



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

**Case Number:** OIC-118029-N1X3P8

**Applicant:** Dr. Johnny Ryan

**Public Body:** Data Protection Commission ('the DPC')

**Issue:** Whether the DPC was justified in refusing access to records relating to its case-handling processes pursuant to Schedule 1, Part 1(f) of the FOI Act, and in refusing access to records relating to the qualifications or training of its staff regarding investigations on the basis that the records did not exist or could not be found

**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 DPC.

**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 a request dated 25 October 2020, the applicant sought access to the following:

- (a) The most recent staff document for each of the years 2017 to 2020 that sets out what the DPC's process for handling complaints is, including any rules that specify how a case progresses from one stage to another;
- (b) The number of full time equivalent staff (FTE) with qualifications or training in how to conduct investigations for the previous four years, with details of the certifying body, as at the date of the request and on four previous specified dates.

After a very considerable delay, the DPC issued a decision on the request on 15 December 2021. It refused access to records falling within the scope of the first part of the applicant's request on the basis that they are excluded from the scope of the FOI Act by virtue of Part 1(f) of Schedule 1. With regard to the second part, it indicated that it had initially understood that this part of his request was being dealt with outside of the framework of FOI. However, on further clarification it realised that it was mistaken in this understanding and indicated that it did not hold any records falling within this part of the request.

The applicant sought an internal review of that decision, following which the DPC affirmed the original decision. With regard to the second part of the applicant's request the internal reviewer specifically relied on section 15(1)(a) to refuse access. On 12 January 2022, the applicant applied to this Office for a review of the DPC's 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 applicant's comments in his application for review and to the submissions made by the DPC in support of its decision. I have decided to conclude this review by way of a formal, binding decision.

## **Scope of Review**

This review is concerned solely with whether the DPC was justified in refusing the applicant's request for records relating to its case-handling processes, pursuant to Schedule 1, Part 1(f) of the FOI Act, and for refusing access to records relating to the number of DPC staff with investigative training qualifications under section 15(1)(a) of the Act on the basis that the records sought do not exist or cannot be found.

## **Preliminary Issue**

At the outset I wish to address the lengthy delay in the DPC issuing its original decision in this matter. Firstly, the processing of the applicant's request in this case fell well below the required standards. The original decision issued well after the statutory timeframes, being almost 14 months after the applicant's initial request. As this Office has stated on many occasions, the administration of the FOI Act is a statutory function which should be afforded

as much weight as any other statutory function. While I note that the DPC has indicated that the delay was due to the prolonged absence of a member of its FOI Unit which was exacerbated by the COVID-19 restrictions, the delay encountered in this case was simply unacceptable. Nevertheless, I wish to acknowledge that the DPC indicated that it has taken steps to address the issue and in particular has, at the end of 2021, implemented a restructuring of its FOI function to prevent the reoccurrence of such an outcome.

## **Analysis and Findings**

### **Part 1(f) of Schedule 1**

Section 6(2)(a) of the Act provides that an entity specified in Part 1 of Schedule 1 of the Act, shall, subject to the provisions of that Part, be a public body for the purposes of the Act. Schedule 1, Part 1 contains details of bodies that are partially included for the purposes of the Act and details of certain specified records that are excluded. If the records sought come within the description of the exclusions in Part 1, then the Act does not apply and no right of access exists.

Part 1(f) of Schedule 1 provides that section 6 does not include a reference to the Data Protection Commissioner, or an officer of the Commissioner, in relation to a record (save as regards a record concerning the general administration of the Office of the Commissioner). In other words, the only records held by the DPC that are subject to the FOI Act are those that concern the general administration of that Office. In accordance with Part 1(f), all other records held by the DPC are excluded.

In his application for review to this Office, the applicant referred to the findings of this Office in a decision made in 2011 (Case 090315) concerning the meaning of general administration. He essentially argued that the records sought are not of a type that fall foul of the essential elements described in that case for a record to be regarded as concerning general administration.

This Office's views on the meaning of general administration are well settled. We consider that the term 'general administration' refers to records which have to do with the management of an FOI body such as records relating to personnel, pay matters, recruitment, accounts, information technology, accommodation, internal organisation office procedures and the like.

In its original decision on the request, the DPC referred to a recent decision issued by this Office concerning the DPC. In the case in question (Case OIC-109002), I considered whether the DPC was justified in refusing a request for any internal documents about the standard of evidence required in a Subject Access Request (SAR) complaint on the ground that any such records would not be regarded as records concerning the general administration of the DPC. I found that the records sought, if they existed, would relate to one of the core functions of the DPC, namely the investigation of SAR complaints. I found that they would not concern the general administration of the DPC.

In this case, the DPC said the information sought by the applicant in the first part of his request relates to records concerning the handling of complaints. It argued that such information relates to the DPC's core investigative role and do not form part of the general administration of its Office. It seems to me that the records sought are of a very similar nature to those that were the subject of case OIC-109002, in that they relate to the performance by the DPC of its core functions. As such, I find that they are records concerning the general administration of the DPC. Accordingly, I find that the DPC was justified in refusing the first part of the applicant's request pursuant to Part 1(f) of Schedule 1.

While it forms no part of this decision, I would add that we would generally expect public bodies to make documents such as procedures manuals publicly available. Indeed, under section 8 of the Act, all FOI bodies must prepare and publish a publication scheme, and such a scheme must generally include, among other things,

(i) rules, procedures, practices, guidelines and interpretations used by the body, and

(ii) any precedents kept by the body,

for the purposes of decisions, determinations or recommendations, under or for the purposes of any enactment or scheme administered by the body with respect to rights, privileges, benefits, obligations, penalties or other sanctions to which members of the public are or may be entitled or subject under the enactment or scheme,

However, the requirement to include information in a publication scheme does not apply to any matter by reason of which a record in which it is included would fall to be refused as an exempt record. Nevertheless, I note from the DPC's decision on the request that it has committed to publishing details of the office's procedures for the handling and investigation of complaints and that work to finalise material for publication is at an advanced stage.

### **Section 15(1)(a)**

The DPC refused access to the second part of the applicant's request on the basis of section 15(1)(a). That section 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 must assess the adequacy of the searches conducted by the FOI body in looking for relevant records.

In his application to this Office the applicant specifically made reference to section 17(4) of the FOI Act and queried whether it was possible for the DPC to reasonable steps to extract information relevant to the second part of his request from electronic records. Section 17(4) provides that where a request relates to data contained in more than one record held on an electronic device by the FOI body concerned, the FOI body shall take reasonable steps to search for and extract the records to which the request relates, being steps that involve

the use of any facility for electronic search or extraction that existed on the date of the request and was ordinarily used by the FOI body.

During the course of the review, the DPC provided submissions to this Office in which it provided details of the searches carried out for relevant records and of its explanation as to why no relevant records could be found. In summary, the DPC indicated that following receipt of the applicant's request the head of People & Learning Unit, within the Corporate Affairs, Media and Learning Division of the DPC, was contacted and asked to provide any relevant records held by that individual and by the relevant staff members reporting to them.

It indicated that following the relevant searches it is satisfied that it does not hold records that indicate training in the conduct of investigations as this is not a category of information that the DPC holds in relation to its full-time equivalent staff. With regard to the specific reference by the applicant to section 17(4), the DPC stated that, as set out above, no records are held by the DPC relating to qualifications of staff that indicate training in the conduct of investigations. As such, the DPC stated that the possibility of merging existing but disparate records did not apply.

In summary, it is the DPC's position that in light of the searches undertaken, it is satisfied that no records falling within the scope of the second part of the applicant's request exist or can be found.

It is important to note that the FOI Act is concerned with access to records held by public bodies that actually exist, as opposed to records that a requester believes ought to exist. If the record sought is not held by the body, then that is the end of the matter. The Act does not require public bodies to create records in order to respond to requests for information or questions that a requester may have. The question I must consider is whether the DPC has taken all reasonable steps to ascertain the whereabouts of relevant records. Having considered the details of the searches undertaken and its explanation as to why no records exist, I am satisfied that it has. I find, therefore, that the DPC was justified in refusing the second part of the applicant's request on the ground that no relevant records exist.

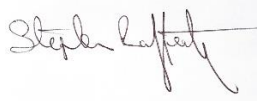
### **Decision**

Having carried out a review under section 22(2) of the FOI Act, I hereby affirm the DPC's decision to refuse the applicant's request for records relating to its case-handling processes, pursuant to Schedule 1, Part 1(f) of the FOI Act, and to refuse access to records relating to the number of DPC staff with investigative training qualifications on the basis that no relevant record containing the information sought exists.

### **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 light grey rectangular background.

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Stephen Rafferty  
Senior Investigator  
5 April 2022