



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

Case Number: OIC-57745-Q4K7Y3

Applicant: John Hamill, [REDACTED]

Public Body: Dublin West Education Centre (DWEC)

Issue: Whether DWEC was justified in refusing the applicant's request for records relating to the Professional Development Service for Teachers (PDST) on the ground that it does not hold the records for the purposes of the 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 DWEC to refuse the request on the ground that it does not hold the records for the purposes of the FOI Act.

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

In the particular circumstances of this case, it is first necessary to provide some background information of the efforts made by the applicant to obtain access to records concerning the Professional Development Service for Teachers (PDST) which led to the request that is the subject of this review.

According to its website, PDST is funded by the Teacher Education Section (TES) of the Department of Education and Skills (the Department) and is managed by DWEC. It describes itself as the country's largest single support service offering professional learning opportunities to teachers and school leaders in a range of pedagogical, curricular and educational areas.

The question of access to records relating to PDST under the FOI Act has proven to be quite complex and has not been helped by the different positions taken by the relevant bodies in the course of their engagements with this Office.

The applicant first submitted a request directly to PDST on 1 January 2018 for certain records. PDST argued that it was not a public body for the purposes of the Act and the applicant sought a review by this Office of that decision (Case OIC-59187 refers).

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 PDST's position that it was a service provider under the aegis of the TES of the Department. I found that PDST was, in essence, a programme or service for the delivery of certain support services to teachers and was not a separate legal entity in its own right.

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 (section 2(5) refers). While I made no finding on whether or not records held by PDST might be under the control of the Department for the purposes of the Act, 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 the same request to the Department. The Department refused the request under section 15(1)(a) on the ground that it did not hold any relevant records. The applicant sought a review by this Office of that decision (Case OIC-53305 refers).

In its submissions to this Office, the Department said DWEC, an independent statutory body recognised by the Minister for Education and Skills under section 37 of the Education Act 1998, "hosts" PDST. It said all funding for PDST from the Department is routed through DWEC and that FOI requests for information held by DWEC including that relating to PDST must be made directly to DWEC.

I issued my decision on the matter on 21 August 2019 wherein I found, 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, that records held by PDST were not under the control of the Department and were not, therefore, deemed to be held by the Department for the purposes of the FOI Act.

On 22 August 2019 the applicant submitted the same request to DWEC that is now the subject of this review. The request was for the following:

1. All correspondence between 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 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 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 PDST and the Department of Education and Skills during calendar year 2016, relating to the teaching of religion. All written correspondence and all emails between PDST and the National Council for Curriculum and Assessment (NCCA) during calendar year 2016, relating to the teaching of religion.
5. 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 PDST, or which were arranged by both the Catholic Church and PDST.
6. Details of any payments made by PDST to the Catholic Church or Diocesan Advisors acting on behalf of the Catholic Church.

On 19 September 2019, DWEC issued a decision in which it refused the applicant's request on the grounds that it did not directly or indirectly control PDST for the purposes of section 2(5) of the FOI Act. The applicant sought an internal review of that decision on the same day. On 10 October 2019, DWEC issued its internal review decision in which it affirmed its original decision to refuse the request. On 24 October 2019, the applicant sought a review by this Office of the decision of DWEC.

During the course of the review, this Office sought submissions from both DWEC and the Department regarding the relationship between the parties and with PDST and regarding the question of access to PDST records. Submissions were also received from the applicant.

I have now 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 the applicant, DWEC, and the Department on the matter. I have also had regard to a previous submission of PDST in case OIC-59187, which I consider to be relevant to the issues arising in this related review.

Scope of the Review

Section 15(1)(a) of the FOI Act provides for the refusal by a public body of a request where the records sought do not exist or cannot be found. This would include requests where the records sought do not exist within the body to which the request was made, i.e. the records sought are not held by that body for the purposes of the Act. Under section 2(5) of the Act, a reference to records held by an FOI body includes a reference to records under the control of that body. As such, even if a body does not physically hold certain records, it will be deemed to hold them for the purposes of the Act if the records sought are under its control.

In essence, the position of DWEC in this case is that the records sought, if they exist, would be held by PDST and not DWEC for the purposes of the Act. Accordingly, the question I must consider is whether DWEC was justified in refusing the request on the grounds that it does not hold the records sought and that they are not under its control.

Preliminary Matter

Before I go on to consider the question of whether DWEC holds the records sought for the purposes of the Act, I would like to make a brief reference to section 11(9) of the FOI Act. That section provides that a record in the possession of a service provider shall, if and in so far as it relates to the service, be deemed for the purposes of this Act to be held by the FOI body, and there shall be deemed to be included in the contract for the service a provision that the service provider shall, if so requested by the FOI body for the purposes of this Act, give the record to the FOI body for retention by it for such period as is reasonable in the particular circumstances.

No argument has been made during this review that PDST is a service provider for DWEC and I am satisfied that this is not the case. I note, however, that DWEC argued that PDST does, indeed, provide a service for the Department. I have not considered the merits of that argument in this decision as the review is concerned with whether DWEC holds the records sought and not with whether the Department holds them.

Analysis and Findings

DWEC argues that it does not hold any of the records sought. Its position in relation to each of the six parts of the applicant's request is as follows:

1. DWEC does not hold any records of this nature. All correspondence between the PDST and third parties would be stored on the PDST's server. DWEC does not have login details or access to PDST emails or its server.
2. DWEC does not hold records of any meetings with any representatives of the Catholic Church. To the knowledge of DWEC, the Catholic Church has not had any input into PDST materials or been involved in any way with the organisation of in-service.
3. DWEC does not hold any records relating to meetings between PDST and any representatives of the Catholic Church. To the knowledge of DWEC, no such meetings have taken place and the Catholic Church have not contributed to any DWEC or PDST materials.
4. DWEC does not hold any e-mails or other correspondence between the PDST and the Department or between the PDST and the NCCA during the calendar year 2016 relating to the teaching of religion.
5. Teachers would have attended these in-service days as registered teachers (with a Teaching Council number). DWEC does not have any records indicating teachers' religious affiliation as such information is not requested or held by DWEC. No representatives of the Catholic Church gave any input into these days as they are curriculum based and delivered by PDST Advisors/Associates. There have been no jointly arranged in-service days jointly arranged by the Catholic Church and PDST. However, PDST Advisors/Associates have been invited to present at Diocesan events on an occasional basis. DWEC does not hold records of any written or formal correspondence regarding the arrangements of these events. It is the understanding of DWEC that these arrangements would have been made through local networks and telephone calls.
6. DWEC does not hold any records relating to any payments made to the Catholic Church or Diocesan Advisors acting on behalf of the Catholic Church.

It is clear from the above that the position of DWEC is that any relevant records, if they exist, would be held by PDST and are not physically held by DWEC. However, as I have outlined above, under section 2(5) of the Act, a reference to records held by an FOI body includes a reference to records under the control of that body. As such, the question I must go on to consider is whether any records held by PDST that are captured by the scope of the applicant's request can be deemed to be under the control of DWEC.

As I have outlined in the Background Section above, I have previously found that PDST is not a public body in its own right for the purposes of the Act. No evidence has been presented to this Office during the course of this review to give me cause to revisit that finding. However, the question of whether the records of PDST can be deemed to be under the

control of some other public body is quite a complex one, given the relationship between PDST, DWEC, and the Department.

DWEC's Position

In its submission to this Office, DWEC set out its understanding of its relationship with PDST as follows:

DWEC serves the needs of 6,000 primary and post primary teachers in West Dublin and plays its part in the national network of Education Centres. DWEC provides training, development and support for teachers and the wider school community. A lot of this training and development is provided by PDST.

PDST is a service provider under the aegis of the TES of the Department. In 2010, the TES re-conceptualised the provision of school support and teacher continuing professional development services to provide for a new generic cross-sectoral support service i.e. PDST. PDST encompasses the supports previously provided by other programmes and support services. Teachers seconded to PDST have a contract of secondment with DWEC, being PDST's host Education Centre. All funding for PDST from the Department is routed through DWEC.

DWEC notes that PDST is described on its website as being "managed" by DWEC. In terms of what this management entails, DWEC's Development & Operations Manager is the line manager for the administrative staff of PDST. The Director of DWEC is the Accounting Officer of PDST and members of DWEC's Management Committee are authorised signatories for the purposes of PDST bank transactions in circumstances where all funding provided to PDST by the Department is routed directly from the Department to the PDST bank account. The National Director of PDST attends a Management Committee meeting once per annum to report on the work and future direction of PDST.

PDST reports to DWEC on the PDST Programme of Work and what the Department's priorities are for the coming year, as well as the recruitment of seconded personnel, facilities and administrative staff. However, DWEC considers that this "management" cannot be considered to amount to "control" for the following reasons:

- a. PDST is funded by the Department and DWEC does not provide any funding to it;
- b. While PDST provides monthly expenditure reports to DWEC for Management Committee meetings, it does not, however, report to DWEC in respect of the daily running or activities of PDST;
- c. DWEC does not have any control of or input into PDST's budget;
- d. DWEC and PDST function independently of each other;
- e. DWEC does not have any control over PDST's national programme of work, nor does PDST require DWEC's approval in relation to the national programme of work;

- f. DWEC does not have either an input or quality assurance role in respect of the design and delivery of PDST materials or professional development programmes;
- g. Notably, none of the members of the Management Committee of DWEC are members of the Senior Management Team of PDST and vice versa;
- h. PDST determines its own team capacity and recruitment requirements in consultation with TES, which do not require the approval of DWEC;
- i. DWEC does not control the design and implementation of PDST's performance management procedures, nor do they require DWEC's approval; and
- j. DWEC is paid by PDST for the use of DWEC facilities e.g. room rental for provision of courses, in the same manner as all other Education Centres.

Department's Position

The Department was also afforded an opportunity to comment upon the substance of DWEC's submission as outlined above. In response, the Department said its position on the matter remains as set out in Case OIC-53305.

The essence of its submission in that case was that DWEC is an independent statutory body that hosts PDST and that the principal activity of Education Centres is to organise the local delivery of national programmes of teacher professional development on behalf of the Department. It said 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.

The Department added that it funds three teacher professional development support services of which PDST is the largest. It said teachers seconded to these services have a contract of secondment with a host education centre, which in the case of PDST is DWEC. It said all funding for PDST from the Department is routed through DWEC and that FOI requests for information held by DWEC including that relate to PDST must be made directly to DWEC.

PDST's Position

In its submissions to this Office in Case OIC-59817 on the question of whether or not it is a public body for the purposes of the Act, PDST said it is a service provider under the aegis of the TES of the Department and is funded by the Department. It said, however, that the Department plays no role in its day to day functions.

PDST also argued that it cannot be considered to be either directly or indirectly controlled by DWEC. It argued that while it is described as being administered by DWEC, this cannot be

considered to amount to control for precisely the same reasons as presented by DWEC in its submission.

Analysis and Conclusions

The question of when records can be deemed to be under the control of a public body is not defined in the Act. In considering that question, this Office may have regard to matters such as the relationship between the parties and any legal rights that a party seeking to assert control over the records might have.

The High Court has considered the issue of control in the case of *Minister for Enterprise, Trade and Employment v the Information Commissioner* [2006] IEHC 39 and in the case of *Westwood Club v the Information Commissioner* [2014] IEHC 375 (the Westwood case). The judgments in these cases set out various non-exhaustive matters for consideration in whether an entity is controlled by a public body, such as which party has day to day operation of the relevant functions; which party has real strategic control; and the extent of the financial nexus between the parties. The factors are non-exhaustive.

In the Westwood case, Cross J indicated that while the day to day workings of an entity and whether the public body interferes with its day to day operations is an important matter, it is not, however, to be taken as definitive. He said control must include the real strategic control of one entity by the other and the financial nexus between them. It seems to me that the factors that are relevant in any case will depend on the particular facts and circumstances of that case.

In my view, there are a number of relevant factors that support a finding that the records sought in this case, if they exist and are held by PDST, are not under the control of DWEC.

It is clear that there is a close working relationship between DWEC and PDST. For example, Teachers seconded to PDST have a contract of secondment with DWEC, DWEC's Development & Operations Manager is the line manager for the administrative staff of PDST and the Director of DWEC is the Accounting Officer of PDST. PDST also appears to have certain reporting commitments to DWEC.

On the other hand, DWEC argues that PDST does not report to it in respect of its daily running or activities and that the entities function independently of each other. PDST does not require DWEC's approval in relation to the national programme of work. None of the members of the Management Committee of DWEC are members of the Senior Management Team of PDST.

PDST determines its own team capacity and recruitment requirements in consultation with TES, which do not require the approval of DWEC.

It seems to me that while DWEC has certain administrative management responsibilities in respect of PDST, it has no role in the day to day operations of PDST. However, as I have indicated above, the Courts have found that the question of whether the public body interferes with the day to day operations of the entity is not to be taken as definitive.

Nevertheless, it also seems to me that the financial arrangements of PDST are such that they do not support an argument that the records of PDST can be said to be under the control of DWEC. PDST is funded entirely by the Department and not by DWEC. It is merely routed through DWEC. Furthermore, DWEC does not have any control of, or input into, PDST's budget. On the matter of strategic control, DWEC has no control over PDST's national programme of work, nor does PDST require DWEC's approval in relation to the national programme of work.

In all of the circumstances, it seems to me that the relationship between DWEC and PDST is not one that would entitle DWEC to regard records held by PDST concerning its core functions as being under its control. As such, I find that DWEC was justified in refusing the request on the grounds that it does not hold the records sought and that they are not under its control.

For the benefit of all of the parties, including the applicant, it seems to me, in hindsight, that my decision in case OIC-53305 did not have regard to the full details of nature of the relationships between the three entities as was made available in the course of this review.

In that case, I found that records relating to PDST were not under the control of the Department, **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 did not, at that time, have access to DWEC's explanation of its relationship with PDST. Had that explanation been available to me, it seems to me that I would have come to a different conclusion in that case.

Nevertheless, it is not open to me in this review to make a definitive finding in relation to whether the Department does, indeed hold the records relating to PDST for the purposes of the Act as the review is confined to a consideration of DWEC's decision.

While I accept that this has been an extremely frustrating matter for the applicant, and while I wish to apologise for this Office's role in prolonging the issue, it seems to me that the applicant will have to submit a fresh decision to the Department for the records he is seeking, based on my findings in this case. If the applicant remains dissatisfied with the Department's decision on his fresh request, it will be open to him to avail of the appeal rights set out in the FOI Act, including a fresh review of the Department's decision by this Office.

Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby affirm the decision of the DWEC to refuse access to certain specified records relating to PDST on the ground that it does not hold the records sought for the purposes of the FOI Act.

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.

A handwritten signature in black ink, reading "Stephen Rafferty", written over a horizontal line.

Stephen Rafferty,
Senior Investigator
10 July 2020