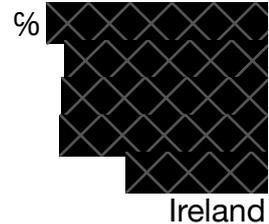


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1st January 2021

Attn: Mr Peter Tyndall
Ombudsman and Information Commissioner,
Office of the Information Commissioner,
6 Earlsfort Terrace,
Dublin 2,
D02 W773.

Re: Policy Regarding Inadequate Fol Responses

Dear Mr Tyndall,

I refer to Case Number OIC-91536-D2Z0S2, which involved a Freedom of Information request that I submitted to Dublin and Dun Laoghaire Education and Training Board (DDLETB). While I am grateful to your Office for the professional manner in which they dealt with this case, I observed the implementation of a specific policy during the case that has also been evident in other appeals that I have been involved with. I would like to suggest that this policy is counter productive and is worth reconsidering.

In the DDLETB case referred to above, I had sought documents regarding some research that had been co-funded by both that public body and by the Roman Catholic Archdiocese of Dublin. In their initial response to my Fol request, I believed that DDLETB had omitted some documents from their response, which should in fact have been provided to me. In contrast, DDLETB refused to provide any additional documentation to me and this was the basis of my appeal to your Office.

During the investigation that your Office undertook, it became clear that there were indeed two additional forms that should have been released to me. That is, the central point of contention between myself and DDLETB was resolved my my favour when those two documents were sent to me. The policy implemented by your Office in dealing with such a situation, is one that I believe is well-intentioned but counter productive. To quote from the decision that your Office published in this case:

“During the course of this review, DDLETB released a redacted copy of two forms ... following receipt of these forms, the applicant was invited by this Office to withdraw his application on the basis that DDLETB hold no further records.”

I believe that this policy is well-intentioned, in that I was provided the opportunity to have my appeal fee refunded once I had received the documents that I was originally denied. However, I cannot be refunded the additional time and effort that processing an appeal towards your Office involves. Any attempt to return to the situation that pertained before the appeal was submitted, is therefore moot. Moreover, this policy also creates a disincentive for public bodies to deal with Fol requests in a diligent manner. For example, in the case referenced above the final decision states as follows:

“I hereby affirm the DDLETB’s decision to refuse access to the record sought by the applicant under section 15(1)(a) of the Fol Act.”

This is a nonsense. DDLETB only released the records when they were forced to do so by your Office, and after I had taken the time and effort to submit the appeal. Your Office did not affirm a decision to refuse access to records. Your Office caused a decision to refuse records to be reversed. However, by publishing such a decision I believe that your Office is encouraging the kind of inadequate response that DDLETB provided to my Fol request in the first instance.

From my experience of submitting Fol requests, and from informal comments made by those those working within public bodies who respond to such requests from citizens, I know that there is often a minimalist approach to Fol taken by public bodies. In fact, if this were not the case there would be no need for your Office to exist. Many public bodies take the view that if there are no adverse consequences for delaying, then they will delay. If there are no adverse consequences for retaining documents that they should rightfully share, then they will omit records that should be provided in response to valid Fol requests. If accessing information becomes more difficult and time-consuming then a certain proportion of citizens will give up trying to access it, and many public bodies will be entirely sanguine about such an outcome.

In that context, why would DDLETB bother sending me the two documents that they should properly have provided in response to my original Fol request? Even if I work through the appeal process with your Office, the worst outcome for DDLETB is that they will just provide the two documents at a later date and your Office will then publish a decision affirming their behaviour. If at some point in the future I need to submit another Fol request to DDLETB, there is no incentive whatsoever for that public body to be any more diligent than they were in the case referenced above. In fact, the policy implemented by your Office creates an incentive in the opposite direction.

I don’t believe that this is an isolated case either. I refer to Case Number OIC-97611-K4F1J2, which involved a Fol request that I submitted to the Department of Education and Skills (DoES). I am still waiting for a decision to be published in that case, but I recently received communications from your Office that included the following comments:

“We have discussed the matter internally following our receipt today of the Department’s revised position. We are of the view that the decision of the Department must be annulled and the matter remitted for fresh processing, as

the Department could not have carried out all reasonable steps if it made no effort to obtain relevant records based on its initial stance. In the circumstances, I should inform you that it is your right to withdraw your application for review if you wish. Should you withdraw, the case would be closed and any fees paid refunded.”

Again, in circumstances where your Office has discovered that the behaviour of a public body in responding to a Fol request was inadequate, the policy of your Office seems to suggest that the applicant might withdraw their appeal. While I accept entirely that the motivation of this policy is a good faith intention to see appeal fees refunded, I would like to suggest that you should consider the incentives that you are creating for public bodies that process Fol requests. If at some point in the future I need to submit another Fol request to the DoES, there is no incentive whatsoever for that public body to be any more diligent than they were in the case referenced above. In fact, the policy implemented by your Office creates an incentive in the opposite direction.

I suspect that this suggestion may require primary legislation and be outside of your current powers, but the best solution in circumstances where the the behaviour of public bodies is inadequate, would be for the appeal fee to be refunded to the applicant and instead charged to the delinquent public body. Failing that though, it seems that the current policy of your Office offered me one of the following two options in the DDLETB case:

1. withdraw my appeal and pretend that the delinquent behaviour of DDLETB never happened
2. proceed with my appeal and have your Office pretend that the delinquent behaviour of DDLETB never happened

In cases such as this one, I would like to suggest that it is inappropriate for your Office to publish a decision stating that, *“I hereby affirm the DDLETB’s decision to refuse access to the record sought ...”*. Where any public body has been forced to change their behaviour by an investigation of your Office, at the very least the decision published by your Office should reflect this. It is not appropriate to pretend that delinquent behaviour on the part of public bodies never occurred.

There may be few powers that your Office has to create incentives towards diligent behaviour on the part public bodies. One of those mechanisms is to publish decisions that can help create public pressure towards providing complete and timely Fol responses to citizens. It seems perverse to me then that even in circumstances where your Office finds that a public body has provided an inadequate Fol response to a citizen, your policy is to offer citizens a choice between withdrawing their appeal or else deciding the case in favour of the public body.

Yours Sincerely,

John Hamill.