

Private & Confidential

[REDACTED]

[REDACTED]

06 July 2020

Our Ref. FOIR 026a 020

Re: Decision on FOI Request (part grant)

Dear [REDACTED],

I refer to the recent request which you made to the Health Information and Quality Authority under the Freedom of Information (FOI) Act 2014. I note this request was received on 7 May 2020, and the scope of the request, as clarified via email on 22 May 2020, was for the following records:

"1. Copies of all correspondence (letters/emails) and notes of phone calls received by the Health Information and Quality Authority from the following nursing homes under the regulation of HIQA relating to Covid-19 between March 1st and May 6th, 2020:

[REDACTED]

2. Concerns received by HIQA from members of staff of registered centres as well as members of the public and the relatives of residents in relation to Covid-19 between March 1st and May 6th, 2020."

This decision concerns the first part of your request. I note that a decision on the second part of your request issued separately to you on 4 June 2020 (FOIR 026b 020). As noted in correspondence dated 27 May 2020, the first part of your request involved a significant number of records and an extension was required in order to process this part of the request.

I, Bob Hennessy, have now made a decision to part grant your request. This decision was made today 6 July 2020.

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

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 of the record, either in full or in part.

The schedule also gives you a summary and overview of the decision as a whole and refers you heading 2 below, which explains the decision made in respect of the records.

There is a separate schedule for each of the six sets of correspondence/notes released.

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

Please note that the approach taken in responding to this FOI was to release the set of correspondence/notes sought in respect of the six above designated centres, but to redact information which would identify which individual centre each set of correspondence/notes related to. To this end the names of the six designated centres have been replaced with the titles "DC1"- "DC6" in the schedule.

This approach was taken in order to strike a balance between the objectives of transparency, set out in the FOI Act, and the need to safeguard commercially sensitive information and information which would undermine public safety during the time of a national health emergency (which are also important factors recognised in the FOI Act).

The specific records to which redactions have been made are identified in the schedule and the individual exemptions relied on are discussed in more below.

(a) Section 36(1)(b) -Commercially Sensitive Information

Section 36(1) 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.”

This request sought correspondence sent to HIQA by four privately run designated centres and phone-notes made by HIQA in respect of these designated centres. It is my view that this correspondence contains commercially sensitive information which could reasonably be expected to result in a material financial loss to the designated centres concerned and prejudice the competitive position of the providers of the individual designated centres. Accordingly, Section 36(1)(b) applies and access to this information must be refused. In making my decision, I have regard to the other provision in Section 36, including those in Section 36(2).

In the interests of transparency, information which identifies the specific centres and thereby undermines the commercial interests of the private designated centres, has been redacted from the records enabling access to the remainder of the record.

The identifying information refused and redacted includes the name of the centre, names/titles of employees, emails addresses of senders/recipients of correspondence, other specific information relating to the designated centre.

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 weighted the public interest issues which arise in this case, taking into account of the following factors.

In favour of release of the information:

- 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 regulators and the regulated entities, 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. I am also of the view that the public interest in allowing access to the records in question has been met to some extent by the partial release of non-exempt information.

(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."

This request sought access to correspondence from two public designated centres relating to Covid-19 and HIQA notes of the same. Having examined the records, I am of the 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 within these designated centres. As such, I find that Section 32(1)(iii) applies in this instance.

I am also of the view that release of the information may endanger the life and safety of persons, given that the COVID 19 pandemic is still on-going and is particular risk to the health and safety of vulnerable residents in designated centres. Accordingly, I find that Section 32(1)(b) also applies.

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

In the interests of transparency, information which identifies the specific centres and gives rise to the public health and safety concerns outlined above, has been redacted from the records enabling access to the remainder of the record.

The identifying information refused and redacted includes the name of the centre, names/titles of employees, emails addresses of senders/recipients of correspondence, other specific information relating to the designated centre.

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 by public bodies.
- The public interest in openness and transparency among FOI bodies.

In favour of refusing access to the records:

- The public interest in ensuring an efficient response to COVID 19.
- The public interest in protecting the life and wellbeing of members of the public during the course of a public health crisis.

I consider that the public interest in favour of refusing access to the information outweighs the public interest in releasing the exempt information.

(c) Section 37 –Personal Information

Section 37 of the FOI Act 2014 states:

“(1)...a head shall refuse to grant an FOI request, if in the opinion Of the head, access to the record concerned would involve the disclosure Of personal information (including personal information relating to a deceased individual).”

A number of specific records contain the personal information of third parties (these records are indicated in the schedule) including information relating to particular individual's COVID 19 status and other sensitive healthcare information. Access to this information has been refused on the basis of Section 37(1), and this information has been either redacted from the records or access to the record has been refused in its entirety. Whether a record was released in part or was refused is indicate in the schedule.

Public interest test

I acknowledge that Section 37(5)(a) provides for the release of personal information relating to third parties where the public interest that the request should be granted outweighs the right to privacy of the individuals to whom the information relates.

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 the public knowing how a public body performs its functions;
- the public interest in members of the public exercising their rights under the FOI Acts.

In favour of withholding the records:

- the public interest in protecting the right to privacy;
- the public interest in public bodies being able to perform their functions and communicate effectively.

(d) Section 35 – Information Given in Confidence

Section 35(1) of the FOI Act states:

(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."

One 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 these records.

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.

2. Appeal Rights

In the event that you are not happy with this decision you can make an internal appeal by writing to the Freedom of Information Unit by e-mail to foi@hiqa.ie. A fee of €30 applies in the case of an appeal involving non-personal requests. You should make your appeal within 4 weeks (20 working days) from the date of this letter, 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.

The appeal will involve a complete reconsideration of the matter by a more senior member of the staff of this body.

3. Publication

This Authority will publish details of all non-personal Freedom of Information requests received on its website.

If you have any queries in relation to this decision, please feel free to contact the FOI Liaison Officer, Lydia Buckley, via foi@hiqa.ie or 0858709023.

Yours sincerely,

Bob Hennessy
Deputy Director of Regulation