

**Private & Confidential**

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[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

19 May 2020

**Our Ref: 019 2020**

**Re: – FOI decision part granting request**

Dear [REDACTED]

I refer the request you made under the Freedom of Information Act 2014 on 16 April 2020. I note you that your request, as refined in an email dated 17 April 2020, was for a copy of the following:

*"All correspondence (including attached documents etc) regarding the infection control in nursing homes and residential centres, between Phelim Quinn (CEO of HIQA) and:*

- *CMO*
- *Secretary General of the Department of Health*
- *Assistant Secretary Generals Department of Health*
- *CEO of the HSE*
- *Deputy CEO of the HSE*

*From February 1st 2020 to the present."*

I note an extension was applied to this request, on 12 May 2020, extending the deadline for response to 19 May 2020. As noted in the email issued on 12 May 2020, this extension was applied on the basis of Section 14(1)(b) of the FOI Act.

I, Kathleen Lombard, have now made a final decision to part grant your request. This decision was made today, 19 May 2020.

The purpose of this letter is to explain that decision. This explanation has the following parts:

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1. A schedule of all of the records covered by your request;
2. An explanation of the relevant findings concerning the records to which access is denied, and
3. A statement of how you can appeal this decision should you wish to do so.

This letter addresses each of these three parts in turn.

## **1. Schedule of records**

A schedule is enclosed with this letter, it shows the documents that I considered to come within the scope of your request. It describes each document and refers to the sections of the FOI Act which apply to prevent release. The schedule also refers you to sections of the detailed explanation given under heading 2 below, which are relevant to the documents in question. It also gives you a summary and overview of the decision as a whole.

## **2. Findings, particulars and reasons for decisions to deny access**

Four different exemptions have been applied in relating to this request. The specific records to which these exemptions were applied are identified in the schedule.

### **(a) Section 36(1)(b) and (c)-Commercially Sensitive Information**

Section 36(1)(b) of the FOI Act states:

*"Subject to subsection (2), a head shall refuse to grant an FOI request if the record concerned contains—*

- (a) trade secrets of a person other than the requester concerned,*
- (b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or*
- (c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates."*

A number of records contain information relating to long term residential centres. The disclosure of this information could be reasonably be expected to result in a material financial loss to the owners and operators of these long term residential centres. Accordingly, I am of the view that Section 36(1)(b) and (c) applies and access to this information must be refused.

In making my decision, I have regard to the other provision in Section 36, including Section 36(2).

## Public Interest Consideration

I acknowledge that the above exemption is subject to a "public interest test" under Section 36(3). This provision provides for the release of commercially sensitive information if releasing the information outweighs the public interest in refusing access to the information.

I have considered the public interest issues which arise in this case and have taken account of the following factors.

In favour of release:

- The public interest in members of the public exercising their rights under the FOI Acts.
- The public interest in openness and transparency among FOI bodies.

In favour of refusing access to the records:

- The public interest in business owners and operators not being unduly impeded in the effective pursuit of their business.
- The public interest in safeguarding the flow of information to and from public bodies, particularly at a time of a national health crisis.

I consider that the public interest in favour of refusing these records outweighs the public interest in releasing them in this instance.

### **(b) Section 32(1)(a)(iii) and 32(1)(b) –Public Safety**

Section 32(1) of the FOI Act states:

*"(1) A head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to:*

*(a) prejudice or impair—*

- (i) the prevention, detection or investigation of offences, the apprehension or prosecution of offenders or the effectiveness of lawful methods, systems, plans or procedures employed for the purposes of the matters aforesaid,*
- (ii) the enforcement of, compliance with or administration of any law,*
- (iii) lawful methods, systems, plans or procedures for ensuring the safety of the public and the safety or security of persons and property,*
- (iv) the fairness of criminal proceedings in a court or of civil proceedings in a court or other tribunal,*
- (v) the security of a penal institution,*
- (vi) the security of a children detention school within the meaning of section 3 of the Children Act 2001 ,*
- (vii) the security of a remand centre designated under section 88 of the Children Act 2001 ,*
- (viii) the security of the Central Mental Hospital,*
- (ix) the security of a building or other structure or a vehicle, ship, boat or aircraft, or*
- (x) the security of any system of communications, whether internal or external, of the Garda Síochána, the Defence Forces, the Revenue Commissioners or a penal institution,*

*(b) endanger the life or safety of any person, or*

*(c) facilitate the commission of an offence.”*

A number of records contain information relating to the management and control of COVID 19 in specific long term residential centres during the pandemic. Having examined the records, I am of the view that the release of this information, at a time of a critical public health emergency, would give rise to significant distress to residents in these long term residential centres and their families and adversely affect their mental and physical health. For this reason, I am of the view that Section 32(1)(b), applies and access to the records should be refused.

It is also my view that the release of this information could be reasonably expected to prejudice or impair the plans for ensuring the safety of the public and the safety or security of persons and property. As such, I find that Section 32(1)(iii) also applies in this instance.

In making the above decision, I have had regard to the other parts of Section 32, including Section 32(3).

#### Public Interest Consideration

I am aware that the above exemption is subject to a “public interest test” under Section 32(3)(b). This provision provides for the release of information covered by the exemption if the public interest in the releasing the information outweighs the public interest in refusing access to it.

I have considered the public interest issues which arise in this case and have taken account of the following factors.

In favour of release:

- The public interest in knowing how COVID 19 has been responded to in long term residential centres.
- The public interest in openness and transparency among FOI bodies.

In favour of refusing access to the records:

- The public interest in protecting the mental and physical health of residents and their families.
- The public interest in ensuring an efficient response to COVID 19 and that plans and measures are executed in a timely manner.
- The public interest in ensuring adherence to public health policies implemented during the national pandemic.

While I acknowledge there is a strong public interest in the release of this information, I consider that the public interest in favour of refusing these records is even stronger. Accordingly, access to the records must be refused.

**(c) Section 29(1)(a)–Deliberations of a FOI body**

Section 29(1) of the FOI Act states:

*"A head may refuse to grant an FOI request—*

- (a) if the record concerned contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and*
- (b) the granting of the request would, in the opinion of the head, be contrary to the public interest,*

*and, without prejudice to the generality of paragraph (b), the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make"*

As outlined in the schedule, a number of records concern the development of papers concerning the management of COVID 19 in long term residential care (LTRC). These papers were developed by representatives of the Department of Health, together with HIQA, the Mental Health Commission, and the HSE. These records include early drafts of a paper, which when finalized was presented to NPHE, for consideration in the context of determining recommendations for the national response to COVID 19.

Given the ongoing nature of work concerned and that NPHE is continuing to make recommendations to the Government and Department of Health on the national response to COVID 19, I am of the view that releasing these records, while the pandemic is still on-going, would be contrary to the public interest. For this reason, I am of the view that the records concerned should be refused on the basis of Section 29(1)(a).

In making this decision, I have considered the other provisions of Section 29, including Section 29(2).

I have also considered the following public interest factors:

In favour of release:

- The public interest in knowing how the recommendations of public bodies on important issues.
- The public interest in openness and transparency among FOI bodies.

In favour of refusing access to the records:

- The public interest in public bodies being able to perform their functions effectively.
- The public interest in public bodies communicating with one another on important issues.
- The public interest in ensuring public safety during a time of pandemic.

**(d) Section 35(1) –Information obtained in confidence.**

Section 35(1) of the FOI Act provides:

*(1) "Subject to this section, a head shall refuse to grant an FOI request if—*

*(a) the record concerned contains information given to an FOI body, in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or*

*(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) in Part 1 or 2 of Schedule 3 of an enactment specified in that Schedule) or otherwise by law."*

Two of the records contain information which constitutes information given in confidence. I am of the view that the above exemption applies to this information and, as this is a mandatory exemption, I must refuse access to this information.

In making my decision I have considered the other parts of Section 35.

**Public Interest Consideration**

I am aware that the above exemption is subject to a "public interest test" under Section 35(3). This provision provides for the release of information covered by the exemption if the public interest in the releasing the information outweighs the public interest in refusing access to it.

I have considered the public interest issues which arise in this case and have taken account of the following factors.

In favour of release:

- The public interest in openness and transparency.

In favour of refusing access to the records:

- The public interest in safeguarding the flow of information to public bodies.
- The public interest in protecting the privacy of individuals.

In this instance, I am of the view that the public interest is best served by refusing to release this information. However, in the interests of transparency, the exempt information has been redacted from the record in order to allow access to the remainder of the record.

**3. Rights of appeal**

If you are unhappy with this decision you may seek an internal review. In the event that you wish to do so, please e-mail [foi@higa.ie](mailto:foi@higa.ie). The appeal will involve a complete reconsideration

of the matter by a more senior member of the staff of HIQA. Please note that a fee of €30 applies in the case of an internal review.

You should make your appeal within 4 weeks, from the date of this notification, where a day is defined as a working day excluding, the weekend and public holidays. However, the making of a late appeal may be permitted in appropriate circumstances.

If you have any queries in relation to this decision, please contact the FOI Liaison Officer, Lydia Buckley, on [foi@hiqa.ie](mailto:foi@hiqa.ie) or [REDACTED].

Yours sincerely

A handwritten signature in black ink that reads "Kathleen Lombard". The signature is written in a cursive style and is contained within a thin black rectangular border.

Kathleen Lombard  
Board Secretary