

Office of the Information Commissioner

Guidance Note

Freedom of Information Act
2014 – Section 38: Procedure
in relation to Certain FOI
Requests to which Section 35,
36 or 37 Applies.

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Introduction

The Information Commissioner has prepared this Guidance Note in relation to section 38 of the Freedom of Information (FOI) Act 2014.

The Note is a short commentary on the interpretation and application of section 38 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 38 Procedure – Overview

1.1.1 Section 38 of the FOI Act sets out the procedure to be followed in certain cases where a decision to release information in a record has the potential to affect the interests of a third party.

1.1.2 Section 38 applies in cases where, at some stage in the decision making process, the FOI body has formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or the party to whom the information relates) that :

- the record in question qualifies for exemption under one or more of the relevant exemptions in the FOI Act relating to third parties, i.e.
 - section 35 (information obtained in confidence)
 - section 36 (commercially sensitive information) or
 - section 37 (personal information)
- but, based on the application of the relevant public interest test, the record should be released.

1.1.3 Section 38 requires the FOI body to notify the affected third parties that it is proposed to grant the request in the public interest and that the FOI body will consider any submissions from the third parties before deciding whether to grant or refuse the request.

Appeals

1.2.1 In the case of most, but not all (see paragraphs 3.4.6 to 3.4.8 below), decisions in which section 38 has been properly applied, any appeal by the requester or by the person notified by the FOI body in relation to that decision must be made by way of application to the Commissioner for a review and may not be made by way of application to the FOI body for an internal review.

1.2.2 An application for review to the Commissioner in such circumstances must be made not later than two weeks after notification of the decision to the person concerned. However, where the Commissioner is of the opinion that there are reasonable grounds for doing so, this two week period may be extended.

Inability to Comply with Notification Requirement & Consent of the Commissioner

1.3.1 Where an FOI body, having taken all reasonable steps to do so, is unable to comply with the notification requirements, the Commissioner may consent to non-compliance or direct the FOI body to take specified steps within a specified period for the purpose of complying with the notification requirement (section 38(6) and (7) refers).

Processing by FOI bodies of Requests relating to Third Party Information

1.4.1 Section 38 is a complex provision and its operation can give rise to difficulties and confusion for FOI bodies, requesters and third parties. It places heavy demands on FOI bodies with regard to time limits.

1.4.2 The FOI Central Policy Unit (CPU) has issued a Guidance Note setting out its advice for decision makers regarding the steps involved in processing FOI requests relating to records containing third party information. See CPU Notice No. 8 – Requests Involving Third Parties – A Step by Step Guide – which is available on the CPU website at <http://foi.gov.ie/download/cpu-notice-8-third-party-consultation/> .

FOI History and Warning regarding Commissioner’s Decisions

1.5.1 Section 38 is similar to section 29 of the FOI Act 1997. This Guidance Note makes reference to previous decisions of the Commissioner where the application of section 29 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 29 in those decisions have been replaced by section 38 of the FOI Act 2014 in this Guidance Note. Where this occurs, such references are denoted by an asterisk (*).

1.5.2 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 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 (*).

1.5.3 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.

1.5.4 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 Cases may be found on the Commissioner’s website at www.oic.ie

1.5.5 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 38 - Third Party Notification Procedure

What the Act states:

38.(1) In this section “request to which this section applies” means an FOI request to which section 35(3), section 36(3) or section 37(5)(a) applies and which, apart from this section, would fall to be granted.

(2) Subject to subsection (6), before deciding whether to grant a request to which this section applies, a head shall, not later than 2 weeks after the receipt of the request —

(a) if the request is one to which section 35(3) applies, cause the person who gave the information concerned to the FOI body concerned and, if the head considers it appropriate, the person to whom the information relates, or

(b) if the request is one to which section 36(3) or 37(5)(a) applies, cause the person to whom the information relates,

to be notified, in writing or in such other form as may be determined —

(i) of the request and that, apart from this section, it falls, in the public interest, to be granted,

(ii) that the person may, not later than 3 weeks after the receipt of the notification, make submissions to the head in relation to the request, and

(iii) that the head will consider any such submissions before deciding whether to grant or refuse to grant the request.

(3) (a) The head may, as respects a request to which this section applies received by him or her, extend the period specified in subsection (2) for compliance with that subsection by such period as he or she considers necessary but not exceeding a period of 2 weeks if in the opinion of the head —

(i) the request relates to such number of records, or

(ii) the number of persons required by subsection (2) to be notified of the matters referred to in paragraph (i) to (iii) of that subsection is such,

that compliance with that subsection within the period specified therein is not reasonably possible.

(b) Where a period is extended under this subsection, the head concerned shall cause notice in writing, or in such other form as may be determined, to be given to the requester concerned, before the expiration of the period, of the extension and the period thereof and reasons therefor.

(c) The reference in subsection (2) to 2 weeks shall be construed in accordance with any extension under this subsection of that period.

(4) A person who receives a notification under subsection (2) may, not later than 3 weeks after such receipt, make submissions to the head concerned in relation to the request to which this section applies referred to in the notification and the head —

(a) shall consider any such submissions so made before deciding whether to grant the request,

(b) shall cause the person to be notified in writing or in such other form as may be determined of the decision, and

(c) if the decision is to grant the request, shall cause to be included in the notification particulars of the right of review of the decision under section 22, the procedure governing the exercise of that right and the time limit governing such exercise.

(5) Subject to subsection (6), a head shall make a decision whether to grant a request to which this section applies, and shall comply with subsection (4) in relation thereto, not later than 2 weeks after —

(a) the expiration of the time specified in subsection (4), or

(b) the receipt of submissions under that subsection in relation to the request from those concerned,

whichever is the earlier, and section 13(1) shall be construed and shall have effect accordingly.

(6) If, in relation to a request to which this section applies, the head concerned is unable to comply with subsection (2), having taken all reasonable steps to do so, the head shall, if the Commissioner consents to the non-compliance, make a decision whether to grant or refuse the request not later than 7 weeks after the receipt of the request and in such a case section 13(1) shall be construed and shall have effect accordingly.

(7) If, in relation to a request to which this section applies, the Commissioner does not consent, pursuant to subsection (6), to non-compliance with subsection (2), he or she shall direct the head concerned to take specified steps within a specified period for the purpose of complying with subsection (2) and if, having taken those steps within that period or such further period as the Commissioner may specify, the head is unable to comply with that subsection, he or she shall, as soon as may be, make a decision whether to grant or refuse the request.

A Request to which Section 38 Applies – Section 38(1)

2.1.1 The term a “request to which section 38 applies” is defined in section 2(1) of the Act as meaning “an FOI request to which section 35(3), 36(3) or 37(5)(a) applies and which, apart from section 38, would fall to be granted”. (The corresponding term used within section 38 (i.e. a “request to which this section applies”) is similarly defined in section 38 – see section 38(1)).

2.1.2 This means, as stated above, that section 38 applies in cases where, at some stage in the decision making process, the FOI body has formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or the party to whom the information relates) that :

- the record in question qualifies for exemption under one or more of the relevant exemptions in the FOI Act relating to third parties, i.e.
 - section 35 (information obtained in confidence)
 - section 36 (commercially sensitive information) or
 - section 37 (personal information)
- but, based on the application of the relevant public interest test, the record should be released.

2.1.3 As explained in the FOI Central Policy Unit (CPU) Notice No. 8, the consideration of the public interest at this stage is provisional as it occurs before seeking the formal views of the third party under section 38.

Requirement to Notify

2.2.1 The requirement to notify the third party(ies) is triggered when the request is one to which section 38 applies as set out above. Thus, where the request is not one to which section 38 applies, the requirement does not arise. Examples of instances where there is no such requirement include, for example:

- In the decision maker's opinion, the information in the record fails to qualify for exemption under the FOI Act (i.e. the decision maker is satisfied that the information was not obtained in confidence/is not commercially sensitive/is not the personal information of a third party).
- The decision maker considers that the record is exempt under sections 35, 36 or 37 and is satisfied that, on balance, the public interest is better served by refusing rather than granting the request. (The section 38 notification mechanism should be invoked only where release in the public interest is contemplated.)
- The exemptions at issue do not include section 35, 36 or 37.
- Section 35, 36 or 37 is being considered but refusal is found to be justified under other exemptions. An example of this would be where personal information relating to a person other than the requester was contained in a record which the decision maker also considered to be exempt under section 31(1)(a) - legal professional privilege. Even if the decision maker came to the conclusion that the public interest in release outweighed the public interest in upholding the individual's right to privacy, the fact that the request would be refused under section 31(1)(a) in any event places it outside of the reach of section 38. (This is because the request does not fall to be granted but for the requirement that the section 38 procedures be followed.)

Section 38 Notification – Section 38(2)

The Third Parties to be Notified

2.3.1 Section 38(2) requires that, before deciding to grant a request to which section 38 applies, the following third parties should be notified by the FOI body –

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

The Notification

2.3.2 Section 38(2) also requires that notification be given in writing (not later than two weeks after receipt of the request) and that the person be notified :

- of the request and that, apart from section 38, the request falls, in the public interest, to be granted
- that the person may, not later than 3 weeks after the receipt of the notification, make submissions to the FOI body in relation to the request, and
- that the FOI body will consider any such submissions before deciding whether to grant or refuse to grant the request.

2.3.3 The CPU Notice No. 8 advises that the third party(ies) also be notified of a number of other matters including the following:

- details of the records concerned (the Notice suggests enclosing copies of the records concerned, where possible)
- details of the exemption under consideration
- the decision-maker's preliminary view that the records should be disclosed in the public interest together with details of the public interest criteria under consideration and
- that they will be advised of any decision to release the information and that, if the decision is to grant the request against the wishes of the person consulted, that person shall have the right to seek independent review of the decision by the Commissioner before any information is released.

2.3.4 The Commissioner takes the view that the form of notification to the third party is very important. Section 38 provides that the notification should tell the person that, apart from section 38, the request falls to be granted in the public interest. The Commissioner takes the view that it would, therefore, be misleading to write to a third party implying that the decision maker had formed no opinion on the matter and was merely considering whether the third party would prefer if the information would not be disclosed.

2.3.5 The Commissioner considers that it should be clear from any section 38 notification which exemption(s) the decision maker deems to apply and that release is nevertheless being considered in the public interest.

2.3.6 The Commissioner also considers that the notice should stress the importance of the third party providing clear and specific information together with any supporting evidence relating to any harm claimed to result from disclosure of his/her confidential, commercially sensitive or personal information. The Commissioner takes the view that requesters and third party appellants cannot be expected to have a detailed knowledge of what is a complicated and technical piece of legislation. They are entitled to expect that correspondence from FOI bodies under the FOI Act reflects comprehensively the relevant provisions of the Act in a way which will allow them to take a fully informed view on how to proceed.

Identification of the Parties

2.3.7 The FOI Act is silent on whether the identity of the requester should be disclosed to the third party and whether the third party's identity should be disclosed to the requester.

Identity of the Requester

2.3.8 The Commissioner agrees broadly with the CPU Notice No. 8 which states that decision makers should exercise discretion as to whether to reveal the identity of the requester. Generally, the Commissioner takes the view that, since release under FOI is regarded, in effect, as release to the world at large, the identity of the requester is irrelevant. Furthermore, in considering an FOI request, the reason or motive of the requester must be disregarded except in very limited circumstances, so that the question of who is seeking access to a record should not generally be a consideration. Furthermore, in cases involving sensitive personal information, it could be inappropriate to disclose the identity of the requester.

Identity of the Third Party

2.3.9 As regards telling the requester the name of the person being notified under section 38 is concerned, the Commissioner's view is that decision makers should exercise caution in disclosing such information - especially where confidential or personal information is involved. In the case of commercial information, the identity of the relevant parties will sometimes be self-evident where, for example, an unsuccessful tenderer is seeking access to records relating to the company to which a public contract has been awarded.

2.3.10 It is very important to note, however, that the disclosure to a requester of the identity of a third party whose personal information is in a record may well be equivalent to disclosure of information in an exempt record.

Records to which the Request Relates

2.4.1 The Commissioner takes the view that it is important that FOI bodies should be in a position to identify the records which have been the subject of a section 38 consultation. He has commented that it is unacceptable that an FOI body cannot identify with total accuracy the records which have been the subject of a section 38 notification, particularly given its intention in such cases to release the records.

Separating Records

2.4.2 Where an FOI body considers that certain records coming within the scope of a request exist to which section 38 does not apply, such records should be separated from the records to which section 38 applies and they should be processed in the same manner as all other requests for records where section 38 does not apply. If a decision is made to refuse access to these records, requesters should be informed of their right to apply for an internal review of that decision.

2.4.3 The consequences of splitting requests in such a manner is that requesters who are not satisfied with the FOI body's decision on the records to which section 38 applies may apply directly to the Commissioner, but may also apply to the body for an internal review of the decision taken on the remaining records to which section 38 does not apply

Time Period for Notification – Section 38(2) and (3)

2.5.1 Notification to the third party(ies) should normally be given not later than two weeks (ten working days) after receipt of the request (section 38(2)). Thus, early identification of third party information and consideration of exemptions and public interest provisions under section 35, 36 or 37 is essential. The CPU Notice No. 8 advises that FOI bodies should examine the records "immediately on receiving the request".

2.5.2 The two week time period within which notification must be given may be extended by a period not exceeding two weeks if:

- (i) the request relates to such number of records or
- (ii) the number of persons to be notified

is such that compliance with the two week time period is not reasonably possible (section 38(3) refers).

2.5.3 Where the period is extended the FOI body must notify the requester before the period expires, of the extension, the period of the extension and the reasons for it.

Example: In Case 110162 the Commissioner found that section 38* requirements were not applied correctly. The papers on file showed that Fáilte Ireland did not notify the third party (Cork City Council) within the required ten day period. Fáilte Ireland had confirmed that it did not notify the original requester of any extension of time before that period expired. The Commissioner noted that the requester was notified of an extension of time due to the considerable number of records involved, but this was outside the period provided under section 38(3)(b)*. He also found that it was apparent from the papers on file that the Council did not provide its submission to Fáilte Ireland within the 3 week period specified in section 38(2)*. He found that the decision of Fáilte Ireland should, therefore, be annulled.

2.5.4 Section 38(3) allows for the extension of the period for notification only for the reasons specified in subsection (3).

In Case 150175 the Department of Transport, Tourism and Sport notified the requester that it was seeking an extension of two weeks. In its letter to the requester, the Department stated that it was in the final weeks of a funding application process concerning a particular Programme. The Department subsequently confirmed to the Commissioner that the requester agreed to the extension. It also explained that it would not have been possible for its staff "to continue to provide the requisite level of service [to its Programme clients] and simultaneously process this FOI request, without a time extension". The Commissioner noted that in this situation an extension could be only requested subject to the provisions of section 38(3)(a)(i) and (ii). She noted that section 38(3)(a) does not provide for an extension to be sought on the grounds of what appeared in this case to be a staff resource issue. She found that the Department's request for an extension was not in compliance with the provisions of section 38(3) and consequently, that the request for the extension was invalid. As a result, the Department did not comply with the provisions of section 38(2), when it contacted the applicant (a third party) on a date which was outside the two week time limit provided for in that section.

Third Party Submissions – Section 38(4)

2.6.1 Section 38(4) provides that a person who has been notified under section 38(2) may make submissions to the FOI body in relation to the request not later than three weeks after receipt of the notification.

2.6.2 Section 38(4) also provides that, where a person makes such submissions to the FOI body, the FOI body must:

- consider the submissions before deciding whether to grant the request
- notify the person in writing of the decision
- if the decision is to grant the request, include in the notification of the decision details of the right to make an application for review to the Commissioner and the procedure and time limit for doing so.

Decision on a Request to which Section 38 Applies – Section 38(5)

2.7.1 An FOI body must make a decision on a request to which section 38 applies not later than two weeks after

- the expiration of the period for the making of submissions by the third party (i.e. three weeks after receipt by the third party of the notification under section 38(2)) or
- receipt by the FOI body of the submissions made by the third party

whichever is the earlier - section 38(5) refers.

2.7.2 Both the requester and the third party must be informed of the decision and of the right of appeal (application for review). Where the decision is on a request to which section 38 applies, the appeal is directly to the Commissioner, normally within 10 working days. It is important to stress that where the decision is on a request to which section 38 applies, there is no right of internal review for the requester or the third party. (See paragraphs 3.4.1 to 3.4.11 below).

Part Release/ Redaction

2.7.3 An FOI body may decide to redact some information or part grant a request to which section 38 applies. In such circumstances, FOI bodies should bear in mind that, unless the refusal is under a neither confirm nor deny provision, there is a statutory requirement to set out in the notification of the decision details of any exemption which is being relied on and particulars of any matter relating to the public interest taken into consideration for the purposes of the decision where any part of the request is being refused. This is also the case even if the refusal is in the form of a redaction or part release of a record.

2.7.4 In such circumstances, the requester will have a right of appeal in respect of withheld parts of the records and should be notified of this in the decision.

Example: In Case 150198 the Commissioner considered the decision making procedure adopted by Cork County Council in a decision on a request to which section 38 applied. She noted that, even though the requester would have had a right of appeal in respect of withheld parts of the records (i.e. partial refusal of access), she could see no reference in the decision making records to the requester having been notified of this as required.

Inability to Comply with Notification Procedure – Section 38(6) & (7)

2.8.1 Where an FOI body has taken all reasonable steps to comply with the notification requirements under section 38(2) but is unable to do so, the Commissioner may consent to non-compliance. In such circumstances, the FOI body must make a decision on the request not later than seven weeks after receipt of the request.

2.8.2 If the Commissioner does not consent to non-compliance with the notification requirements of section 38(2), he shall specify the steps to be taken within a specified period for the purpose of complying with the requirements. Provision is also made for the FOI body to make a decision, if having taken such steps, it is unable to comply with section 38(2).

3.0 Applications for Review by the Commissioner of Decisions on Requests to which Section 38 Applies

What the Act also states:

- 22.** (1) This section applies to —
- (g) a decision on a request to which section 38 applies, ...
- (2) Subject to this Act, the Commissioner may, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person -
- (a) review a decision to which this section applies, ...
- (4) An application under subsection (2) shall be made —
- (a) if it relates to a decision specified in paragraph (e) or (g) of subsection (1), not later than 2 weeks after the notification of the decision to the relevant person concerned or, in a case in which the Commissioner is of the opinion that there are reasonable grounds for extending that period, the expiration of an additional period of such length as he or she may determine, ...

3.1.1 Section 22(1)(g) of the Act provides that one of the categories of decisions which the Commissioner may review is "a decision on a request to which section 38 applies". See paragraphs 2.1.1 – 2.1.3 above for an explanation of the term "a request to which section 38 applies".

3.1.2 Section 21(1) of the FOI Act sets out the decisions which may be the subject of an internal review by an FOI body. Section 21(1)(a) refers to a decision to refuse to grant an FOI request, whether in whole or in part, "(other than a request to which section 38 applies)". Section 21(1)(a), therefore, makes it clear that a decision to refuse, wholly or partly, a request to which section 38 applies, should not be reviewed internally by the FOI body under that section.

3.1.3 Thus, an application for review of a decision on a request to which section 38 applies should be made to the Information Commissioner directly. There is no internal review available in relation to such decisions.

Relevant Person

3.2.1 Section 22(2) states that the Commissioner may review a decision to which section 22 applies on application by a relevant person. A "relevant person" is defined in section 22(16) and includes:

- the requester and
- if the decision is in respect of a request to which section 38 relates, a person to whom section 38(2) applies.

3.2.2 Section 38(2), in turn, applies to:

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

Time Limit for Making an Application for Review to the Commissioner

3.3.1 Section 22(4) provides that an application for review, if it relates to a decision on a request to which section 38 applies, must be made not later than two weeks after the notification of the decision to the relevant person. However, the Commissioner may extend this period if he is of the opinion that there are reasonable grounds for doing so.

3.3.2 Late applications are not admitted as a matter of course. Apart from the clear provisions of the Act, there may well be good reasons why such an application should be refused.

3.3.3 Among the grounds which might be considered reasonable in some cases are *force majeure* situations (e.g. prolonged illness or absence from home). However, the Commissioner will decide each case on its merits and it is not possible to set out in advance a comprehensive set of grounds that will be considered reasonable.

Application for Review to the Commissioner

3.4.1 If, in making the initial decision, the provisions of section 38 have been properly applied by the FOI body then there are three possible outcomes.

Refusal of the Request on Public Interest Grounds

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

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

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

3.4.5 In relation to requests to which section 35 applies, it may happen that the FOI body will not have consulted with a person to whom the information relates (it has a discretion not to consult). Such persons are not treated by the Commissioner as relevant persons for the purposes of section 22. However, they are potentially affected parties and may, subject to certain considerations, be notified of the review.

Refusal of the Request under Other Exemptions

3.4.6 The second possible outcome is a decision by the FOI body to refuse the request on grounds other than section 35, 36, or 37. This may happen if, at some stage after it commenced the notification process required by section 38, the FOI body decided that some other exemption applies (regardless of whether section 35, 36 or 37 also applies).

3.4.7 Such a decision is not a decision on a request to which section 38 applies. This is because, despite the notification process having been commenced, it cannot be said that, apart from section 38, the request would fall to be granted.

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

Example: In Case 090191 a decision maker in the Health Service Executive, having received an FOI request, wrote to a third party, Lifeline, referring to section 38* of the FOI Act and indicating that she was considering whether to release in the public interest records affecting their interests. The information at issue was identified as commercial information supplied by Lifeline which, apparently, in the decision maker's view at that time, was exempt under section 36* of the Act. Lifeline's solicitors made submissions to the HSE objecting to release of the records. The decision maker refused access relying solely on section 29* of the FOI Act which protects records in certain circumstances where deliberative processes of public bodies are involved. She made no reference to the public interest, to Lifeline's interests, to commercial sensitivity or the exemptions to which section 38 might apply. When the case came to the Commissioner for review, the HSE claimed that sections 29*, 35* and 36* applied, although it had not notified the applicant that those provisions were relevant to the refusal of his request. As the decision to refuse was on grounds other than section 35*, 36* or 37*, the decision under review was not one to which section 38* applied because it could not be said that, apart from section 38, the request would fall to be granted.

Grant the Request in Public Interest / Grant the Request as No Exemption Applies

3.4.9 The third possible outcome is a decision to grant the request. The basis for such a decision will usually be that the record qualifies for exemption under section 35(1), 36(1) or 37(1), but that the public interest is better served by release. However, it could also happen that, in the course of the section 38 notification procedure, the FOI body may reconsider the matter and decide that the record does not qualify for exemption. In either case, the decision is one on a request to which section 38 applies.

3.4.10 Any party consulted by the FOI body may apply to the Commissioner for a review of the decision within the 2 week time limit. In such cases, the requester is treated as a relevant person by the Commissioner and notified in accordance with section 22(6).

3.4.11 In relation to requests to which section 35 applies, it may happen, as with the first outcome, that the FOI body will not have consulted with a person to whom the information relates (it has a discretion not to consult). Such persons are not treated

as relevant persons by the Commissioner for the purposes of section 22. However, they are potentially affected parties and may, subject to certain considerations, be notified of the review.

Cases where the Provisions of the Act have not been Followed

3.5.1 Cases may arise in which the FOI body decides to grant access in the public interest to records considered exempt under section 35(1), 36(1) or 37(1), but the purported consultation under section 38 is deficient in some way. For example, the time limits in section 38 may not have been met or the basis of the consultation may not have been properly explained to the third parties.

3.5.2 Among the key concerns is whether the FOI body, at some stage in the decision making process, formed the view (subject only to receiving the views of the party who gave the information to the FOI body and/or a party to whom the information relates) that the public interest would, on balance, be better served by granting than by refusing to grant the request.

Example: In Case 080279 the Commissioner stated that it was not entirely clear whether, in writing to the applicant (a school), the Health Service Executive (HSE) had formed the view that the parts of the records at issue were exempt under section 35*. She stated that if section 35* did not apply to the records at all, the question of release of exempt records in the public interest would not arise. However, given the HSE's notification to the applicant, the fact that it informed the school of a right of appeal directly to the Commissioner and the fact that when queried by the Commissioner's Office before the application was accepted for review, the HSE stated that it considered that "records involving the school are appropriate to release in the public interest", she believed it appropriate to make a decision on the review application. The Commissioner's decision did not deal with information which had not formed part of the notification to the school under section 38* of the Act.

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

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

Refusal to Accept or Discontinuance of an Application

3.5.5 It should be noted that section 22(9)(a)(ii) provides that the Commissioner may refuse to accept an application for review or may discontinue a review if he is or becomes of the opinion that the application does not relate to a decision specified in section 22(1). Thus, if the Commissioner is of the opinion or becomes of the opinion that an application does not relate to a decision on a request to which section 38

applies or to any other decision specified in section 22(1), he may refuse to accept the application. If such an application has already been accepted, the Commissioner may discontinue a review relating to such a decision.

Cases where Statutory Time Limits have not been Adhered to

3.6.1 The section 38 process followed by the FOI body may sometimes be defective as a result of non-compliance with the timelines provided for in the FOI Act. In such cases the application may be accepted and a decision may issue annulling the FOI body's decision. Application fees in such cases are refunded.

Example: In Case 110081 the Commissioner found that the section 38* requirements were not applied correctly. Kerry County Council notified the third party's representative after the ten working day period provided for in section 38(2)* had expired. The original requester was notified of an extension of time due to the considerable number of records involved, but this was outside the period provided under section 38(3)(b)*. The Council notified its decision to the original requester eight weeks after receipt of the request, but delayed notifying the applicant's solicitor (the third party's representative) of its final decision until over two weeks later. It also subsequently engaged further with the applicant's solicitor in correspondence. The outcome of that delay was that the applicant's solicitor only appealed the Council's decision to the Commissioner approximately five weeks after he had been notified of the decision (and approximately eight weeks after the original requester was notified of the decision). The Commissioner annulled the Council's decision. The effect of this was that the section 38* aspects of its original decision had to be put aside and the Council had to conduct a new, first instance decision making process in which it could apply the section 38* requirements correctly.

3.6.2 Where the Commissioner annuls the decision of the FOI body in this manner and directs it to carry out a fresh decision making process, there is no requirement on the requester to submit a fresh request to the FOI body in the matter.

Example: In Case 150333 the Commissioner had previously annulled a decision of the Department of Transport, Tourism and Sport on the basis that the Department had not complied with the time requirements of section 38. The Department was directed to conduct a new decision making process. In an appeal of the Department's subsequent decision, the applicant (third party) argued that a new FOI request should have been submitted by the requester. It argued that, as no new request was submitted, the Department again failed to comply with the time requirements of section 38 and its decision should be annulled. However, the Commissioner did not accept this argument. The Commissioner found that the Department had not been directed to seek a new request from the requester and there was no requirement on the Department to do so. The effect of the direction to the Department was that the original request remained to be processed as if no decision had been made by the Department. In the case, the Department had informed the applicant that the date for the commencement of the section 38 process would be four weeks after the date of the Commissioner's previous decision to annul, allowing for the period for an appeal to the High Court to elapse. The Commissioner found that this was a legitimate approach to take.

Cases which have Gone to Internal Review

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

The Reason for the Consultation

3.7.2 If, following such a consultation, the FOI body decides to grant access, the Commissioner may receive an application, from a third party who has been consulted, asking for the decision to be reviewed. Whether such an application is accepted by the Commissioner depends on why the consultation was undertaken by the FOI body.

- If the consultation was undertaken because the internal reviewer took the view that the record was otherwise exempt but that the provisions of section 35(3), 36(3) or 37(5)(a) (the public interest provisions) required its release then the decision is one on a request to which section 38 applies and the application may be accepted by the Commissioner.
- However, if the consultation was undertaken for some other reason, for example, with a view to seeking the consent of the party concerned or with a view to putting the party on notice that information about them was about to be released, then any application by a third party objector will generally be refused by the Commissioner.

Determining the Reason

3.7.3 The Commissioner takes the following approach where a question arises as to the basis for consultation in cases that have gone to internal review.

- If the internal reviewer decided to release the record and based that decision on the provisions of section 35(3), 36(3) or 37(5)(a) (the public interest provisions) then, in the absence of any other evidence to the contrary, it can be assumed that the internal reviewer had formed this view prior to any consultation and, hence, that the decision is a decision on a request to which section 38 applies.
 - In cases where the rationale for the decision is not apparent from the decision letter, the FOI body will generally be asked to state whether or not it is based on the provisions of section 35(3), 36(3) or 37(5)(a).
- If the internal reviewer decided to refuse the request then regard will be had to the time limit for making an application to the Information Commissioner mentioned in the internal reviewer's decision letter.
 - If the requester has been informed that the time limit is 2 weeks then, in the absence of any evidence to the contrary, it will generally be assumed that the decision is one on a request to which section 38 applies.
 - On the other hand, if the decision letter informed the requester that the time limit for an application to the Commissioner is six months then, in the absence of any evidence to the contrary, it will generally be assumed that the decision is not one on a request to which section 38 applies.

Cases Wrongly Accepted for Internal Review

3.8.1 As stated above, an initial decision to refuse, wholly or partly, a request to which section 38 applies, should not be reviewed internally by the FOI body under section 21.

3.8.2 However, it can happen that, in such cases, the requester is granted an internal review, in error, instead of being referred to the Commissioner. In the event of such a matter coming to the attention of the Commissioner by way of an application by the requester for a review of the internal review decision, the position is as follows;

- In the unlikely event that such an application is made within 2 weeks of the original decision, it may be accepted by the Commissioner as an application for a review of the original decision.
- Where the application to the Commissioner is made outside that period it could fall to be refused as the internal review decision in such cases is not a decision under section 21. However, in these circumstances, the Commissioner will normally exercise his discretion to admit such 'late' applications.

Requests Including Other 'non-section 38' Records

3.9.1 Cases arise where some of the records contain information relating to a third party and are subject to section 38 consultations, while other records within the scope of the request may not contain any information to which section 35, 36 or 37 applies. However, the FOI body may decide that these latter records are exempt under other section(s) of the FOI Act. In such cases the requester should be advised that they have a right to internal review of these latter records. See paragraph 2.4.2 – 2.4.3 above - Separating Records.

3.9.2 Thus, an FOI body's decision on the 'section 38' records may be appealed directly to the Commissioner within 2 weeks while the decision on remaining exempt records is appealed to the Commissioner within six months of an internal review.

3.9.3 The Commissioner's review of a decision on a request to which section 38 applies will deal only with the records which had been the subject of the section 38 consultation.

3.9.4 It is important, therefore, that the records which were the subject of the section 38 consultation can be clearly identified. As stated above, the Commissioner takes the view that it is important that FOI bodies should be in a position to identify the records which have been the subject of a section 38 consultation. See paragraphs 2.4.1 to 2.4.3 above.

4.0 Review by the Commissioner of ‘Section 38 Cases’

What the Act states:

22 (12) In a review under this section—

(a) a decision to grant a request to which *section 38* applies shall be presumed to have been justified unless the person concerned to whom *subsection (2)* of that section applies shows to the satisfaction of the Commissioner that the decision was not justified, and ...

(16) In this section “relevant person”, in relation to a decision specified in *subsection (1)*, means—

(a) the requester concerned and, if the decision is in respect of a request to which *section 38* relates, a person to whom *subsection (2)* of that section applies, or

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

- the head of the FOI body,
- the “relevant person”, i.e.
 - the requester and
 - in the case of a decision in respect of a request to which section 38 relates, a person to whom section 38(2) applies, i.e.:
 - the person who gave the information concerned to the FOI body and, if the FOI body considers it appropriate, the person to whom the information relates (section 35) or
 - the person to whom the information relates (sections 36 or 37) and
- any other person who, in the Commissioner’s opinion, should be notified.

Any Other Person who Should be Notified

4.2.1 Section 22(6) refers to “any other person who, in the opinion of the Commissioner, should be notified of the proposal” to review the decision. As is the case in other reviews - i.e. reviews of a decision which is not a decision on a request to which section 38 applies - in which the interests of a third party may be affected, the Commissioner will consider whether it is necessary to notify any third party, other than a person to whom section 38(2) applies (see above).

4.2.2 The Commissioner takes the view that a guideline for deciding whether or not to notify a third party under section 22(6) is whether that person is likely to be affected by the decision of the Commissioner. The Procedures Manual of the Office of the Information Commissioner states that, as a general rule, it would not be desirable for the Commissioner to decide to release information which might affect someone's interests without that person's knowledge.

Fee for Application to the Commissioner

4.3.1 The Freedom of Information Act 2014 (Fees) (No. 2) Regulations 2014 (SI 531 of 2014) prescribe the fees payable in respect of applications for review. Where an

application for review of a decision on a request to which section 38 applies is made to the Commissioner by a third party under section 38(2), a fee of €15 is payable.

4.3.2 Where the application for review of a decision on a request to which section 38 applies is made by the original requester, the application fee is €50, unless the applicant is a medical card holder or the dependant of a medical card holder, in which case the fee is €15.

Section 38 Cases and Burden of Proof

4.4.1 Section 22(12)(a) of the Act provides that a decision to grant a request to which section 38 applies shall be presumed to have been justified unless the third party concerned shows to the satisfaction of the Commissioner that the decision was not justified. This means that the onus is on the third party to satisfy the Commissioner that the FOI body's decision to release the records at issue was not justified.

4.4.2 Section 22(12)(a) shifts the burden of proof - which lies with the FOI body in most cases - onto the person who is objecting to the release of the record. This is not to say that only the arguments raised by the third party will be considered. The Commissioner takes the view that it would contravene the purposes of the FOI Act and be inconsistent with the public interest and/or the right of privacy if he were to direct the release of sensitive information in records simply because a third party failed to raise substantial arguments to justify the setting aside of the FOI body's public interest decision. Nonetheless, this provision does serve to reinforce the statutory position that, apart from section 38, the request would have fallen to be granted.

4.4.3 In a review of a decision on a request to which section 38 applies where the FOI body decided, after consulting with the third party(ies), to refuse to grant the FOI request, section 22(12)(b) is relevant. It provides that such a decision shall be presumed not to have been justified unless the FOI body shows to the satisfaction of the Commissioner that the decision was justified.