

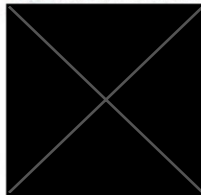


Oifig an Choimisinéara Faisnéise
Office of the Information Commissioner

**Review Application to the Information Commissioner under the
Freedom of Information Act 2014 (the FOI Act)**

Case Number: OIC-53305-L3H8G0 (190055)

Applicant: Mr John Hamill



Public Body: Department of Education and Skills (the Department)

Issue: Whether the Department was justified in its decision to refuse access to certain records relating to the Professional Development Service for Teachers (PDST) under section 15(1)(a) of the FOI Act

Review: Conducted in accordance with section 22(2) of the FOI Act by Stephen Rafferty, Senior Investigator, who is authorised by the Information Commissioner to conduct this review

Decision: The Senior Investigator affirmed the decision of the Department. He found that the Department was not required to consider if relevant records are held by PDST on the ground that such records, if they exist, are not held by or under the control of the Department. He also found that the Department had taken all reasonable steps to ascertain the whereabouts of relevant records.

Right of Appeal: Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated not later than four weeks after notice of the decision was given to the person bringing the appeal.

Background

The applicant in this case previously sought a review by this Office of the refusal of his FOI request by the Professional Development Service for Teachers (PDST) on the grounds that it is not a public body for the purposes of the FOI Act. On 21 August 2018 I notified the applicant of my finding that PDST was not a public body for the purposes of the Act.

I noted in my letter that PDST had stated it was a service provider under the aegis of the Teacher Education Service (TES) of the Department of Education and Skills. I also noted that the Act provides for a right of access to records held by FOI bodies and that for the purposes of the Act, a reference to records held by an FOI body includes a reference to records under the control of that body. While I made no finding on whether or not records held by PDST might be under the control of the Department, I suggested that it might be open to the applicant to pursue the possibility that the records he was seeking may be deemed to be held by the Department.

On 14 December 2018 the applicant submitted a request to the Department for:

1. "All correspondence between the PDST and representatives of the Catholic Church (including emails and written correspondence) during calendar year 2016. This is to include Diocesan Advisors working with schools on behalf of the Catholic Church
2. All minutes from meetings, policy documents or other agreements between the PDST and representatives of the Catholic Church that were applied during the calendar year 2016, which relate to in-service days for religion teachers. This is to include agreements and discussions relating to the content to be presented at such in-service days, arrangements for physical premises to be used; how costs should be covered and the management of any fees paid; how such in-service days should be advertised towards schools; and what commercial products would be promoted at such in-service days (for example, from suppliers such as Veritas)
3. Any minutes from meetings, policy documents or other agreements between the PDST and representatives of the Catholic Church during calendar year 2016, which relate to how religion should be taught or how teachers should be instructed in the teaching of religion
4. All written correspondence and all emails between the PDST and the Department of Education and Skills during calendar year 2016, relating to the teaching of religion
5. All written correspondence and all emails between the PDST and the National Council for Curriculum and Assessment during the calendar year 2016, relating to the teaching of religion
6. A list of all in-service days for religion teachers during the calendar year 2016, which were attended both by representatives of the Catholic Church and representatives of the PDST, or which were arranged by both the Catholic Church and the PDST
7. Details of any payments made by the PDST to the Catholic Church or Diocesan Advisors on behalf of the Catholic Church".

On 16 January 2019 the Department refused the request under section 15(1)(a) on the ground that it did not hold any relevant records. On 17 January 2019 the applicant sought an internal review of the Department's decision, following which the Department affirmed its original

decision. On the same day the applicant sought a review by this Office of the Department's decision.

During the course of the review the Department provided details of the searches it had undertaken to locate relevant records and an explanation as to why it would not hold records that might be held by PDST. By email dated 25 June 2019 Ms Hannon of this Office provided the applicant with the details of the Department's submission and invited him to comment on the matter.

As submissions have now been received from the applicant, I have decided to conclude this review by way of a formal, binding decision. In carrying out my review. I have had regard to the correspondence between the Department and the applicant as set out above. I have also had regard to the communications between this Office and both the applicant and the Department on the matter.

Scope of the Review

This review is concerned solely with whether the Department was justified in refusing the applicant's request under section 15(1)(a) of the FOI Act on the grounds that no relevant records exist or can be found.

Analysis and Findings

While the majority of the applicant's request was for records that one would expect PDST to hold, part of the request (part 4) was for records that one would expect both PDST and the Department to hold if such records exist. In light of the applicant's arguments, there are two matters to be considered in this review. The first matter is whether relevant records held by PDST might be deemed to be held by the Department for the purposes of the FOI Act. The second matter is whether the Department has taken all reasonable steps to ascertain the whereabouts of any relevant records it might hold.

Records held by the PDST

The FOI Act provides for a right of access to records held by FOI bodies. Section 2(5) of the Act provides that a reference to records held by an FOI body includes a reference to records under the control of that body.

In its submissions to this Office, the Department stated that the Dublin West Education Centre (DWEC), which is an independent statutory body recognised by the Minister for Education and Skills under section 37 of the Education Act 1998, "hosts" PDST. It said the principal activity of Education Centres is to organise the local delivery of national programmes of teacher professional development on behalf of the Department.

The Department explained that it is the main funder of Education Centres through direct budget allocations for administrative staff pay and operating costs and that the Centres also receive significant funding for the support services that are funded entirely by the Department for the purpose of designing and delivering continuing professional development courses and other professional support for teachers throughout the country. It added that it funds three teacher professional development support services of which PDST is the largest. It stated that teachers seconded to these services have a contract of secondment with a host education centre, which in the case of PDST is DWEC. It stated that all funding for PDST from the Department is routed through DWEC. It stated that FOI requests for information held by DWEC including that relating to PDST must be made directly to DWEC.

In his submission of 25 June 2019 the applicant suggested that this Office agreed with PDST's argument that it is a service provider under the aegis of TES and that it determined that he must submit a request to the Department for the relevant records. That is not correct.

As I explained above, I noted that **PDST had stated** it was a service provider under the aegis of TES and I expressly stated that I was making no finding on whether or not records held by PDST might be under the control of the Department as the only matter before me was whether PDST was a public body for the purposes of the Act.

It is important to note that DWEC is, of itself, a public body for the purposes of the FOI Act. Having regard to the Department's explanation of the nature of its relationship with DWEC and of the nature of the relationship between DWEC and PDST, I am satisfied that records held by PDST are not under the control of the Department and are not, therefore, deemed to be held by the Department for the purposes of the FOI Act. As such, I am also satisfied that the Department was not required to ask PDST if it holds relevant records in the course of its efforts to locate relevant records.

I would add, at this stage, that the nature of the relationships between the parties is quite complex. Given the Department's knowledge of the details of those relationships, it seems to me that it should have considered transferring the relevant parts of the request to DWEC for processing. Section 12(3) provides that where an FOI body receives a request for records that it does not hold but to its knowledge are held by another FOI body, it must give a copy of the request to the other FOI body within two weeks and inform the applicant of having done so. It is unfortunate that the Department did not do so in this case. Nevertheless, it is open to the applicant to make a fresh FOI request to DWEC for relevant records should he so wish.

Section 15 (1)(a)

The Department refused the request under section 15 (1)(a) of the Act on the grounds that the records sought do not exist. That section provides that a request for access to a record may be refused if the record sought does not exist or cannot be found after all reasonable steps to ascertain its whereabouts have been taken. The role of this Office in cases such as this is to review the decision of the FOI body and to decide whether that decision was justified. This means that I must have regard to the evidence available to the decision maker and the reasoning used by

the decision maker in arriving at his decision and I also must assess the adequacy of the searches conducted by the FOI body in looking for relevant records.

As I outlined above, Ms Hannon of this Office has provided the applicant with details of the searches undertaken and the Department's explanation as to why it does not hold any relevant records. Therefore, while I do not propose to repeat those details here in full, I can confirm I have had regard to them for the purposes of this review.

In summary, the Department said that in accordance with Department policy, files are saved both electronically and in hard copy paper files. Hard copy files that are currently in use are kept in the section for easy access with the facility of a filing room also available to the section for those files accessed infrequently or before movement to the managed warehouse. It said official records are only destroyed if there is an accompanying disposal certificate from the National Archives Office. The Department stated that it is not aware of any records during the period of the relevant timeframe (2016) having been destroyed.

The Department added that TES is responsible for the retention of hard copy and electronic files in relation to PDST. It stated that these files contain information in relation to matters such as the annual work plan for PDST, its range of continuous professional development support across all curricular areas, recruitment of teachers annually on secondment to PDST, funding provided by the Department to PDST and details of various steering committee and management meetings. It stated that it undertook both manual and electronic searches of the relevant areas and no relevant records were returned.

It stated that while electronic key word searches identified a number of records, subsequent analysis established that those records were not relevant to the request. It stated that all relevant individuals were consulted and their records searched. An email was also sent to the entire Department advising of the request, the records sought and requesting that relevant records be forwarded to the deciding officer for consideration.

Having considered the searches undertaken by the Department and the details it provided of its records management processes, I am satisfied it has taken all reasonable steps to ascertain the whereabouts of relevant records. I find that it was justified in refusing the applicant's request under section 15(1)(a) on the ground that the records sought do not exist or cannot be found.

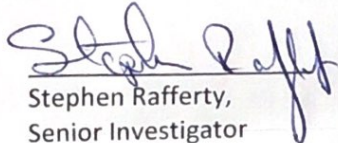
Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby affirm the decision of the Department to refuse the applicant's request for certain records relating to PDST under section 15(1)(a) of the Act on the grounds that no relevant records exist or can be found.

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Right of Appeal

Section 24 of the FOI Act sets out detailed provisions for an appeal to the High Court by a party to a review, or any other person affected by the decision. In summary, such an appeal, normally on a point of law, must be initiated not later than four weeks after notice of the decision was given to the person bringing the appeal.



Stephen Rafferty,
Senior Investigator
21 August 2019