumstances individuals may understand that the information is given to the FOI body for a limited purpose and that such information may be held by the FOI body on the understanding that it will be treated as confidential.

## **Categories (i) to (xiv)**

2.3.1 As stated above, once information complies with or falls within one of the 14 listed categories at (i) to (xiv), it is personal information as defined by the FOI Act. There is no requirement for such information also to meet the requirements of either paragraph (a) or (b).

2.3.2 As also indicated above, considerable caution should be taken on this issue when referring to any decision of the Commissioner which was made before the Supreme Court decision in the *Rotunda* case.

## **Information Not Included in Personal Information**

2.4.1 Section 2 states that the definition of personal information “does not include” the information specified at (I), (II) and (III). Thus, information falling within (I), (II) or (III) is expressly excluded from the definition of personal information.

### **(I) Staff Members of, and Individuals Holding Certain Other Positions in, FOI Bodies**

2.4.2 The definition of personal information includes at category (iii) information relating to the employment or employment history of the individual and, at category (v), information relating to the individual in a record falling within section 11(6)(a) (which refers to a personnel record – a record relating wholly or mainly to “the competence or ability of the individual in his or her capacity as a member of the staff of an FOI body or his or her employment or employment history or an evaluation of the performance of his or functions...”). It also includes at category (xiv) the views or opinions of another person about the individual.

2.4.3 On the other hand, the exclusion at (I) excludes from the definition of personal information certain information relating to an individual who holds or held office as a director of an FOI body, who holds or held a position as a member of the staff of an

FOI body or who holds or held any other office, or any other position, remunerated from public funds in an FOI body. The information excluded is

- the name of the individual,
- information relating to the office or position or its functions,
- the terms upon and subject to which the individual holds/held that office or occupies/occupied that position, or
- anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions.

2.4.4 The exclusion at (I) does not provide for the exclusion of *all* information relating to such directors, staff or office holders. The Commissioner takes the view that this exclusion is intended to ensure that section 37 will not be used to exempt the identity of a staff member or director of, or office / position holder in, an FOI body in the context of the particular position held or any records created by the staff member, director or office/ position holder while carrying out his or her official functions.

2.4.5 The exclusion to the definition of personal information at (I) does not deprive staff members or directors of, or office/position holders in, FOI bodies of the right to privacy generally. For example, the Commissioner takes the view that it does not exclude personnel records relating to the “competence or ability of the individual in his or her capacity as a member of staff of an FOI body”.

Example: In Case 150440 the Commissioner considered whether information in Role Profile forms of members of staff of the Courts Service was personal information relating to the staff members in question. The Commissioner had regard to the Guidelines for PMDS which stressed the collaborative nature of the PMDS process and the need for agreed goals to be specific and measurable to encourage discussion and agreement about strengthening individual performance as well as the organisational goals and service to the public. She noted a number of matters including that individuals were required to identify precise goals and record how performance would be supported and measured and that, in some of the role profiles, goals relating to personal development and effectiveness had been identified. She also noted that learning and development plans were part of the form and that the role profile and goal setting process fed into performance reviews and feedback. She found that the records could be defined as "personnel records" coming within the scope of section 11(6)(a) of the Act and that, as a result, the information contained in the records came within category (v) of the definition of personal information. She found that the exception in paragraph (I) did not exclude personnel records such as those described in the case.

2.4.6 Whether information falls within the exclusion specified at (I) should be carefully considered. For example, the Commissioner considers that where a salary scale applies to an office or position, the assigning of an individual to a particular point on a scale can often derive from some personal aspect of an individual's life. For instance, in the public service an individual is often assigned to a particular point on a scale having regard to their previous income or position. In other instances individuals can be allocated a point on a scale as a result of long service, performance or qualifications. The Commissioner takes the view that the salary scale applicable to the post, as opposed to the individual's point on that scale, can

be said to be information relating to the office or position held by that individual and as such does not constitute personal information; however, the specific salary of the individual would constitute personal information.

2.4.7 The question as to whether information falls within (I) may arise in a variety of contexts.

Example # 1: In Case 99230 some of the records contained material written by two officials of the Department of Enterprise, Trade & Employment. The material was written in the course of a dispute which culminated in the issuing of proceedings by one of the officials. The Commissioner found that the actions taken in conducting the dispute and pursuing grievances were not actions undertaken for the purpose of the performance of the functions of the two officials concerned and, therefore, the exclusion in subparagraph (I) of the definition of "personal information" did not apply.

Example # 2: In Case 090045 the Commissioner found that, if a successful candidate for a position in University College Cork (UCC) previously held a position as a member of staff at UCC, her name was not personal information in the context of the position that she held. However, she also found that the candidate's decision to apply for a new position, even a new position within UCC, would not have been taken "in the course of and for the purpose of the performance of the functions" of the position she previously held. The Commissioner also found that, as the successful candidate accepted the new position offered to her, her name was not personal information within the context of her new position but she was nevertheless entitled to a degree of privacy in relation to her candidacy for the job.

## (II) Service Providers

2.4.8 The exclusion at (II) excludes the following information relating to an individual who is or was a service provider from falling within the definition of personal information:

- the name of the individual or
- information relating to the service or the terms of the contract or
- anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service.

Example # 1: In Case 160341 the Commissioner considered records which were listings comprising panels of Temporary Veterinary Inspectors (TVIs) that had been accepted by the Department of Agriculture, Food and the Marine as approved service providers. He found that the fact that certain panellists might not be offered work did not alter the fact that they were included as approved service providers. As such, the details of the names of the panellists on the lists were specifically excluded from the definition of personal information by virtue of exclusion (II). However, disclosure of the lists in their entirety would disclose the position of each TVI on the lists. The Department had stated that maintaining a position of seniority on the panel was subject to change if the service provided was deemed to be unsatisfactory or did not meet the required safety standards, or if the TVI persistently turned down shifts. In such cases TVIs might be moved to a lower position on the panel. The Department had also stated that, effective from late 2011, it was not accepting applications for approval to be engaged as TVIs

until further notice. The Commissioner considered, therefore, that a comparison of lists over time would allow for the identification of panellists who had moved down in position. He took the view that this, in turn, would allow for inferences to be drawn as to the views of the Department on the adequacy of the service provided. The Commissioner found that the disclosure of the position of each individual on the panel would involve the disclosure of personal information relating to that individual and that section 37(1) applied.

Example # 2: In Case 160220 the Commissioner considered certain records including a Legal Services Consultancy Agreement and related email correspondence held by Eirgrid. She found that, at the time the request was made, ESB provided legal services to EirGrid in accordance with the terms of the Agreement. She found, therefore, that the names of its staff, contained in the relevant records did not constitute personal information.

Example # 3: In Case 150198 Cork County Council had decided to release parts of three contamination reports prepared by a third party. The Council had not redacted the names of the third parties' employees, insurance company employees or the names of loss adjustors. The Commissioner was satisfied that these individuals were providing a service for private individuals or businesses rather than for an FOI body and that the names were personal information which was exempt under section 37(1) of the Act, subject to the other provisions of that section.

### (III) Views or Opinions in relation to an FOI body etc.

2.4.9 The exclusion at (III) excludes the views or opinions of the individual in relation to an FOI body, the staff of an FOI body or the business or the performance of the functions of an FOI body.

### **An Identifiable Individual**

2.5.1 Personal information is information about an identifiable individual. Where information may not, on the face of it, be about an identifiable individual, it may still be personal information if it allows the individual to be identified. An individual may not be named in a record, yet may still be identifiable.

Example # 1: In Case 130257 the Commissioner considered, in the course of a review relating to section 9\* of the Act, whether certain comments contained in a report were personal information. The comments were ascribed to all of the Motor Transport Drivers serving in a section, of which the applicant was one. The Commissioner found that, while the applicant was not referred to specifically, the report was written in such a way that it would appear to anyone who read it and knew that he served in that section that he was interviewed for its preparation and held the opinions mentioned. The Commissioner was satisfied that the statements constituted personal information in relation to identifiable individuals, including the applicant.

Example # 2: In Case 150034 the applicant sought records showing the amount of damages paid by RTÉ arising out of legal complaints, to include details of the programme involved, if any, and the recipient of the money. The Commissioner found that the release of the details of the recipients of the payments and the

amounts they received would disclose personal information relating to the individuals concerned. The Commissioner considered whether it might have been possible for RTÉ to release details of the amount paid, associated with the particular programme. However, he accepted RTÉ's arguments that releasing such details would also involve the disclosure of personal information relating to identifiable individuals.

Example # 3: In Case 140162 the Commissioner found that the names and addresses of owners of greyhounds which had been tested for banned substances, as well as the names of the dogs, was personal information relating to the dog owners. However, he found that the name of the track and the date of the meeting contained in an audit of dogs was not exempt from release under section 37\*. As multiple races took place at each track when it was operating, involving anything up to sixty dogs in total, the Commissioner considered that the disclosure of such information would not be sufficient to allow the owners of the animals to be identified.

2.5.2 Where it is not apparent, an FOI body should explain clearly how disclosure of information would allow an individual to be identified.

Example: In Case 160289 the Commissioner was not satisfied that release of certain information would allow for the identification of individuals. The Department of Education & Skills had redacted identifying information relating to certain schools from a schedule on the ground that release would involve the disclosure of personal information. It described the schedule as a sample of schools selected by researchers for a project commissioned by the National Council for Special Education (NCSE) named "An Evaluation of Education Provision for Students with Autism Spectrum Disorder in Ireland" that was published by the NCSE in May 2016. It appeared to the Commissioner that the Department's concern was that, while the NCSE Report had been anonymised to protect the identities of individuals, the disclosure of the identities of the schools contained in the schedule would allow for the identification of personal information relating to identifiable individuals in the NCSE Report, as a result of local knowledge. However, the Department had provided no further information as to how this might arise. It did not, for example, point to any specific information contained in the NCSE Report that would allow for the identification of identifiable individuals if the names of the schools as contained on the schedule was released. The Commissioner found that it was not at all apparent how the release of the identities of the schools contained in the schedule at issue would allow for the identification of individuals connected with the schools. He found that the mere possibility of disclosure of personal information occurring, no matter how remote, was insufficient for section 37 to apply. Having regard to the burden of proof provided for in section 22(12)(b), he found that Department had not justified its decision.

### **Whether the Record is Exempt**

2.6.1 It should be noted that where information is found to be personal information, it is important to consider all relevant provisions within section 37 before reaching a conclusion as to whether the record is exempt.

### **3.0 Section 37(1) The Disclosure of Personal Information**

**What the Act states:**

**37 (1)** Subject to this section, a head shall refuse to grant an FOI request if, in the opinion of the head, access to the record concerned would involve the disclosure of personal information (including personal information relating to a deceased individual).

3.1.1 Section 37(1) provides that, subject to the other provisions of the section, an FOI body shall refuse a request if access to the record would involve the disclosure of personal information. However, this does not apply where the information concerned relates to the requester – this is because section 37(2)(a) provides that, subject to subsection (3), section 37(1) does not apply if the information relates to the requester. The effect of section 37 is that, generally speaking, access to a record shall be refused if it would involve the disclosure of personal information relating to individual(s) other than the requester. Under section 37(1), personal information cannot be released unless one of the other relevant provisions of section 37 applies.

3.1.2 Where an FOI body is relying on section 37(1) for the refusal to grant access, it is important to consider whether the other provisions of section 37 (including, in particular, section 37(2) or 37(5)) apply before reaching a conclusion on the application of the exemption.

#### **Disclosure “to the world at large”**

3.2.1 It may well be the case that the personal information relating to an individual is known to the requester. In some cases the requester and the individual may be closely connected. Nevertheless, this does not alter the fact that the information is personal information.

3.2.2 The Commissioner considers that, when a record is released under the FOI Act, this, in effect, amounts to disclosure to “the world at large”, as the Act places no restrictions on the subsequent uses to which the record may be put.

3.2.3 In *EH v Information Commissioner* [2001] 2 I.R. 463 the High Court, O’Neill J, accepted that neither the head of an FOI body nor the Commissioner had any jurisdiction “to impose any conditions on the type or extent of disclosure or the use of the documents after disclosure and hence, in permitting disclosure, a head of [an FOI] body and the Commissioner must assume that the disclosure of a record will be to the world at large”.

3.2.4 It should be noted that the absence of qualifications or restrictions regarding the use by requesters of information released to them under the Act contrasts with, for example, the position before the courts where an order for discovery has been made or where the *in camera* rule applies.

3.2.5 In *FP v Information Commissioner* [2016] IEHC 771\*\* the applicant had been willing to make a declaration of his willingness to protect and uphold the privacy rights of third parties if his request was granted. He had acknowledged that the FOI Act did not make any provision for restricting the use of information released pursuant to an FOI request. In the High Court, McDermott J found that the Commissioner was correct in his conclusions that there was little value in the applicant's offer as the Commissioner's Office would have no means of enforcing any such declaration nor would any such declaration provide any "comfort" to the third parties. (\*\*This decision of the High Court is under appeal to the Court of Appeal at the time of writing.)

3.2.6 Thus, the fact that third party personal information is known to a requester does not change the fact that such information may be exempt from release under the FOI Act. The fact that the requester may have created, or may have been sent, some of the records concerned does not mean that s/he necessarily has any entitlement to them under FOI.

### **Private Aspect of the Individual's Life**

3.3.1 A wide variety of information may fall within the definition of personal information. However, the Commissioner has drawn a distinction between information which derives from some private activity or private aspect of an individual's life and other personal information which does not relate to private matters.

Example: In Case 99168 the Commissioner distinguished expenses payments made to members of the Oireachtas (where the information concerned amounts paid to individuals to defray expenses incurred by them in discharging their functions as public representatives) and a payment to a claimant under the Social Welfare Acts, (where there is an expenditure of public money, but the payment derives from some private aspect of the claimant's life such as family circumstances or inadequacy of means).

3.3.2 The Commissioner takes the view that the degree of invasion of privacy is relatively high where the information relates to the private aspect of the life of an individual. The nature of the information at issue and whether it relates to a particularly private aspect of the individual's life may be relevant to the consideration of the public interest under section 37(5)(a) – see further below.

## **4.0 Section 37(2) – Where the Exemption Does not Apply**

### **What the Act states:**

- (2) Subsection (1) does not apply if —
- (a) subject to subsection (3), the information concerned relates to the requester concerned,
  - (b) any individual to whom the information relates consents, in writing or such other form as may be determined, to its disclosure to the requester,
  - (c) information of the same kind as that contained in the record in respect of individuals generally, or a class of individuals that is, having regard to all the circumstances, of significant size, is available to the general public,
  - (d) the information was given to the FOI body concerned by the individual to whom it relates and the individual was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public, or
  - (e) disclosure of the information is necessary in order to avoid a serious and imminent danger to the life or health of an individual,

but, in a case falling within paragraph (a) or (b), the head concerned shall ensure that, before the FOI request concerned is granted, the identity of the requester or, as the case may be, the consent of the individual is established to the satisfaction of the head.

4.1.1 Section 37(2) provides that section 37(1) does not apply in certain circumstances. These circumstances are specified in paragraphs (a) to (e) of subsection (2). Where an FOI body is relying on section 37 for the refusal to grant access to a record, it is important to consider whether paragraphs (a) to (e) of section 37(2) are relevant before reaching a conclusion on the application of the exemption. If any of the circumstances specified in paragraphs (a) to (e) exist, then section 37(1) does not apply.

4.1.2 Thus the FOI body should consider whether:

- (a) the information disclosed by granting access to the record relates to the requester;
- (b) any individual to whom the information relates has consented to its disclosure to the requester;
- (c) information of the same kind as that contained in the record in respect of individuals generally (or of a class of individuals that is, having regard to all the circumstances, of significant size) is available to the general public;
- (d) the information was given to it by the individual to whom it relates and the individual was informed, before giving the information, that it belongs to a class of information that would or might be made available to the general public; or
- (e) disclosure of the information is necessary to avoid a serious and imminent danger to the life or health of an individual.

### **(a) Information Relates to the Requester**

4.2.1 Where the information disclosed by granting access to the record relates to the requester, section 37(1) does not apply. Thus, records disclosing personal information relating only to the requester may be released to the requester.

4.2.2 Records may also disclose personal information which relates to individuals other than the requester. Where there is personal information which relates solely to the requester that can be separated from the personal information relating to other individuals, section 37(2)(a) applies to the information relating to the requester and that information is not exempt under section 37(1).

Example: In Case 150448 the Commissioner found that section 37(2)(a) applied to certain records. The records sought related to: the applicants' fostering of particular children; children who were in the foster care of the applicants; parents of children in foster care; family members of the applicants; and other third parties. The Commissioner found that release of the majority of the records would involve the disclosure of personal information relating to individuals other than the applicants. However, she also found that certain records related more to the applicants than to the children being fostered. She found that those records contained professional observations of, and opinions about, the applicants and their suitability for a particular foster placement. She considered that such information fell into the definition of personal information under section 2(xiv) of the FOI Act, by virtue of being "the views or opinions of another person about the individual". She also considered that it would be practicable to grant access to those records with the redaction of the name (or initials) of the relevant children and any identifying references e.g. a geographical location, such that section 37(2)(a) would apply to them.

4.2.3 Where the personal information relating to the requester cannot be separated from the information relating to the other individual(s), it can be described as joint personal information and section 37(7) must be considered – see further below.

4.2.4 It should be noted that paragraph (a) is subject to subsection (3). Thus, where the request falls within subsection (3), the provisions of subsection (3) and (4) must be considered.

4.2.5 It should also be noted that section 37(2) provides that, in a case falling within paragraph (a), the FOI body shall ensure that the identity of the requester is established to its satisfaction before the FOI request is granted.

### **(b) The Individual to whom the Information Relates Consents**

4.3.1 Section 37(1) does not apply where the individual to whom the information relates consents to its disclosure to the requester.

4.3.2 Where a consent is provided to the FOI body, subsection (2) provides that the FOI body must ensure that the consent of the individual is established to its satisfaction before the request is granted.

4.3.3 The Commissioner takes the view that, generally speaking, it is not appropriate for his Office to approach third parties to seek their consent to the release of their personal information.

4.3.4 Where it is argued that consent has been given, the relevant terms and the circumstances need to be considered.

Example: In Case 150426 the applicant argued that a consent given to the Personal Injuries Assessment Board by a claimant for the Board to provide respondents and/or insurers with certain information she (the claimant) provided to the Board in relation to her claim meant that all the information was “already in the 'public domain' i.e. with the Respondents”. The Commissioner did not accept this. She noted that the terms of that consent indicated that it was given only in respect of some material on her file - not for all records on it. Furthermore, any material provided to respondents and their insurers was given on the proviso that they “treat such information confidentially and [do not] further disclose it”. She also did not accept that the fact that the applicant's organisation or insurers may have obtained some of the material at issue as part of the Board's assessment created an entitlement to the same records under FOI. In these circumstances, the Commissioner also found that it was irrelevant whether, as claimed by the applicant, those respondents connected to the applicant's organisation consented to the release of their information.

#### **(c) Information of the Same Kind is Available to the General Public**

4.4.1 Section 37(1) does not apply if information of the same kind as that contained in the record in respect of individuals generally (or of a class of individuals of significant size) is available to the general public. In the *Rotunda* case Fennelly J stated that the equivalent of this provision in the 1997 Act

“is concerned with “information of the same kind,” not with information corresponding to the particular individual whose records are the subject of a request”

4.4.2 In the Supreme Court decision in the *Rotunda* case, Fennelly J referred to “the simple and objective test laid down by para.(c)” and found that it was possible for members of the public to learn the ages of people whose vital information was registered in the general register. He found that it was impossible, in the face of the statutory right to inspect and take copies, to doubt that the information in the register was available to the general public. He found that it made no difference that searches in individual cases might be difficult or time consuming. While Macken J preferred not to make a general statement of principle as to whether or not, in all circumstances, the registration of a birth automatically leads to that information constituting “information of the same kind” as age, she was satisfied that in that case the Commissioner was correct to determine that information in the register of births was information of the same kind as age.

#### **(d) Individual Informed regarding the Information Being Made Available**

4.5.1 Section 37(1) does not apply where the information was given to the FOI body by the individual to whom the information relates and the individual was informed by the FOI body, before giving the information, that it belongs to a class of information that would or might be made available to the general public.

4.5.2 The Commissioner takes the view that paragraph (d) requires that the FOI body inform the individual that the information would or might be made available.

Example: In Case 99168 the requester argued that members of the Oireachtas must have been aware that information about their expenses fell into this category. He claimed that the members were specifically informed by members of the Government that their expenses claims could be sought under the terms of the FOI Act. However, the Commissioner expressed the view that it did not follow that section 37(2)(d)\* applied. The Commissioner accepted that the Office of the Houses of the Oireachtas (the public body in the matter) did not inform the members that their claims belonged to a class of information that would or might be made available to the general public. He found that section 37(2)(d)\* required that the individual be informed by the public body or on its behalf that the information would or might be made available to the general public. Since this did not happen in the case, he found that section 37(2)(d)\* did not apply.

#### **(e) Serious and Imminent Danger to Life or Health**

4.6.1 Section 37(2)(e) provides that section 37(1) does not apply if disclosure of the information is necessary in order to avoid a serious and imminent danger to the life or health of an individual.

4.6.2 The Commissioner takes the view that the test to be met in section 37(2)(e) is a high one. The risk to life or health must be serious and must be imminent. This means that the degree of danger must be grave and the danger must be impending or close at hand. It must also be shown that disclosure of the information is required in order to avoid such harm. A clear link must therefore be established showing that disclosure of the information is necessary for such purposes.

4.6.3 The Commissioner considers that the requirements of this provision are not met where disclosure would merely be of assistance to an individual or an individual's mental health, for example, by giving him or her an understanding or knowledge of an issue which is of great concern to them.

## **5.0 Section 37(3), (4) & (9) – Medical, Psychiatric or Social Work Records**

### **What the Act states:**

- (3) Where an FOI request relates to —
- (a) a record of a medical or psychiatric nature relating to the requester concerned, or
  - (b) a record kept for the purposes of, or obtained in the course of the carrying out of, social work in relation to the requester,

and, in the opinion of the head concerned, disclosure of the information concerned to the requester might be prejudicial to his or her physical or mental health, well-being or emotional condition, the head may decide to refuse to grant the request.

- (4) Where, pursuant to subsection (3), a head refuses to grant an FOI request —
- (a) there shall be included in the notice under section 13(1) in relation to the matter a statement to the effect that, if the requester requests the head to do so, the head will offer access to the record concerned, and keep it available for that purpose, in accordance with section 13(3) to such health professional having expertise in relation to the subject-matter of the record as the requester may specify, and
  - (b) if the requester so requests the head, he or she shall offer access to the record to such health professional as aforesaid, and keep it available for that purpose, in accordance with section 13(3).

.....

(9) In this section “health professional” means a medical practitioner, within the meaning of the Medical Practitioners Act 2007, a registered dentist, within the meaning of the Dentists Act 1985, or a member of any other class of health worker or social worker standing prescribed, after consultation with such (if any) other Ministers of the Government as the Minister considers appropriate.

### **Prejudicial to Physical or Mental Health, Well-being or Emotional Condition**

5.1.1 In most cases concerning medical, psychiatric or social work records section 37(3) is unlikely to be relevant. The Commissioner takes the approach that section 37(3) will apply only if there is sufficient evidence presented in support of the opinion that release of the records in question might be prejudicial to the requester’s “physical or mental health, well-being or emotional condition.”

5.1.2 The test in section 37(3) is whether disclosure of the information in the record in question “might” be prejudicial to the requester’s “physical or mental health, well-being or emotional condition.”

Example # 1: In Case 150074 the records sought were from a named Acute Psychiatric Unit. The Health Service Executive (HSE) provided a letter from a Consultant Psychiatrist about the applicant's diagnosis and treatment. In summary, the Psychiatrist's opinion was that release of the records directly to the applicant might be prejudicial to her mental health, well-being or emotional condition. The Commissioner was satisfied that the HSE had provided evidence

to support its view that there was a real possibility of harm being caused to the applicant's mental health, well-being or emotional condition by release of the records directly to the applicant.

### **Access to be Offered to a Health Professional**

5.2.1 Section 37(4) provides that where, under section 37(3), an FOI body refuses to grant an FOI request, it shall include a statement in its notice of the decision that, if the requester requests it to do so, it will offer access to such health professional having expertise in relation to the subject matter of the records as the requester may specify. Thus, the FOI body must, at the requester's request, offer access to the records to such a health professional.

5.2.2 In the Commissioner's view, the intention of section 37(4) would appear to be to ensure that information about possibly disturbing records may be given with the assistance of a health professional of the requester's choosing. ("Health professional" is defined in section 37(9) – see further below). The FOI Act does not appear to envisage any role for the Commissioner in relation to the making of arrangements between the FOI body, the applicant and the health professional *"having expertise in relation to the subject-matter of the record as the requester may specify"*.

5.2.3 If the requester asks the FOI body to do so, the FOI body must keep the relevant record(s) available for the purpose of offering access to the health professional in accordance with section 13(3) of the Act.

5.2.4 It is important to note that section 37(4) applies automatically in any instance in which an FOI body relies on section 37(3).

### **"Health Professional"**

5.3.1 Section 37(9) defines 'health professional' for the purposes of section 37 as meaning

- a medical practitioner (within the meaning of the Medical Practitioners Act 2007),
- a registered dentist (within the meaning of the Dentists Act 1985), or
- a member of any other class of health worker or social worker standing prescribed.

5.3.2 The Minister may prescribe other classes of health workers or social workers for the purposes of this section. Section 54 and Schedule 5 of the Act provide that the Freedom of Information Act, 1997 (Classes of Health Professionals) Regulations, 2001 continue in force under the 2014 Act. These Regulations prescribe clinical psychologists (as defined in the Regulations) as a class of health worker and social workers (as defined in the Regulations) as a class of social worker for the purposes of the section.

## **6.0 Section 37(5) – the Public Interest & Benefit to the Individual**

### **What the Act states:**

(5) Where, as respects an FOI request the grant of which would, but for this subsection, fall to be refused under subsection (1), in the opinion of the head concerned, on balance —

- (a) the public interest that the request should be granted outweighs the public interest that the right to privacy of the individual to whom the information relates should be upheld, or
- (b) the grant of the request would benefit the individual aforesaid,

the head may, subject to section 38, grant the request.

6.1.1 Section 37(5) sets out circumstances where a request, which would otherwise be refused under subsection (1), may be granted. It is very important to note that any proposal to grant a request under section 37(5) to records which would otherwise be exempt under section 37(1) is “subject to section 38”. Section 38 requires the FOI body to notify certain parties that it is proposed to grant the request. The section 38 procedure is dealt with in a separate Guidance Note.

6.1.2 Where an FOI body is relying on section 37(1) for its refusal to grant access to a record, it must go on to consider section 37(5) before reaching a conclusion on the application of the exemption.

### **The Public Interest Test – section 37(5)(a)**

6.2.1 The public interest test is dealt with in a separate Guidance Note. However, issues relating to the public interest test which are of particular relevance in the context of section 37 are addressed below.

6.2.2 A request which would otherwise be refused under section 37(1) may be granted where the public interest that it be granted outweighs the public interest that the right to privacy of the individual to whom the information relates should be upheld.

### **The Right to Privacy**

6.2.3 The Commissioner’s view is that the public interest in respecting the right to privacy is a very strong public interest and is recognised in the language of section 37 itself. This public interest in protecting privacy rights is also reflected in the Long Title to the Act (which makes clear that the release of records under FOI must be consistent with “the right to privacy”).

6.2.4 The Commissioner also notes that the right to privacy has a constitutional dimension having been recognised as an unenumerated right under the Constitution. In addition, the Commissioner is mindful that the strong protection afforded to privacy rights under FOI is consistent with Article 8 of the European Convention on Human Rights, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

6.2.5 The High Court has referred to the right to privacy in the context of FOI. In the case of *FP v Information Commissioner* (referred to above) McDermott J stated:

The right to privacy is a personal right guaranteed under Article 40 of the Constitution by which the State guarantees in its laws to respect and as far as practicable, by its laws to defend and vindicate that right. Article 8 of the European Convention on Human Rights was relied upon by the decision maker. The power vested in the Commissioner under s.28 [now s.37 of the FOI Act 2014] is the means by which the State provides for the protection to the parties' rights to access records and to privacy in accordance with its obligations under the Constitution and the Convention.

6.2.6 In *The National Maternity Hospital v The Information Commissioner* [2007] IEHC 113 Quirke J, in considering the equivalent provision of what is now section 35(1)(b), stated:

Citizens and persons living lawfully within the State enjoy a constitutional right to privacy. The right is not absolute. It is qualified by "... the constitutional rights of others ... the requirements of the common good and...the requirements of public order and morality ..." (see *Kennedy v. Ireland* [1987] I.R. 587 at p. 592)  
It has also been qualified by a number of statutory provisions. The right to privacy is explicitly recognised in the long title to the [FOI] Act of 1997. However, the need to balance that right with the public interest is also recognised.

6.2.7 Unlike other public interest tests provided for in the FOI Act, there is a discretionary element to section 37(5)(a), which the Commissioner views as a further indication of the very strong public interest in the right to privacy.

#### A True Public Interest

6.2.8 In relation to the issue of the public interest, it is important to take note of the *obiter* comments of the Supreme Court in the *Rotunda* case. Fennelly J distinguished between a request made by a “private individual for a private purpose” and a request “made in the public interest”. Macken J in the same case stated that in her view a public interest would “require to be a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law.” Thus, a public interest (“a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law”) should be distinguished from a private interest.

6.2.9 The Commissioner takes the view that both section 13(4) of the FOI Act and the *Rotunda* case stand for the principle that a requester’s private interest in certain records cannot be construed into a public interest based on the requester’s own motives for seeking access to the records. He considers that an objective rather than subjective standard applies in determining the public interest in granting access to records.

## Privacy Rights and the Need for Protection

6.2.10 The Commissioner takes the view that privacy rights will be set aside only where the public interest served by granting the request (and breaching those rights) is sufficiently strong to outweigh the public interest in protecting privacy.

6.2.11 In considering the public interest test in section 37(5)(a) an FOI body should consider the extent to which the right to privacy of any third parties would be breached by release of the information at issue.

6.2.12 The Commissioner has taken the view that some personal information may concern intensely private matters. The Commissioner has, for example, expressed the view that, in considering the very many contexts in which personal information about an individual may exist, cases of sexual abuse or assault, including child sexual abuse, are among the most sensitive. He takes the view that the need for the protection of the right to privacy in such circumstances is very great.

Example: In Case 090261 the Commissioner found that the records (which involved allegations of child sexual abuse) concerned “intensely private matters.” The Commissioner found that, even if allegations in the case had been made for what might be regarded as malicious purposes, the records related to the deeply troubled family history of the applicant, his estranged wife and a four year old child at the centre of marital breakdown. The Commissioner stated that, whether true or not, descriptions of alleged sexual abuse given by a four year old child were disturbing and suggestive of serious dysfunction in a family. The records also included references to the medical and psychological histories of certain family members.

6.2.13 The Commissioner has drawn a distinction between personal information relating to a person’s private life and other personal information that does not relate to private matters.

Example: In Case 99168 the records contained details of the expenses paid to members of the Houses of the Oireachtas. The Commissioner drew a distinction between the information which concerned amounts paid to individuals to defray expenses incurred by them in discharging their functions as public representatives and a payment to a claimant under the Social Welfare Acts where the payment derives from some private aspect of the claimant’s life (such as family circumstances or inadequacy of means). The Commissioner found that the information at issue was not related to the private business of the parties concerned; rather, it related to their roles as public representatives. The payments were made to them in connection with their public duties. He found that this was true regardless of the fact that, technically, the information came within the definition of “personal information” for the purposes of the FOI Act.

6.2.14 The Commissioner has taken the view that persons in receipt of remuneration sourced from public funds should have a diminished expectation of privacy or confidentiality in relation to that remuneration.

Example: In Case 090149 the Commissioner did not accept that the applicant, a former CEO of a public service body, could have had a reasonable expectation that his level of remuneration would never be disclosed to the public. The

Commissioner also considered that release of the salary details at issue would not be a hugely significant invasion of the rights to privacy of the applicant to the extent that disclosure of health or other personal details might be.

6.2.15 On the other hand, the Commissioner has taken a different approach where the individual is a recipient of grant aid.

Example: In Case 120084 the Commissioner was satisfied, following the judgement of the Supreme Court in the *Rotunda* case, that information relating to the payment of agricultural grants such as the information in the case was personal information. He found that, as such, the manner in which he considered the public interest balancing test set out in section 37(5)(a)\* was necessarily affected. The Commissioner found that there was a public interest in ensuring openness, transparency and accountability in the public service and in ensuring openness and transparency in how a public body performs its functions. Specifically, he accepted that there was a public interest in maximising transparency and accountability in terms of the administration by the Department of Agriculture, Food and the Marine of grant schemes and in the expenditure of public money. However, having considered the contents of the records in that case, he did not see how release of the records would enhance, to any significant extent, the public interest in ensuring such openness, transparency or accountability. He found that the public interest in granting the request did not outweigh the public interest that the right to privacy should be upheld.

6.2.16 The Commissioner considers that circumstances in which individuals may have an expectation of a diminution of privacy rights may include commercial transactions with public bodies. He also takes the approach that privacy rights arising in a commercial context may not be particularly strong.

Example # 1: In Case 110092 Commissioner found that the expectation of a diminution of privacy rights, at least in relation to the disclosure of details of commercial transactions with public bodies, was a necessary consequence of entering into certain arrangements. The third parties concerned had entered into lease arrangements with the Industrial Development Authority in the 1980s and had sought a rent review in either 2007 or 2008, 10 years after the passing into law of the FOI Act. As such, the Commissioner found it difficult to accept that the third parties could have had any justifiable belief that details of annual payments they were due to receive from the State, further to arrangements entered into for commercial advantage, would be kept secret indefinitely.

Example # 2: In Case 140162 part of a record contained the name of counsel who had provided an opinion to the Irish Greyhound Board. It was not clear that a contract for services existed between the individual in question and the Board. (Certain information relating to services rendered is excluded from the definition of personal information where an individual provides a service for an FOI body). However, the Commissioner found that, even if no contract for services existed, the information at issue related to the individual's professional activities. The Commissioner noted that the courts had considered the constitutional right to privacy in relation to business dealings in *Caldwell v. Mahon* [2007] 3 I.R. 542, where Hanna J stated that such a right operates at the "outer reaches of and at the furthest remove from the core personal right to privacy". The Commissioner

also referred to the interpretation of this statement by McGovern J in *Slattery v. Friends First Life Assurance Company* [2013] IEHC 136 as entailing that such a right "may readily be qualified by countervailing considerations." The Commissioner was satisfied that, if it was the case that the name of counsel was personal information, the public interest in release outweighed the public interest that the right to privacy of the individual to whom the information related should be upheld.

### Seeking a Remedy or Issues of Procedural Fairness

6.2.17 The Commissioner does not consider it open to him as Information Commissioner to determine that further personal information should be provided to an applicant, in the public interest under section 37(5)(a) of the FOI Act, as a means of remedying any actual or suspected wrongdoing by an FOI body.

Example: In Case 090261 while the Commissioner accepted that there was a strong public interest in openness and accountability in relation to the manner in which public bodies carry out their functions in dealing with allegations of child sexual abuse. However, he found that this did not mean that it was within his remit as Information Commissioner to determine or to make value judgments as to whether the applicant should have been provided with further personal information in the course of the assessment process or the investigation, whether as a matter of fair procedures, "equality of arms", or simply good administrative practice. He found that the question of whether the applicant should have access to further information in order to pursue a remedy or some other form of redress was a matter for the Courts, which have been given exclusive power under the Constitution for the administration of justice.

6.2.18 On appeal, the High Court in the case of *FP v The Information Commissioner* (referred to above) McDermott J stated:

It is clear that "private" as opposed to "public" interests are not a sufficient basis upon which to exercise the discretion in favour of the appellant under s. 28(5)(a) [now s.37(5)(a)]. Thus the suggestion that access to the records might assist in some way in determining whether he had a cause of action against any of the parties or in advancing such a claim or might provide the basis for making a criminal complaint or mounting a judicial review ... do not qualify as matters of public interest in that respect.

### **Benefit the Individual – Section 37(5)(b)**

6.3.1 A request which would otherwise be refused under section 37(1) may still be granted where the grant of the request would benefit the individual to whom the information relates.

Example: In Case 060269 the Commissioner found that a right of access arose under section 37(5)(b)\*. The records related to the Patient's Private Property Account of the requester's aunt who was a long stay patient in a HSE facility. The HSE had treated the requester as an appropriate next-of-kin for the purposes of giving consent, on behalf of her aunt, for the collection of long-stay charges (including arrears of such charges) from her Patient's Private Property Account. The Commissioner found that in the particular circumstances of this case - where much of the information at issue concerned her aunt's financial affairs - the release to the requester of information relating to her aunt would be of benefit to

her aunt. He found that in a situation in which her aunt was not in a position to manage her financial affairs and where the HSE was managing them on her behalf, it appeared to be to her aunt's benefit that a next-of-kin would be aware of the financial transactions being made on her behalf.

### **Third Parties and Section 37(5)**

6.4.1 As stated above, section 37 is one of three exemptions in the FOI Act which specifically relate to third parties either by relating to information given to an FOI body by the third party or to information which relates to the third party. The other exemptions are section 35 (which relates to information obtained in confidence) and section 36 (which relates to commercially sensitive information).

6.4.2 It is very important to note that any proposal to grant access, pursuant to section 37(5), to records which would otherwise be exempt is expressed by the Act to be "subject to section 38". Section 38 requires the FOI body to notify certain third parties that it is proposed to grant the request in the public interest, that the person may make submissions to the FOI body and that the FOI body will consider any such submissions before deciding whether to grant or refuse the request.

6.4.3 The Commissioner's approach to the application of section 38 is dealt with in a separate Guidance Note. FOI bodies may wish to have regard to the FOI Central Policy Unit Notice No. 8 "Requests involving third parties – A step by step guide", which sets out for decision makers the steps involved in processing FOI requests relating to third parties. This is available on the Department of Public Expenditure and Reform, FOI Central Policy Unit, website at [foi.gov.ie](http://foi.gov.ie)

6.4.4 In the *Rotunda* case (referred to above) Macken J referred to the consultation procedure set down in what was then section 29 of the FOI Acts 1997 and 2003 – now section 38 of the FOI Act 2014 – and stated

"This clearly implies that the interests of both the donor and the holder of the information must be considered, even then presumably so as to ensure rights are not infringed, and to provide for possible refusal."

## **7.0 Section 37(6) – Neither Confirm nor Deny**

### **What the Act states:**

- (6) Where —
- (a) an FOI request relates to a record to which subsection (1) applies but to which subsection (2) and (5) do not apply or would not, if the record existed, apply, and
  - (b) in the opinion of the head concerned the disclosure of the existence or non-existence of the record would have the effect specified in subsection (1),
- he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.

7.1.1 This is called a ‘neither confirm nor deny’ provision. It provides for the refusal of a request for access to a record and for the refusal to disclose whether or not such a record exists, provided the requirements of the subsection are met. ‘Neither confirm nor deny provisions’ are dealt with in a separate Guidance Note. Matters particularly relevant to the provision in the context of section 37 and personal information are addressed below.

7.1.2 The overall purpose of section 37(6) is to protect the personal information of a third party in situations where knowledge of the existence, or non-existence, of particular records would effectively disclose that party’s personal information. The usefulness of the provision depends upon it being invoked both in instances in which relevant records do not exist as well as in cases in which relevant records do exist.

Example # 1: In Case 140157 the Commissioner found that to confirm that an employee had been under investigation for alleged wrong-doing would be to disclose personal information of that employee. He also found that to state that no such investigation was conducted would also disclose personal information of that employee.

Example # 2: In Case 150108 the Commissioner took the view that to require an FOI body to disclose the non-existence of a particular record essentially negates the effectiveness of the entitlement to refuse to disclose the existence of such a record. The applicant’s request to the Department of Justice & Equality was for “the letter my separated wife sent to Immigration” which, he stated, made false allegations that he had been violent to her. The Department had refused the applicant’s request under section 15(1)(a) on the basis that the records sought did not exist. However, the Commissioner found that the more appropriate course of action would have been for the Department to consider the provisions of section 37(6) in the first instance.

7.1.3 Consideration of section 37(6) must be conducted on the basis of what would be the case were the FOI body to hold records of the kind sought by the requester, rather than on whether or not such records are actually held. For section 37(6) to apply, the following requirements must be satisfied:

- the record sought must be of a type which would disclose the personal information of a third party, if it existed, and which would be exempt from release by virtue of section 37(1) of the FOI Act;

- none of the exceptions to the section 37(1) exemption, contained at sub-sections (2) or (5) of section 37, applies or, in the case where relevant records do not exist, would apply if such records did exist and
- the head of the FOI body must form the opinion that to state whether or not relevant records exist would in itself be to disclose the personal information of a third party.

7.1.4 For the purposes of a review, the Commissioner will ascertain the actual position regarding the existence or non-existence of records of the type sought. Necessarily, however, consideration of the three requirements above must be conducted on the basis of what would be the case were the FOI body to hold records of the kind sought rather than on whether or not such records are actually held.

### **Records of a Type which Would Disclose Personal Information & section 37(1)**

7.2.1 The first matter for consideration is whether the record sought is of a type which would disclose the personal information of a third party, if it existed, and which would be exempt from release by virtue of section 37(1) of the FOI Act. This will depend on the nature of the records sought and may depend on the manner in which the request has been framed.

Example # 1: In Case 150108 (referred to above) the Commissioner found that the applicant's request was predicated on an assumption that the applicant's estranged wife wrote to the Department of Justice & Equality alleging that the applicant was violent towards her. He found that, in relation to the applicant's estranged wife, the disclosure of such a record would disclose, at a minimum, the fact that she had made allegations in writing to the Department that she had been a victim of domestic violence. He was satisfied that such a disclosure would involve the disclosure of personal information relating to both the applicant and his estranged wife. He was also, therefore, satisfied that such a record, if it existed, would be exempt from release under section 37(1).

Example # 2: In Case 140157 the Commissioner took the view that it was in the public domain that an inquiry or investigation was held by Cork County Council into its agreement to buy certain lands. He stated that disclosure of nothing more than the fact that the Council held records concerning the investigation and the land deal would not, in itself, disclose personal information. However, the Commissioner stated that the applicant had not chosen to make an FOI request for access to records of the investigation generally; instead, parts of his request were predicated on the applicant's contention that the investigation into the "deal" focused on "the conduct of" a named employee. Thus, the Commissioner considered that parts of the request sought access to any of the specified records arising from any investigation carried out by the Council into the conduct of the named official in relation to the agreement to purchase the land in question. He considered that they sought access to any of the specified records that confirmed if the named employee was the subject of an internal investigation. Having considered the definition of personal information, the Commissioner found that the records sought, if they existed, would constitute personal information and that, on the face of it, they would be exempt from release under section 37(1)\* of the FOI Act.

### **Exceptions to section 37(1) - sub-sections (2) or (5)**

7.3.1 The second matter to be established is that none of the exceptions to the section 37(1) exemption, contained at sub-sections (2) or (5) of section 37, applies or, in the case where relevant records do not exist, would apply if such records did exist.

7.3.2 Subsection (2) specifies at paragraphs (a) to (e) a number of situations where the exemption for personal information at section 37(1) does not apply. Subsection (5) provides for two situations where an FOI request, which would otherwise fall to be refused, may be granted. (These provisions are discussed earlier in this Guidance Note.)

Example: In Case 140157 (referred to above) the Commissioner considered the provisions at section 37(2)(a) to (e)\* and was satisfied that none of them had relevance. He found that section 37(2)\* would not have applied to the requested records, if they existed. He also considered the public interest under section 37(5)(a)\* and the applicant's arguments in that regard. He found that, if records of the type sought by the requester existed, the public interest served by their release would not outweigh the public interest in upholding the right to privacy of the employee concerned. He also found that section 37(5)(b)\* would not have applied if the requested records existed.

### **Stating Whether or not Records Exist Would Disclose Personal Information**

7.4.1 Finally, the FOI body must form the opinion that to state whether or not relevant records exist would in itself disclose the personal information of a third party. Where the relevant records exist, it may be clear that by disclosing their existence the FOI body will disclose personal information. However, it may be less obvious that disclosing the non-existence of records (or confirming that no records exist) may cause the disclosure of personal information.

Example: In Case 140157 (referred to above) the applicant's request was predicated on his contention that an investigation focused on the conduct of a named employee of the Council. The Commissioner found that there were two possibilities in this case. Firstly, that the Council did, in fact, hold records of the type sought by the requester. The Commissioner was satisfied that to disclose that records of this type existed would be to disclose personal information. The second possibility was that the Council did not hold records of the type sought by the requester. While this may have been less obvious than in the case where the existence of relevant records was confirmed, the Commissioner was satisfied that confirmation that no such records existed would also cause the disclosure of personal information. He found, for example, that disclosing that no allegations of wrong-doing had been made against an employee of a public body was to disclose information regarding the employee's "employment or employment history"; similarly, it was to disclose in a general sense what was contained in the employee's personnel file; and, finally, it was to disclose the "views or opinions of another person about the individual" in as much as it discloses that such views held did not include a view that the employee has engaged in misconduct or in a breach of discipline.

## **8.0 Section 37(7) – Joint Personal Information**

### **What the Act states:**

(7) Notwithstanding paragraph (a) of subsection (2), a head shall, subject to paragraphs (b) to (e) of that subsection and subsections (5) and (8), refuse to grant an FOI request if, in the opinion of the head, access to the record concerned would, in addition to involving the disclosure of personal information relating to the requester, also involve the disclosure of personal information relating to an individual or individuals other than the requester.

8.1.1 Section 37(2)(a) provides that the exemption at section 37(1) does not apply if the personal information concerned relates to the requester concerned. However, section 37(7) provides that, notwithstanding section 37(2)(a), an FOI body shall refuse to grant a request if access to the record concerned would, in addition to involving the disclosure of personal information relating to the requester, also involve the disclosure of personal information relating to an individual or individuals other than the requester. Section 37(7) is subject to section 37(2)(b) to (e), 37(5) and 37(8).

8.1.2 Where a record or part of a record contains personal information relating to the requester, which is closely intertwined with personal information relating to another party (or parties), and where it is not feasible to separate the personal information relating to the requester from that relating to the other party (or parties), it can be described as joint personal information and section 37(7) must be considered.

Example: In Case 160175 the Commissioner stated that it was clear that most of the records disclosed the personal information of parties other than the applicant and that much of this information was of a private and sensitive nature. She found that the information to which access has been refused related to third parties and joint personal information relating to the applicant, his child and, in almost all instances, other individuals. However, having examined the records, she found that one record contained information that was personal only to the applicant. Consequently, she found that section 37 did not apply to that record.

8.1.3 In *FP v Information Commissioner* (referred to above) the appellant submitted that the Commissioner had failed to have due regard to the joint character of the information and that it concerned information which was relevant primarily to him (the appellant). McDermott J was not satisfied that there was any substance to this submission. He held:

“The reality of the case is that the records sought are exempt as personal information under s.28(1) [now s.37(1) of the 2014 Act]... It was inevitable that considerable emphasis was placed on the rights of the other two parties affected by the granting of access to documents having regard to the case for access made by the appellant, the nature of the allegation made, the submissions made by the notice parties and the fact that the records constituted joint personal information under s.28(5)(B) [now s.37(7)].”

### **Part of a Record**

8.1.4 In the context of joint personal information, it is important to be aware of the Commissioner’s approach to the granting of access to parts of records. As stated in

the Overview of Section 37 above, the Commissioner takes the view that neither the definition of a record nor the provisions of section 18 envisage or require the extracting of particular sentences or occasional paragraphs from records for the purpose of granting access to those particular sentences or paragraphs. Generally speaking, therefore, he is not in favour of the cutting or "dissecting" of records to such an extent. See paragraphs 1.11.3 – 1.11.4 above.

Example: In Case 160120 the records were the applicant's mental health services records for a certain period. Having examined the records, the Commissioner noted that the information redacted by the Health Service Executive referred to (1) persons other than the applicant, including third parties such as the family members of the applicant and (2) the applicant and those third parties. She found that, given their context and content, none of the withheld records contained information which was personal information relating solely to the applicant. In considering this aspect, she took account of section 18 of the FOI Act.

Subject to 37(2)(b) to (e), 37(5) and 37(8)

8.1.5 It is important to bear in mind that section 37(7) is also subject to section 37(2)(b) to (e) and section 37(5) and 37(8). These provisions should also be considered in any consideration of the application of section 37(7) and before reaching a conclusion on the matter. Where, in considering the application of section 37(7), sections 37(2)(b) to (e) and section 37(5) and 37(8) are found not to apply, access to the record must be refused under section 37(1).

8.1.6 See Section 4.0 above in relation to section 37(b) to (e), Section 6.0 above in relation to section 37(5) and Section 9.0 below in relation to section 37(8).

## **9.0 Section 37(8) – Request by a Parent or Guardian or where the Individual is Dead**

### **What the Act states:**

- (8) Notwithstanding subsection (1), the Minister may provide by regulations for the grant of an FOI request where —
- (a) the individual to whom the record concerned relates belongs to a class specified in the regulations and the requester concerned is the parent or guardian of the individual, or
  - (b) the individual to whom the record concerned relates is dead and the requester concerned is a member of a class specified in the regulations.

### **Relevant Regulations**

9.1.1 Section 37(8) provides that, notwithstanding subsection (1), the Minister for Public Expenditure and Reform ("the Minister") may make regulations for the grant of an FOI request in certain circumstances where the requester is the parent or guardian of the individual to whom the record relates or where the individual to whom the information relates is dead.

### **Freedom of Information Act 2014 (Section 37(8)) Regulations 2016**

9.1.2 The Minister made regulations under section 37(8) – Freedom of Information Act 2014 (Section 37(8)) Regulations 2016 (S.I. 218 of 2016). These Regulations were made on 27 April 2016. They revoke the previous Regulations (the 2009 Regulations). Article 9 of S.I. 218 of 2016 was amended by the Freedom of Information Act 2014 (Section 9(6), 10(6) and 37(8)) Regulations 2016 (S.I. 558 of 2016).\*\* S.I. 218 of 2016 as amended is referred to in this Note as “the 2016 Regulations”.

9.1.3 The transitional provisions in S.I. 218 of 2016 provide that any action commenced under the 2009 Regulations (see below) shall continue to be performed and shall be completed as if the 2009 Regulations had not been revoked.

### **Actions commenced under the 2009 Regulations**

9.1.4 The Freedom of Information Act, 1997 (Section 28(6)) Regulations, 2009 (S.I. No. 387 of 2009) (the “2009 Regulations”)\*\* were made under section 28(6) of the 1997 Act. (The provisions in section 28(6) of the 1997 Act are now reflected in section 37(8) of the 2014 Act.) While the 2009 Regulations were made prior to the passing of the FOI Act 2014, section 54 and Schedule 5 provide that they continued in force as if made under the 2014 Act. Thus, the 2009 Regulations apply to certain requests which, although made under the 2014 Act, were made prior to the introduction of S.I. 218 of 2016 on 27 April 2016.

\*\*While S.I. 558 of 2016 was, in turn, revoked by the Freedom of Information Act 2014 (Sections 9(6), 10(6) and 37(8)) Regulations 2017 (S.I. 53 of 2017) this was without prejudice to the amendment of Article 9 effected by S.I. 558 of 2016.

\*\*\* An application challenging the validity of the 2009 Regulations was refused by the High Court – O’Loughlin v Information Commissioner, Minister for Finance and Others [2012] IEHC 117. An appeal of the High Court decision is currently pending.

## Consideration of the Relevant Regulations

9.1.5 Where it appears that a requester may be seeking access to records in a capacity provided for in the relevant Regulations, the Commissioner may conclude that the FOI body should consider the Regulations concerned.

Example: In Case 160240 the Commissioner found that there was no indication that the Legal Aid Board had considered section 37(8) or the relevant Regulations in its original or internal review decisions. The applicant had made an FOI request to the Board for access to records relating to its legal representation of her deceased mother. It appeared to the Commissioner that the applicant may have been seeking the records as next of kin, however she found that it was a matter for the Board to establish this. She was satisfied that, in the circumstances of this case, the Board should have considered the Regulations and that, therefore, the appropriate course of action was to annul the decision of the Board and direct that it undertake a fresh decision making process, having due regard to the provisions of the relevant Regulations.

## Warning Regarding Previous Regulations

9.2.1 It should be noted that there were two different sets of Regulations under the 1997 Act. The first Regulations were made in 1999 (Freedom of Information Act, 1997 (Section 28(6)) Regulations, 1999. S.I. No 47 of 1999). The second Regulations were made in 2009 (S.I. No 387 of 2009 referred to above). It is important to be aware that the wording of the 1999 Regulations was different to the wording of the 2009 Regulations (particularly with regard to the provisions relating to the records of deceased individuals). The wording of the 2009 Regulations are also somewhat different from the wording of the 2016 Regulations.

9.2.2 Thus, considerable caution should be taken when referring to any decision of the Commissioner made under either the 1999 Regulations or the 2009 Regulations as the decision may relate to parts of the Regulations which no longer apply.

## Guidance

9.3.1 The Minister for Public Expenditure and Reform (the Minister) has produced Guidance relating to section 37(8) and the Regulations. See Guidance document entitled "Freedom of Information. Access to records by parents/ guardians Access to records relating to deceased persons prepared under section 37(8) of the Freedom of Information Act 2014" dated May 2017 (the Guidance).

9.3.2 Section 48(1) provides that the Minister may draw up and publish guidelines for the effective and efficient operation of the Act and section 48(3) provides that FOI bodies shall have regard to any guidelines in the performance of their functions under the Act.

## Subject to the Other Provisions of the FOI Act

9.4.1 The grant of a request in relation to a record under the 2016 Regulations (and previously under the 2009 Regulations) is "subject to the other provisions" of the FOI

Act. Thus, other provisions of the FOI Act may be relevant in relation to the records concerned and may need to be considered.

Example : In Case 130085 the records included records relating to proceedings before the Courts under the Child Care Act 1991. The Commissioner, in the context of section 37(8)\*, considered whether the views of the applicant's son should be sought. However, she stressed that section 37(8)\* would not displace, amongst other provisions, the *in camera* rule (section 31(1)(b)\*).

9.4.2 Neither section 37(8) nor the 2016 Regulations provide a basis for releasing records, or parts of records, which contain personal information relating both to a minor/ incapacitated person and a third party or to a deceased person and a third party, except where the third party is the requester.

Example # 1: In Case 160440 the applicant sought access to a letter concerning his daughter's medical treatment which was written by the child's mother. The Commissioner found that the letter contained inherently private information pertaining to applicant, the child, and the mother. She was satisfied that the personal information of the applicant and his daughter was inextricably linked to the personal information of the child's mother. The Commissioner explained that the Freedom of Information Act 2014 (Section 37(8)) Regulations 2016, were not applicable. She stated that, if the letter only contained personal information relating to the applicant and his daughter, the applicant might have had a right of access under the Regulations, in his capacity as a parent of the child, if the release of the information was determined to be in the best interests of his daughter. However, the Regulations did not apply where the information was joint personal information, i.e. personal information relating to a child and a third party. As the information was joint personal information, the Regulations did not apply and applicant did not have a right of access under the Regulations.

Example # 2: In Case 140115 the records were social work records relating to the applicant and his family. The Commissioner found that much of the content of the records was the personal information of the applicant's wife. While some of the applicant's children were minors, two of the children had reached their majority. In her consideration of section 37(8)\* and the Regulations in relation to certain information, the Commissioner was satisfied that any information about the younger children was so intertwined with the personal information of the applicant's wife and the now adult children that it would be impractical to isolate it for release in any manner which would not make the information misleading. She found that section 37(8)\* did not displace, amongst other provisions, the other provisions of section 37\* insofar as the joint personal information involved persons other than the applicant's minor children.

### **Minors or Incapacitated Individuals**

9.5.1 The 2016 Regulations (Regulations 4 and 5) provide that, subject to the other provisions of the FOI Act, a request shall be granted where the requester is a parent or guardian of the individual to whom the record relates and that individual belongs to one of the following classes of individual:

- (a) individuals who, on the date of the request, have not attained full age, or
- (b) individuals who have attained full age, being individuals who—

- (i) at the time of the request have, or are subject to, a psychiatric condition, mental incapacity or severe physical disability, the incidence and nature of which are certified by a registered medical practitioner, and
- (ii) by reason of that condition, incapacity or disability, are incapable of exercising their rights under the Act.

9.5.2 Access shall be granted to the records in such cases subject to the condition that the individual –

is an individual access to whose records would, in the opinion of the head having regard to all the circumstances, be in the individual's best interests.

Regulation 6 refers.

9.5.3 Thus, the 2016 Regulations provide that a request for access to records which involves the disclosure of personal information relating to a minor shall be granted where the requester is the minor's parent or guardian and where, having regard to all the circumstances, access to the records would be in the minor's best interests.

9.5.4 The Regulations similarly provide that a request for access to records which involves the disclosure of personal information relating to an incapacitated individual (as defined in the Regulations) shall be granted where the requester is the parent or guardian of the incapacitated individual and where, having regard to all the circumstances, access to the records would be in the individual's best interests.

9.5.5 The Guidance regarding access under section 37(8) published by the Minister for Public Expenditure and Reform details factors to be considered in relation to granting access to parents / guardians and regarding consultation with minors or incapacitated adults.

### Minors

#### *Presumption regarding Parent of a Child*

9.5.6 In his approach to the application of the Regulations with regard to requests made by a parent for access to records relating to his/her child, the Commissioner has regard to the Supreme Court decision in the case of *McK v The Information Commissioner* [2006] IESC 2. (His approach to the application of the previous Regulations also changed after that decision. Thus, again, it should be noted that considerable caution should be taken when referring to any decision of the Commissioner relating to requests by parents made prior to the *McK* decision, as the decision would not reflect the Commissioner's current approach.)

9.5.7 In *McK* the Supreme Court held:

"The [FOI] Act of 1997 and the Regulations fall to be interpreted in accordance with the Constitution. A parent ... has rights and duties in relation to a child. It is presumed that his or her actions are in accordance with the best interests of the child. This presumption while not absolute is fundamental...

...A parent's rights and duties include the care of a child who is ill. As a consequence a parent is entitled to information about the medical care a child is receiving so that he or she may make appropriate decisions for the child, as his or her guardian. ...The presumption is that the release of such medical information would best serve the interests of the minor. However, evidence may be produced that it would not serve her interests, and, in considering the circumstances, her welfare is paramount."

9.5.8 Thus, a parent is entitled to a rebuttable presumption that access to his/her child's medical information is in the best interests of the child. However, the presumption may be overcome if sufficient evidence is presented to show that the release of such medical information would not be in the child's best interests. In considering whether sufficient evidence has been presented to overcome the presumption, the welfare of the child is paramount. In following this approach, the Commissioner acknowledges that the fundamental presumptions operating in favour of a requester who is the parent of the individual to whom the information relates cannot be lightly displaced.

Example # 1: In Case 050129 (decided after the *McK* judgment) the Commissioner found that the Health Service Executive (HSE) had not presented evidence sufficient to upset the presumption that the release to the applicant of his son's hospital records would serve his best interests. The Commissioner understood that, along with his mother, the applicant had both guardianship and custodial rights and obligations in respect of his son. She also understood that the son lived with his mother and that the applicant had certain access rights in relation to him. The HSE opposed the release of the records primarily on the basis of a safety order which, it said, was granted against the applicant. However, the child's mother had indicated that the safety order was granted for her protection rather than that of her children. She also stated that she had agreed to joint custody of the children with the applicant. In the circumstances and having regard to the Supreme Court's judgment in the case of *McK v. The Information Commissioner*, the Commissioner decided that the request for access to the records must be granted.

Example # 2: In Case 000128A (decided after the *McK* judgment) the parties had made serious allegations and raised issues concerning access to, and alleged alienation of, the children involved in that case. The Commissioner made it clear that these issues were only relevant to her review insofar as they might be factors to be taken into account in considering whether evidence existed to rebut the presumption that release to the applicant of his daughter's medical records was in her best interests. The Commissioner stressed that her starting point in the review was an acknowledgement of the applicant's constitutional rights as a parent and of the enjoyment by him of "parental primacy" in relation to access to records containing medical information about his daughter. Having considered the matter carefully, the Commissioner was satisfied, based on certain facts established, that the evidence given by the minor to the effect that disclosure of her medical records to the requester would not serve her best interests was sufficient in all the circumstances of the case to rebut the presumption that release of the records to her father would serve her best interests.

9.5.9 While the records at issue in the *McK* case related to medical treatment, the Commissioner takes the view that the judgment is likely to apply to any personal information of a minor that is relevant to his or her welfare. This view is supported by the following comments made in relation to the Supreme Court's decision in *McK* by McMahon J in *HSE v. Information Commissioner* [2008] IEHC 298:

"While [the] case concerned a parent's right of access to the child's medical records, the Supreme Court did not place undue emphasis on the nature or content of the records in question and I adopt the court's reasoning as being applicable also to the records

involved in this case which were concerned with allegations of physical abuse of the child."

9.5.10 However, the Commissioner also takes the view that it is apparent from the Supreme Court's repeated references to medical information or medical care that, while the nature or content of the records in question may not be determinative, it is a relevant factor.

9.5.11 The Commissioner has also noted that, under the Constitution, both parents in a marital family are presumed to be acting in the best interests of their child and that this presents difficulties where the parents are not acting in accord. He takes the view that the *McK* case indicates that reluctance by one parent or guardian to agree to access is not, in and of itself, sufficient to rebut the presumption to which a parent is entitled. However, the circumstances of a case may be distinguishable from those in *McK* (where the mother of the child concerned was deceased, the father (who was the requester) had been granted an order of supervised access and the requested records related to a hospital visit for an unspecified viral infection).

Example: In Case 100186 records contained highly sensitive information relating to allegations made against the applicant of child sexual abuse of his daughter. The Commissioner found that the circumstances of the *McK* case were distinguishable from those presented in this case. He considered it to be self-evident that the nature of the information in the case was such that it must be treated with the utmost caution to protect the privacy interests of the child and also to avoid any risk of prurient interest in the matter by a third party. This was not to suggest that the applicant had any intention of disseminating the information he sought; he was entitled to the presumption that he would act in the best interests of his child. Nevertheless, the Commissioner had regard to the fact that, unlike family law proceedings, no conditions are attached when records are made available to a requester under the FOI Act. The Commissioner found that the provision of copies of the records to the applicant carried some potential to impact negatively on the best interests of the child and found that the best interests of the child would not be served by the release of the records disclosing her personal information.

#### *The Views of the Minor*

9.5.12 In its judgment in the *McK* case, referred to above, the Supreme Court considered that the views of the minor who was nearly 18 years of age were "very relevant". In considering the issue of the views of the minor, the Commissioner will have regard to the circumstances as they are at the time of his decision.

Example # 1: In Case 000128A (this decision followed the remittal of the case by the Supreme Court in *McK* for fresh review) and the related Case 000137 the Commissioner had regard to the age and maturity of the applicant's daughter who was nearly 18 years of age and thus near to reaching the age of majority. The Commissioner found that the wishes, attitude and views of the applicant's daughter required careful and detailed consideration. She found that the daughter was of an age and maturity at which it was appropriate to take account of her wishes.

Example # 2: In Case 050129 the records related to the admission of the applicant's son to hospital as a result of an allergic reaction. At the time of the Commissioner's decision, the son was soon to be 10 years old. In the circumstances the Commissioner did not consider it appropriate to have sought the son's views on whether his hospital records should be released to the applicant.

9.5.13 In addition, where the minor to whom the information relates has reached the age of 18 at the time of a review by the Commissioner, the Commissioner will take account of this. A review by the Commissioner is *de novo* which means that it is based on the circumstances and the law as they pertain at the time of the decision.

Example: In Case 090102 the Health Service Executive (HSE) had refused the applicant access to records concerning his son. The applicant's review application was accompanied by a letter signed by his son stating that he wished his father to have access to the records. At that time the son was still a few weeks short of his majority. However, the son reached the age of 18 before the review was considered by the Commissioner's Office. Staff of the Office met with the son who indicated, verbally and in writing, that he consented to his father being granted access to his personal information. While the HSE's view was that the withholding of the records would be in the best interests of the applicant's son, the Commissioner found that there was no provision in the FOI Act for her to disregard the consent obtained nor to consider whether release of the records was in the best interests of a third party who was an adult and who had consented to the granting of the applicant's request. She found that consent in writing dis-applied the exemption in section 37(1)\* by virtue of section 37(2)(b)\*.

#### Incapacitated Individuals

9.5.14 The 2016 Regulations also provide for access by parents or guardians to personal information relating to incapacitated individuals (as defined in Regulation 5(b) – see 9.5.1 above). The Commissioner has found that next of kin cannot be treated as a guardian in such circumstances.

Example: In Case 160286 the Commissioner considered whether the applicant was a guardian for the purposes of regulation 5(b). The applicant had sought access to records relating to the financial affairs of his brother, Mr Y, who was described as being "severely disabled and non-verbal" and "incapable of managing his own affairs". The applicant confirmed that that Mr. Y was not a ward of court and, thus, the applicant was not his committee. The Commissioner formed the view, having considered the applicant's suggestion in this regard, that even if the applicant's siblings were in agreement that they would consent to his being appointed as guardian, it would not have the effect of actually appointing him as Mr. Y's guardian, and as such would not be sufficient to meet the requirements of the regulation. The Commissioner also had regard to the fact that regulation 7 specifically provided for access to records of deceased persons by their next of kin and defined next of kin for those purposes, but that no similar provision was included under regulation 5. This reinforced the Commissioner in his view that next of kin could not be treated as a guardian for the purposes of regulation 5.

### The Best Interests of the Individual

9.5.15 The Regulations provide that access shall be granted where the individual is an individual access to whose records would, “having regard to all the circumstances, be in the individual’s best interests”. There is, therefore, a range of factors that may be relevant in making a decision regarding granting access to records which would involve the disclosure of personal information relating to a minor or incapacitated individual.

9.5.16 The Guidance published by the Minister sets out factors to be considered where records relate to persons with a disability and where they relate to minors including, for example, the nature and duration of the disability, whether the person/ minor would consent to the release of the material and whether release would damage the person / minor in any way.

9.5.17 The Commissioner takes the view that relevant factors may, for example, include: the records at issue and their contents; whether it is appropriate to seek the views of the minor and, if so, the views of the minor; the state of knowledge of the minor regarding the information at issue; and, the context, including family context, in which the records were created. As stated above, it is also important to bear in mind the extent of any joint personal information relating to individuals other than the minor or the requester and also that other exemptions under the FOI Act may apply.

### The Individual to whom the Information Relates is Dead

9.6.1 Section 37(1) expressly provides for the protection of personal information relating to deceased individuals. Under the 2016 Regulations a request for access to a record which would involve the disclosure of personal information relating to a deceased individual shall be granted in certain circumstances. Such a request shall, subject to the other provisions of the Act, be granted if the case falls within a case to which Regulation 7 applies. Regulation 7 applies where:

- (a) the requester concerned belongs to one or other of the following classes:
  - (i) a personal representative of the individual acting in due course of administration of the individual’s estate or any person acting with the consent of a personal representative so acting,
  - (ii) a person on whom a function is conferred by law in relation to the individual or his or her estate acting in the course of the performance of the function, or
- (b) the requester is the spouse or the next of kin of the individual and, in the opinion of the head, having regard to all the circumstances, the public interest, including the public interest in the confidentiality of personal information, would on balance be better served by granting than by refusing to grant the request.

9.6.2 It is important to note that the public interest test referred to in the Regulations is confined to persons specified in paragraph (b).

9.6.3 The Guidance published by the Minister includes guidance regarding categories of requester who may be given access to the records of deceased persons.

#### Personal Representative – Regulation 7(a)(i)

9.6.4 The Commissioner takes the view that the only test for qualification as a member of a class specified under Regulation 7(a)(i) (previously Regulation 4(1)(b)(i) in the 2009 Regulations) is that the requester be the personal representative of the individual acting in due course of administration of his or her estate or any person acting with the consent of a personal representative so acting.

Example: In Case 100260 the applicant had requested copies of all medical records held by the HSE relating to her deceased husband. The Commissioner was provided with a copy of the Grant of Representation issued by the District Probate Registry which, amongst other things, stated that letters of administration of the estate of the deceased who died intestate were granted to the applicant. The document described the applicant as the "guardian lawfully appointed" of the couple's three children and the grant was limited for their use and benefit until they reached 18 years or until one of them reached 18 and applied for and obtained administration of the estate of their deceased father. Solicitors for the applicant confirmed that none of the children had obtained administration of their late father's estate and that the estate remained unadministered. The Commissioner found that the only test for qualification as a member of a class specified under 4(1)(b)(i) of the 2009 Regulations [now Regulation 7(a)(i) of the 2016 Regulations] was that the requester be the personal representative of the individual acting in due course of administration of his or her estate or any person acting with the consent of a personal representative so acting. She found that the existence of the Probate document, including the onus on the applicant arising from the grant of Administration to administer the estate for the use and benefit of the children, should be taken as fulfilling the criteria for this specified class. She also noted a confirmation by the applicant's solicitors of their client's responsibilities in relation to mortgage protection cover in respect of part of the deceased's estate.

9.6.5 The 2016 Regulations define "personal representative" as meaning a personal representative within the meaning of the Succession Act 1965.

#### Function Conferred by Law – Regulation 7(a)(ii)

9.6.6 The 2016 Regulations provide that a request for a record which involves the disclosure of personal information shall, subject to the other provisions of the Act, be granted where the individual to whom the record relates is dead and the requester is a person on whom a function is conferred by law in relation to the individual or his or her estate acting in the course of the performance of the function.

#### Spouse or Next of Kin – Regulation 7(b)

9.6.7 The Regulations provide for a potential right of access to a requester who "is the spouse or the next of kin" of the deceased. A request shall, subject to the other provisions of the FOI Act, be granted where, having regard to all the circumstances, the public interest, including the public interest in the confidentiality of personal information, would on balance be better served by granting than by refusing the request.

### *Spouse*

9.6.8 The Regulations state that the term “spouse” includes, in addition to a lawful spouse:

- (a) a party to a marriage that has been dissolved, being a dissolution that is recognised as valid in the State, and a person who is living apart from his or her spouse pursuant to a deed of separation;
- (b) a man or woman who was not married to, but cohabited as a spouse with, the deceased individual; and
- (c) a civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (No.24 of 2010).

### *Next of Kin*

9.6.9 Regulation 8 of the Regulations states:

“next of kin” means:

- (a) issue,
- (b) parent,
- (c) brother or sister,
- (d) a niece or nephew, or
- (e) any other person standing nearest in blood relationship to the individual in accordance with section 71(2) of the Succession Act 1965 (No.27 of 1965).

9.6.10 The Regulations provide for a potential right of access to “the” next of kin. The Regulations, as amended by Regulation 11 of S.I. 558 of 2016\*\*, provide that, where two or more paragraphs of the definition of next of kin would be applicable (i.e. paragraphs (a) to (e) in Regulation 8 – see above), the paragraph that, alphabetically, is the first in order shall alone be regarded as being applicable. The amended Regulations\*\* also provide that, if two or more persons fall within that paragraph, each of them shall be regarded as next of kin of the particular individual.

\*\*While S.I. 558 of 2016 was revoked by S.I. 53 of 2017, this was without prejudice to Regulation 11 of those Regulations.

### *Spouse “or” Next of Kin*

9.6.11 The 2016 Regulations refer, at Regulation 7(b), to the requester who “is the spouse or the next of kin” of the individual. The Commissioner considered the equivalent provision under the 2009 Regulation and found that both the spouse and the next of kin had a potential right of access.

Example: In Case 140320 the applicant sought access to the records relating to his deceased father. The deceased person's spouse was also alive. The Health Service Executive (HSE) refused the applicant's request on the basis that the deceased person's spouse took priority over the applicant. The Commissioner considered whether the 2009 Regulations provided a potential right of access to either the spouse or the next of kin, or whether it provided for a potential right of access to both types of requester. He considered whether a potential right of access was afforded to the next of kin only where there was no surviving spouse. He found that there was nothing in the 2009 Regulations to suggest this to be the case. He found that the Regulations clearly stated that “the spouse or the next of kin” may be entitled to access, subject to the various conditions set out in article 4(1)(b)(iii) of the Regulations. He found that both the spouse and the next of kin had a potential right of access under article 4(1)(b)(iii) of the 2009 Regulations.

### *The Public Interest*

9.6.12 It is important to note that even if a requester is the spouse or the next of kin of the requester within the meaning of the Regulations, decision makers must still consider whether, having regard to all the circumstances, the public interest (including the public interest in the confidentiality of personal information) would on balance be better served by granting the request than by refusing it.

9.6.13 The Guidance published by the Minister refers to factors to be taken into consideration in deciding if release is appropriate to persons in this category (spouse or next of kin). Factors referred to in the Guidance include:

- the confidentiality of personal information
- would the deceased have consented to the release of the records to the requester when living?
- has the person outlined arrangements in his or her will or other instrument in writing consenting to release of personal records?
- would the release damage the good name and character of the deceased?
- the nature of the relationship of the requester to the deceased and the circumstances of the relationship prior to the death of the deceased
- the nature of the records to be released
- can the requester obtain the information they seek without accessing the records of the deceased?
- any other circumstances relevant to the request as set out by the requester.

The Guidance also refers to consultation in relation to the records.

9.6.14 The Regulations provide that a request **shall** be granted in certain cases where the individual to whom the record relates is dead. The Commissioner takes view that it is plain from the Regulations, which refer to “all the circumstances”, and from the factors specified in the Guidance produced by the Minister, that such circumstances and matters, where relevant, cannot be excluded solely on the basis that they are not public interest factors.

9.6.15 The Commissioner also considers that, in having regard to the circumstances when considering where the balance of the public interest lies, it may be reasonable to consider the reasons why a request was made.

Example: In Case 150053 the applicant had concerns relating to the capacity of her deceased brother for some years prior to his death in 2014. She argued that access was required to his medical records to determine whether or not any challenge should be made to transactions that he may or may not have been involved in prior to his death, specifically in the period 2000 to the date he was made a Ward of Court. The Commissioner stated that the prohibition on taking account of the motivation of a requester is not absolute in that it is subject to the provisions of the FOI Act, one of which was the provision at what was then section 28(6) of the FOI Act 1997 (now section 37(8) of the 2014 Act) regarding access to records of a deceased person. The Commissioner stated that the 2009 Regulations made under section 28(6) of the Act required that regard must be had to "all the circumstances" when a decision maker was considering whether the public interest would on balance be better served by granting the request of a spouse or next of kin. He stated that it may well be reasonable, in having regard to the circumstances when considering where the balance of the public interest lies, to consider the reasons why the request was made in the first place.

## **10.0 Records of a Particular Nature - Complaints, Allegations and Investigations**

10.1.1 Where a complaint has been made to an FOI body by an individual, information about the individual who made the complaint may be personal information relating to that individual.

Example: In Case 160060 the Commissioner found that the name and email address of a complainant who had made a complaint against the applicant was personal information. The Health Service Executive stated that it considered that this information was given to it in confidence. The Commissioner noted that the HSE considered the complainant's identity to have been given in confidence as opposed to the details of the complaint made. The Commissioner was of the view that it was reasonable for the complainant to have understood that his/her identity would be treated as confidential, as opposed to the details of the complaint itself. He was satisfied that the name and email of the complainant consisted of the personal information of that individual for the purposes of the FOI Act.

10.1.2 Where allegations are made regarding the conduct or behaviour of an individual, the information about the individual against whom the allegation has been made may be personal information relating to the individual concerned.

Example # 1: In Case 150099 the applicant made a request to the Nursing & Midwifery Board of Ireland for access to the complete file relating to a complaint she made about a named nurse. The Commissioner noted that the records had their background in a complaint of alleged misconduct made by the applicant against a specific nurse. He was satisfied that the records clearly related to the nurse's employment or employment history, and that correspondence from other medical professionals speaking on the nurse's behalf contained the views or opinions of those persons as to the nurse's character. He was satisfied that the information in the records relating to the nurse fell within the definition of personal information in the Act. While section 2 of the Act provides an exception to the definition of personal information, i.e where the individual "is or was a service provider" to a public body, he was satisfied, given the nature of the information at issue, that the exceptions did not apply.

Example # 2: In Case 150450 a prisoner complained that the applicant, a prison officer, assaulted him. The Irish Prison Service carried out an investigation into the complaint. Subsequently, the applicant requested access to all records relating to the complaint. Having carefully examined the contents of the complaint file, the Commissioner was satisfied that, by its very nature, it contained information that was personal to both the applicant and the prisoner, and that therefore the information could be appropriately described as joint personal information, as the release of information relating to the applicant would also involve the disclosure of personal information relating to the prisoner.

### **Information Known to the Requester**

10.1.3 It may well be the case that various pieces of third party personal information in the records are known to a requester. However, this does not change the fact that such information may be exempt from release under the FOI Act. The fact that the

requester may have created, or may have been sent, some of the records concerned does not mean that s/he necessarily has any entitlement to them under FOI.

### Fair Procedures

10.1.4 A requester against whom an allegation has been made may, when seeking access to records relating to the allegation, argue that fair procedures require that s/he be granted access to the records. Under section 37, this argument may arise in the context of section 37(5)(a) and a consideration of the public interest.

10.1.5 The Commissioner takes the view that the recognition of a public interest in promoting procedural fairness through FOI is understood as an acknowledgement that the public interest in openness and accountability is entitled to significant weight when the constitutional rights of individuals may be affected by the actions of FOI bodies. In the case of *FP v The Information Commissioner* (referred to above) the High Court held that the remedy for any decision arising by reason of unfair procedures lies by way of judicial review.

10.1.6 The Commissioner takes the view that the question of whether an applicant should have access to information in order to pursue a remedy or some other form of redress is a matter for the courts. In *FP v The Information Commissioner* (referred to above) McDermott J stated:

“[T]here are extensive legal remedies and procedures available in civil and criminal proceedings to ensure that legally admissible, discoverable or disclosable materials are made available to the parties and to the court in the course of civil and criminal proceedings. In my view, it would require a legislative change to permit the right of access to records as a matter of course to persons claiming to be falsely accused of child sexual abuse or any other crime.”

10.1.7 In *FP v The Information Commissioner* (referred to above), the High Court also held that the Commissioner’s determination that he does not have authority to investigate complaints against public bodies or to act as an alternative dispute mechanism with respect to actions taken by them is correct.

### Malice

10.1.8 Occasionally, it may be argued that personal information or joint personal information should be released where the information comprises malicious allegations against the requester. The Commissioner takes the view that even if the information about the requester is not “the truth” or may be regarded as having been made for a malicious purpose, the information may still be personal information.

10.1.9 In *FP v The Information Commissioner* referred to above, McDermott J stated:

“This court is not satisfied that the issue of malice as raised ... is to be regarded as central to or determinative of the issue of access to records. The motivation for or validity or truthfulness of any allegation is a matter to be pursued by other forms of remedy.”

### Identity of Person who Provided Information in Confidence

10.1.10 It is also important to bear in mind that other provisions of the FOI Act may be relevant when considering records relating to complaints or allegations. For example, section 42(m) provides that the FOI Act does not apply to a record relating to information whose disclosure could reasonably be expected to reveal, or lead to

the revelation of, the identity of a person who has provided information in confidence in relation to the enforcement or administration of the law to an FOI body.