

Guidance Notes

on

**Access to records by parents /guardians
Access to records relating to deceased persons
under section 28(6) of the
Freedom of Information Act 1997**

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1. Outline of contents.

Contents of guidance notes

These notes deal with:

- ♦ classes of persons whose records may be made available to parents or guardians
- ♦ categories of requester who may obtain access to the records of deceased persons.

The purpose of these notes is to assist decision makers in considering requests relating to such persons.

Access to routinely available information

In general, members of the public will use the FOI Act to access information only when that information is not readily available through existing sources. Where access to records is currently routinely available to parents and guardians, or where the records of deceased persons are similarly available, these practices should continue. The provisions of section 28(6) will only be used when access is required to the specific range of records covered by that subsection where such routine access is not available.

2. Classes of Records which may be made available to Parents or Guardians arising from Section 28(6) of the FOI Act.

There are two classes of person whose records may, in certain circumstances, be made available to parents or guardians

- ♦ those relating to persons with a disability, and
- ♦ those relating to minors.

In applying these notes, decision makers should have due regard to the best interests of the person to whom the records relate.

Use of these notes in relation to adults will only arise where the adult is incapable of exercising his or her rights under the Act. Decision makers would have to make whatever enquiries and consultation were necessary to verify any such incapacity.

In general, decision makers are advised to put themselves in the place of the person to whom the records relate as far as practicable when examining requests. In this way, they would be better able to assess the impact of release of material on the person.

2.1 Factors to be considered

(A) Persons with a disability:

(i) The nature and duration of the disability: A critical factor is whether the condition or incapacity is temporary or continuing:

Intermittent or temporary incapacity: In the case of a person who suffers intermittent incapacity, but can normally manage his or her own affairs, it is unlikely that records would be released to a third party during such periods of incapacity unless the decision maker had strong grounds for assuming either:

- a. that the person would consent to release if able to do so, or
- b. if release was in his or her best interests e.g.- where the person's parent/guardian have concerns about treatment and seek the person's medical records with a view to obtaining a second medical opinion

Continuing incapacity: In cases where incapacity is continuing, it is more likely that release to third parties may be in the person's best interests where such third parties are caring for the person on an ongoing basis. However, this may not always be the case. **Decision makers must treat each request on its merits on a case by case basis.**

(ii) Would the person consent to release of the material? In forming an opinion as to whether the person would have consented to release, it may be helpful to consider:

- ◆ whether access to the record may be of benefit to the requester e.g. whether access to the records may help to improve the quality of care being provided to the person.
- ◆ whether the information is of a particularly private and sensitive nature e.g. where carers' case notes may reveal that a resident in an institution has developed a relationship with another resident.
- ◆ whether information on an incapacitated person also related to their parents/guardians or includes details on family background etc. Depending on the circumstances of that background (e.g. abuse or ill treatment of the person), it may be inappropriate to release the material to the parents/guardians.

(iii) Would release of the material be damaging to the person in any way? In seeking to assess the likely affects of disclosure of the record on the individual, the following would be among the factors the decision maker should consider:

- ◆ whether disclosure is likely to be damaging to the person's interests.
- ◆ if the record relates to a person's treatment, the likely effects of disclosure on the treatment programme. The decision maker should endeavour to identify both beneficial and adverse effects, if any.
- ◆ the inclusion in the records of any notes containing unflattering comments made by the person about their parents/guardians.

(B) Minors (*persons who have not reached the age of majority - persons under 18 years who are not or have never been married*):

(i) Would the minor consent to release of the material?

The general tenet of our legal advice is that consultation is not compulsory. *Therefore, the amount of consultation to take place, and the weight to be given to a minor's views obtained in the consultation process, is being left at the discretion of the decision maker.* In this way, the minor's best interest can be determined on a case by case basis (see Section 2.2 below on consultations with minors). The fact that a minor might object to release of information to his or her parents/guardians will not always be enough in itself to justify refusal, but it will always be a factor that the decision maker should consider before making a decision.

(ii) Would release of the material damage the minor in some way?

As with the records of incapacitated persons, there will be occasions when it would not be appropriate to release the records of minors to their parents/guardians, e.g.-

- ◆ release of records relating to a school disciplinary action against a pupil - if there is evidence that the pupil might suffer physical abuse as a result of his or her parents/guardians becoming aware of the process, then it would not be in the minor's best interests to release the records. Conversely, if the decision maker had reason to believe that remedial parental action could improve the pupil's performance at, and standing in, the school, then release of the records on the disciplinary process would be in the minor's best interests.

(iii) Are the records held in the minor's own right?

If so, the general position is that such records would **not** be released to a parent or guardian unless such release was in the minor's best interest. Examples of records in this area would be:

- ◆ Lone Parent's Allowance in the Department of Social, Community and Family Affairs (which are not age related),
- ◆ Motorcycle licenses in the Department of the Environment which can be issued to 16 year old applicants in their own right.
- ◆ Certain medical records which may not be appropriate for automatic release to parents/guardians, such as records a GP might have on prescribing contraceptives to a minor.

(iv) Records of incapacitated minors:

The treatment of these would be the same as (i)-(iii) above but would also incorporate the approaches set out in (A).

2.2 Consultation with Minors or Incapacitated Adults

Before making a decision on whether to release records, it will often be necessary to consult with the subject of the records. When considering or undertaking such consultation, a decision maker should take account of the following:

- a. **The capacity of the person to understand the issues involved:** This could depend on the extent of disability or, in the case of minors, their age, intelligence and maturity. The decision to consult with a minor will also depend on factors such as the nature of the record, i.e. its sensitivity or otherwise. The decision maker should seek to ascertain whether the minor is capable of coming to a mature view as to what is in his/her best interests in the particular circumstances and weigh any opinion that may be got from the child accordingly. In some cases, even young children may be capable of understanding the issues involved and in such event the refusal of the minor to consent to release of a record to a parent or guardian could be given a significant weighting.
- b. **The presence of a parent or guardian during consultation:** The decision maker would need to determine the extent to which involvement of a parent or guardian in the consultation process is appropriate. For example, if the record sought contains allegations of abuse or suspected abuse of the child by a parent or guardian, it may not be appropriate for that parent or guardian to be present during consultation with the child.
- c. **The nature of the record:** Where records sought are of substantial concern to the minor or incapacitated adult to whom they relate, or they are of an inherently personal and sensitive nature, this will influence the form and extent of consultation undertaken and the weight to be given to the views of the person, e.g. where records sought relate to personal, including sexual, relationships of the person, it is more likely that the decision maker would give greater weight to the views of the person in such a case than in others.
- d. **The nature of the consultation:** When a decision is made to consult with a child, common sense should dictate how the consultation is to be conducted. A personal contact or visit will often be more appropriate than a written consultation enclosing copies of documents and seeking the child's views. The decision maker would need to be confident that any view obtained in writing was, in fact, the view of the child. As has been outlined previously, the age, intelligence and maturity of the child will be factors to be considered by the decision maker in weighing any opinions he or she might get from the child. In this context, the decision maker's view may need to be informed through contact with the child directly, consultation with professionals in contact with the child (teacher, social worker, doctor, police etc.) or as appropriate with a parent, guardian, other relative or close adult friend.
- e. **Guardianship and custody issues:** Different parties can enjoy different rights pertaining to the child and this may influence a decision maker regarding access sought to records that concern the personal affairs of the child. This includes the question of which of those parties, if any, should be consulted. Where rights have been extinguished or limited through the courts, such as a parental barring order, the decision maker should take such limitation into account in determining with whom it is appropriate to consult.

- f. **Proof of consent:** As indicated above, the decision maker must satisfy him or herself that such consent, where provided, is genuine.

In applying these notes, decision makers must have due regard to the best interests of the person to whom the records relate.

Section 2.3 Other provisions of the FOI Act

When reflecting on whether access should be provided, decision makers must also consider any other exemptions that may be relevant. They must assess whether any harm or damage may arise from disclosure e.g.:

- ◆ whether disclosure may lead to the revelation of confidential sources;
- ◆ the danger of prejudice to an ongoing investigation;
- ◆ damage to a law enforcement matter;
- ◆ whether the information may be protected by a secrecy provision in another enactment.

Decision makers should, therefore, be aware that decisions on release of records under these guidance notes cannot be taken in isolation from the other provisions of the FOI or other Acts.

3. Categories of Requester

Section 28 of the FOI Act exempts records containing personal information, including personal information of a deceased person, from disclosure, subject to certain specific exceptions. In the case of records of deceased persons, section 28(6) provides that the Minister for Finance may make regulations for access by specific categories of requester. Three categories of requester are identified in these regulations:

Category 1 - Personal representative

Category 2 - A person appointed by the courts or by statute

Category 3 - Spouse / former spouse, partner/ former partner, next of kin

The persons set out in categories 1 and 2 have the same right of access as the deceased person enjoyed when living, in respect of records relating to the performance of the functions specified in the regulations

In the case of category 3, spouse, former spouse, partner, former partner or next of kin, release is subject to a public interest test which is to be carried out, having regard to the circumstances of the request and in accordance with these guidelines.

The burden of establishing the death of an individual rests with the requester who would be required to submit an affidavit or other proof acceptable to the public body identifying the deceased and exhibiting the necessary death certificate. Where the death has not been registered, (under the Civil Registration Act, 2004) the requester would be required to submit an affidavit or other acceptable proof identifying the deceased and exhibiting such evidence of the death, such as church records etc establishing the fact of death. In these cases, it would be a matter for the public body to decide if such proofs are acceptable. These proofs would not be required if the public body already has sufficient proof of the death of the person whose records are being sought.

CATEGORY 1

The personal representative of the deceased acting in due course of administration of the estate of the deceased or any person acting with the consent of the personal representative so acting. This only covers people who have taken out a grant of probate in cases of testacy or letters of administration in cases of intestacy of the deceased and any agent acting for the personal representative. It does not include a will where a grant of probate has not been taken out, i.e. with an unproven will. As release of records for the administration of the estate will readily apply to this category of requester, the public body will need to satisfy itself on a number of basic points. Among the steps that the decision maker should take are the following:

- a. Require the requester to produce the original or Probate office copy of the Grant of Probate or Administration;
- b. Have the requester confirm that, where the grant of Probate is limited, it is still in full force and effect;
- c. Evidence of identity of the requester to confirm that he/she is the person named in the Grant;
- d. Evidence of identity of any person acting with the consent of the personal representative, and evidence of such consent. A written statement from a solicitor that he or she is acting on behalf of the personal representative can be taken as sufficient evidence of consent in this case;

- e. Check that the grant covers the class of records to which access is being sought i.e. if the grant is limited to the personal estate of the deceased it would not cover records relating to the real estate or other personal affairs of the deceased not related to administration of the estate;
- f. Be satisfied that the records sought are required for the administration of the estate e.g. records relating to land, property, finance, pensions, social welfare payments, grants etc,. In the normal course of administration, the personal representative would not require access to sensitive medical records or such like. If in doubt, the decision maker should ask the requester to show how he/she is acting "in due course of administration" of the estate in requesting the particular records.

CATEGORY 2

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. This would cover, inter alia, cases where the estate and subsequent affairs of the deceased are taken over by a Court or State agency. The steps required in this instance would be the following:

- a. Require the requester to produce the official copy of the court order where applicable;
- b. Obtain proof of identity of the requester to confirm that he/she is the person appointed by the court order or authorised by the Statute; and
- c. Check that the records requested are covered by the authorisation in the court order or statute.

CATEGORY 3

Spouses/former spouses, partners/former partners or next of kin of the deceased: This category permits, in appropriate circumstances, access to certain records to be given to the different individuals who enjoyed a particular relationship with the deceased.

Applicants under this category would be required to produce evidence of their relationship to the deceased. Examples of appropriate evidence are set out below:

A. Spouses/former spouses - An affidavit or other acceptable proof showing the marriage certificate and stating the circumstances at the date of death of the deceased i.e. living together in a spousal relationship, separated and the length of the separation, whether legal proceedings for separation/ divorce had been instituted. Copies of any separation agreements, court orders, divorce decrees, should be lodged.

B. Partners/former partners - The requester should establish that he or she has lived with and shared the life of the deceased person for a significant period of time. It is suggested that four or more years might be a guideline in this regard. Proof of living with and sharing the life of the deceased should be done by way of affidavit or other acceptable proof setting out such facts as are relied upon in support of his/her claim to be the partner of the deceased. The onus is on the requester to prove the facts on which he or she bases his or her claim. Such proofs could include:

- evidence of unequivocal acts of sharing the life of the deceased for a significant period;

- evidence of living with the deceased on a continuous basis as opposed to occasional social visits; and
- evidence of payment of outgoings relating to a shared family home. Any element of such evidence, considered on its own, may not suffice to establish that the requester was the partner of the deceased. The matter should be decided by the decision maker on consideration, firstly, of all of the facts established by the requester and secondly, on consideration of the views of other relevant parties whose views have been obtained through the consultation process referred to below. The weight to be given to the different facts established and views obtained is a matter for the decision maker and each such case must be dealt with on its merits on a case by case basis.

C. Next of Kin - In order to establish his or her claim to be the next of kin of the deceased, the requester would be required to submit an affidavit or other acceptable proof establishing the relationship and showing the necessary State Certificates. For this purpose, next of kin are described (in accordance with the Succession Act, 1965) as follows:

- child or children of the person to whom the records relate, then
- parents or surviving parent of the person to whom the record relates, then
- brothers and sisters of the person to whom the record relates, then
- nephews and nieces of the person to whom the record relates, then
- the person or persons who, at the date of death, stand nearest in blood relationship to the person to whom the record relates, then
- the Minister for Finance.

(Relatives of the half - blood are to be treated equally with relatives of the whole blood)

In some instances, supplementary evidence may be required to establish next of kin e.g. if a child seeks access to records of a father whose name does not appear on the birth certificate, a court declaration of paternity may be required.

3.1 Factors to be taken into consideration in deciding if release is appropriate to persons in category no. 3

Once a decision maker is satisfied that the requester comes within the scope of category no. 3, it is a matter for the decision maker to make such enquiries and engage in such consultation as is necessary to allow him or her to decide if the public interest would be better served by granting than by refusing the request.

Each case will have to be judged on its own merits. The decision maker will have to balance the public interest in the confidentiality of personal information against the public interest in the right of the requester to access the records. While section 8(4) requires that the decision maker shall disregard any reasons the requester gives for the request, in making a judgment in relation to the records of deceased persons, it is reasonable for a decision maker to inform

him or herself as fully as possible of all the circumstances relevant to the request.

In reaching this decision, the decision maker should take the following into consideration:

- The confidentiality of personal information as set out in section 28(1) of the Act
- Would the deceased have consented to the release of the records to the requester when living? If so, this would strengthen the case for deciding to release after death. If, however, the deceased had refused to release the records during his/her lifetime or had left written instructions in a will or other document that the records were not to be released, there would have to be compelling reasons for overturning the deceased's expressed wishes.
- Has the person outlined arrangements in his or her will or other instrument in writing consenting to release of personal records? If so, the following steps may be appropriate:
 - a. Evidence of the original grant of probate, or the probate office copy, or the original instrument in writing;
 - b. Proof of identity of the requester to confirm that he/she is the person authorised in the proven will or written instrument; and
 - c. Check that the records requested are covered by, or appropriate to, the authorisation in the proven will or written instrument.
- Would the release damage the good name and character of the deceased? The effect of release of the records on the good name and character of the deceased should be considered e.g. whether disclosure of the information would, without just cause or excuse, lower the standing of the person in the eyes of right thinking persons or leave the person open to ridicule.
- The nature of the relationship of the requester to the deceased and the circumstances of the relationship prior to the death of the deceased. For example, if the requester is a spouse, issues such as whether the parties were living together, or had been separated or engaged in legal proceedings, and whether the relationship was amicable or acrimonious would be relevant. The claims of a cohabiting spouse would in most circumstances be stronger than those of a non-cohabiting spouse. In the case of a former spouse or former partner seeking access to records of the deceased, in the normal course, only records concerning the period of his or her marriage or relationship with the deceased should be considered for release.
- The nature of the records to be released. If the record is inherently private, and of a very sensitive nature, then it is likely not to be released unless there are compelling reasons for so doing. Such reasons might include the release to a blood relative of records that show a hereditary medical condition. In relation to medical records, due regard should be had to the confidentiality of medical records in accordance with the Irish Medical Council Guide to Ethical Conduct and Behaviour. Records containing joint personal information of both the requester and the deceased might, subject to other considerations, fall to be released.

- Can the requester obtain the information they seek without accessing the records of the deceased, for example from another family source? This avenue should be explored with the requester. Any request for access to financial records should be directed in the first instance to the personal representative.
- Any other circumstances relevant to the request as set out by the requester. These should be taken into account by the decision maker in reaching a decision on the request.

Decision makers should note that, even where they have made a preliminary finding that access is appropriate in the particular circumstances, it is still necessary to consider the other exemptions in the Act.

3.2 Consultation in relation to the records of the deceased

General points

Consultation does not arise in respect of FOI requests by requesters in categories 1 and 2, i.e.:

Category 1 - The personal representative of the deceased acting in due course of administration of the estate of the deceased or any person acting with the consent of the personal representative so acting, and

Category 2 - A person appointed by the courts or by statute acting in the course of the performance of the assigned functions.

Access should be granted to appropriate records sought by such requesters on submission of the necessary material described earlier in this text.

Where a request for the release of records relating to a deceased person falls into Category 3, the public body may make such enquiries and engage in such consultations as are necessary to ensure that all public interest considerations are taken into account. Examples of how this might operate in particular circumstances are described below:

- a. Where there is a proved will, or where letters of administration have been extracted on a death intestate, and the records are such as are necessary for the due course of administration of the estate of the deceased, the personal representative may be consulted in the first instance.
- b. Where there is an unproved will, or where no letters of administration have been extracted on the death intestate of a deceased person, or where the personal representative is deceased, or where the records are personal non-administration records, the spouse or the next of kin, as applicable, may be consulted.
- c. Persons who had a "family" relationship with the deceased during his/her life, though not legally related to him or her, such as a foster parent of an informally adopted child, could also be consulted as could persons with an established relationship of trust such as a medical or legal adviser or close friend.

Contacts

It may be necessary to make enquiries to establish the whereabouts of the next of kin. In cases where a grant to the estate of the person to whom the record relates has issued, the names and present addresses of the party or parties as set out above should be sought from the personal representative or his/her solicitor. Where a grant has not been extracted, the requester could be asked to make every effort to provide the necessary information. Relevant information may be obtained from:

- Inspection of the death certificate;
- Valuation Office;
- Probate Office;
- Land Registry/Registry of Deeds records;
- Other sources such as the electoral register, death notices in newspapers, telephone directories or in Thom's Directory.

Nothing in the guidelines should be interpreted as obviating the requirement for consultation, in accordance, with section 29 of the FOI Act where records contain joint personal or third party information.

3.3 Other provisions of the FOI Act

As with the classes of persons whose records may be made available to parents or guardians, decision makers, when reflecting on whether access should be provided to the records of deceased persons, **must also consider any other exemptions that may be relevant.**

3.4 Persons not within categories 1-3

Cases may arise where a request is received for the records of a deceased person from an individual not belonging to the categories specified above. The FOI Act does not prohibit access to records being granted to persons not covered by the specified categories. Such requests fall to be considered on their merits outside the parameters of the FOI Act with decisions on access expected to follow such enquiries and consultations as the public body deems necessary depending on the particular case. Cases, where it may be considered appropriate by a public body for persons to pursue access requests outside FOI, could include the following situations:-

- *where an individual, though not the closest blood relative to the deceased person, is a next-of-kin within the meaning of the Succession Act, 1965,*
- *where an individual had a “family” relationship with the deceased during his/her lifetime, though not legally related to him or her, such as a foster parent of an informally adopted child,*
- *where the deceased had made arrangements in his/her will or otherwise as to how their personal records were to be handled following death,*
- *where there is no will and letters of administration have not been extracted,*
- *where there is a will but no grant of probate,*
- *where there are disputes regarding a will, or*
- *where no grant will be extracted because there is no estate to be administered.*