

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

Case Number: OIC-97611-K4F1J2

Applicant: John Hamill
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Church Heath
Castleblayney
Monaghan
A75 F729

Public Body: Department of Education (the Department)

Issue: Whether the Department was justified in refusing access to certain records relating to the Professional Development Service for Teachers on the grounds that they are not held by the Department (section 11(1) refers) or do not exist or cannot be found (section 15(1)(a) refers)

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 annulled the Department's refusal to grant access to additional records under section 15(1)(a) and directed the Department to consider the request afresh.

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 appropriate 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 (the Department) and is managed by Dublin West Education Centre (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. 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. On 24 October 2019, the applicant sought a review by this Office of the decision of DWEC (Case OIC-57745).

DWEC asserted that if the records existed, they would be held by PDST and not DWEC for the purposes of the Act. Accordingly, I considered whether DWEC was justified in refusing the request on the grounds that it did not hold the records sought and that they were not under its control.

During the course of that review, DWEC made a detailed submission in support of its position that records held by PDST were not under its control. The Department was invited to comment upon the substance of DWEC's submission. In response, the Department simply said its position on the matter remained as set out in Case OIC-53305.

Following a detailed consideration of the various submissions, I found that records held by PDST were not under the control of DWEC. I stated in my decision that in hindsight, my decision in case OIC-53305 concerning the Department 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 the review concerning DWEC. I noted that I did not have access to DWEC's explanation of its relationship with PDST in case OIC-53305 and had that explanation been available to me, I would have come to a different conclusion on the matter of whether the records held by PDST were under the control of the Department.

Unfortunately, all of this meant that the applicant was no closer to receiving a decision on his request for records relating to PDST and he had to make a fresh request to the Department. On 10 July 2020, he submitted the following request to the Department:

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 (as it then was) 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 calendar year 2016, relating to the teaching of religion.
6. Details of any payments made by the PDST to the Catholic Church or Diocesan Advisors acting on behalf of the Catholic Church.

On 4 September 2020, the Department issued a decision in which it said it had decided to grant the request. However, it maintained the position it had taken in case OIC- 53305, namely that records held by PDST were not under its control. It said that, given the timeframe involved in the request, and in the interest of assisting the applicant in accessing PDST records, it had decided to inform PDST of the request. It said PDST confirmed that two relevant records exist and had agreed to provide those records to the Department outside of the FOI Act. The Department released copies of both records. It said it had done so in the interest of assisting the applicant and this was not to be used as a precedent in respect of any subsequent FOI request for records which may be held by the PDST and are outside the control of the Department.

By email dated 7 September 2020, the applicant sought an internal review of that decision, following which the Department affirmed its original decision, without providing any further explanation of the grounds on which it had decided to do so. On 30 September 2020, the applicant sought a review by this Office of that decision.

I have now completed my review in accordance with section 22(2) of the FOI Act. In carrying out my review, I have had regard to the submissions made by the parties to the review and the communications between this Office and the parties on the matter. I have also had regard to communications between the parties, as above. I have decided to conclude this review by way of a formal, binding decision.

Scope of the Review

During the course of the review, the Investigator sought submissions from the Department on the matter. In doing so, he informed the Department of his view that that PDST is essentially an administrative scheme set up and controlled by the Department. In its response of 20 November 2020, the Department said that following a full review of its files relating to the applicant's requests, and having sought detailed advice internally to consider the file and the decisions of this Office and the complex relationship between the three entities, it accepted that PDST is a service provider under the control of the Department for the purposes of the Act. However, it added that the two records released are the only two relevant records held in relation to the request.

The Investigator informed the applicant of the Department's revised position in respect of the PDST records. While the applicant welcomed the fact that the matter of control of the records had, at last, been settled, he did not accept that all relevant records had been considered for release. Accordingly, this review is concerned solely with the question of whether the Department was justified in refusing access to any additional relevant records on the ground that no such records exist or can be found.

Preliminary Matter

I wish to apologise to the applicant at the outset for the inordinate delay that has arisen in connection with his attempts to access records relating to PDST. This Office played its part in that delay by failing to request submissions from DWEC in case OIC-53305. In hindsight, such submissions should have been sought, given the arguments that had been made concerning the nature of the relationship between the three entities. I would add that the Department played its part in the delay by failing to properly consider the nature of its relationship with PDST from the outset. Any inconvenience caused is very much regretted.

Analysis and Findings

As I have outlined above, the scope of this review is concerned solely with whether the Department was justified in refusing access to any other relevant records coming within the scope of the applicant's request, apart from the two records already released.

Section 15(1)(a) of the FOI Act provides for the refusal of a request where the records sought do not exist or cannot be found after all reasonable steps to ascertain their whereabouts have been taken. In such cases, the role of this Office 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/her decision and I also must assess the adequacy of the searches conducted by the FOI body in looking for relevant records.

In his application for review to this Office, the applicant provided detailed comments in support of his view that further relevant records should exist. When seeking a submission from the Department, the Investigator invited the Department to consider those comments. The Department's submission did not do so not in any meaningful way. Furthermore, at no point in processing the request or in responding to this review has the Department provided any details of the searches undertaken to locate relevant records nor has it explained why it considers that no further records exist.

In any event, given that it was only during the course of this review that the Department accepted that PDST records are under its control and given the manner in which it processed the applicant's request, I simply cannot find that the Department took all reasonable steps to ascertain the whereabouts of relevant records as required by section 15(1)(a).

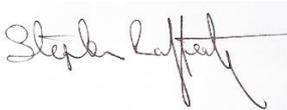
In the circumstances, I find that I have no alternative but to annul the Department's decision to refuse access to any further relevant records and to remit the request to the Department to be processed afresh. In doing so, I would urge the Department to have regard to the guidelines this Office has published on its website concerning section 15(1)(a). Should the applicant be unhappy with the Department's fresh decision on the request, his rights of appeal shall apply in the normal course.

Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby annul the Department's decision to refuse access, under section 15(1)(a), to any further relevant records coming within the scope of his request. I direct the Department to consider the request afresh.

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, appearing to read 'Stephen Rafferty', written over a horizontal line.

Stephen Rafferty
Senior Investigator
26 February 2021