

Office of the Information Commissioner

# Guidance Note

Freedom of Information Act  
2014 – Section 9: Amendment  
of Records relating to Personal  
Information

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## **Introduction**

The Information Commissioner has prepared this Guidance Note in relation to section 9 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 9 of the Act by the Commissioner. It is intended to provide a brief 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 9: Amendment of Records - Overview**

1.1.1 Section 9 provides a mechanism for the amendment of records held by FOI bodies which contain personal information relating to the applicant. It provides for the amendment of such records where the personal information in the record is incomplete, incorrect or misleading.

### **Section 9(1)**

1.1.2 An applicant seeking to exercise the right of amendment under section 9 must show the Commissioner that the information which is the subject of the application is on the balance of probabilities, incomplete, incorrect or misleading. The information concerned must be personal information relating to the applicant within the meaning of the FOI Act.

1.1.3 An amendment of a record under section 9 may be made in the following ways:

- (a) by altering it
- (b) by adding a statement, or
- (c) by deleting the information.

### **An Application under Section 9**

1.2.1 An application under section 9 must, in so far as is practicable, specify the record and the amendment required and must include appropriate information in support of the application (section 9(2)). It must also be expressed to be an application under section 9 and contain sufficient particulars so as to enable the record to be identified (section 9(10)).

### **Handling of a Section 9 Application by an FOI body**

1.3.1 The requirements which an FOI body must meet in acknowledging receipt of an application under section 9 are set out in section 9(8). An FOI body must also make its decision not later than four weeks after receipt of the application (section 9(3)).

1.3.2 Where the application is refused, the notice of the decision given by the FOI body must specify certain details (section 9(9)) and must include certain particulars (section 9(4)(a)(ii)). Also, with certain exceptions, the FOI body must attach to the record concerned the application, or a copy of it, or a notation that the application has been made (section 9(4)(a)(i)).

1.3.3 Where a record is amended under section 9, the FOI body must take all reasonable steps to notify certain persons / bodies of the making of the amendment (section 9(5)).

1.3.4 In certain circumstances, an FOI body must also offer assistance to an individual in the preparation of an application under section 9 (section 9(11)).

### **Applications by Parents/Guardians or in relation to Deceased Persons**

1.4.1 Under section 9(6) the Minister may provide by regulations for the making of an application by the parent or guardian of an individual (if the individual belongs to a specified class) or, where the individual to whom the information relates is dead, by a member of a class of persons specified. The Freedom of Information Act 2014 (Sections 9(6), 10(6) and 37(8)) Regulations 2017 (S.I. No 53 of 2017) specify the relevant classes of individuals. See further below.

### **Frivolous or Vexatious Applications**

1.5.1 An FOI body may refuse to grant an application under section 9 where, in the opinion of the body, the application is frivolous or vexatious or forms part of a pattern of manifestly unreasonable applications (section 9(7)). See further below.

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

1.6.1 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.

1.6.2 Section 9 is similar to, although not the same as, section 17 of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 17 was considered under the FOI Act 1997 (or under the FOI Act 1997 as amended) in so far as those decisions or parts of the decisions remain relevant. To simplify matters for the reader, all references to section 17 in those decisions have been replaced by the equivalent section 9 provision of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (\*).

1.6.3 Reference may also be 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 the equivalent provisions under the FOI Act 1997 (or the FOI Act 1997 as amended), those provisions are replaced with the relevant provision in the 2014 Act. Again, where this occurs, such references are denoted by an asterisk (\*).

1.6.4 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)

1.6.5 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. 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).

## **2.0 Section 9(1) and (2) – Amendment of Records**

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

**9 (1)** Where personal information in a record held by an FOI body is incomplete, incorrect or misleading, the head of the body shall, on application to him or her in that behalf, in writing or in such other form as may be determined, by the individual to whom the information relates, amend the record—

- (a) by altering it so as to make the information complete or correct or not misleading, as may be appropriate,
- (b) by adding to the record a statement specifying the respects in which the body is satisfied that the information is incomplete, incorrect or misleading, as may be appropriate, or
- (c) by deleting the information from it.

**(2)** An application under *subsection (1)* shall, in so far as is practicable—

- (a) specify the record concerned and the amendment required, and
- (b) include appropriate information in support of the application.

2.1.1 Section 9 allows for the amendment of records held by an FOI body in cases where personal information in a record is incomplete, incorrect or misleading.

2.1.2 An applicant seeking amendment of a record under section 9 should show, firstly, that the information concerned constitutes personal information and, secondly, that the information is incomplete, incorrect or misleading.

2.1.3 Where the information has been shown to be "incomplete, incorrect or misleading", the next step is to decide what form the amendment should take. Section 9 identifies three possible forms of amendment:

- altering the record
- adding a statement specifying the respects in which the information is incomplete, incorrect or misleading or
- deleting the information.

### **The Onus of Proof and the Standard of Proof**

2.2.1 The FOI Act is silent on the question of where the onus of proof lies in section 9 cases. The Commissioner takes the view that, in the absence of any express statement in the FOI Act, the onus of proof lies on the applicant as the party asserting that the information is incomplete, incorrect or misleading.

2.2.2 The Act is also silent as to the standard of proof which should apply in such cases. The Commissioner takes the view that the standard of proof required in such cases is that of "the balance of probabilities". It follows that an applicant, seeking to exercise the right of amendment under section 9, must show the Commissioner that the information which is the subject of the application is, on the balance of probabilities, incomplete, incorrect or misleading.

2.2.3 It should also be noted that section 9(2)(b) requires that an application "shall, in so far as is practicable ... include appropriate information in support of the application."

Example: In Case 120073 the applicant sought amendment of a record of allegations made against him which was held by the Health Service Executive. He provided the Commissioner's Office with his own written statement regarding the events underlying the allegations. He also suggested that relevant evidence might be found by contacting the Garda Síochána and the St. John of God Centre in Stillorgan, Dublin and indicated that "other official records" would be "dealt with later". The Commissioner found that, despite having been given ample opportunity in which to do so, the applicant had not produced any evidence to show that the record did not, in substance, accurately reflect the allegations that had been made against him.

2.2.4 The Commissioner does not consider that there is a requirement to provide a particular level of evidence in all cases. He takes the view that the amount of information to be provided to support a claim and whether or not it is capable of being verified, and by what means, will vary depending on the type of record at issue. However, the onus is on the applicant to satisfy the Commissioner that, on the balance of probabilities, the information is incomplete, incorrect or misleading.

Example: In Case 98158 the Commissioner found that in approaching the question of amending the record – an estimate of living expenses prepared by an accountant – a number of considerations were relevant. Firstly, the information concerned was an estimate. He found that an estimate of living expenses for a particular period should not be confused with the actual amount of the living expenses. He took the view that it would have to be shown that there was some flaw in the method used to arrive at the original estimate which made the resultant figure unsuitable for the purpose for which the estimate was being made. Examples of such flaws given by the Commissioner were: an arithmetical error, a serious error in the assumptions underlying the estimate which undermined the basis for the estimate completely or the use of a methodology which was clearly unsuitable for the purpose for which it was being used. The Commissioner also found that the accountant's approach to the estimate had to be understood by reference to the exercise in which he was then engaged. The accountant was adopting a negotiating stance in anticipation of a later meeting with the Inspector of Taxes. The Commissioner found that the estimate had to be seen for what it was - a figure adopted for negotiation purposes, carrying no particular claims to accuracy. He was not satisfied that the figure could be said to be incomplete or incorrect, nor was he satisfied that the estimate was misleading.

2.2.5 The Commissioner does not see his role, arising from section 9, as being to conduct his own comprehensive enquiry as to the accuracy or completeness of records held by a public body. Rather, he must have regard to the evidence actually provided by the applicant, and to any rebutting evidence put forward by the FOI body, and make a decision on that basis.

2.2.6 In requiring the applicant to provide evidence that the information in a record is actually incomplete, incorrect or misleading, the Commissioner is not making any prior judgement as to the accuracy of a record. The fact that an applicant fails to

provide sufficient evidence to enable the Commissioner to conclude that the information in a record is incomplete, incorrect or misleading will cause the records to remain undisturbed; but this does not carry any judgement on the part of the Commissioner that the record is, in fact, complete, correct and not misleading.

Example: In Case 120146, while the Commissioner considered it possible that references to a certain dosage of oxygen could well have been misleading, he found that there was not sufficient evidence before him to conclude, on the balance of probabilities, that they were, in fact, incomplete, incorrect or misleading. Accordingly, he considered that he had no option but to find that the Health Service Executive was justified in its decision to refuse the request for this amendment.

### A Mere Statement of Contrary Opinion not Sufficient

2.2.7 The Commissioner takes the view that he would not be justified in directing that an FOI body amend its records on the sole basis of contrary statements or opinions - however strongly held - by the person seeking the amendment. Thus, the applicant's assertions alone will not form sufficient evidence to warrant an amendment, in the absence of supporting evidence.

Example: In Case 99260 the applicant sought to have two records which contained assessments of her performance deleted from her personnel file. Her submissions provided the Commissioner with a clear indication as to the strength of her feelings that the opinions expressed in the assessments were flawed. However, the Commissioner was unable to identify anything in those submissions which would have led him to the conclusion that the information which she sought to have deleted was "incomplete, incorrect or misleading" information. While the applicant might not have agreed with the judgements expressed in the records, the Commissioner found that the mere statement of a contrary opinion by her, was, of itself, an insufficient basis for concluding that the information should be amended under section 9\* of the Act.

2.2.8 In a number of cases where conflicting accounts of events have been provided, the Commissioner has found that, on the balance of probabilities, the applicant had not provided sufficiently strong evidence to support the application for amendment.

Example: In Case 000072 the applicant sought the amendment of three performance reports relating to him. Much of the evidence provided by the applicant in support of his case was anecdotal and there were clear contradictions between that evidence and the responses given by the FOI body. In the circumstances, the Commissioner found that it would not be appropriate for him to accept one party's version of events to the detriment of the other unless there was compelling evidence which required him to do so. He found that the question he had to consider was whether the evidence which the applicant had submitted to support his arguments was sufficient to satisfy him that the information contained in the reports was, on balance, incomplete, incorrect or misleading. Amongst the evidence considered by the Commissioner were examples given by the applicant of instances which, in the applicant's view, showed that he displayed initiative during his career. However, the Commissioner was not satisfied that the examples given constituted substantive evidence which would allow him to

conclude that an opinion concerning the applicant's alleged lack of initiative should be amended. He found that he had not been presented with sufficient evidence to enable him to conclude that the comments were incomplete, incorrect or misleading.

2.2.9 In this context, it is also important to note that, with certain exceptions, in cases where a section 9 application is refused, the FOI Act requires the FOI body to attach to the record concerned the application for amendment, a copy of the application or a note indicating that it has been made. This in itself is quite significant as it alerts all future users of the record that aspects of its contents are disputed by the applicant.

### **Personal Information**

2.3.1 The information concerned must be personal information within the meaning of the FOI Act. Personal information is defined in section 2 of the Act as follows:

"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,

In addition, the definition of personal information contains a list of fourteen specific types of information, including the views or opinions of another person about the individual.

2.3.2 If the information concerned is not personal information relating to the applicant, a right of amendment under section 9 does not exist.

Example # 1: In [Case 100205](#) the applicant sought the amendment of the term "Interview Board" to "Selection Panel/Committee". However, the Commissioner found that the description did not comprise the personal information of the applicant, in that it was a description given by the Head of the Public Body to the group with responsibility for determining which Public Body employee obtained a Post of Responsibility. Thus, he found that it was not capable of amendment under section 9\*.

Example # 2: In [Case 130257](#) the Commissioner found that certain comments in a report were ascribed to all of the Motor Transport Drivers serving in a section, of which the applicant was one. 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 and that, accordingly, section 9\* of the FOI Act might be invoked in relation to the personal information.

2.3.3 The Commissioner considers that the onus of proof is on the applicant to provide evidence to support the contention that the information which is the subject of the application is personal information.

Example: In Case 130303 the Commissioner was satisfied that the applicant had not provided evidence that the relevant information was personal to him. The record which the applicant sought to have amended related to the scheduling of interviews which were part of the assessment of students on a course in UCD. The applicant was a student on the course. The applicant contended that he was affected personally by the scheduling of the interviews. However, the Commissioner considered the definition of personal information in section 2\* of the FOI Act and found that the information in the statements which the applicant sought to amend in relation to the scheduling or rescheduling of interviews did not identify any person and was therefore not "information about an identifiable individual" as provided for in section 2\* and was not captured in the [then twelve] categories of personal information listed in section 2\* of the Act.

## **Opinions**

2.4.1 The definition of "personal information" includes "the views or opinions of another person about the individual". Thus, the right of amendment of personal information includes the right of amendment of opinions that are incorrect, in addition to the right of amendment of incomplete or misleading opinions.

2.4.2 The Commissioner's view, however, is that section 9 does not permit the decision maker or the Information Commissioner to substitute a different opinion for the one in respect of which the application under section 9 is made.

2.4.3 The Commissioner has not presented an exhaustive list of the circumstances in which an opinion might be found to be "incomplete, incorrect or misleading". However, he would expect an applicant to satisfy him that the opinion is somehow flawed, by reason of the total inadequacy of the factual information underlying it, or because of the existence of bias or ill will, or incompetence, lack of balance or necessary experience in the person forming the opinion, or because of some other particular factor which renders the opinion dangerous to rely upon.

Example: In Case 090318 the applicant sought the amendment of certain comments in her medical records which related to a psychiatric referral. Following contact from the Commissioner's Office, the HSE agreed to delete the words "Known for" and to insert "Suspected of" in respect of a comment regarding the insertion of foreign bodies into the applicant's knee where the medical records seemed to show that the applicant was suspected of doing so. However, the Commissioner found that no further amendment of the records was required. She found that Mr. Y, a qualified consultant orthopaedic surgeon, formed the opinion that the applicant may have inserted foreign bodies into her knee and that his opinion was based on the circumstances of her injury and also the circumstances of her previous admission to Hospital. Based on his opinion of the matter, Mr. Y decided to refer the applicant for a psychiatric consultation. The Commissioner found that a qualified consultant orthopaedic surgeon must be presumed to be competent to form an opinion as to the probable cause of the injuries he was treating. She also emphasised that Mr. Y did not purport to make any psychiatric diagnosis of the applicant; rather, he merely referred her for a psychiatric consultation.

2.4.4 Generally speaking, the Commissioner would be slow to disturb the marks awarded and comments made by interview boards in the absence of strong evidence that such decisions or comments are somehow flawed.

Example: In Case 020362 the Commissioner found no reason to believe that an interview board's decision to award marks to the applicant and certain comments in a statement of reasons of the Central Statistics Office were based on factors other than its interview with the applicant and her application form. He accepted that there is a degree of judgement and subjectivity in the decisions of any interview board. He said that, generally speaking, he would be slow to disturb the marks awarded and comments made by interview boards in the absence of strong evidence that such decisions or comments are somehow flawed. Having examined the records concerned, the submissions of the CSO and the evidence provided by the applicant, he found that she had not shown that the marks awarded or opinions expressed in the statement of reasons were incomplete, incorrect or misleading.

### **Incomplete, Incorrect or Misleading**

2.5.1 It is useful to bear in mind that it is the information, rather than the record, which must be incomplete, incorrect or misleading before the right of amendment may be exercised

2.5.2 There is an element of overlap between the three terms – incomplete, incorrect or misleading - in the sense that information which is incomplete or incorrect may be misleading.

2.5.3 The Commissioner takes the view that a decision as to whether information is incomplete, incorrect or misleading is an objective exercise.

Example: In Case 110128 a record, which related to an investigation by the Health Service Executive (HSE) in connection with fraudulent claims, recorded the applicant's username (which comprised her first initial and her surname) as having input a number of the claims based on the computer used. However, the HSE accepted that the fraudulent information was not entered by the applicant. During the course of the review, the HSE agreed to amend the record by replacing the applicant's username with the computer's identification number, known as an MSD number. The HSE confirmed that MSD numbers were allocated to particular PCs and not to individual staff members. The Commissioner found that it was a matter of undisputed fact that the entries at issue were entered from the computers identified by the relevant MSD number at the times and dates shown on the record at issue. In his view, the amended record simply recorded this fact and did not contain personal information relating to the applicant.

2.5.4 Personal information in a record is not incomplete merely because the record does not contain all the information which the applicant might like it to contain. The Commissioner takes the view that the word incomplete in section 9 is used in the sense of imperfect or defective or lacking certain requisite items or details. In deciding whether the information can be so described, regard has to be had to the purpose for which the information is held. It can be said to be incomplete if it lacks certain requisite details i.e. details required by the circumstances in which the record

is created or required for the uses to which the record is put or which might put a different complexion on the information.

Example: In Case 120073 the Commissioner found that the fact that allegations might not have been recorded in a verbatim manner did not necessarily mean that a record was incomplete, incorrect or misleading for the purposes of section 9\* of the FOI Act. The applicant's primary objection to the record at issue seemed to have been, not the facts underlying the allegations themselves, but rather the understated nature in which the allegations were recorded by Ms. Y. The applicant believed that his sister was the source of the allegations and that the nature and number of the allegations were far more excessive than what was reflected in the record. The inference was that Ms. Y deliberately understated the allegations in writing in order to protect herself and the applicant's sister from legal action for the manner in which the applicant believed that they had violated his Constitutional and human rights. The Commissioner found that the applicant had not produced any evidence to show that the record did not, in substance, accurately reflect the allegations that were made against him.

2.5.5 In deciding whether information is incomplete, incorrect or misleading, the nature of the information and the purpose for which it is held is relevant.

Example # 1: In Case 98158 the information which the applicant sought to amend was an estimate of living expenses in a statement of affairs submitted to the Revenue Commissioners by an accountant. The Commissioner found that the estimate had to be seen for what it was - a figure adopted for negotiation purposes, carrying no particular claims to accuracy. In the circumstances, the Commissioner was not satisfied that the figure could be said to be incomplete or incorrect. The Commissioner also found that the accountant had explained his approach in sufficient detail as to enable a reader of the document to understand the basis on which he arrived at the estimate. In the circumstances, and notwithstanding doubts which the Commissioner had about the approach adopted, he was not satisfied that the estimate was misleading.

Example # 2: In Case 100210 the Commissioner found that regard had to be had to the purpose for which the information was held. The records at issue were on the social work file of the applicants' son. The Commissioner found that, while there were some differences between the applicants' account of what happened and the social worker's summary of events, this did not necessarily render the report incomplete, incorrect or misleading. She also found that, while the records may not have contained the information which, in the applicants' view, they should have contained, this did not take away from the fact that the information that was contained was collected for the purposes of the protection of children. The applicants did not suggest amending the records to correct existing information or include additional information, but instead contended that the records should be deleted in their entirety. The Commissioner was not satisfied that it was appropriate to direct that the records should be deleted on the basis that they did not contain information that in the applicants' view should be included. According to the HSE, the records in the case were held for the purpose of child protection work and it had a policy to retain all records concerning allegations in relation to children. The Commissioner found that the requirement to attach to the record a copy of the application ensured that any future reader of the file would be in a

position to read the records created by the HSE, along with the applicants' own comments as to the accuracy of the records, and in this way come to a reasonable conclusion using his or her own judgement on the matter.

2.5.6 The context of the record may be relevant in determining the nature of the information which is at issue and whether it is incomplete, incorrect or misleading.

Example: In Case 031100 the applicant sought the amendment of a paragraph in a letter in which the Revenue Commissioners denied that they had been in violation of their statutory powers in relation to the applicant. The Commissioner found that for a right of amendment of the record to exist, the applicant had to show that the paragraph was not, on the balance of probabilities, an accurate reflection of the Revenue's position. She found that the record in this case did not purport to be a factual determination as to whether or not the Revenue Commissioners ever breached the applicant's statutory rights. Rather, it stated that the Revenue Commissioners denied ever having violated those rights. The question of whether or not the Revenue Commissioners actually violated the applicant's statutory rights was not a valid consideration in determining whether the statement, that the Revenue Commissioners' position at the date of the creation of the record was to deny ever having done so, was incomplete, incorrect or misleading.

### **Medical Records**

2.6.1 It is not the role of the Commissioner to investigate complaints about medical treatments or to consult with clinical experts in order to make findings in relation to, for example, what medicines should be administered to patients. His role does not extend to examining clinical judgement. Neither is it his role to conduct a comprehensive enquiry as to the accuracy or completeness of medical or other records. Rather, he must have regard to the evidence actually provided by the applicant, to any rebutting evidence put forward by the FOI body and make a decision on that basis.

Example: In Case 140021 the Commissioner affirmed the HSE's refusal of an application for various amendments of medical records, including a note contained in the applicant's medical notes. The applicant disputed the accuracy of a sentence in a very brief note regarding a telephone conversation that the doctor in a clinic had had with the applicant's GP. The Commissioner found that the comments outlined the doctor's understanding of what the GP would discuss with the applicant in due course. She stated that, while it might be the case that the applicant's GP did not have that discussion with him, this did not of itself render the doctor's note to be inaccurate. Thus, she found that she had no basis on which to consider the sentence at issue to be incomplete, incorrect or misleading.

2.6.2 The Commissioner does not consider that medical notes must contain a word for word account of what was said between medical staff and patient, but rather that they are intended to contain an overall summary of the relevant consultation, treatment etc. He has acknowledged that there are inherent difficulties in altering contemporaneous medical notes. The evidential value of the record and the extent (if any) to which any decisions or other actions would be potentially affected by the information in the original record are also relevant concerns.

2.6.3 Nevertheless, the Commissioner has, in the past, found the evidence presented by an applicant was sufficient to show that, on balance, information in medical records was incomplete, incorrect or misleading.

Example: In Case 120146 the applicant sought, among other things, the amendment of a note in the medical records of her deceased partner reflecting the sequence of events around the transfer of her partner to a nursing home. The applicant contended that the note did not accurately reflect the events and timing around the transfer. The Commissioner found that the applicant had supplied sufficient evidence to show that, on the balance of probabilities, arrangements for the transfer were made before the family members visited the patient. The evidence supplied included evidence of contact made with the nursing home and the ambulance service regarding the transfer of the patient (including phone and fax records) and statements made by a number of relevant personnel.

### **Methods of Amendment**

2.7.1 Where a record contains personal information which is incomplete, incorrect or misleading there are three methods for effecting the amendment provided for by section 9:

- (i) by altering it so as to make the information complete or correct or not misleading, as may be appropriate,
- (ii) by adding to the record a statement specifying the respects in which the body is satisfied that the information is incomplete, incorrect or misleading, as may be appropriate, or
- (iii) by deleting the information from it.

2.7.2 The Commissioner takes the view that directing the amendment of, or deletion of information from, the records of an FOI body is a serious step and has particular implications for the evidential value of records. Interference with the integrity of a record of an FOI body is not something to be decided upon lightly.

2.7.3 The Commissioner also takes the view that amendment should, as far as possible, not interfere with the historical accuracy of records, with the way the contents of a record serve to establish facts or with the way the contents of a record explain subsequent actions and decisions of public bodies.

2.7.4 In determining the matter, consideration should also be given to possible future use of the record and to the effect of the form of amendment on the future usefulness of the record. Also, the views of the author of the record may need to be taken into account.

2.7.5 As stated above, the Commissioner takes the view that a decision as to whether information is incomplete, incorrect or misleading is an objective exercise. The fact that the existence on record of certain personal information may have certain consequences is a separate matter and not one which should influence the decision as to whether that information is incomplete, incorrect or misleading. On the other hand, where personal information in a record is found to be incomplete, incorrect or misleading and where the continued existence of the record may have

certain consequences (for example, may cause harm), this is a consideration in deciding which of the three forms of amendment of the information should be adopted.

2.7.6 Determining the appropriate form of amendment is not always clear cut and requires careful consideration of the facts and circumstances of the case, including the context and purpose of the record.

Example #1: In Case 020220 the Commissioner found that on the balance of probabilities information in a record which appeared as a statement of fact that a stab wound of the applicant was self inflicted was incorrect and misleading. He found that without the deletion of the incorrect information from the record there was the potential for a significant adverse effect on the applicant in that reliance on incorrect information could impact on future medical treatment. However, he also found that information in another record showed that, at the time of treating the applicant, the medical personnel queried the manner in which the wound occurred and by whom it was inflicted. He found that, to alter that record would mean no record would remain of what was in the mind of the medical personnel at that time. Given that the piece at issue did not purport to be a statement of fact, he found that the correct approach was to add to the record a statement which set out the manner in which it was incorrect or misleading

#### Alteration

2.7.7 The Commissioner takes the view that the alteration of a record by anyone other than its author creates a certain artificiality about the record. It ceases to be the same record as it was before. Therefore, any alteration should make it clear that the record has been altered as a result of an application under the FOI Act. Because of the evidential value of the altered record, the date of the amendment should be clear on the record.

2.7.8 In many cases, an alteration of the record which leaves visible the original incomplete, incorrect or misleading information but clearly marked as incomplete, incorrect or misleading and with the addition of information to set the record right, may be most appropriate.

Example: In Case 140039 the Commissioner directed that the method of amendment of two records should be to strike through, but leave visible, the information he had found to be incorrect or misleading and to add the amended text to each record. He found that a sentence contained in one record stating "Methotrexate was given on 8/1/13, at the patients request to manage the ectopic pregnancy" should be amended to read "Methotrexate was given on 8/1/13, under the medical guidance of [Dr Y], to manage the ectopic pregnancy". In relation to the other record, he found it should be amended by replacing the words "A diagnosis of pregnancy of unknown location was made" with "A diagnosis of a likely ectopic pregnancy was made".

#### Addition of a Statement

2.7.9 The Commissioner considers that the addition of a statement specifying the respects in which the body is satisfied that the information is incomplete, incorrect or misleading may be appropriate where more substantial defects exist in the information or where the medium on which the record is stored does not lend itself to

alteration. In such cases, care must be taken that the additional record will maintain its link with the original record and that the composite record is the one used for any future consultation.

2.7.10 The key issue in adding a statement to the record is whether the statement adequately identifies the respects in which the personal information in the record is "incomplete, incorrect or misleading". Whereas it may be helpful to know why the information is "incomplete, incorrect or misleading", it is not the purpose of the section 9 exercise to record these reasons.

Example: In Case 030023 the Commissioner found that certain parts of a statement which the Department of Health & Children decided to add to a record on the applicant's personnel file represented clear-cut and valid expressions of the respects in which the personal information in the record was "incomplete, incorrect or misleading". In relation to other parts of the statement, the Commissioner found, with one qualification, that while they represented background information, it was nevertheless information which elucidated in an important way the respects in which the personal information was "incomplete, incorrect or misleading". However, he found that certain information was unnecessary and irrelevant in the context of a work assessment intended to reflect the opinion of the official to whom the applicant actually reported at the time and that such information should be deleted from the statement.

2.7.11 If a statement is added to the record by an FOI body and the matter is appealed to the Commissioner, it is only if the statement is found to be less than adequate that it becomes necessary for the Commissioner to consider what alternative form the statement might take.

#### Deletion

2.7.12 The Commissioner's view is that the deletion of information from a record, on foot of an application under section 9 is not something to be undertaken lightly, given its implications for the evidentiary value of the record concerned.

2.7.13 It should be noted that it is the information which is being deleted, not the record itself. However, it is possible that where the contents of a record consist entirely of incomplete, incorrect or misleading information, then the deletion of the information will be equivalent to the destruction of the record.

2.7.14 Without wishing to lay down an inflexible rule on this point, the Commissioner considers that deletion of incorrect information from a record is only justified in cases where the actual or potential adverse effect on the applicant is significant and alteration of the record or the addition of a statement will not suffice to remove that effect.

Example # 1: In Case 080270 the Commissioner found that certain sentences relating to, or based on conclusions regarding, a police clearance were misleading. She found that the information was not supported by the factual information underlying it and that the potential adverse effect on the applicant was significant. She found that deletion of the sentences was justified.

## **Complaints, Appeals and the Purpose of Section 9**

2.8.1 The Commissioner takes the view that the purpose of section 9 is very specific and care must be taken not to allow it become a vehicle for purposes other than those evident from the FOI Act itself. It is outside the remit of the Information Commissioner to adjudicate on how FOI bodies carry out their functions generally. He does not have the authority to investigate complaints against FOI bodies.

2.8.2 The Commissioner also takes the view that section 9 does not provide an alternative mechanism for resolving disputes regarding the administrative actions of FOI bodies or an alternative appeal mechanism against determinations by a properly appointed authority.

2.8.3 The Commissioner considers that a determination by a properly appointed authority cannot be deemed to be incomplete, incorrect or misleading if made by a properly appointed and authorised person and in the absence of a successful appeal as provided for by the appropriate legislation. (Such determinations may include, for example, a determination in relation to the entitlements of an individual as a beneficiary under the Social Welfare Acts, or a determination of the liability of an individual in respect of tax or duty payable.)

Example: In Case 050102 the Commissioner considered a section 9\* application involving academic examination results. She found that the Examination Appeals Committee was established by the University's Academic Council and was the properly appointed authority for addressing disputes arising from examination results. She found that the fact that a different assessment of the applicant's performance could be made by others did not provide a basis for amendment of the University's assessment under section 9\* of the FOI Act unless it was accepted through the appeals process established by the University's Academic Council that an error had been made. She also found that the applicant's dissatisfaction with the procedures followed by the Examination Appeals Committee did not render it inappropriate for her to consider the Committee as the properly appointed authority for addressing disputes arising from examination results.

## **Consequences of Amendment**

2.9.1 The FOI Act is silent as to how an amended record should be treated and as to the consequences of the amendment for the rights and liabilities of the applicant. The Commissioner's remit extends only to deciding whether the personal information is incomplete, incorrect or misleading and to deciding on the form of amendment, where appropriate. He has no role, as Information Commissioner, in determining what further action an FOI body ought to take in the light of an amendment to a record made under section 9.

2.9.2 The Commissioner takes the approach that, given that the FOI Act does not give him any powers in relation to the functions of FOI bodies, other than those powers in relation to the FOI Act itself, it is a matter for the FOI body to "carry through" the effects of the amendment to any subsequent rights or liabilities.

2.9.3 Should an FOI body fail to "carry through" the effect of an amendment, applicants may have other avenues of administrative or judicial review open to them. These could include various statutory appeals mechanisms, a complaint to the Ombudsman or recourse to the courts. Effectively, the amended information may form new evidence which may have to be considered by the reviewing authority for the purposes of determining the rights or liabilities of the applicant.

### **The Date of Creation of Records Sought to be Amended**

2.10.1 The Commissioner has found that the right of amendment can apply to a record created prior to the commencement of the FOI Act.

Example: In Case 98158 the Commissioner noted that the right of amendment applied to 'records held by a public body'. He took the view that, on the face of it, this was sufficient to cover records held by a public body regardless of the date of their creation. He also noted that, although the term "held by a public body" was not defined in the FOI Act, it was also used in section 6 of the FOI Act 1997\*\* and that it was clear that, as used in section 6 of the 1997 Act, the phrase was not confined to records created after the commencement of the Act. Furthermore, the right of amendment was confined to personal information. A requester has a right of access to a record relating to personal information about him or her (subject to any exemption in the Act) regardless of the date of creation of the record. The Commissioner found it consistent with the scheme of the Act that the right of amendment should also apply to records containing personal information, regardless of the date of their creation.

(\*\*Section 6 of the 1997 Act is similar to section 11 of the FOI Act 2014.)

### **Relationship between Right of Amendment and Right of Access**

2.11.1 An application for amendment of records is separate to a request for access to records. If records have been provided pursuant to an FOI request for access to records and amendment of those records is sought, this should be done by way of separate application to the FOI body concerned.

Example # 1: In Case 100114 the applicant requested records under the FOI Act from the Rotunda Hospital where she had been employed. She applied to have her records amended under section 9\* in her internal review letter to the Hospital. However, the Commissioner found that the scope of the review was confined to the records containing the information requested in her original FOI request (as subsequently clarified). The Applicant was advised that, if she wished to request the amendment of records under section 9\*, she should submit a new application to the Hospital.

Example # 2: In Case 100122 the applicant's original request to the Department of Social and Family Affairs stated that "I request a copy of this information so that I may have same corrected." The Commissioner was satisfied that the part of the applicant's request where amendment of information was mentioned was a statement as to why he wanted access to the record rather than a specific request to have his personal information amended. He did not consider section 9\* any further in the review. He indicated that it was open to the applicant to pursue a section 9\* amendment with the Department in a fresh FOI application.

2.11.2 Certain records containing personal information may be exempt. An individual may be refused access to such records and may not be in a position to show that the information is incomplete, incorrect or misleading. Section 9 does not give an applicant a right of access to an exempt record in order to make a section 9 application.

Example: In Case 98169 the applicant posed the question "How am I supposed to challenge something I am not allowed to view?". The Commissioner considered that the applicant's question highlighted the fact that records containing personal information are subject to certain exemptions and exclusions. He found that the effect of this was that, in certain circumstances, an individual may not be enabled to exercise the right to have personal information amended in accordance with the provisions of section 9\* simply because the record containing the information is exempt and, as a consequence, the individual is unable to establish whether the information is incomplete, incorrect or misleading.

2.11.3 In the same case 98169, the Commissioner accepted that circumstances could arise where a person who had not sought access to personal information under the Act, could become aware of the contents of records or the nature of information held about him/her by an FOI body. The Commissioner accepted that, in such circumstances and regardless of how the individual concerned became aware of the contents of the information, the right to apply to a public body for amendment of the information under section 9\* would still apply.

### **Records to which the Act does not Apply**

2.12.1 Section 42 of the Act provides that the Act does not apply to certain specified records. It follows that such records do not come within the scope of the Act and, thus, the right of amendment under section 9 does not apply.

2.12.2 Under the FOI Acts 1997 & 2003 a record available for inspection by members of the public or a record, a copy of which was available for purchase or removal free of charge by members of the public, were specified as records to which the FOI Act did not apply. Thus, the right of amendment of records under section 17 of the FOI Acts 1997 & 2003 did not apply to such a record. However, these records are now included in section 15(2) of the FOI Act 2014, which provides that access to such records may be refused on administrative grounds. The fact that section 15(2) applies to a record does not mean that the FOI Act does not apply to the record in question or that a right of amendment to the record under section 9 does not apply. Considerable caution should be taken with regard to any decision of the Commissioner under the FOI Acts 1997 & 2003 regarding the right of amendment of such records (i.e. records available for inspection, purchase or removal) as the decision would not represent the position under the FOI Act 2014.

### **3.0 Section 9(3), (4) and (5) - Grant or Refusal of the Application by an FOI Body**

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

**9(3)** The head concerned shall, as soon as may be, but not later than 4 weeks, after the receipt by him or her of an application under *subsection (1)*, decide whether to grant or refuse to grant the application and shall cause notice, in writing or in such other form as may be determined, of his or her decision and, if the decision is to grant it, of the manner of such grant to be given to the person concerned.

**(4) (a)** If the grant of an application under *subsection (1)* is refused, the head concerned shall—

(i) attach to the record concerned the application or a copy of it or, if that is not practicable, a notation indicating that the application has been made, and

(ii) include in the notification under *subsection (3)* particulars of—

(I) rights of review and appeal under this Act in relation to the decision to refuse to grant the application, and

(II) the procedure governing the exercise of those rights and any time limits governing such exercise.

**(b)** *Paragraph (a)(i)* does not apply in relation to a case in which the head concerned is of the opinion that the contents of the application concerned are defamatory, or the alterations or additions to the record concerned to which the application relates would be unnecessarily voluminous.

**(5)** Where a record is amended pursuant to this section, the FOI body concerned shall take all reasonable steps to give notice of the making of the amendment to—

(a) any person to whom access to the record was granted under this Act, and

(b) any other FOI body to whom a copy of the record was given,

during the period of one year ending on the date on which the amendment was effected.

**3.1.1** An FOI body must make a decision on a section 9 application not later than four weeks after receipt of the application. Notice of the decision and, if the decision is to grant the application, notice of the manner of the grant, must be given to the applicant.

**3.1.2** If the decision is to refuse the application, section 9(4) requires the FOI body to "attach to the record concerned the application or a copy of it or... a notation indicating that the application has been made ...".

Example: In Case 100210 the applicants had sought that the 'overall file record' on the social work file of their son be "expunged". The Commissioner affirmed the decision of the Health Service Executive to refuse the application to delete the file record. The Commissioner noted that in all cases where a section 9\* application is refused, the FOI Act requires the FOI body to attach to the file concerned a copy of the application for amendment which will contain the details and contentions put forward by the applicant. She stated that this in itself was significant as it alerted all future users of that file that aspects of its contents were in dispute and future users would have access to the views of the applicants. She commented that this requirement under the FOI Act ensured that any future reader of the file would be in a position to read the records created by the HSE,

along with the requester's own comments as to the accuracy of the records, and in this way come to a reasonable conclusion using his or her own judgement on the matter.

3.1.2 However, where the FOI body is of the opinion that the contents of the application are defamatory or that the alterations or additions to the record concerned would be unnecessarily voluminous, the requirement to attach the application (or a copy or a notation) does not apply.

3.1.3 Where a record is amended pursuant to section 9, subsection (5) requires the FOI body concerned to take all reasonable steps to give notice of the amendment to any person to whom access to the record was granted under the Act and to any other FOI body to whom a copy of the record was given, within the period of one year ending on the date on which the amendment was effected.

## **4.0 Section 9(6) - Making of Applications by Certain Individuals**

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

**9(6)** Notwithstanding *subsection (1)*, the Minister may provide by regulations for the making of an application under that subsection—

- (a) by the parent or guardian of an individual referred to in that subsection, if the individual belongs to a class specified in the regulations, or
- (b) in a case where such an individual is dead, by a member of a class specified in the regulations.

4.1.1 Under section 9(6) the Minister may provide by regulations for the making of an application under section 9(1) by:

- the parent or guardian of an individual to whom the information relates, if the individual belongs to a class specified, or
- where the individual to whom the information relates is dead, by a member of a class of persons specified.

4.1.2 The Freedom of Information Act 2014 (Sections 9(6), 10(6) and 37(8)) Regulations 2017, S.I. No 53 of 2017, (“the 2017 Regulations”) prescribe the classes of individuals who may make such an application or in relation to whom such an application may be made. These Regulations were made on 17 February 2017.

### **Applications by Parent or Guardian**

4.2.1 The 2017 Regulations provide that an application under section 9 may be made to amend a record that includes personal information which is incomplete, incorrect or misleading and shall, subject to the other provisions of the FOI Act, be granted where -

- the applicant is a parent or guardian of the individual to whom the information relates and that individual belongs to one of the following classes of individual:
  - (a) individuals who, on the date of the application, have not attained full age, or
  - (b) individuals who have attained full age, being individuals who—
    - (i) at the time of the application 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 Freedom of Information Act 2014

**and**

- the granting of the application would, having regard to all the circumstances, be in the individual’s best interests.

### **Applications where the Individual to whom the Information relates is Dead**

4.3.1 The 2017 Regulations also provide that an application under section 9 may be made to amend a record that includes personal information which is incomplete, incorrect or misleading and shall, subject to the other provisions of the FOI Act, be

granted, where the individual to whom the information relates is dead and the applicant is:

- a personal representative of the individual acting in due course of administration of the individual's estate or any person acting with the consent of a personal representative so acting, or
- 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
- the spouse or the next of kin of the individual and, 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 application.

4.3.2 The Regulations define spouse for the purposes of the Regulations as follows:

“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).

4.3.3 The Regulations also define ‘next of kin’ and ‘personal representative’ for the purposes of the Regulations.

## **5.0 Section 9(7) - Frivolous or Vexatious**

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

**9(7)** A head to whom a request under this section is made may refuse to grant the request if the request is, in the opinion of the head, frivolous or vexatious, or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who appear to have made the requests acting in concert.

5.1.1 This is a discretionary provision which allows for the refusal to grant an application for amendment where the application is frivolous or vexatious. An application may also be refused were it forms part of a pattern of manifestly unreasonable applications from the same applicant or from different applicants who appear to be acting in concert.

5.1.2 The refusal of an application under section 9(7) is not something that should be undertaken lightly. The provision and any of the Commissioner's decisions should not be taken as encouragement to ignore the rights of applicants.

5.1.3 The terms "frivolous or vexatious" and "pattern of manifestly unreasonable requests" also appear in section 15(1)(g) - which concerns requests to FOI bodies for access to records - and section 22(9)(a)(i) and (vi) of the Act – which concern applications for review to the Commissioner. A refusal by an FOI body of a request under section 15(1)(g) or the refusal of an application or discontinuance of a review by the Commissioner under section 22(9)(a)(i) or (iv) is an entirely separate matter to a refusal under section 9(7). However, the reasoning and interpretation by the Commissioner of the terms "frivolous or vexatious" and "pattern of manifestly unreasonable requests" in the context of reviews of such refusals by FOI bodies or in the context of such a refusal or discontinuance by the Commissioner may be of assistance in understanding the term in section 9(7).

5.1.4 The Commissioner has published a separate Guidance Note in relation to the application of section 15(1)(g) which FOI bodies may find helpful in considering the application of section 9(7).

5.1.5 In considering whether an application for amendment is frivolous or vexatious, the Commissioner may have regard to the nature of the amendment requested and the effect the amendment may have on the meaning of the record.

Example: In Case 040004 the Commissioner discontinued part of a review on the ground that the application for amendment of certain records was frivolous. The particular amendments were to records which contained a version of what occurred at a meeting with the applicant. In general, the Commissioner found that the description of the applicant's statement at the meeting contained in the records did not differ in substance from the applicant's account of what he said. The Commissioner stated that, in considering whether an application is frivolous, she must consider a number of criteria including the nature of the amendment and the effect the amendment might have on the meaning of the record. She found

that the amendments sought would either not change the substance or meaning of the content at all or, at most, would achieve an infinitesimal shift on how the information in the record was presented.

## **6.0 Section 9(8), (9), (10) and (11) - Making an Application, its Receipt and Notice of Refusal**

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

9(8) A head shall cause the receipt by him or her of an application under this section to be notified to the applicant in the manner specified in *section 12(2)*.

(9) In the case of a decision to refuse to grant an application under this section the notice under *subsection (3)* in relation to the decision shall comply with *section 13(2)(d)*.

(10) An application under this section shall be expressed to be such an application and shall contain sufficient particulars in relation to the personal information concerned to enable the record to be identified by the taking of reasonable steps.

(11) Notwithstanding *subsection (10)*, where an FOI body receives either—  
(a) an application which purports to be an application under this section but which is not in the proper form, or  
(b) an application which does not purport to be an application under this section but which applies for the amendment of personal information to which amendment can be effected only by way of an application under this section,  
the head shall assist, or offer to assist, the individual in the preparation of an application under this section.

6.1.1 Section 9(8) and 9(9) specify some of the procedure to be followed by an FOI body in handling an application under section 9 for the amendment of a record, including the procedure for acknowledging receipt of the application and the nature and content of any decision to refuse to grant the application.

6.1.2 Section 9(10) provides that an application under section 9 for the amendment of a record shall be expressed to be such an application and shall contain sufficient particulars to enable the record to be identified by the taking of reasonable steps.

6.1.3 However, where an application is made to an FOI body which is not in the proper form or which does not purport to be an application under section 9, but which applies for the amendment of personal information which can only be effected by an application under section 9, then the FOI body must assist or offer to assist the individual in the preparation of the application (section 9(11)).