



An Coimisinéir Faisnéise
Information Commissioner

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

Case Number: OIC-107608-M5G7B6

Applicant: Mr. John Hamill, [REDACTED]
[REDACTED]

Public Body: Department of Education (the Department)

Issue: Whether the Department was justified in refusing access to various records relating to the role of the Professional Development Service for Teachers (PDST) in relation to the Catholic religion

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

Decision: The Senior Investigator affirmed the Department's decision. She found that section 15(1)(a) applied (reasonable searches/records do not exist). She found that section 37(1) (personal information) applied to details redacted from one record and that the public interest did not weigh in favour of their release.

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

According to its website, PDST is funded by the Teacher Education Section (TES) of the Department and is managed by Dublin West Education Centre. 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 applicant has made a number of FOI requests in relation to the PDST and its role in the teaching of the Catholic religion. His request to the Department of Education and Skills (as it then was) of 10 July 2020 sought access to the following:

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 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.

The Department's decision on the above request was considered by this Office in Case No. OIC-97611-K4F1J2. During that review, the Department accepted that PDST is a service provider under its control for the purposes of the Act. However, in the circumstances, the Senior Investigator's decision of 26 February 2021 was unable to find that the Department had taken all reasonable steps to ascertain the whereabouts of relevant records covered by the request, as required by section 15(1)(a). He annulled the Department's decision and remitted the request to the Department for a fresh decision to be made in accordance with the FOI Act.

The Department's decision of 20 April 2021 granted access to extracts from the PDST annual reports for 2015-2016 and 2016-2017 regarding Religious Education (RE) events with PDST input. It also granted access to two emails, retrieved by the PDST, which it said were

relevant to part 1 of the request. The applicant sought an internal review on 21 April 2021, arguing that the Department should hold further records covered by his request. The Department's internal review decision of 13 May 2021 described the searches it said had been carried out for records covered by his request, including the key words used by it and PDST in searching their electronic files. It said that PDST had found four further records on foot of additional searches. The Department released two of these records in full and two in part. On 14 May 2021, the applicant applied to this Office for a review of the Department's decision, particularly relating to its searches for records.

I have now completed my review in accordance with section 22(2) of the FOI Act and I have decided to conclude it by way of a formal, binding decision. In carrying out my review, I have had regard to the above exchanges and to correspondence between this Office, the Department and the applicant. I have also had regard to the records that were released in part, and to the provisions of the FOI Act.

Scope of the Review

The scope of this review is confined to whether the Department was justified under the provisions of the FOI Act in its decision to (i) refuse to release further records covered by the applicant's request under section 15(1)(a) and (ii) partially release one of the four records identified at internal review stage.

As noted, one other of the four records identified at internal review stage was also partially released. It comprised an email thread. The details released from it show that it relates to the "Irish Maths Teachers National Conference" as well as to a request from the Religion Teachers' Association of Ireland (the RTAI). The Department granted access to those parts of the thread that concern the RTAI request, including details of those in PDST who dealt with it. I am satisfied that the remainder of this email thread is not covered by the applicant's request and is outside the scope of my review. I note that this Office's Investigator brought this matter to the applicant's attention and that he has not commented.

Furthermore, it should be noted that this Office does not have a role in seeking the Department's response to various questions that the applicant asks, in commenting on the content of correspondence issued to the applicant by the Department or PDST further to his FOI requests, or in examining the Department's or PDST's performance of their functions in general. Finally, the FOI Act does not permit me to have regard to the applicant's reasons for making his FOI request.

Findings

At the outset, I note that the applicant takes issue with certain views put to him by this Office's Investigator. Her views (which I note she said were not binding on the Commissioner) concerned what might not be a reasonable search for the purposes of the

FOI Act, and the relevance of a mandatory exemption to details that identify an individual. The applicant refers to the “perspective from which [this Office’s] Investigator has processed the present appeal” and says that her views are inconsistent with the letter and spirit of the FOI Act and the rights of citizens to access information within public bodies. Although unclear if the applicant is suggesting that there was some form of bias on the Investigator’s part, I should say that I do not accept any such contention. I am satisfied that the Investigator carried out her role in this case entirely in accordance with the requirements of the FOI Act.

Section 15(1)(a) – reasonable searches/records do not exist

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. Where a body relies on section 15(1)(a), 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. It is not necessarily the Commissioner’s role to search for records.

It is important to note that the FOI Act requires FOI bodies to carry out reasonable, not exhaustive, searches for records covered by a request. It follows that any finding that section 15(1)(a) applies at a point in time does not preclude the possibility that further records covered by a request may subsequently come to light. Finally, this Office has no role in determining whether further or more detailed records should have been created.

Submissions

The applicant describes the types of search he expects to be carried out, including searches of PDST records using the names of parties who contacted it seeking input, examining employee expense payments and asking PDST staff if they retained material that they agreed with their hosts that they would deliver. His view is that the PDST is not performing its functions consistent with the Department’s policies prohibiting evangelism. He expresses concern at the Department’s treatment of his request, including that only a small number of records were found and at different stages of the FOI process. He says that there should exist further records relating to the events described in those records already released, such as regarding the arrangement of the events, payment of expenses, agendas, presentations given, etc.

By way of general background, the Department says that at the start of each year it agrees a work plan with PDST. This plan comprises all CPD provision relating to curriculum, teaching and learning, including that which supports any curricular change affecting all teachers nationwide. PDST’s advisors facilitate events in accordance with this work plan through the 21 local education centres in the country. The centres are responsible for the administration aspects of the events and PDST pays for venue hire, catering and advisors’ travel and subsistence expenses.

PDST may also be invited by individual schools and patron bodies (which can be responsible for a number of schools) to give in-service training on specific topics, and to present at conferences. The inviting party is responsible for arranging venue, attendances etc. and the only costs borne by PDST are the presenter's mileage/travel and subsistence expenses.

In relation to RE specifically, the Department says that PDST has remit only at post-primary level. PDST has a solely curricular and methodology remit whereas a faith formation role is the job of the school patrons. The NCCA devise the statutory curriculum. PDST may correspond with the Department and NCCA in relation to RE (as it may do in relation to other areas of the curriculum). The Department says that there were no reviews or updates of the RE curriculum in 2016.

The Department says that PDST does not correspond regularly with Catholic Church diocesan advisors. It may respond on an occasional basis to requests for curricular inputs in relation to RE. It does not enter into arrangements with any church for the provision of religion in-service days or around the teaching of religion in schools. The same content (as agreed between the PDST/Department and the NCCA) is delivered at RE in-service days, regardless of the religious ethos of the school. PDST does not pay the Catholic Church or diocesan advisors.

The Department also outlines PDST's comments. It says that only a small number of records relevant to part 1 were found because most events are arranged by telephone. It records the date, venue, duration, and attendance of in-service/events at which it is requested to give presentations. It includes these details in its annual report (relevant excerpts have been released to the applicant). It has no access to rolls, reports, minutes, records relating to arrangement of venues etc. because they are not PDST events.

Searches for records

The Department says that sections are responsible for the management of their own files in accordance with Department policy. Records in active use are retained on paper files, normally in filing cabinets or in open shelving in each individual section. All associated electronic records are printed and filed with the paper file. Dormant or inactive files are crated and sent to a managed warehouse with a detailed listing of the contents. Official records are destroyed only if there is an accompanying disposal certificate from the National Archives Office. It is not aware of records concerning 2016 having been destroyed.

The Department says that TES holds files relating to PDST such as the annual work plan; its range of CPD support across all primary and post primary curricular areas; recruitment of teachers annually on secondment to PDST; Departmental funding; and steering committee and management meetings. Hard copy files in current use are kept in TES, while infrequently accessed files and files that are being sent to the managed warehouse are kept in a filing room.

The Department says that TES (including former staff members), Curriculum and Assessment Policy Unit and the Inspectorate were asked to forward any records they hold that are covered by the request. The Inspectorate replied that any records generated by them would have been forwarded to TES. Curriculum and Assessment Policy Unit replied that their only contact with PDST would be through TES. The Department says that TES has searched its electronic files for 2016 using various terms, a list of which it has supplied to this Office and details of which I note have also been given to the applicant. The Department says that it also physically searched relevant hard copy files. Finally, the Department says that PDST says it has searched administrator emails, the director's pc and the server using various terms relating to the request, which have also been supplied to this Office and the applicant.

This Office's Investigator put the above details to the applicant. She also said that, having particular regard to the Department's description of PDST's interactions with churches generally, she felt that the additional searches he had suggested were not reasonable steps for the purposes of section 15(1)(a).

In response, the applicant sets out the background to his request and reiterates how records have been found at various stages of the FOI process. He takes issue with the accuracy of the Department's description of the role played by it and PDST in RE. He contrasts the Department's position that it does not enter into arrangements with any church for the provision of religion in-service days or around the teaching of religion in schools, with the content of a released email sent from a Diocesan Advisor asking for a particular PDST advisor to "facilitate at another such in-service." He notes that PDST did not respond to this request by saying that it would not make arrangements with any church in this regard but, rather, arranged for two representatives to attend and paid all associated travel, accommodation and subsistence costs from public monies.

He remains of the view that proper searches have not been carried out for the requested records. He says that what he describes as "extraordinary awards of publicly funded support that PDST has bestowed on Catholic Church representatives" is a strong basis on which I should direct that further searches be carried out, such as searches using the names of those who might have contacted PDST seeking RE input. He says that the Investigator has assumed that such steps are too onerous for the Department to take and that the Department has not made such an argument. He says that if the Department is to be believed that most arrangements were made verbally, these searches would not identify any further emails and therefore carrying them out should not take more than five minutes. He says that if this Office does not direct the Department to take further steps, he will be required to compose a list of the huge number of people who worked for the Catholic Church in 2016 and make numerous FOI requests seeking email searches for all of their names.

Analysis

I note the details in the Department's submission regarding the level and types of contact that PDST generally has with the Catholic Church. I note the position regarding the making of arrangements for in-service days in Catholic schools and how the content of such in-service is agreed with the NCCA, rather than any church, and delivered in all schools. I note the position regarding PDST's remit in relation to RE, about the lack of reviews or updates of the RE curriculum in 2016, and that PDST does not pay the Catholic Church or Diocesan Advisors. All of these matters are, in my view, relevant to the nature and number of records that one might expect to exist in relation to the applicant's request in the first instance, and to the reasonableness of the steps taken to find them.

While the applicant disagrees with the Department's submission as to what PDST does in practice, this does not of itself require me to direct that further searches be carried out. It also seems to me that the email thread highlighted by the applicant (i.e. relating to the request to PDST to facilitate an in-service) is in keeping with the Department's submission that PDST may be invited by individual schools and patron bodies to give in-service training on particular topics. In my view, that thread gives me no basis to further query any aspects of the submission, including about the extent to which PDST corresponds with Catholic Church Diocesan Advisors generally or about the content of RE in-service given. Neither have I any role in questioning the policy that a PDST presenter's mileage / travel and subsistence expenses are paid from public funds. Furthermore, the application of such a policy is not relevant to my consideration of whether the searches in this case have been reasonable for the purposes of the FOI Act.

Having regard to all of the above, I see no reason to question the Department further in relation to its submission or to direct that further searches be carried out. In particular, I am satisfied that the searches described in the decisions and the Department's submission, including the key words chosen for electronic searches, are reasonable steps for the purposes of section 15(1)(a) in this case. As to the various further searches suggested by the applicant, it seems to me that this and the other suggested searches are exhaustive steps, rather than the reasonable steps that are contemplated by section 15(1)(a) of the FOI Act. Accordingly, I do not think it reasonable to direct the Department to carry out these further searches.

It follows that I am satisfied that the Department was justified in refusing access to further records covered by this request on the basis that they do not exist or cannot be found after all reasonable steps to ascertain their whereabouts have been taken. I find that section 15(1)(a) applies. I should also say that in light of the Department's explanations, I agree with the Investigator's view that any records held by PDST relating to in-service presentations given and travel expenses paid are not covered by the applicant's request as framed. Finally, I do not intend to comment on the further FOI requests that the applicant suggests he might make, in case this is seen as pre-judging the outcome of any further reviews that come before this Office as a result.

Section 37 – personal information

The details released from the partially released record (an email thread) show that it concerns a request to the PDST from a Diocesan Advisor for a particular person to give an RE in-service in 2016. The Department redacted details identifying the Diocesan Advisor. However, its internal review decision does not refer to the redaction of the record or cite any exemptions being relied on.

All FOI bodies should be aware of the provisions of sections 13(2)(d) and 21(5)(c). These provide that where an FOI body decides to refuse to grant a request whether wholly or in part, the notification of the original or internal review decision shall specify:

- the reasons for the refusal;
- any provisions of the FOI Act pursuant to which the request is refused;
- the findings on any material issues relevant to the decision; and
- particulars of any matter relating to the public interest taken into consideration for the purposes of the decision.

In inviting the Department's submissions, the Investigator drew the above to the Department's attention and said that it should clearly identify the exemption provision(s) being relied on and supply all relevant information/argument. Although the Department makes no submissions in relation to the redacted material, this does not determine the matter. Given their nature, and as the Investigator notified the applicant, I am obliged to consider whether they are exempt under the mandatory exemption set out at section 37 of the FOI Act (personal information).

Section 37(1)

Section 37(1), subject to other provisions of section 37, requires the refusal of access to a record containing personal information. Section 2 of the FOI Act sets out a definition of personal information and also lists 14 non-exhaustive examples of what must be considered to be personal information, including (iii) information relating to the employment or employment history of the individual and (viii) information relating to the religion or religious beliefs of the individual. Where information can be classified as one of these 14 examples, there is no need for the requirements of the definition to also be met. I should say that it is not relevant to my finding that the applicant or others may already be aware of the information concerned.

I am satisfied that the withheld details are captured by the above examples of what comprises personal information about an identifiable individual. I find that section 37(1) applies. This is subject to the consideration of sections 37(2) and (5), however.

Section 37(2) - exceptions to section 37(1)

Section 37(2) of the FOI Act sets out certain circumstances in which 37(1) does not apply and I am satisfied that none of those circumstances arise in this case.

Section 37(5)(a) - the public interest

In considering section 37(5), I consider that only section 37(5)(a) is relevant in this case. This section provides that a request that would fall to be refused under section 37(1) may still be granted where, on balance, the public interest that the request should be granted outweighs the public interest that the right to privacy of the individuals to whom the information relates should be upheld.

On the matter of whether the public interest in granting access to the information at issue would, on balance, outweigh the privacy rights of the individuals concerned, I have had regard to the comments of the Supreme Court in *The Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women v The Information Commissioner* [2011] 1 I.R. 729, [2011] IESC 26 (“the Rotunda case”). It is noted that a public interest (“a true public interest recognised by means of a well known and established policy, adopted by the Oireachtas, or by law”) should be distinguished from a private interest.

On the matter of the type of public interest factors that might be considered in support of the release of the information at issue in this case, I have had regard to the findings of the Supreme Court in *The Minister for Communications, Energy and Natural Resources v The Information Commissioner & Ors* [2020] IESC 5. In her judgment, Baker J. indicated that the public interest in favour of disclosure cannot be the same public interest as that broadly stated in the Act. She said the public interest in disclosure must be something more than the general public interest in disclosure and the reason must be found from the scrutiny of the contents of the record. She said there must be a sufficiently specific, cogent and fact-based reason to tip the balance in favour of disclosure.

While the comments of the Supreme Court in both judgments cited above were made in relation to provisions of the FOI Act other than section 37, I consider them to be relevant to the consideration of public interest tests generally.

Both the language of section 37 and the Long Title to the FOI Act recognise a very strong public interest in protecting the right to privacy (which has a Constitutional dimension, as one of the un-enumerated personal rights under the Constitution). Unlike other public interest tests provided for in the FOI Act, there is also a discretionary element to section 37(5)(a), which is a further indication of the very strong public interest in the right to privacy. Privacy rights will therefore be set aside only where the public interest served by granting the request (and breaching those rights) is sufficiently strong to outweigh the public interest in protecting privacy. It is also relevant to note that the release of records under FOI is, in effect, regarded as release to the world at large given that the Act places no constraints on the uses to which the information contained in those records may be put.

The applicant says that the Diocesan Advisor sought and received publicly funded support from PDST and therefore that the name should be made available to the Irish citizens who pay for these activities.

The withheld details (including an email address) relate to the Diocesan Advisor. Disclosure thereof will not reveal anything further about how the Department or PDST perform their

functions, given that all such details have been released from the record. Also released is the particular Diocese on whose behalf the in-service was sought. It seems to me that release of the withheld information would provide minimal, if any, further insight into such matters. However, even if a significant further insight would be provided, this does not mean that there should be no protection of privacy rights of individuals. I do not believe it is appropriate for me to direct the release in the public interest of third party personal information, effectively to the world at large, on the basis of the applicant's dissatisfaction with the Department and/or PDST, or because of a policy whereby a PDST presenter's mileage/travel and subsistence expenses are paid from public monies.

It seems to me the Department's release of other details from this record attempts to strike a balance between the competing interests. I am satisfied that placing the withheld details in the public domain would breach the rights to privacy of an identifiable individual. Having regard to the nature of the information at issue, I am aware of no public interest factors in favour of its release that, on balance, outweigh the right to privacy of the individual to whom the information relates. I find, therefore, that section 37(5)(a) does not apply.

Decision

Having carried out a review under section 22(2) of the FOI Act, I hereby affirm the Department's decision on the applicant's request on the basis that sections 15(1)(a) and 37(1) of the FOI Act apply.

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 'D. McGoldrick', with a large, stylized flourish at the end.

Deirdre McGoldrick
Senior Investigator
31 January 2022

