
In general, the FOI Acts, pursuant to section 28(1), accord the same rights of privacy to records containing personal information relating to living and deceased persons. This is so despite the fact that constitutional rights to privacy beyond death are doubtful, having never been dealt with directly by the Irish Courts, and that comparable information rights under the Data Protection legislation are specifically limited to personal data relating to living individuals1. However, in relation to medical records in particular, the High Court has recently indicated a willingness to consider the possible existence of an obligation of confidence to deceased persons2. The extension of privacy rights to deceased persons also accords with the Medical Council’s Guide to Ethical Conduct and Behaviour, which states that patient information “remains confidential even after death”3.

In FOI terms, all records held by a public body are potentially accessible, unless a relevant exemption provision can be found to apply. Generally, medical records are protected by section 28(1), which prohibits the release of records containing personal information, regardless of whether the person to whom the information relates is deceased. However, the prohibition in section 28(1) is subject to certain exceptions.

One of these exceptions, in section 28(6), allows for the introduction, by the Minister of Finance, of regulations granting access to personal information (including personal information relating to deceased persons) to certain classes of requester. The current Regulations were introduced in September 20094.

The 2009 Regulations

In relation to access to records relating to a deceased person, regulation 4(1)(b) of the 2009 Regulations provides, subject to the other provisions of the FOI Acts, that access shall be granted where the requester is:

Category 1 the personal representative of the deceased’s estate acting in the administration of the estate or any person so acting with the personal representative’s consent;

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2 *Rotunda Hospital v Information Commissioner*, [2009] IEHC 315: Note that this judgment is currently under appeal to the Supreme Court
3 *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*, 7th Ed., Medical Council (2009), para. 24.2
Category 2 a person performing a legal function in relation to the deceased or their estate; and

Category 3 the spouse / former spouse, co-habiting partner / former co-habiting partner, or next of kin of the deceased, where, in the opinion of the head of the public body concerned, having regard to all the circumstances and any relevant guidelines published by the Minister, the public interest, including the public interest in the confidentiality of personal information, would on balance be better served by granting than by refusing to grant the request.

However, one question which arose in relation to the preceding 1999 Regulations, and which the 2009 Regulations have failed to ‘cure’, is the question of whether the regulations are intra vires section 28(6) of the FOI Acts. In this regard, as stated above, section 28(6) permits the Minister to prescribe certain classes of requester which can access personal information. However, in addition to prescribing such classes of requester, the 2009 Regulations also require the application of a public interest test. It is arguable, as has been noted by the Information Commissioner in relation to the 1999 Regulations, that the inclusion of a public interest test in determining the classes of requester prescribed by the 2009 Regulations is ultra vires on this basis, particularly in circumstances where the FOI Acts already include, in section 28(5), a general public interest test which must always be considered where section 28(1) is applied to prohibit the release of personal information. Notably, the question of the validity of the 2009 Regulations is currently under consideration in judicial review proceedings that have been recently instituted. Developments in this regard will be watched with interest.

Guidance Notes
New guidance notes were also drawn up and published by the Minister for Finance in September 2009 pursuant to the 2009 Regulations (the “Guidance Notes”).

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5 “Next of Kin” is defined as the person(s) standing nearest in blood relationship to the deceased
6 Note that the 1999 Regulations provided for access to deceased records by spouses, next of kin or “other persons” as considered appropriate by the head of the public body concerned.
7 X and Southern Health Board, Letter Decision No. 020561, 7 July, 2003
8 James O’Loughlin v Information Commissioner, Minister for Finance, Ireland, the Attorney General and the HSE, High Court Record No. 2011, Number 185 JR
9 Guidance Notes on Access to records by parents / guardians and Access to records relating to deceased persons under section 28(6) of the Freedom of Information Act 1997
In relation to categories 1 and 2, the Guidance Notes clarify that only those persons who have taken out a grant of probate of letters of administration or their agents, or who have been appointed by the Court or State Agency are covered.

In relation to category 3, the Information Commissioner has acknowledged that the previous 1999 guidelines represented “a useful tool in dealing with the difficult question of what is meant by the term ‘appropriate in all the circumstances’”\(^{10}\). By extension to the 2009 Regulations, the Guidance Notes might be said to be a useful tool in dealing with the difficult question of what factors should be considered in determining where the balance of the public interest lies in relation to the request for access under category 3. In this regard, the Guidance Notes specify that the following are factors to be considered in deciding whether the public interest would be better served by granting than by refusing the request:

1. The confidentiality of personal information;
2. Whether the deceased, if living, would have consented to the release of the records to the requester;
3. Whether the deceased’s will or other written instrument consents to the release of personal records;
4. Whether release of the records would damage the good name and character of the deceased;
5. The nature of the relationship between the requester and the deceased, including, for example, whether they were living together/separated, whether the relationship was amicable or acrimonious etc.;
6. The nature of the records to be released, for example, whether the records are inherently private and of a very sensitive nature;
7. Whether the requester can obtain the information contained in the records without accessing the records; and
8. Any other relevant circumstances.

Although the Guidance Notes do not have force of law, pursuant to Regulation 4(1)(b)(iii) of the 2009 Regulations, FOI decision-makers must have “regard to” them when

\(^{10}\) X and Southern Health Board, above, n.5
considering a request for access to a deceased's personal information from a spouse or next of kin. What is clear, however, is that the requirement to have regard to the Guidance Notes does not amount to an obligation to comply with them. In this regard, the High Court has held that this type of guidelines may be departed from for bona fide reasons, once reasonable consideration is given to them “with a view to accommodating their objectives and policies”.

For further information on any of the above issues, please contact our FOI team.

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